Written by **Joe Wolverton, II, J.D.** on November 11, 2012

Will Americans Be Stripped of Citizenship Based on Accusation?

In a recent op-ed published in Jurist, St. John's University School of Law student Christopher Elsee described a scenario he believes threatens the civil rights of his fellow citizens.

Writes Elsee:

> Imagine you have just written a check to an organization that sends mechanical engineering textbooks to students in Afghanistan or Iraq. Now further imagine that you have been engaged in this practice for well over a decade because you are interested in helping individuals in developing countries to improve their technical knowledge, with the hopes of enabling them to better themselves. Are you supporting terrorists? According to a proposed piece of legislation, you may very well be.

The legislation Elsee mentions is the Terrorist Expatriation Act. This bill, proposed in 2010 by Senator Joe Lieberman (I-Conn.), would strip any American accused of terrorism of his citizenship. This would place the suspect outside of the jurisdiction of the U.S. Constitution's Article III courts and assign the trial on his alleged crimes to a military tribunal.

As Elsee explains:

> The act adds offenses such as providing material support to foreign terrorist organizations, engaging in or purposefully and materially supporting hostilities against the US or any country engaged in hostilities alongside the US or providing direct operational support to the US. Another section of the act explains that "material support or resources" means, among other things as the list goes on, property, services, training, expert advice or assistance, communications equipment and facilities.

This illustrates why the person in Elsee's hypothetical would face expatriation.

A central point of the act not specifically addressed in Elsee's article is the provision specifying the burden of proof in a case brought under its authority.

Under the Terrorist Expatriation Act, anyone stripped of his citizenship could appeal his expatriation to a federal court, where the federal government would have to demonstrate by "a preponderance of the evidence" that the accused committed the offense with the purpose of relinquishing his citizenship.

An online legal dictionary defines this standard of proof as "just enough evidence to make it more likely

than not that the fact the claimant seeks to prove is true." In the taxonomy of burdens of proof, preponderance of the evidence is much easier to prove than "beyond a reasonable doubt," for example, which is defined by that same dictionary as "no other logical explanation can be derived from the facts except that the defendant committed the crime, thereby overcoming the presumption that a person is innocent until proven guilty."

In an article in *Reason* published just after Lieberman introduced this bill, Jacob Sullum described the disturbing effect of the dramatic lowering of the standard of proof for taking away the citizenship of American charged under the act:

> Hence an American accused of ties to terrorism could be stripped of his citizenship without anything like the evidence needed to convict him in federal court. It would not matter whether he was arrested here or abroad, or where his offense allegedly occurred; indeed, an arrest, let alone a conviction, does not seem to be a requirement at all. Once stripped of his citizenship, the suspect could be locked in a military prison indefinitely, with or without a trial by a military tribunal (where he would have fewer due process protections than he would in a civilian court) and regardless of whether he was convicted or acquitted.

Remarkably, given the penchant of lawmakers for violating constitutional protections on civil liberties, Lieberman's bill died in committee.

Undaunted, in October 2011, Lieberman introduced an amendment to the Immigration and Nationality Act giving the federal government the same citizenship stripping power as was included in the Terrorist Expatriation Act.

The latest iteration of the bill, known as the Enemy Expatriation Act, similarly augments the power of the federal government, allowing it to strip a suspect of his American citizenship based on nothing more than a suspicion of "engaging in, or purposefully or materially supporting, hostilities." The text of the 2011 bill reads in relevant part:

> A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality … committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States, violating or conspiring to violate any of the provisions of section 2383 of title 18, or willfully performing any act in violation of section 2385 of title 18, or violating section 2384 of title 18 by engaging in a conspiracy to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, if and when he is convicted thereof by a court martial or by a court of competent jurisdiction.

A careful reading of the above wording reveals that, like other unconstitutional acts suffocating the American body politic, the legislation's key terms are intentionally vague so as to provide plenty of hazy cover for the federal government's assault on liberty. For example, as one reporter noted, "Legally, the term 'hostilities' means any conflict subject to the laws of war but considering the fact that the War on Terror is a little ambiguous and encompassing, any action could be labeled as supporting terrorism."

And also hiding effectively behind the smokescreen of safety is the fact that the Enemy Expatriation Act "does not say which government body — say a military tribunal or a congressional panel — has the power to brand suspected persons as hostiles."

"Fortunately, it's unlikely that Congress would pass something like this," according to ACLU legislative counsel Devon Chaffee. "If it did, the law would probably be found unconstitutional since the Supreme

Court has ruled that Congress cannot revoke U.S. citizenship without a citizen's consent.

The landmark ruling cited by Chafee was handed down by the high court in the case of *Afroyim v. Rusk*, 387 U.S. 253 (1967). In that decision, Justice Black explained in the majority opinion that Congress has no power under the Constitution to divest a person of his U.S. citizenship absent his voluntary renunciation thereof.

Furthermore, the Court in *Rusk* declared that "the Fourteenth Amendment's provision that 'All persons born or naturalized in the United States … are citizens of the United States …' completely controls the status of citizenship, and prevents the cancellation of petitioner's citizenship."

The current state of federal law conforms to the ruling in *Rusk*. Under Section 349 of the Immigration and Nationality Act as currently written, Americans can lose their U.S. citizenship only if they formally renounce it or take certain actions, such as joining the military of a foreign state, that can be reasonably interpreted as an attempt to voluntarily renounce their status as citizens of the United States of America.

As both these proposed bills illustrate, the long list of presidential precedents of ignoring core constitutional principles inconveniently cluttering the path toward tyranny continues to grow. Should Congress eventually pass either the Terrorist Expatriation Act or the Enemy Expatriation Act, the Fourteenth Amendment is an impediment that will be cleared by the congressional lictors of the Oval Office autocrat.

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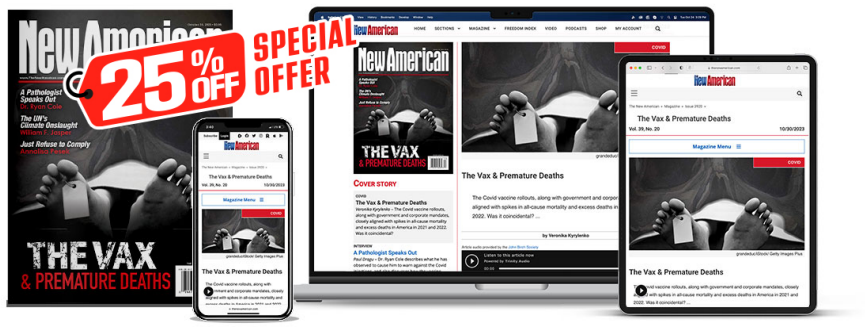

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