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PASSPORT REVOCATION AS PROXY DENATURALIZATION: EXAMINING THE YEMEN CASES

*Ramzi Kassem**

INTRODUCTION

This Article stems from cases handled at the Creating Law Enforcement Accountability & Responsibility (CLEAR) project and from mutually corroborating accounts from a number of CLEAR's partner organizers and attorneys who are active in the Yemeni-American community in New York City and beyond. Collectively these cases and firsthand accounts paint a disturbing portrait of the U.S. Department of State attempting to circumvent the procedures and safeguards that normally must be respected in order to reach a result tantamount to the denaturalization and expatriation of a U.S. citizen.

CLEAR forms part of the City University of New York (CUNY) School of Law's clinical arm, Main Street Legal Services, Inc.¹ The project provides a range of legal services that aim to address the legal needs of Muslim, Arab, South Asian, and other communities in New York City and beyond, whose civil liberties and human rights are particularly affected by law enforcement counterterrorism policies and practices.²

Since the September 11, 2001, attacks, federal and local law enforcement agencies have engaged in aggressive counterterrorism, intelligence gathering, and demographic mapping practices.³ Authorities have also

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1. Founded in 2009, CLEAR is a cross-clinical collaboration between CUNY School of Law's Immigrant & Non-Citizen Rights Clinic (INRC) and its Criminal Defense Clinic (CDC). For more on CLEAR, see CLEAR: CREATING L. ENFORCEMENT ACCOUNTABILITY & RESP., www.cunyclear.org (last visited Mar. 25, 2014). For more on Main Street Legal Services, Inc., see *Clinics & Concentrations*, CUNY SCH. L., www.law.cuny.edu/academics/clinics.html (last visited Mar. 25, 2014).

2. *Our Mission*, CLEAR: CREATING L. ENFORCEMENT ACCOUNTABILITY & RESP., www.cunyclear.org/mission/ (last visited Mar. 25, 2014).

3. See, e.g., *Mapping the FBI: Uncovering Abusive Surveillance and Racial Profiling*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/mapping-fbi-uncovering-abusive-surveillance-and-racial-profiling> (last visited Mar. 25, 2014) (describing federal law enforcement—FBI—surveillance activity); *Unleashed and Unaccountable: The FBI's Unchecked Abuse of Authority*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/unleashed-and-unaccountable> (last visited Mar. 25, 2014) (same); see also THE CREATING LAW

improperly employed various immigration related mechanisms to exert pressure on community members.⁴ The Yemen cases examined in this Article constitute yet another dimension of that larger pattern, simultaneously furthering the marginalization of targeted communities while evading accountability and redress mechanisms.

In responding to these policies, CLEAR's community-oriented approach has developed primarily along three axes: advocacy and counseling in support of community organizing; rights awareness campaigning; and free legal representation and consultation.

Grounding this Article in our social justice-oriented clinical practice at CUNY School of Law seems a sound way to meet the challenge of developing relevant scholarship. The hope is that this kind of scholarship can then feed back into social justice lawyering, clinical or otherwise.

I. A TROUBLING TREND IN YEMEN

The issues at the heart of this Article first came to my attention in connection with cases that my students, my colleagues, and I handled at CLEAR and ones that we heard about from our allies who are active in the Yemeni-American community at large.

One individual—call him Sami, a Yemeni national by birth—naturalized as a U.S. citizen in New York City twenty years ago. In mid-2013, he traveled back to Yemen to spend six months there with his family. Over the summer, he accompanied his elderly mother to the U.S. embassy compound in Sana'a, to help her apply for a visa to come visit him in the United States. At the U.S. embassy, officials abruptly confiscated Sami's U.S. passport and ejected him and his mother from the premises.

Another individual—call him Mansour—is a twenty-two-year-old, naturalized Yemeni American who had temporarily relocated to Yemen in order to get married. When he and his spouse had their first baby in Yemen, they went to the U.S. embassy in Sana'a to register the birth abroad. At their arrival, embassy officials detained them and began interrogating him, yelling at him, and demanding that he admit that he had concealed his real name. They then threatened to keep Mansour and his wife and newborn in their custody until he agreed to sign a self-incriminating statement. With his family in tears and terrified, officials finally confiscated Mansour's U.S. passport and expelled him and his family from the premises.

Partners in the Yemeni-American community in New York City—mostly in Brooklyn and the Bronx—have described a widespread pattern of

ENFORCEMENT ACCOUNTABILITY & RESPONSIBILITY (CLEAR) PROJECT ET AL., *MAPPING MUSLIMS: NYPD SPYING AND ITS IMPACT ON AMERICAN MUSLIMS* (2013), available at <http://www.law.cuny.edu/academics/clinics/immigration/clear/Mapping-Muslims.pdf> (describing local law enforcement—NYPD—surveillance activity).

4. See, e.g., NYU SCH. OF LAW CTR. FOR HUMAN RIGHTS AND GLOBAL JUSTICE, *UNDER THE RADAR: MUSLIMS DEPORTED, DETAINED, AND DENIED ON UNSUBSTANTIATED TERRORISM ALLEGATIONS* (2011), available at <http://aaldef.org/UndertheRadar.pdf> (describing the abuse of immigration authority).

passport revocation targeting Yemeni Americans from all over the country at the U.S. embassy in Sana'a. The stories are consistent and they match various accounts of disturbing incidents that have emerged in the domestic press as well as in Arabic-language media.

Indeed, journalists have written about how “U.S. officials may have intimidated U.S. citizens into confessing identity fraud, then kept them in Yemen without due process.”⁵ Reporters have also revealed that “some Yemeni-Americans whose passports have been seized on suspicion of fraud have been required to wait up to two years while the embassy clears up its suspicions.”⁶ Even “elderly Yemeni-Americans coming to the embassy for routine social security questions have been subjected to interrogations and again, after being accused of fraud, losing their passports without further explanation.”⁷

The approach taken by U.S. State Department officials appears fairly uniform—and uniformly shocking. Consular officials are cited as using “often vague accusations of fraud . . . as excuses to simply grab a passport.”⁸ An anonymous State Department official told reporters that almost all of the statements obtained from Yemeni Americans at the embassy “say that the individual naturalized under a false identity,” adding that “[t]hey appear to be involuntary.”⁹ That same official explained that an internal State Department inquest “determined that the statements those revocations were based on were obtained under ‘confrontational’ circumstances, with individuals alone in an interview room with an investigative officer and an interpreter who . . . treated their subjects ‘aggressively.’”¹⁰ The official concluded that this was “an inherently coercive and intimidating environment, without any independent supervision of the interrogator and his translator.”¹¹

On the whole, press reports confirm that these are not isolated incidents. While some sources put the number of Yemeni-Americans whose passports have been revoked at as high as 500,¹² others, relying on an “inside source,” report that “‘at least 100 passports were taken’ so far in Sana’a,”¹³ and

5. Amel Ahmed, *Yemeni-Americans Cry Foul over Passport Revocations*, ALJAZEERA AM. (Jan. 21, 2014, 5:00 PM), <http://america.aljazeera.com/articles/2014/1/21/yemeni-americanscryfouloverpassportrevocations.html>.

6. Al Kamen, *Rights Groups: Be Careful Going to the U.S. Embassy in Yemen*, WASH. POST (Jan. 9, 2014, 12:51 PM), <http://www.washingtonpost.com/blogs/in-the-loop/wp/2014/01/09/rights-groups-be-careful-going-to-the-u-s-embassy-in-yemen/>.

7. Peter Van Buren, *EXCLUSIVE: State Department Seizing U.S. Passports in Yemen*, DISSENTER (Dec. 5, 2013, 8:44 AM), <http://dissenter.firedoglake.com/2013/12/05/exclusive-state-department-seizing-u-s-passports-in-yemen/>.

8. *Id.*

9. Ahmed, *supra* note 5.

10. *Id.*

11. *Id.*

12. *Safaarat Amreeka Tujarrid 500 Amreeki Yamani min Jinsiyyaatihim...Ta'assufann* [500 Yemeni Americans Arbitrarily Stripped of Their U.S. Passports], KHABAR AGENCY (Jan. 13, 2014), <http://www.khabaragency.net/news9261.html>.

13. Domani Spero, *US Embassy Yemen: Revocation of U.S. Passports, a Growing Trend?*, DIPLOPUNDIT (Jan. 13, 2013, 8:59 AM), <http://diplomundit.net/2014/01/13/us-embassy-yemen-revocation-of-u-s-passports-a-growing-trend/>.

others, still, citing “exclusive information obtained through a U.S. government whistleblower,” assert that “over one hundred U.S. passports [were seized] from Yemeni-Americans.”¹⁴

That dozens or hundreds of Americans have been stripped of their passports overseas without fair process is disturbing enough. But this sort of revocation also raises important questions about the U.S. government’s authority to take such measures and the often existential consequences of these practices for targeted communities. Families have been torn asunder, life plans and careers disrupted, and entire communities terrorized by the specter of sudden and seemingly final rights deprivation.

Compounding these serious concerns is the fact that U.S. embassy personnel in Yemen appear to have used intimidation and threats to procure forced confessions of passport fraud.¹⁵ Indeed, for those who bore the brunt of these practices and found themselves in limbo abroad, administrative or judicial protections and remedies remained empty promises.

II. EXECUTIVE AUTHORITY TO REVOKE PASSPORTS

Passports are essential to foreign travel and courts have regarded the right to obtain a passport as a valuable dimension of citizenship.¹⁶ The U.S. Secretary of State enjoys some discretion when wielding her authority over the issuance or revocation of passports, but that discretion cannot be arbitrarily exercised.¹⁷ Indeed, as detailed below, many of the circumstances warranting passport denial or revocation are ones where some degree of process has occurred prior to the deprivation.

Courts have examined passport denials in two situations: “first, questions concerning the citizenship of the applicant; and second, ‘whether the applicant was participating in illegal conduct, trying to escape the toils

14. Van Buren, *supra* note 7.

15. Rights groups, including CLEAR, the organization that the author supervises, were sufficiently alarmed by events in Yemen that they promptly published a know-your-rights pamphlet in both Arabic and English, warning Yemeni Americans about the U.S. embassy in Sana’a, Yemen. *See My Rights at the US Embassy in Sanaa*, MY EMBASSY RTS., <http://myembassyrights.us/my-rights%D8%AD%D9%82%D9%88%D9%82%D9%8A/> (last visited Mar. 25, 2014). The U.S. State Department, on the other hand, announced on November 13, 2013, that the embassy official in Yemen in charge of the passport revocations had been named Consular Officer of the Year, an award for excellence acknowledging “‘outstanding individual contributions . . . with a particular emphasis on efficiency and quality [and] inspired leadership.’” Van Buren, *supra* note 7. Observers reported that, according to the official’s Facebook page, “she was also promoted, and given a dream follow-on assignment from Yemen to Australia.” *Id.*

16. *See, e.g., Kent v. Dulles*, 357 U.S. 116, 121, 125–26 (1958) (acknowledging that a passport is “necessary” for travel and that “[t]he right to travel is a part of the ‘liberty’ of which the citizen cannot be deprived without the due process of law under the Fifth Amendment”).

17. *See id.* at 129.

of the law, promoting passport frauds, or otherwise engaging in conduct which would violate the laws of the United States.”¹⁸

The statutory and regulatory framework for the executive’s authority over passports is clear and detailed. Under the Immigration and Nationality Act, “[t]he Secretary of State is authorized to cancel any United States passport . . . if it appears that such document was illegally, fraudulently, or erroneously obtained.”¹⁹ Title 22, section 51 of the Code of Federal Regulations regulates the denial, revocation, and restriction of passports.²⁰

Specifically, the regulations outline the circumstances in which the U.S. State Department may revoke a U.S. passport after its issuance.²¹ Revocation is permissible if the bearer would not be entitled to the issuance of a new passport on any of a number of enumerated grounds for refusal²² or if the passport was fraudulently obtained, altered, or misused.²³ The enumerated grounds that would lead to the denial of a U.S. passport include a number of criminal violations and failure to repay financial obligations.²⁴ Convicted drug traffickers may also be subject to passport denial or revocation,²⁵ as are minors if a parent or custodian objects to the issuance of the passport,²⁶ or if the minors are the subject of a pending custody dispute.²⁷

Law enforcement interests frequently dictate passport denial or revocation—for example, “to prevent travel by ‘a citizen who is seeking to avoid the judicial processes of the United States.’”²⁸ A host of similar scenarios are contemplated in the regulations, including being subject to a federal, state, or local felony arrest warrant; a criminal court order prohibiting departure from the United States; a finding of legal incompetence; a request for extradition from or to the United States; or a subpoena in a federal prosecution.²⁹ Felony arrest warrants issued by foreign governments can also lead to passport denial or revocation.³⁰

Further, passports may be denied or revoked if the passport holder has been convicted of a federal or state drug offense and used the U.S. passport when crossing an international border to commit the offense.³¹ Passports may be denied or revoked if an individual is in default on a loan received from the United States for repatriation or emergency assistance,³² or if an

18. *Kelso v. U.S. Dep’t of State*, 13 F. Supp. 2d 1, 6 (D.D.C. 1998) (citing *Kent*, 357 U.S. at 127).

19. 8 U.S.C. § 1504 (2012).

20. 22 C.F.R. § 51 (2013).

21. *Id.* § 51.62.

22. *Id.* §§ 51.60–.61 (setting forth grounds for refusal to issue U.S. passports).

23. *Id.* § 51.62.

24. *Id.* § 51.60.

25. *Id.* § 51.61.

26. *Id.* §§ 51.28(c), 51.60(b)(7).

27. *Id.* § 51.60(e).

28. *Kelso v. U.S. Dep’t of State*, 13 F. Supp. 2d 1, 7 (D.D.C. 1998).

29. 22 C.F.R. § 51.60(b).

30. *Id.* § 51.60(d).

31. *Id.* § 51.61(b).

32. *Id.* § 51.60(a)(1), 51.60(c)(1)–(2).

individual is in arrears of child support for an amount exceeding \$2,500.³³ In the situations outlined above, the authority to deny or revoke a U.S. passport is employed to facilitate and lend force to judicial process or to prevent the evasion of duties, responsibilities, or penalties imposed by law.

The regulation that appears most centrally implicated in the cases arising out of the U.S. embassy in Yemen is that allowing for passport revocation when the passport “has been obtained illegally, fraudulently, or erroneously; was created through illegality or fraud practiced upon the Department; or has been fraudulently altered or misused.”³⁴

As a distinct ground for agency action, if the U.S. State Department determines, for example, that the bearer of a U.S. passport is not, in fact, a U.S. national, or if the agency finds that the bearer’s citizenship or naturalization certificate has been duly canceled, then it may revoke that individual’s passport.³⁵

There are additional limits to executive discretion and authority to revoke a U.S. passport. For instance, the bearer’s ideological views or her personal beliefs or associations cannot justify passport revocation.³⁶ But a passport may still be denied or revoked if “[t]he Secretary determines that the [bearer’s] activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States.”³⁷ While, based on available information, the national security and foreign policy grounds cited in this regulation have not been invoked by the U.S. State Department in these Yemeni cases, the possibility that they might be used in the future certainly cannot be discounted.³⁸

33. *Id.* § 51.60(a)(2).

34. *Id.* § 51.62(a)(2) (implementing 8 U.S.C. § 1504, a statute passed in 1994 and authorizing the secretary of state to cancel any U.S. passport if it appears to have been illegally, fraudulently, or erroneously obtained, or was created through illegality or fraud).

35. *Id.* § 51.62(b).

36. *See, e.g., Kent v. Dulles*, 357 U.S. 116, 130 (1958).

37. 22 C.F.R. § 51.60(c)(4); *see also Haig v. Agee*, 453 U.S. 280 (1981) (involving an unsuccessful challenge to a previous version of same regulation). In *Haig*, the U.S. Supreme Court cited several historical instances in which the agency had construed and applied this standard, though noted that denial on a national security basis had arisen in only a few situations. *Id.* at 302. In 1948, a passport was denied to a member of Congress who sought to go abroad to support a movement in Greece to overthrow the existing government. *Id.* In 1954, the passport of a man who was supplying arms to groups abroad whose interests were contrary to positions taken by the United States was revoked, and in 1970, passports of two people who sought to travel to the site of an international airplane hijacking were revoked. *Id.* In *Haig* itself, the passport of an American citizen and former CIA employee was revoked under the national security/foreign policy regulation when his activities abroad resulted in the identification of undercover CIA agents and foreign intelligence sources. *Id.* at 284.

38. This is not to say, of course, that this particular species of authority has not been invoked by the U.S. government in Yemen at all. A notable example is a U.S. State Department cable dated March 24, 2011, directing the State Department’s post in Sana’a, Yemen, to write Anwar al-Awlaki in order to instruct him to collect a passport revocation notice at the U.S. embassy’s consular section. Cable from Regina L. Ballard to Jonathan M. Rolbin, Dir., Office of Legal Affairs & Law Enforcement Liaison, Bureau of Consular Affairs, Passport Servs. (Oct. 15, 2012), *available at* <http://images.politico.com/global/2012/11/28/binder1.html>. The grounds cited for revocation are “the determination by the

III. NOTICE AND HEARING REQUIREMENTS

By statute, a U.S. passport “shall have the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction.”³⁹ Because the law equates passports with certificates of naturalization and of citizenship, and since those certificates cannot be revoked without a pre-deprivation hearing, some courts have held that a hearing is required prior to a passport revocation as well.⁴⁰

But the part of the statute authorizing the secretary of state “to cancel any United States passport”⁴¹ arguably superseded cases holding that a pre-deprivation hearing was necessary for passport revocation too.⁴²

That said, the regulations still require a written notification to the person’s last known address that sets forth the specific grounds for passport revocation, as well as procedures for seeking any applicable post-revocation hearing.⁴³

Initially, in the cases that came up in practice or were reported by the press, no written notice was provided to individuals in Yemen to explain why their passport was taken away or how they could appeal that decision. More recently, however, the U.S. embassy in Yemen began providing written notices setting forth the grounds for revocation and providing a sixty-day opportunity to request a post-deprivation hearing.⁴⁴ In most cases thus far, such notices were provided retroactively to individuals whose passports had been confiscated many months prior.⁴⁵

The typical notice cites the regulations providing for the revocation of U.S. passports on grounds “that the passport was illegally, fraudulently or

Secretary that Mr. Aulaqi’s activities abroad are causing and/or are likely to cause serious damage to the national security or the foreign policy of the United States.” *Id.* at 1.

39. 22 U.S.C. § 2705 (2012).

40. *See* *Magnuson v. Baker*, 911 F.2d 330, 334, 336 (9th Cir. 1990).

41. 8 U.S.C. § 1504.

42. *See, e.g.,* *Atem v. Ashcroft*, 312 F. Supp. 2d 792, 799 (E.D. Va. 2004) (“In light of Congress’ enactment of § 1504, the Ninth Circuit’s conclusion that a passport cannot be revoked without a pre-revocation hearing is no longer persuasive.”); *see also* *Hizam v. Clinton*, No. 11 Civ. 7693(JCF), 2012 WL 3116026, at *4 n.1 (S.D.N.Y. July 27, 2012) (citing *Atem*, 312 F. Supp. 2d at 799), *rev’d sub nom.* *Hizam v. Kerry*, No. 12-3810 (2d Cir. Mar. 12, 2014); *Mondaca-Vega v. Holder*, No. CV-04-339-FVS, 2011 WL 1195877, at *1 n.2 (E.D. Wash. Mar. 29, 2011) (stating that *Magnuson’s* holding that a pre-deprivation hearing was necessary for passport revocation “has been superseded by statute”).

43. 22 C.F.R. § 51.65. The availability of post-revocation review is also detailed in the regulations. *Id.* §§ 51.70–74. The constitutional sufficiency of a post-revocation hearing was affirmed in *Haig*, 453 U.S. at 310 (“The Constitution’s due process guarantees call for no more than what has been accorded here: a statement of reasons and an opportunity for a prompt postrevocation hearing.”).

44. *See, e.g.,* Matt O’Brien, *Oakland Man Stuck in Yemen Rights To Return*, INSIDE BAY AREA NEWS (Jan. 31, 2014, 5:49 AM), http://www.insidebayarea.com/news/ci_25030453/oakland-man-stuck-yemen-fights-return (“Hussein and others began receiving notices in December notifying them of a chance to appeal [the confiscation of their passports].”).

45. *See, e.g., id.* (“It took nearly a year before American officials offered Hussein a formal explanation [for the confiscation of his passport].”).

erroneously obtained.”⁴⁶ The notice also informs recipients that they “are entitled to a hearing upon written request,” as long as the request is received by the embassy “within 60 days” of notification.⁴⁷

But, of course, as the revocation notice itself reflects, “[a] request for a hearing does not serve to stay the revocation action taken by the Department of State.”⁴⁸ Consequently, U.S. passport bearers who have been stripped of their documents may not be able to travel in order to avail themselves of any post-revocation hearing occurring within the United States. This holds true even if they are notified at least ten business days in advance of the date and place of the hearing, consistent with the applicable regulation.⁴⁹

It is still too early to gauge if the post-revocation administrative hearings stemming from these cases will be held primarily in Yemen or in the United States. Practitioners have reported that some hearings arising from passport revocations in Yemen have already taken place in Washington, D.C., and that, generally, the applicant can choose if the hearing should be held in Washington, D.C., or at the overseas post in Yemen.⁵⁰ These hearings have been described as brief, informal, and followed by extensive delays before any decision is issued.⁵¹ To the extent that the grounds asserted for revocation were related to the fraudulent, illegal, or erroneous obtainment of a passport, it remains unclear whether formal denaturalization proceedings will follow.

IV. THE IMPOSSIBILITY OF JUDICIAL REVIEW

Following the post-revocation hearing, the U.S. State Department’s decision is final and not subject to further administrative review.⁵² In theory, that sets the stage for the decision to be challenged in federal district court.⁵³ But, in the Yemeni passport-stripping cases, what the statutes

46. Notice from U.S. Embassy, Sana’a, Yemen (Dec. 17, 2013) (citing 22 C.F.R. § 51.62(a)(2)) (on file with *Fordham Law Review*).

47. *Id.* (citing 22 C.F.R. §§ 51.70–.74).

48. *Id.*

49. 22 C.F.R. § 51.70(c)–(d); *see also* *Kelso v. U.S. Dep’t of State*, 13 F. Supp. 2d 1, 3 (D.D.C. 1998) (vacating a passport revocation where the State Department failed to hold hearing within sixty days of request). Recently, U.S. officials have notified some aggrieved individuals of their right to return to the United States notwithstanding the revocation of their travel document. *See, e.g.*, O’Brien, *supra* note 44 (“U.S. officials in recent days told Hussein and others with confiscated passports that they might be granted permission to return to the United States.”). Generalizing that approach would at least mitigate some of the harms that flow from passport revocation.

50. Email from anonymous practitioner to author (Jan. 17, 2014, 4:23 PM) (on file with *Fordham Law Review*) [hereinafter Jan. 17 Email]; *see also* Email from anonymous practitioner to author (Mar. 12, 2014) (on file with *Fordham Law Review*).

51. Jan. 17 Email, *supra* note 50.

52. 22 C.F.R. § 51.74.

53. *See* 28 U.S.C. § 2201 (2006) (establishing declaratory actions in federal court to challenge passport revocation); *see also* 5 U.S.C. § 702 (2012) (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”); *id.* § 704 (“Agency action made reviewable by statute and final agency action for which there is no other

granted with one hand was taken away with the other. While a statutory grant of federal court jurisdiction enables individuals to challenge passport revocation by petitioning for declaratory relief,⁵⁴ requests for such relief in cases involving revocation “upon the ground that [the passport holder] is not a national of the United States” are statutorily limited to “any person who is within the United States.”⁵⁵

As a result, any individual who was unable to return to the United States because of the revocation of their passport on grounds of noncitizenship was statutorily precluded from seeking declaratory relief in federal court to challenge that very revocation.⁵⁶ Moreover, for those individuals whose passports were revoked on grounds “that the passport was illegally, fraudulently, or erroneously obtained,”⁵⁷ the inability to return to the United States, while not a *legal* hurdle to seeking judicial review, could prove an insurmountable practical obstacle to retaining counsel and prosecuting a claim in a U.S. court.

adequate remedy in a court are subject to judicial review.”); 8 U.S.C. § 1503(a) (“An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege”); *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (holding that to be final for Administrative Procedure Act purposes, agency action must “mark the ‘consummation’ of the agency’s decisionmaking process”). It is unclear how review can be sought for passport revocations that are not eligible for hearings. Indeed, 22 C.F.R. § 51.70(b) does not provide for hearings in the wake of any State Department action taken in denying, restricting, revoking, or invalidating a passport, or in any other way adversely affecting the ability of a person to receive or use a passport for such reasons as (1) nonnationality; (2) refusal on § 51.60(a) grounds; (3) refusal to grant a discretionary exception under emergency or humanitarian relief provisions of § 51.61(c); and (4) refusal to grant a discretionary exception from geographical limitations of general applicability.

54. 28 U.S.C. § 2201 (2006).

55. Immigration and Nationality Act of 1952, Pub. L. No. 414, § 360(a), 66 Stat. 163, 273 (codified as amended at 8 U.S.C. § 1503 (2012)). This provision allows any person whose passport is revoked on grounds of noncitizenship while outside the United States to apply for a “certificate of identity” at a U.S. consulate in order to travel to the United States. However, to obtain that document, the applicant must satisfy the same U.S. consulate that took away her passport of her “good faith” and of the “substantial basis” for her application. *Id.*

56. There have not been many federal court challenges to U.S. passport revocations out of the U.S. embassy in Sana’a. *Hizam v. Clinton* involves a U.S. citizen of Yemeni descent whose passport was initially withheld at the U.S. embassy in Yemen, before he was permitted to return to the United States only to see his passport revoked anew. *Hizam v. Clinton*, No. 11-CV-7693, 2012 WL 3116026, at *2 (S.D.N.Y. July 27, 2012), *rev’d sub nom.* *Hizam v. Kerry*, No. 12-3810, slip op. at 2–3 (2d Cir. Mar. 12, 2014). On appeal, the Second Circuit reversed the district court, upholding the revocation of Hizam’s Consular Report of Birth Abroad, which provided the basis for his U.S. citizenship and passport; the court noted, however, that “[t]he equities in this case overwhelmingly favor Hizam” and entreated the State Department to “stand by its representations to the Court” and “support other lawful means to provide relief to Hizam.” *Hizam*, No. 12-3810, slip op. at 21–22. Another case, *Qassem v. Holder*, No. 13-CV-6041 (W.D.N.Y. Jan. 30, 2013), reportedly involved the revocation of the petitioner’s passport at the U.S. embassy in Sana’a and was settled when the State Department reissued the passport. The documents in that case are sealed save for an order granting a motion to withdraw the petition for a writ of mandamus.

57. Notice from U.S. Embassy, *supra* note 46.

Applicable regulations allow the U.S. State Department to issue “a passport for direct return to the United States” in certain circumstances.⁵⁸ Those include situations involving passport revocation or denial because an individual is in default on a loan for repatriation, is in arrears with child support, or is a minor who is the subject of a custody dispute.⁵⁹ The regulations do not explicitly provide for direct return passports in other circumstances warranting passport revocation or denial.⁶⁰

However, courts in a number of cases have noted the availability of some sort of limited-purpose, one-way travel document provided by the agency denying or revoking a passport in order to facilitate the bearer’s return to the United States. In *Haig v. Agee*,⁶¹ a case involving an overseas passport revocation, the U.S. Supreme Court noted that “the Secretary has provided Agee with identification papers permitting him to return to the United States.”⁶² In *Kelso v. U.S. Department of State*,⁶³ another revocation case, the attorney adviser in the Office of Passport Policy and Advisory Services advised that if the plaintiff “needs documentation in order to return to the United States, such will be provided.”⁶⁴

At the very least, where, as in Yemen, a U.S. embassy or consulate overseas revoked passports, it should have systematically informed the bearers that they could obtain temporary travel documents.⁶⁵ The overseas post should have also promptly issued such documents so that the subjects of administrative revocation might avail themselves of the post-revocation hearing, if held in the United States, and pursue relief through the courts if necessary.⁶⁶

V. PROXY DENATURALIZATION AND DEPORTATION

Dozens of naturalized U.S. citizens have been stripped of their passports at the U.S. embassy in Yemen. None of them received a pre-deprivation hearing, and most of them were not provided with written notice of the grounds for the passport revocation at the time it occurred or of the

58. 22 C.F.R. § 51.60.

59. *Id.* § 51.60(a), (e).

60. *See id.* § 51.62 (outlining passport revocation procedures but failing to mention “direct return” passport).

61. 453 U.S. 280 (1981).

62. *Id.* at 289 n.16.

63. 13 F. Supp. 2d 1 (D.D.C. 1998).

64. *Id.* at 4.

65. The U.S. Citizen Services section of the U.S. embassy in Sana’a’s website makes no mention of the availability of direct return passports for citizens in need. *U.S. Embassy in Sanaa Open for Limited Consular Services (December 4, 2013)*, EMBASSY U.S.: SANA’A, YEMEN, <http://yemen.usembassy.gov/service.html> (last visited Mar. 25, 2014).

66. As an alternative to a direct return passport, an individual stripped of their passport “upon the ground that he is not a national of the United States” can also seek to obtain “a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission.” 8 U.S.C. § 1503(b) (2012). That option is available “only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent.” *Id.*

opportunity to request an administrative hearing following the deprivation. Even those who were notified at the time of the deprivation, months after the fact, or who somehow managed to collect in Yemen a notice that was sent to their last known address in the United States, may not be able to avail themselves of any avenues for redress because of the practical obstacles to returning to the United States without a U.S. passport.

Indeed, presence in the United States is a practical necessity if the post-deprivation administrative hearing is slated to occur in the United States. For purposes of mounting a challenge to revocation in federal court, presence becomes a legal or a practical necessity, depending on the grounds asserted by the State Department for the revocation of the individual's passport.⁶⁷

Without a valid U.S. passport, and unless they are issued temporary travel documents by the U.S. embassy, those Yemeni Americans are effectively exiled from the United States and cannot take advantage of the recourse afforded them under the applicable statutes and regulations. Even if they happen to still retain valid Yemeni travel documents, they would still have to secure a visa to enter the United States through the very consular section that stripped them of their U.S. passport—a course of action unlikely to succeed.

Regarding the availability of return documents, a U.S. State Department official commenting on the trend of passport revocations in Yemen conceded only that “[d]epending upon the circumstances, the bearer may be provided with a limited validity passport for a direct return to the United States.”⁶⁸ Such tentative and qualified statements do little to quell concern that significant deprivations occurred in Yemen and that citizens targeted for radical administrative action overseas were effectively cut off from available relief.

By implementing this practice overseas, the U.S. government is enforcing expatriation in possible violation of the Fifth and Fourteenth Amendments to the U.S. Constitution.⁶⁹ The right of return to the United States and a prohibition against involuntary expatriation have both been read into the right of citizenship guaranteed by the Fourteenth Amendment's Citizenship Clause.⁷⁰ More specifically, U.S. State

67. Immigration and Nationality Act of 1952, Pub. L. No. 414, § 360(a), 66 Stat. 163, 273 (codified as amended at 8 U.S.C. § 1503) (seeming to preclude, as a jurisdiction-conferring statute, anyone not “within the United States” from seeking declaratory relief in cases involving revocation on grounds of noncitizenship); *see also supra* notes 53–56 and accompanying text.

68. Spero, *supra* note 13 (emphasis omitted).

69. The Fourteenth Amendment's Citizenship Clause provides that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. CONST. amend. XIV, § 1. The Fifth Amendment's Due Process Clause prohibits deprivations of liberty “without the due process of law.” U.S. CONST. amend. V.

70. *See, e.g., Tuan Anh Nguyen v. INS*, 533 U.S. 53, 67 (2001) (stating that an entitlement of U.S. citizenship is the “absolute right to enter its borders”); *Afroyim v. Rusk*, 387 U.S. 253, 263 (1967) (“Th[e] undeniable purpose of the Fourteenth Amendment to make citizenship . . . permanent and secure would be frustrated by holding that the Government

Department regulations governing passport revocations possibly violate the Fourteenth Amendment to the extent that they do not provide for direct return passports for travel back to the United States in all cases of passport revocation abroad (unless the agency can demonstrate that, as a matter of policy, other temporary travel documents are issued in all such cases, automatically or upon request).

The U.S. State Department's practice in Yemen also amounts to constructive denaturalization. The U.S. Constitution does not erect many distinctions between naturalized citizens and citizens by birthright, protecting both categories equally in almost all significant regards.⁷¹ That the subjects of administrative action in Yemen mostly happen to be naturalized U.S. citizens should be of no consequence insofar as concerns the constitutional protections to which they are entitled.

Moreover, statutes and regulations providing for passport denial or revocation affect only the document, not the underlying citizenship status of the individual whose passport has been revoked.⁷² An agency cannot effect

can rob a citizen of his citizenship without his consent by simply proceeding to act under an implied general power to regulate foreign affairs or some other power generally granted.”). Forcible expatriation may also amount to cruel and unusual punishment, in violation of the Eighth Amendment. *See, e.g., Trop v. Dulles*, 356 U.S. 86, 101 (1958) (“[U]se of denationalization as a punishment is barred by the Eighth Amendment . . . [because it involves] the total destruction of the individual’s status in organized society. It is a form of punishment more primitive than torture”); *id.* at 92–93 (“[T]he deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen’s conduct.”).

71. *See, e.g., Afroyim*, 387 U.S. at 261 (“(The naturalized citizen) becomes a member of the society, possessing all the rights of a native citizen, and standing, in view of the constitution, on the footing of a native.” (quoting *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 827 (1824))). *But see* U.S. CONST. art. II, § 1, cl. 4 (disqualifying naturalized U.S. citizens from eligibility for office of the president).

72. It bears emphasis that passport fraud within the meaning of 22 C.F.R. § 51.62(a)(2) must be limited to narrow circumstances, such as the illegal fabrication of or tampering with passports or the use of a passport under an identity other than one’s own. The State Department itself offers a limited set of examples of passport fraud, like “[a]ssuming the identity of a deceased person to apply for passports; [u]sing phony support documents, such as fake birth certificates; [u]sing stolen and altered passports; [and c]ircumventing the two-parent signature rule for children.” *See Passport and Visa Fraud: A Quick Course*, U.S. DEP’T ST., <http://www.state.gov/m/ds/investigat/c10714.htm> (last visited Mar. 25, 2014). In the Yemen cases, the State Department appears to extend the operative definition of passport fraud to cases where there is some suspicion that an individual held a different name prior to immigration or naturalization. *See* Notice from U.S. Embassy, *supra* note 46. Such a broad reading of the regulation pulls what are essentially suspicions of fraud in the procurement of a certificate of citizenship or of naturalization within the meaning of passport fraud. This outcome was clearly not intended by Congress, which placed the authority to grant and cancel certificates of citizenship, and to initiate denaturalization proceedings, within the ambit of U.S. Citizenship and Immigration Services (USCIS) and the U.S. Attorney General, not the State Department. *See* 8 U.S.C. § 1453. Internal State Department materials recognize as much, stating that “an individual remains eligible for a U.S. passport until his/her Certificate of Naturalization or Citizenship is revoked by U.S. Citizenship and Immigration Services (USCIS) or a U.S. District Court.” 7 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL: CONSULAR AFFAIRS § 1381.2(d)(1) (2013) (emphasis omitted). And it has been settled for decades that the State Department is not to engage in collateral attacks on citizenship. *See, e.g., Administrative Certificates of Citizenship*, 41 U.S. Op. Atty. Gen. 452 (1960) (“Congress, in providing for the issuance of certificates of citizenship by the

direct denaturalization, as that authority rests exclusively with the federal judiciary.⁷³ Even if suspicion of noncitizenship is the underlying issue, a passport bearer remains entitled to a post-revocation hearing, and her U.S. citizenship rests intact unless and until a federal court rules otherwise.⁷⁴

By choosing to take aggressive administrative action on a large scale in Yemen, the State Department has achieved an outcome—with naturalized citizens stripped of their U.S. passports, stranded beyond U.S. borders, and unable to avail themselves of due privileges and protections—that could normally be achieved in only two ways: denaturalization proceedings in court or revocation of citizenship resulting from a conviction for naturalization fraud, followed by removal proceedings.⁷⁵ Such an apparent end-run around the statutory and constitutional protections that ought to be enjoyed by all U.S. citizens is unlikely to withstand serious judicial scrutiny and cannot constitute sound policy.

For U.S. passport bearers who were suddenly stripped of their travel documents in Yemen, notice of the grounds for revocation, of the opportunity to request an administrative hearing, and of their right to eventually challenge administrative action in federal court could all amount to naught if they are unable to return to the United States. The U.S. embassy in Sana'a or any other overseas post taking such aggressive action should distribute the notice with a clear offer to issue direct return passports expeditiously to individuals whose documents have been revoked.

Attorney General . . . , and in specifying that in all public offices of the United States such a certificate should have the same effect as judicial certificate of naturalization or citizenship, meant to put the matter at rest and to deprive all other administrative officers of the United States of the power to put in issue the citizenship status recognized by a certificate regular on its face.”).

73. *See, e.g.*, 8 U.S.C. § 1451 (outlining federal court jurisdiction over revocation of naturalization proceedings); *United States v. Minker*, 350 U.S. 179, 188 (1956) (discussing policy considerations guiding the Court’s requirement of judicial rather than administrative adjudication of citizenship claims); *Ng Fung Ho v. White*, 259 U.S. 276 (1922) (holding that individuals with citizenship claims are entitled to a judicial, rather than administrative, determination); *Gorbach v. Reno*, 219 F.3d 1087, 1096 (9th Cir. 2000) (discussing longstanding Supreme Court precedent that “avoid[s] delegation [of denaturalization] except to federal courts, except where an alternative delegation was clearly and unambiguously expressed”).

74. *See, e.g.*, *Atem v. Ashcroft*, 312 F. Supp. 2d 792, 800 (E.D. Va. 2004) (holding that mere suspicion of noncitizenship is insufficient to deny a post-revocation hearing because no adjudication of citizenship has occurred); *see also* *Kelso v. U.S. Dep’t of State*, 13 F. Supp. 2d 1, 4 (D.D.C. 1998) (“[U]nless the reason for revoking one’s passport is based upon a *finding* of non-citizenship, the loss of a passport itself indicates nothing about the legitimacy of one’s citizenship.” (emphasis added)).

75. *See, e.g.*, 8 U.S.C. § 1451 (outlining federal jurisdiction over revocation of naturalization proceedings); 18 U.S.C. § 1425 (punishing criminally the offense of naturalization and citizenship fraud)

VI. PEERING BEHIND THE PRACTICE

Looking behind the practice of passport revocation at the U.S. embassy in Yemen could yield valuable insights into the factors impelling that practice and, going forward, could help reduce the odds that the practice will recur at that site or elsewhere in the world.

Naturally, the first question is: why Yemen? For that practice to have emerged in that particular country may have been simply an expression among many of a collective American fear—warped by the attacks of September 11, 2001—of Muslim-majority countries and regions. Certainly, in the view of many U.S. government agencies, Yemen is a haven for alleged militants such as Anwar al-Awlaki and Umar Farouk Abdulmutallab and a country where U.S. armed drones are frequently deployed on lethal missions.⁷⁶ The deadly attack on the *U.S.S. Cole* also occurred off the coast of Yemen in 2000. In other words, the context, colored this way, would seem to call for heightened scrutiny in all official U.S. dealings in Yemen, including immigration and consular services.

While outside visibility of the inner workings of U.S. government affairs in Yemen is admittedly limited, some publicly available records nonetheless help outline the way in which heightened suspicion centering on an entire country is actualized bureaucratically by an agency on the ground.

For example, an unclassified Fraud Summary Report issued by the U.S. embassy in Sana'a, dated September 29, 2009, and released by WikiLeaks, may suggest a partial answer. In it, embassy personnel are informed that, at the U.S. consular section in Yemen, "all Immigrant Visa (IV) cases are considered fraudulent until proven otherwise."⁷⁷ The Fraud Summary Report reveals a surprisingly sweeping and indiscriminately negative view within that embassy of Yemenis and, by extension, of U.S. citizens of Yemeni descent. It may well be that another similar directive imposes a presumption of fraudulence on all requests for consular services made by U.S. citizens of Yemeni origin in Yemen.⁷⁸

76. See, e.g., Jim Garamone, *Mullen Outlines U.S. Military Role in Yemen*, U.S. DEP'T DEF. (Jan. 8, 2010), <http://www.defense.gov/news/newsarticle.aspx?id=57430> ("Yemen has posed a concern as a potential terrorist safe haven for some time."); *A Wedding That Became a Funeral: US Drone Attack on Marriage Procession in Yemen*, HUM. RTS. WATCH (Feb. 19, 2014), <http://www.hrw.org/reports/2014/02/19/wedding-became-funeral> (reporting on drone strikes in Yemen).

77. *Fraud Summary—Sana'a*, WIKILEAKS, <http://cablegatesearch.wikileaks.org/cable.php?id=09SANAA1729&q=yemen> (last visited Mar. 25, 2014).

78. Of course, the Yemen cases are not without historical precedent. These recent events hark back to unsavory episodes during the twentieth century when the U.S. government aggressively sought to strip unpopular groups of the rights and privileges of citizenship in one way or another. See, e.g., PATRICK WEIL, *THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC* 76–82 (2013) (describing how the U.S. Naturalization Bureau pursued "a mission of denaturalizing Asians, whenever it came into contact with them, when, for example, they requested an American passport or any other official document").

Taken together with the pattern of passport revocations at the U.S. embassy in Yemen, the leaked records illustrate how prejudice and flawed risk analysis can morph into unsound policy. While it is clear from the Fraud Summary Report that noncitizens seeking sundry immigration services, including immigrant visas, have also fallen prey to misguided policy, the net effect for Yemeni Americans is that the value of their U.S. citizenship has been diluted. Fear that chimerical sleeper cells in Yemen are constantly plotting to infiltrate the American homeland has driven the exceptionalization of Yemeni Americans and has distorted the legal processes that deal with them.⁷⁹ The resulting erosion of their rights can only be meaningfully reversed—and a future recurrence in another context averted—if the factors that led to it are properly identified and understood.

79. See, e.g., Andrew Hammond, *Al Qaeda Goes Underground in Yemen Against U.S.-Driven Crackdown*, REUTERS (Oct. 23, 2012, 6:05 PM), <http://www.reuters.com/article/2012/10/23/us-yemen-qaeda-cells-idUSBRE89M10620121023> (describing the United States' fear of "sleeper cells" in Yemen). The distortion of policymaking through a total security prism—a phenomenon I call "9/11 warping"—can be observed both in the altered functioning of already existing systems (as is the case with passport revocations in Yemen) and in the creation of new systems. See, e.g., Ramzi Kassem, *Praying While Muslim*, NATION, July 2–9, 2012, at 25, available at <http://www.thenation.com/article/168376/long-roots-nypd-spying-program#> (describing 9/11 warping in another context).