

THE CONSTITUTION PROJECT



Safeguarding Liberty, Justice & the Rule of Law

November 18, 2015

The Honorable Chuck Grassley
Chairman
Senate Judiciary Committee
135 Hart Senate Office Building
Washington, DC 20510

The Honorable Patrick J. Leahy
Ranking Member
Senate Judiciary Committee
437 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Grassley, Ranking Member Leahy, and Judiciary Committee Members:

On January 22, 2015, Senator Ted Cruz (R-TX) introduced S.247, the Expatriate Terrorists Act (ETA).¹ Representative Steve King (R-IA) simultaneously introduced companion legislation in the House.² According to the bill's sponsors, the ETA is a common sense counterterrorism tool that would strip U.S. citizenship from Americans who fight with or support foreign terrorist organizations working to attack the United States. The ETA would also purportedly "fill ... statutory holes" in the Secretary of State's "authority to revoke a terrorist's passport."³

In fact, the ETA serves virtually no practical purpose, raises serious constitutional concerns, and would do nothing to keep America safe. We urge you to oppose it.

Like previous iterations of the same idea,⁴ the ETA would amend 8 U.S.C. § 1481(a), which sets out limited circumstances under which U.S. citizens can be denaturalized or expatriated. The bill would add the following to the short list of predicate acts that can result in loss of citizenship: 1) taking an oath of allegiance to a foreign terrorist organization; 2) joining a foreign terrorist organization's armed forces while they are fighting the United States; and 3) "becoming a member of, or providing training or material assistance to," a foreign terrorist organization.

The ETA also amends the Passport Act of 1926 to require the Secretary of State to deny a passport to, or revoke one from, anyone who the Secretary has determined is a member, or is attempting to become a member, of a foreign terrorist organization.

¹ S.247, available at <http://thomas.loc.gov/cgi-bin/query/z?c114:S.247>:

² H.R. 503, available at <http://thomas.loc.gov/cgi-bin/query/z?c114:H.R.503>:

³ "King, Cruz Introduce Expatriate Terrorists Act," remarks of Representative Steve King, available at <https://steveking.house.gov/media-center/press-releases/king-cruz-introduce-expatriate-terrorist-act>

⁴ On May 6, 2010, Senators Joseph Lieberman (I-CT) and Scott Brown (R-MA) introduced S.3327, the Terrorist Expatriation Act of 2010. Around the same time, Congressmen Jason Altmire (D-PA) and Charlie Dent (R-PA) introduced a comparable bill—H.R. 5237—in the House of Representatives. The Constitution Project's bipartisan Liberty and Security Committee, which we co-chair, opposed those legislative efforts. Many of our Committee's objections also apply to Senator Cruz's Expatriate Terrorists Act. Our Committee's previous statement is available here: <http://www.constitutionproject.org/pdf/402.pdf>.

Senator Cruz has said repeatedly that the ETA works a “formal” or “affirmative” renunciation of U.S. citizenship. To the extent he means to suggest that, under the bill, a person would automatically lose citizenship simply by engaging in the above conduct, he is wrong. The ETA does not and could not achieve that result.

Citizenship is a constitutional right, and the Constitution prohibits the government from revoking a person’s citizenship against his will under any circumstances. As the Supreme Court has explained, “the intent of the Fourteenth Amendment, among other things, was to define citizenship ... [and] that definition cannot coexist with a congressional power to specify acts that work a renunciation of citizenship even absent an intent to renounce. In the last analysis, expatriation depends on the will of the citizen rather than on the will of Congress and its assessment of his conduct.”⁵ As a constitutional right, citizenship can be knowingly and voluntarily waived, but it cannot be taken away from an individual absent such a waiver. Thus, to revoke a person’s citizenship the government must prove not only that he committed an expatriating act prescribed in section 1481(a), but also that he did so voluntarily and *with the specific intent to relinquish his citizenship*.⁶

Given these requirements, the ETA will almost certainly result in no additional expatriations. Unless Senator Cruz expects citizens subject to expatriation proceedings freely to admit that they joined or supported a foreign terrorist group specifically intending to renounce their U.S. citizenship, no one will in fact be expatriated. We doubt that government officials would believe it an efficient use of resources to try, especially given the broad reach of existing laws that already provide harsh penalties for U.S. citizens who engage in acts of terrorism.

The bill’s passport revocation provisions are similarly unnecessary. There is no “statutory hole” to fill – the Secretary of State already has the authority to deny a passport to anyone whose “activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States,”⁷ and to revoke a passport on the same grounds.⁸

Not only is the bill practically useless, it also raises serious constitutional concerns. The ETA makes membership in or “providing training or material assistance to” certain foreign terrorist organizations a predicate act to expatriation. There are two constitutional problems with this provision. First, neither “training” nor “material assistance” is defined. Similar language in 18 U.S.C. § 2339B was ruled unconstitutionally vague until Congress added specific definitions.⁹ Because Congress has not done so here, this provision of the ETA suffers from the same constitutional flaw.

⁵ *Vance v. Terrazas*, 444 U.S. 252, 260 (1980).

⁶ *See id.* at 261.

⁷ *See* 22 C.F.R. § 51.60(C)(4) (listing grounds for denial and restriction of passports).

⁸ *See* 22 C.F.R. § 51.62 (listing grounds for revocation of passports, including when “[t]he bearer of the passport may be denied a passport under 22 CFR 51.60”).

⁹ *See Humanitarian Law Project, et al. v U.S. Department of Justice et al.*, 352 F.3d 382, 403-404 (9th Cir. Dec. 3, 2003) (vacated on other grounds).

Second, unlike other crimes currently listed in section 1481(a) that can result in loss of citizenship (see section 1481(a)(7)), Senator Cruz's addition does not require proof of a conviction as a prerequisite. That omission undermines the constitutional right of due process. As the Constitution Project's Liberty and Security Committee explained in opposing similar past attempts to amend section 1481(a):

[T]he language of § 1481(a)(7) expressly requires a conviction as a necessary prerequisite to denaturalization or expatriation proceedings. This requirement protects the constitutional right of due process, since one cannot actually be said to have committed the acts specified in § 1481(a)(7)—each of which are crimes against the United States—until and unless those acts have been proven to a jury beyond a reasonable doubt. As the Supreme Court expressly held in *Kennedy v. Mendoza-Martinez*, Congress cannot deprive an individual of his or her citizenship as a “punishment” absent the procedural safeguards of a criminal trial.¹⁰

The rise of the Islamic State of Iraq and the Levant (ISIL) and the United States' response to date raises a critical question for Congress to consider, but it is not the ETA. For well over a year, the United States has been at war with ISIL and Congress has still not weighed in, notwithstanding its constitutional responsibility to do so. Members should spend their time debating and voting on this grave question, not preoccupied with needless and likely unconstitutional legislation.

We urge you to oppose the Expatriate Terrorists Act.

Sincerely,

David Cole, Hon. George J. Mitchell Professor in Law and Public Policy at Georgetown University Law Center; co-chair of the Constitution Project's Liberty and Security Committee

David Keene, Opinion Editor, The Washington Times; Former Chairman, American Conservative Union; co-chair of the Constitution Project's Liberty and Security Committee

CC: Members of the Senate Judiciary Committee

¹⁰ See Statement Opposing the Terrorist Expatriation Act, a Report by The Constitution Project Liberty and Security Committee (May 20, 2010) (attached) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165–68 (1963)).