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EXPATRIATING TERRORISTS

*Peter J. Spiro**

INTRODUCTION

Since September 11, 2001, U.S. lawmakers have aggressively sought to outdo each other in looking tough on terror. Members of Congress have purported to limit the president's capacity to shut down Guantánamo,¹ have looked to limit the application of *Miranda* rights to terror suspects,² and have authorized the indefinite detention of those deemed enemy belligerents.³ Congress's overall stance on counterterrorism has been more aggressive than either the courts or the executive branch; in important respects, it has been an obstacle in efforts to ramp down the war on terror.⁴ There have been few episodes in which Congress has resisted counterterror initiatives.

Notable among exceptions are proposals to strip terrorists of their U.S. citizenship. The bipartisan rejection of such proposals presents a puzzle. Insofar as citizenship has historically been associated with loyalty, it would seem a costless, expressive remedy to terminate the citizenship of those who lend support to hostile entities. This would seem even more the

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1. See, e.g., National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1027, 125 Stat. 1298, 1308 (codified at 10 U.S.C. § 801 note (2012)); MICHAEL JOHN GARCIA ET AL., CONG. RESEARCH SERV., R40139, CLOSING THE GUANTANAMO DETENTION CENTER: LEGAL ISSUES 5 (2013) (concluding that congressional constraints on the transfer of Guantánamo detainees "seem to ensure that the Guantánamo detention facility remains open for the foreseeable future").

2. See, e.g., *Republican Lawmakers Urge Obama To Use 'Combatant Status' for Bombing Suspect*, FOXNEWS.COM (Apr. 20, 2013), <http://www.foxnews.com/politics/2013/04/20/capitol-hill-republicans-want-combatant-status-for-bombing-suspect-obama-yet-to/> (reporting congressional calls to limit rights extended to Boston Marathon bomber Dzhokhar Tsarnaev).

3. National Defense Authorization Act for Fiscal Year 2012 § 1022, 125 Stat. at 1563-64 (mandating the detention, in military custody, of enemy combatants).

4. See, e.g., Spencer Ackerman, *Osama's Dead, but Congress Wants a Wider War on Terror*, WIRED (May 10, 2011, 11:56 AM), <http://www.wired.com/dangerroom/2011/05/osamas-dead-but-congress-wants-a-wider-war/>; David Cole, *It's Congress' Fault That It's Still Open*, N.Y. TIMES, (Feb. 5, 2013, 5:09 PM), <http://www.nytimes.com/roomfordebate/2012/01/09/guantanamo-10-years-later/its-congress-fault-that-guantanamo-is-still-open>; Patricia Zengerle & Matt Spetalnick, *Obama Wants To End 'War on Terror' but Congress Balks*, REUTERS (May 24, 2013, 2:34 PM), <http://www.reuters.com/article/2013/05/24/us-usa-obama-speech-idUSBRE94M04Y20130524>.

expected response in the context of individuals who, through race and religion, seem alien relative to the dominant culture. Other nations, including the United Kingdom, have adopted legislative measures allowing for expatriation in the terrorism context.⁵ And yet, high-profile efforts to legislate the termination of citizenship in the context of terrorist activities have fallen flat in the United States. There is little chance that these proposals will be resurrected. Expatriation of terrorists is unlikely to ever comprise a component of the U.S. counterterror response.

This Article seeks to explain the rejection of a terrorism ground for terminating U.S. citizenship. The Article first establishes the constitutionality of proposals, focusing on Senator Joseph Lieberman's 2010 Terrorist Expatriation Act,⁶ which would have used association with foreign terrorist groups to evidence an individual's intent to relinquish citizenship. The bill's constitutionality might deepen the puzzle of its rejection. But conforming such measures to the U.S. Supreme Court's jurisprudence on the question limits their utility. Lieberman's proposal could be put to work in a very small number of cases; expatriation would be clear-cut only where terrorist activity were coupled with unambiguous expressions of individual intent. In other cases, government efforts to terminate citizenship would prompt litigation on the question, hardly a welcome prospect in the face of the other various uncertainties and missteps that have plagued the War on Terror in the courts. It is not clear, moreover, how expatriation would advance the counterterror agenda. Few counterterror tactics account for citizenship. Citizenship no longer buys individuals much protection; citizens, relative to noncitizens, enjoy few additional rights.

Where the expatriation proposal lacked instrumental advantage, it may nonetheless have had expressive value. Even if there was no concrete payoff, one might have expected the expatriation of alleged terrorists to have symbolic appeal, especially to politicians otherwise intent on appearing tough on terror. And yet the likes of then house minority leader John Boehner and Senator Lindsey Graham desisted. Although sloppy drafting and a poor rollout for the bill may have contributed to its rejection, the response may also have been grounded in a robust conception of citizenship, under which citizenship is seen as sacrosanct, perhaps even more precious than life itself. This view, which enjoys strong Warren Court roots, argues against deprivation of citizenship except under the most stringent constraints. But those who hold this position (largely though not exclusively Republican) also tend to be counterterror maximalists, favoring muscular counterterror policies that leave little room for rights, regardless

5. See Immigration, Asylum and Nationality Act, 2006, c. 13 (U.K.), available at http://www.legislation.gov.uk/ukpga/2006/13/pdfs/ukpga_20060013_en.pdf (enabling the deprivation of citizenship upon a determination that the deprivation is "conducive to the public good"); Matthew J. Gibney, 'A Very Transcendental Power': *Denaturalisation and the Liberalisation of Citizenship in the United Kingdom, Should Citizenship Be Conditional?*, 61 POL. STUD. 637 (2013).

6. Terrorist Expatriation Act, S. 3327, 111th Cong. (2010).

of citizenship. The sanctified view of citizenship is more nostalgic and reflexive than substantial—in other words, cheap talk. Citizenship agonists seemed in the end to shrug off the Lieberman proposal as much as anyone else.

Either way, the failure of terrorist expatriation proposals will reinforce the dwindling citizenship differential. As those hostile to the United States retain their citizenship, citizenship will no longer demarcate the boundary between friends and enemies. Formal membership is degraded as a proxy for social membership, which is itself no longer amenable to demarcation. That perhaps best explains why expatriation no longer has a place in the context of hostilities. It is no longer clear who the other is. It is no longer a manageable undertaking to expel those otherwise outside the fold. Expatriation supplies another optic on the changed nature of global conflict and human association.

I. EXPATRIATION: A SHORT HISTORY

Capturing a news cycle's worth of attention in May 2010,⁷ Joe Lieberman's "Terrorist Expatriation Act" would have amended the Nationality Act to add a new ground for loss of citizenship for engaging in hostilities against the United States or providing material support to a foreign terrorist organization.⁸ The measure was framed as "an update" to the nationality regime enacted in an era of largely interstate conflict. The amendment would also have been consistent with Supreme Court rulings relating to the termination of citizenship. Those rulings have set a high bar to termination of citizenship without an individual's cooperation. If enacted, the new ground of expatriation would have applied in very few cases. Attempts to secure expatriation in cases of terrorism would have sparked litigation parallel to litigation implicating more important remedies, none of which have been substantially obstructed by the maintenance of U.S. citizenship. In other words, it would hardly have been worth the trouble for the government to seek termination of citizenship under the Act.

Expatriation has a fascinating part in the history of U.S. nationality.⁹ It was first put to work, through administrative practice, in the context of immigrants to the United States who returned to their countries of origin after naturalization as Americans.¹⁰ Bilateral conflict resulted when these individuals attempted to use their U.S. citizenship as a shield against the

7. See, e.g., Charlie Savage, *Bill Targets Citizenship of Terrorists' Allies*, N.Y. TIMES, May 7, 2010, at A12.

8. See S. 3327. An identical version of the bill was introduced in the House of Representatives by Representative Charlie Dent. See Terrorist Expatriation Act, H.R. 5237, 111th Cong. (2010).

9. See, e.g., I-MEIN TSIANG, THE QUESTION OF EXPATRIATION IN AMERICA PRIOR TO 1907 (1942); Richard W. Flournoy, Jr., *Naturalization and Expatriation*, 31 YALE L.J. 848 (1921); John P. Roche, *The Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. PA. L. REV. 25 (1950).

10. See Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411, 1442 (1997).

depredate of European sovereigns.¹¹ In cases in which individuals had permanently returned to their homelands, U.S. authorities often denied eligibility for diplomatic protection—in effect, denying the validity of their citizenship.¹² This practice was codified in the Expatriation Act of 1907.¹³ The 1907 Act also provided for the loss of citizenship where an individual swore allegiance to a foreign sovereign. The Supreme Court upheld the constitutionality of the expatriation regime in its 1915 decision *Mackenzie v. Hare*, which considered a woman's loss of citizenship upon marriage to a noncitizen.¹⁴ The Court reasoned that because the act of marriage was voluntarily undertaken, the loss of citizenship was itself also volitional.

Service in a foreign armed force was specified as a ground for expatriation under the Nationality Act of 1940, which significantly expanded the scope of expatriation.¹⁵ It was under the 1940 Act that many thousands of U.S. citizens who enlisted in the armed forces of Axis states lost their nationality. The termination of citizenship was automatic; that is, the act of enlistment by itself made termination effective.¹⁶ Loss of citizenship was challenged in a slew of cases following the war on the grounds that enlistment had occurred under duress (rendering the underlying expatriating act involuntary).¹⁷ Otherwise, individuals benefited from the automaticity, insofar as loss of citizenship insulated them from treason charges and military service obligations.¹⁸ In *Kawakita v. United States*, the Supreme Court upheld a treason conviction against a Japanese American dual national only because he had mistreated U.S. prisoners of war as an employee of a Japanese company and not as a member of the Japanese armed services.¹⁹ As a mere employee, he did not forfeit his U.S. citizenship and was thus amenable to the treason charge.²⁰ In most cases, however, expatriation was a fairly straightforward proposition in the context of a citizen's service in a foreign fighting force, hostile or otherwise.

The picture became more complex as the Supreme Court bore down on the expatriation power in a series of midcentury decisions. The Court issued a dramatic trio of rulings on a single day in 1958. In *Trop v. Dulles*, the Court rejected a punitive use of expatriation; the 1940 law had provided

11. *See id.*

12. *See id.*

13. Act of Mar. 2, 1907, Pub. L. No. 59-193, 34 Stat. 1228.

14. *Mackenzie v. Hare*, 239 U.S. 299 (1915).

15. Nationality Act of 1940, Pub. L. No. 76-853, 54 Stat. 1137.

16. *See id.* (providing for loss of citizenship for “[e]ntering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state”).

17. *See, e.g., Mandoli v. Acheson*, 344 U.S. 135 (1952); Note, “Voluntary”: A Concept in Expatriation, 54 COLUM. L. REV. 932 (1954).

18. Treason itself was added as a ground for expatriation under the 1940 Act. *See* Nationality Act of 1940, Pub. L. No. 76-853, § 401(h), 54 Stat. 1137, 1169. The Act was amended in 1954 to include advocating overthrow of the U.S. government by force. *See* Act of Sept. 3, 1954, Pub. L. No. 83-772, 68 Stat. 1146.

19. *See Kawakita v. United States*, 343 U.S. 717, 720–21, 728, 745 (1952).

20. *See Spiro, supra* note 10, at 1447 n.157.

for loss of nationality in cases of desertion.²¹ In *Nishikawa v. Dulles*, the Court required the government to shoulder the burden of proof in establishing the voluntariness of an expatriating act (in the case, enlistment in the Japanese armed forces where the individual claimed it to have been under duress).²² In *Perez v. Brownell*, meanwhile, the Court upheld expatriation for voting in a foreign political election.²³ Justice William Douglas described the decisions at the time as “the most important constitutional pronouncements of this century.”²⁴ The *Trop* majority played to rhetorically lofty notes in describing citizenship as more precious than life itself.²⁵ Even so, the rulings did not significantly crimp the exercise of the expatriation power in the great majority of cases.

In its 1967 decision *Afroyim v. Rusk*, the Court pivoted to more muscular constraint of the power.²⁶ Overruling *Perez*, *Afroyim* struck down foreign voting as an expatriation ground.²⁷ Although Justice Hugo Black’s opinion appeared categorically to reject a power to terminate citizenship against an individual’s will,²⁸ the government continued to terminate citizenship where it deemed expatriating conduct to evince an intent to relinquish citizenship. Expatriation remained a common practice.²⁹ In *Vance v. Terrazas*, the Court acknowledged that conduct other than formal, express renunciation could result in loss of citizenship, for instance, where an individual undertook an express oath of renunciation in the course of naturalizing in another country.³⁰ In 1990, however, the U.S. Department of State adopted an administrative presumption of nonintent to relinquish citizenship with respect to statutory grounds of expatriation.³¹ Under the current approach, it is impossible to lose one’s citizenship against one’s will.

Notwithstanding the change in administrative practice, the expatriation statute itself has remained largely unchanged since 1940. In 1986, section

21. *Trop v. Dulles*, 356 U.S. 86 (1958).

22. *Nishikawa v. Dulles*, 356 U.S. 129 (1958).

23. *Perez v. Brownell*, 356 U.S. 44 (1958).

24. See PATRICK WEIL, *THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC* 147 (2013).

25. See *Trop*, 356 U.S. at 101 (stating that expatriation is “a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development”); see also *Perez*, 356 U.S. at 64 (Warren, C.J., dissenting) (“Citizenship is man’s basic right for it is nothing less than the right to have rights.”).

26. *Afroyim v. Rusk*, 387 U.S. 253 (1967).

27. *Id.* at 267–68.

28. See *id.* at 257 (rejecting the proposition that “Congress has any general power, express or implied, to take away an American citizen’s citizenship without his assent”).

29. See Peter J. Spiro, *Afroyim: Vaunting Citizenship, Presaging Transnationality*, in *IMMIGRATION STORIES* 147 (David A. Martin ed., 2005) (describing administrative practice in the aftermath of the *Afroyim* decision).

30. *Vance v. Terrazas*, 444 U.S. 252, 257, 261–63 (1980). In *Terrazas*, the Court upheld the expatriation of a citizen who had expressly renounced his U.S. citizenship in applying to Mexican authorities for a certificate of Mexican nationality. See *id.* at 255.

31. See U.S. DEP’T OF STATE, *ADVICE ABOUT POSSIBLE LOSS OF U.S. CITIZENSHIP AND DUAL NATIONALITY*, reprinted in *State Dept. Explains New Evidentiary Standards for Expatriation*, 67 INTERPRETER RELEASES 1092 (1990).

349 of the Nationality Act of 1940 was amended to reflect the intent requirement.³² It still provides for expatriation with respect to foreign naturalization, for instance, so long as it is associated with intent to relinquish.³³

II. PROVING EXPATRIATING INTENT

The Lieberman measure looked to piggyback on this existing statutory framework.³⁴ It would have added new grounds of expatriating conduct for providing material support to designated foreign terrorist organizations, engaging in or materially supporting hostilities against the United States, or engaging in or materially supporting hostilities against any country supporting the United States in hostilities. The Lieberman measure did not purport to change intent thresholds for loss of citizenship. Under the amended statute, intent to relinquish citizenship would have remained a required showing for expatriation. Expatriation would result only where hostilities against the United States were undertaken with the intent to relinquish citizenship. Under *Nishikawa*, the burden of establishing this intent would rest with the government.³⁵

The Lieberman measure would almost certainly have withstood facial constitutional attack. The sole plausible challenge would have framed the added ground as punitive and thus inconsistent with *Trop*'s bar on punitive uses of expatriation. The new expatriation grounds would have overlapped with parallel criminal measures. Material support for terrorists (expansively defined) is subject to criminal penalties.³⁶ Undertaking hostilities against the United States would in many cases qualify as treason.³⁷ Nonetheless, a strong argument could be made that the new ground would merely extend the established ground of service in a foreign armed force engaged in hostilities against the United States.³⁸ That ground (which originally applied to service in any foreign armed force,³⁹ and still

32. See Act of Nov. 14, 1986, Pub. L. No. 99-653, 100 Stat. 3655, 3658.

33. See 8 U.S.C. § 1481(a)(1) (2012).

34. Lieberman was reported to be "merely suggesting that the U.S. update a decades-old statute that calls for Americans who join foreign armies fighting the U.S. to lose their citizenship." See Ben Frumin, *Lieberman on Revoking Terrorists' Citizenship: 'American Citizenship Is a Privilege, Not a Right,'* TPM (May 5, 2010, 9:37 PM), <http://talkingpointsmemo.com/dc/lieberman-on-revoking-terrorists-citizenship-american-citizenship-is-a-privilege-not-a-right-video?ref=fpi>; see also *Your World with Neil Cavuto* (Fox News broadcast May 5, 2010), available at http://www.youtube.com/watch?v=pfXn_ZIDhY; CongressmanDent, *Comments on Enemy Expatriation Act (H.R. 3166)*, YOUTUBE, <http://www.youtube.com/watch?v=Hzpr7bLIw4> (including comments by Representative Charlie Dent characterizing the measure as "modernizing" and "updating" existing law).

35. See *Nishikawa v. Dulles*, 356 U.S. 129, 133 (1958).

36. See 18 U.S.C. § 2339A.

37. Treason has been charged in one post-9/11 case. See *infra* notes 46–47 (describing the case of Adam Gadahn).

38. See 8 U.S.C. § 1481(a)(3).

39. The Expatriation Act of 1907 provided for expatriation where an individual took an oath of allegiance to a foreign state, which would have included enlistment in foreign armed forces in many cases. See Act of Mar. 2, 1907, Pub. L. No. 59-193, § 2, 34 Stat. 1228. As a result, an estimated 15,000 to 20,000 Americans lost their citizenship for enlisting in the

applies to service in any service as a commissioned or noncommissioned officer⁴⁰) is more about transferred allegiance than about criminal activity. It would thus seem to survive the *Trop* test. The material support component of the Lieberman proposal would have been more vulnerable to constitutional attack, given the breadth of its application in the criminal context (a breadth upheld by the Supreme Court in *Holder v. Humanitarian Project*⁴¹). Perhaps for that reason, when Lieberman and co-sponsor Senator Scott Brown reintroduced the bill in the following session of Congress in 2012, they omitted the material support ground for expatriation.⁴² In its narrowed form, the measure's constitutionality was assured.

Perhaps because the Lieberman bill would satisfy constitutional strictures, it would not have supplied much of a tool. Assuming no change in current State Department practice, under which there is a presumption that potentially expatriating conduct did not occur with intent to relinquish,⁴³ the amendment would have been without effect. But even assuming that the administrative practice was changed, constitutional limitations would work to defang it. Under *Terrazas*, the government would need to show specific intent to relinquish citizenship.⁴⁴ Intent is readily demonstrated only with verbal expressions. The case of Adam Gadahn is probably the sole notable case in which the Lieberman approach would have worked to effect loss of citizenship. In the course of an anti-American diatribe against the United States, Gadahn (a native-born citizen) shredded his U.S. passport.⁴⁵ That would presumably suffice to demonstrate intent to relinquish.⁴⁶

Canadian, British, and other allied armed forces prior to the United States' entry into World War I, which was later restored to them by statute. See Repatriation Act of Oct. 5, 1917, Pub. L. No. 65-55, 40 Stat. 340 (providing for restoration of citizenship to persons who had served in armed forces of countries "engaged in war with a country with which the United States is at war"); 55 CONG. REC. 7662 (1917) (describing the circumstances leading to the legislation).

40. See 8 U.S.C. § 1481(a)(3)(B).

41. 561 U.S. 1 (2010).

42. See S. 1698, 112th Cong. (2011). The reintroduced measure was entitled the "Enemy Expatriation Act," perhaps also by way of addressing concerns of the breadth of the original measure.

43. See *supra* note 31.

44. See *Vance v. Terrazas*, 444 U.S. 252, 259 (1980).

45. See Jeffrey Imm, *Al-Qaeda's Gadahn—Transcript of January 6 Message*, COUNTERTERRORISM BLOG (Jan. 7, 2008, 6:27 PM), http://counterterrorismblog.org/2008/01/gadahn_010608_transcript.php (transcribing a video showing Gadahn ripping up his U.S. passport "in symbolic rejection of U.S. citizenship"); *American Al Qaeda Member Renounces U.S. Citizenship*, CNN.COM (Jan. 6, 2008), <http://www.cnn.com/2008/WORLD/meast/01/06/gadahn.tape/>.

46. Lieberman referred to the Gadahn case in introducing the bill. "If our proposal becomes law the State Department could immediately begin revoking Gadahn's citizenship and that of other American citizens we know are involved in American terrorist organizations abroad. They could then be tried by military commission." See Kasie Hunt, *Experts Dismiss Lieberman Terror Bill*, POLITICO (May 6, 2010), <http://www.politico.com/news/stories/0510/36896.html>; see also Patricia Murphy, *Lieberman and Scott Brown Move To Strip U.S. Citizenship for Terrorists*, POL. DAILY (May 6, 2010),

Otherwise, expatriation would require a fact-based inquiry into intent in particular cases. That could prove tricky. Engagement in hostilities (much less material support of foreign terrorist organizations) would not by itself evidence intent to relinquish citizenship. Short of passport shredding or equivalent expressions, one could imagine equating the articulation of unmitigated antagonism to the United States with a desire to shed citizenship status. The only clear path to loss of citizenship—formal renunciation before U.S. consular authorities—is not exactly a practical alternative for those plotting against the United States. As the most notorious citizen-terrorist, Anwar al-Awlaki presents an interesting test case. Al-Awlaki was serially involved in various plots to attack the United States and U.S. entities, but it is unclear whether he intended to relinquish his citizenship.⁴⁷

Expatriating terrorists would be anything but straightforward. An earlier proposal drafted by the U.S. Department of Justice under the Bush Administration—billed as Patriot II—was leaked, but never introduced as legislation in Congress. The proposal would have made serving in or providing material support to a terrorist organization “prima facie evidence that the act was done with the intention of relinquishing United States nationality.”⁴⁸ That would have been more easily satisfied than the Lieberman threshold, but would have been in tension, at least, with the *Terrazas* holding. In either case, efforts to expatriate terrorists would have promised drawn-out litigation on issues of both law and fact.

III. CITIZENSHIP’S (NON)ADVANTAGE

Compounding the unfavorable jurisprudential backdrop is the lack of a substantial instrumental advantage in expatriation from the government’s perspective. Even if there were a clear path to expatriation, the payoff would be minimal. The citizenship differential, even in the counterterror context, is dwindling.⁴⁹

There are three key counterterror dimensions in which citizenship does make a difference. As a matter of policy, citizens are not detained at Guantánamo. By statute, citizens cannot be subjected to prosecution before military commissions. Finally, the targeting of citizens in drone strikes is subjected to a higher level of scrutiny. These differences do not appear to significantly enhance the government’s arsenal against particular

<http://www.politicsdaily.com/2010/05/06/terror-suspects-would-lose-u-s-citizenship-under-senate-bill/> (suggesting, in reference to Gadahn, that “[i]f somebody wants to set fire to their passport, let’s help them along”).

47. Cf. H.R. Res. 1288, 111th Cong. (2010) (urging an appropriate diplomatic or consular official to find that al-Awlaki had voluntarily relinquished his citizenship as a result of hostile acts against the United States).

48. Domestic Security Enhancement Act of 2003, § 501, available at <http://www-tc.pbs.org/now/politics/patriot2-hi.pdf>; see also Joanne Mariner, *Patriot II’s Attack on Citizenship*, CNN.COM (Jan. 22, 2004, 2:57 PM), <http://www.cnn.com/2003/LAW/03/06/findlaw.analysis.mariner.patriotII/>.

49. See generally Peter J. Spiro, *The (Dwindling) Rights and Obligations of Citizenship*, 21 WM. & MARY BILL RTS. J. 899 (2013).

individuals. Guantánamo is a legacy undertaking—no president, Democrat or Republican, is going to send new detainees to the facility in the face of growing global and domestic opposition. The military commissions, which by statute are limited to the prosecution of noncitizens,⁵⁰ are probably also an artifact of the Bush Administration's post-9/11 policy. Although necessary for the prosecution of Guantánamo detainees, whom Congress has barred from transfer to the United States,⁵¹ the military commissions present a clearly inferior forum for the prosecution of future terror cases. As the Obama Administration has highlighted, the federal courts have a perfect record in convicting terrorists post-9/11 where the military commissions have been plagued by legal and administrative deficiencies.⁵² Given the choice on a clean slate (with evidence that has not been tainted by torture or other constitutional infirmities), military commissions are clearly inferior to the Southern District of New York as a prosecutorial venue.⁵³

The differential process afforded citizens in targeting decisions is more salient, perhaps. Although details remain classified, targeting of U.S. citizens with drones is clearly subject to a higher level of review than the targeting of noncitizens.⁵⁴ However, whatever higher level of scrutiny is extended to citizen targeting, it is less than the scrutiny applied to expatriation. In other words, it is easier to kill than expatriate. If the government had sufficient evidence to expatriate an individual, it would also have sufficient evidence to undertake a drone strike, at least under existing practice. In most cases, in fact, the government will have a shaky case for expatriation but an adequate one for targeted killing. In the

50. See 10 U.S.C. § 948c (2012) (stating that military commissions are only applicable to alien unlawful enemy combatants). There is no constitutional bar to the use of military commissions against citizens. See *Ex Parte Quirin*, 317 U.S. 1, 37–38 (1942).

51. See Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1032, 124 Stat. 4137 (codified at 10 U.S.C. § 127b). See generally MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R40754, GUANTANAMO DETENTION CENTER: LEGISLATIVE ACTIVITY IN THE 111TH CONGRESS (2011); Recent Legislation, *National Defense Authorization Act for Fiscal Year 2013*, Pub. L. No. 112-239, § 1028, 126 Stat. 1632, 1914–17 (codified at 10 U.S.C. § 801 note (2012)), 127 HARV. L. REV. 835 (2013).

52. See generally JESS BRAVIN, THE TERROR COURTS: ROUGH JUSTICE AT GUANTANAMO BAY (2013).

53. Lieberman used the availability of military commissions in the prosecution of noncitizens as a justification for his proposal. See Hunt, *supra* note 46. In the most recent case posing the choice between military commission or federal court for the prosecution of an accused terrorist noncitizen, federal authorities opted for the latter. See Benjamin Weise, *Captured in Libya, 1998 Bombing Suspect Pleads Not Guilty in Manhattan Court*, N.Y. TIMES, Oct. 16, 2013, at A22 (describing the case of Nazih Abdul-Hamed al-Ruqai).

54. See U.S. DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE (2011), available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf; Charlie Savage & Scott Shane, *Legal Basis Cited To Kill Americans in Al Qaeda*, N.Y. TIMES, Feb. 5, 2013, at A6. Citizenship appears salient to public attitudes on targeted killings. See Aaron Blake, *Poll Shows Huge Support for Rand Paul's Filibuster Stance on Drones*, WASH. POST (Mar. 25, 2013, 9:18 AM), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/03/25/poll-shows-huge-support-for-rand-pauls-filibuster-stance-on-drone-attacks/> (stating that 65 percent of U.S. adults support airstrikes against suspected noncitizen terrorists abroad, while only 41 percent support such strikes against citizens).

expatriation context, the government would have to take litigation uncertainty into account, where in the targeting context (at least as of now) the executive branch makes the call on its own.⁵⁵ Why look to strip an alleged terrorist of his citizenship when you can more easily strip him of his existence? Warren Court rhetoric aside,⁵⁶ the government would have reason to prefer a dead citizen terrorist to a live noncitizen one.⁵⁷

Citizenship, in other words, does not buy you much protection, at least not if you are a suspected terrorist. In addition to targeted killing without judicial process, the Bush Administration claimed the constitutional capacity to detain a citizen without process.⁵⁸ In *Hamdi v. Rumsfeld*, the Supreme Court sustained the detention of a U.S. citizen apprehended on the battlefield.⁵⁹ Although the Court found citizens in *Hamdi* to enjoy some level of due process, it did not require the government to prosecute or release.⁶⁰ In recent detention-related legislation, Congress failed to deny the president the power to detain individuals apprehended in the United States, citizens or not.⁶¹ Citizenship does not insulate terror suspects from surveillance or other investigatory activity. The Boston Marathon bombing is illustrative: the surviving Tsarnaev brother (a naturalized citizen) was questioned for sixteen hours without being given *Miranda* warnings under a

55. See *Al-Aulaqi v. Obama*, 727 F. Supp. 1, 21–22 (D.D.C. 2010) (rejecting a challenge to kill-list designation on jurisdictional grounds); see also Attorney General Eric Holder, Address at Northwestern University School of Law (Mar. 5, 2102), available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html> (“‘Due process’ and ‘judicial process’ are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process.”).

56. See *supra* notes 25–28.

57. On the flip side, a terrorist expatriation measure would have little deterrent value. See Peter H. Schuck, *Citizen Terrorist*, 164 POL’Y REV. 61, 72 (2010) (“The threat to a potential terrorist of losing his American citizenship is likely to pale in significance compared with the other penalties for terrorist acts. If the threats of self-immolation, criminal prosecution, and capital punishment do not deter him, possible loss of citizenship will certainly not do so.”).

58. The Second Circuit rejected the government’s power to subject a U.S. citizen to military detention on U.S. territory. See *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), vacated on other grounds, 542 U.S. 426 (2004). The Supreme Court vacated that decision on procedural grounds. See *Padilla*, 542 U.S. at 427 (rejecting the habeas petition as filed in the wrong judicial district). The Bush Administration transferred *Padilla* to the civilian criminal justice system before the Supreme Court could revisit the case on the merits. See Eric Lichtblau, *In Legal Shift, U.S. Charges Detainee in Terror Case*, N.Y. TIMES, Nov. 23, 2005, at A20.

59. See generally *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

60. *Id.*; see also *id.* at 556–58 (Scalia, J., dissenting).

61. See National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021, 125 Stat. 1298 (2011). In his signing statement, President Barack Obama sought “to clarify that [his] Administration will not authorize the indefinite military detention without trial of American citizens.” Press Release, White House, Statement by the President on H.R. 1540 (Dec. 31, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540>. President Obama also undertook to limit the military detention of noncitizens to a limited class of “covered persons,” waiving the National Defense Authorization Act’s military detention requirement with respect to broad categories of noncitizens. *Id.* An effort to amend the statute the following year to bar the military detention of citizens and permanent residents apprehended in the United States passed the Senate but failed in the House. See S. 3254, 112th Cong. (2012).

public safety exception applicable regardless of location and citizenship status.⁶² As a practical matter, citizenship may not even guarantee entry into the United States, as citizens placed on watchlists have discovered.⁶³

At the same time that citizenship protections have been diluted, protections for noncitizens have been elevated. Terror suspects held at Guantánamo have been extended habeas privileges.⁶⁴ Lower courts have extended Fifth Amendment rights to noncitizen terror suspects in criminal investigations outside the United States.⁶⁵ Though the Supreme Court found that noncitizens outside of the United States do not enjoy Fourth Amendment protections in its pre-9/11 decision *United States v. Verdugo-Urquidez*,⁶⁶ there may be equivalent protections under foreign law and emerging ones under international law.⁶⁷ International human rights norms

62. See Charlie Savage, *Debate Over Delaying of Miranda Warning*, N.Y. TIMES (Apr. 20, 2013), <http://www.nytimes.com/2013/04/21/us/a-debate-over-delaying-suspects-miranda-rights.html>; see also Joanna Wright, *Mirandizing Terrorists? An Empirical Analysis of the Public Safety Exception*, 111 COLUM. L. REV. 1296 (2011); Charlie Savage, *Developments Rekindle Debate Over Best Approach for Terrorism Suspects*, N.Y. TIMES, Oct. 14, 2011, at A14.

63. See, e.g., JEFFREY KAHN, MRS. SHIPLEY'S GHOST: THE RIGHT TO TRAVEL AND TERRORIST WATCHLISTS 171–72 (2013); Leti Volpp, *Citizenship Undone*, 75 FORDHAM L. REV. 2579, 2579 (2007). Expatriation would thus add little to the counterterror toolbox in terms of nullifying the possible advantages of citizenship with respect to enabling terrorist activity. Citizenship legally guarantees unfettered access to the United States, which could facilitate the planning of a terrorist attack. Preemptively depriving an individual of citizenship thus might contribute to counterterrorism efforts. However, the government would need to already possess evidence of terrorist activity in order to undertake expatriation, at which point citizenship itself would be of little value to the would-be terrorist insofar as he would be subject to surveillance and other enforcement activity, including placement on no-fly lists. If the standard for expatriation were lower, it might comprise a more useful counterterror policy. See Shai Lavi, *Punishment and Revocation of Citizenship in the United Kingdom, United States, and Israel*, 13 NEW CRIM. L. REV. 404, 409–13 (2010) (observing that British law allowing expatriation where “conducive to the public good” might serve proactive security interests). Similar to the placement of citizens on no-fly lists is the practice of confiscating the passports of U.S. citizens abroad, as documented elsewhere in this symposium. See Ramzi Kassem, *Passport Revocation As Proxy Denaturalization: Examining the Yemen Cases*, 82 FORDHAM L. REV. 2097 (2014) (documenting the irregular confiscation of passports of U.S. citizens resident in Yemen); see also Amel Ahmed, *Yemeni-Americans Cry Foul over Revocations*, ALJAZEERA AM. (Jan. 21, 2014, 5:00 PM), <http://america.aljazeera.com/articles/2014/1/21/yemeni-americanscryfouloverpassportrevocations.html>.

64. See *Boumediene v. Bush*, 553 U.S. 723 (2008).

65. See *United States v. Bin Laden*, 132 F. Supp. 2d 168, 173 (S.D.N.Y. 2001) (extending Fifth Amendment protection to a detainee held in Kenya).

66. 494 U.S. 259 (1990).

67. See International Covenant on Civil and Political Rights art. 17, Dec. 16, 1966, 999 U.N.T.S. 177 (“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence . . .”). The recent controversy over U.S. government surveillance is more firmly fueling efforts to establish privacy rights under international law. See, e.g., David Cole, *We Are All Foreigners: NSA Spying and the Rights of Others*, JUST SECURITY (Oct. 29, 2013), <http://justsecurity.org/2013/10/29/foreigners-nsa-spying-rights/>; see also LIBERTY AND SECURITY IN A CHANGING WORLD: REPORT AND RECOMMENDATIONS OF THE PRESIDENT'S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES 155–56 (2013), available at http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf (situating NSA surveillance issues in a human rights frame).

have gone a long way to undermining Hannah Arendt's pronouncement that "all rights are national rights."⁶⁸

No doubt there are situations in which U.S. citizenship status represents an advantage to the individual that holds it. The government would not hold a known citizen at Bagram Air Base in Afghanistan on an indefinite basis, for example.⁶⁹ But for purposes of the expatriation question, the baseline would be an individual whom the government already can show, shouldering the burden of proof, is associated with a hostile force. In almost all cases, that baseline would supply probable cause for suspecting criminal activity, in which citizen and noncitizen alike are almost equally exposed to government enforcement activity. The question is not to what extent citizenship insulates individuals from official depredations; it is rather what the government has to gain from stripping an individual of citizenship and what it will take to do the stripping. Given the proverbial exertion and uncertainties involved in reviving a process that has all but descended into desuetude, it is not worth the effort.

Under this instrumentalist explanation, it is easy to see why the Lieberman proposal was shrugged off. The exercise was one in counterterror showboating on the part of Lieberman and his cosponsors. The Lieberman proposal attracted some media attention, especially on the coattails of the attempted 2010 Times Square bombing, yet it did not garner so much as a committee hearing. When the measure was reintroduced in the following Congress (again, with Lieberman and Scott Brown as cosponsors),⁷⁰ it attracted no attention at all.

IV. COUNTERTERROR CULTURES OF CITIZENSHIP

Some legal commentators recognized the nonconsequence of the Lieberman initiative.⁷¹ But the proposal's lack of consequence only partly explains its rejection. It is unlikely that most politicians had situated the proposal against an obscure constitutional backdrop. One might have expected the proposal to have expressive value even if it had no concrete effect, especially among those who have revived a loyalty discourse in the

68. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 267 (2d ed. 1973).

69. See *Al Maqaleh v. Gates*, 605 F.3d 84, 99 (D.C. Cir. 2010) (finding habeas not to extend to a detainee held in military custody in Afghanistan).

70. See *supra* note 42.

71. Schuck, *supra* note 57 (stating that expatriation is not "an effective weapon" against terrorists); David Cole, *Bill To Expatriate Those Who Support Terrorists More Symbol Than Substance*, WASH. POST, May 8, 2010, at A13; Erwin Chemerinsky, *Even Terrorism Suspects Have Rights*, L.A. TIMES (May 11, 2010), <http://articles.latimes.com/2010/may/11/opinion/la-oe-0511-chemerinsky-20100511>. There were also proceduralist attacks on the proposal. See, e.g., Jonathan Turley, *Lieberman Unveils Citizenship Stripping Bill*, JONATHAN TURLEY (May 6, 2010), <http://jonathanturley.org/2010/05/06/lieberman-unveils-citizenship-stripping-bill/>. For the (mostly) supportive view of a prominent conservative academic, see Richard Epstein, *Terrorism and Citizenship*, FORBES (May 18, 2010), <http://www.forbes.com/2010/05/18/terrorism-citizenship-constitution-politics-opinions-columnists-richard-a-epstein.html>.

wake of 9/11.⁷² The response seemed more reflexive than considered. Some worked from a robust conception of citizenship and its constitutional stature in rejecting the measure. Others seemed unimpressed, in a way that evinced an attenuated understanding of the status, one buttressed by its diminishing consequence even in the context of counterterrorism. That perhaps ultimately explains why expatriation proposals have had no legs.

Citizenship has historically been framed in terms of loyalty and allegiance.⁷³ It has set down the legal boundaries of human community—the marker between “us” and “them.”⁷⁴ Beyond its legal benefits, it has been processed as a signifier of membership, reflecting communal solidarities, vaunted as a kind of badge of honor. In the terror context, which of course has been situated as “war,”⁷⁵ hostile forces have been labeled as “enemies” (legally⁷⁶ and colloquially) and “the other.”⁷⁷ It is thus surprising that legislative counterterror warriors would hesitate to use expatriation as a mechanism for outcasting those who have shown loyalty to terrorist adversaries. Expatriation would have expected expressive value in consolidating communal solidarities by reinforcing the line between member and nonmember.⁷⁸ Even if the courts obstructed its deployment in particular cases, legislators would garner returns through the enactment of a terrorist expatriation measure.⁷⁹ Along these lines, the “spirit” of the Lieberman proposal was welcomed from some unexpected quarters.⁸⁰

72. See, e.g., Geoffrey R. Stone, *Free Speech in the Age of McCarthy: A Cautionary Tale*, 93 CALIF. L. REV. 1387 (2005).

73. See, e.g., CRAIG ROBERSTON, *THE PASSPORT IN AMERICA: THE HISTORY OF A DOCUMENT* 151 (2010). The current naturalization oath perpetuates this framing by requiring new citizens to “renounce and abjure all allegiance and fidelity” to foreign sovereigns while having them “bear true faith and allegiance” to the United States. See 8 C.F.R. § 337.1 (2014) (setting forth the oath of naturalization).

74. See, e.g., Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

75. On the nomenclature of the response to the 9/11 attacks, see, for example, *Is It War?*, WASH. POST (Dec. 23, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/22/AR2007122201492.html>, and Philip Bobbitt, *Terror Is the Enemy*, N.Y. TIMES, Dec. 14, 2008, at WK10.

76. Alleged terrorists are designated as “enemy combatants” for purposes of taking them out of the civilian justice system. When Senator Lieberman reintroduced his measure in 2011, the title was changed from “Terrorist Expatriation Act” to “Enemy Expatriation Act.” See *supra* note 42.

77. See, e.g., Riva Kastoryano, *Codes of Otherness*, 77 SOC. RES. 79, 79 (2010).

78. Cf. Lavi, *supra*, note 63, at 425 (“Citizenship may be revoked if and only if such revocation simultaneously strengthens the civic bond of the community”); Schuck, *supra* note 57 (suggesting that stripping terrorists of citizenship would be “morally just and emotionally satisfying”).

79. See *Threat To Strip Citizenship Won’t Dissuade Terrorists*, BOS. GLOBE (May 8, 2010), http://www.boston.com/bostonglobe/editorial_opinion/editorials/articles/2010/05/08/threat_to_strip_citizenship_wont_dissuade_terrorists/ (“Given that this bill is probably unconstitutional and not any sort of real deterrent, it seems designed as a vehicle for expressing political anger over terrorism.”). Several commentators predicted that the proposal would secure popular support. See, e.g., Interview by Jennifer Scholtes with Peter H. Schuck, Professor, Yale Law School (Jan. 11, 2011), available at http://www.law.yale.edu/documents/pdf/News_&_Events/CitizenTerrorist.pdf (including Peter Schuck’s observation that the public would accept expatriation measure); Paul Waldman, *Citizen Ex*, AM. PROSPECT (May 11, 2010), <http://prospect.org/article/citizen-ex-0>

Moreover, adopting a terrorist expatriation measure would have been in line with the practice of other states. Most notably, the United Kingdom has pursued expatriation against alleged terrorists under a 2003 statute that allows the termination of citizenship where it serves the public interest. It has reportedly undertaken denationalization by way of facilitating U.S. drone strikes against (former) British citizens.⁸¹ The British counterparts to al-Awlaki, in other words, have been stripped of their citizenship before targeting proceeds. Similar security-related expatriation statutes are on the books in other countries.⁸² The expatriation question may supply an example of a phenomenon described by Kim Lane Scheppele, in which international counterterror norms expand rather than constrain state power (more particularly, executive power).⁸³ Though Congress is hardly known to follow international leads, it adds incrementally to the puzzle. If states such as the United Kingdom have adopted terrorist expatriation measures, one might expect the United States to take the cue.

Congressional rejection of the expatriation measure thus requires explanation beyond its expected lack of efficacy as a counterterror tool.

(“Though no one has done a poll on the Lieberman proposal yet, it’s a good bet that a majority of the public would be in favor of stripping citizenship from ‘bad guys.’”). It would not be the first time that Congress took action that it could assume would be subsequently blocked in the courts. *See, e.g.*, MARK C. MILLER, *THE VIEW OF THE COURTS FROM THE HILL: INTERACTIONS BETWEEN CONGRESS AND THE FEDERAL JUDICIARY 102–03* (2009) (describing the enactment of clearly unconstitutional laws). Those cases almost always involve expressive value by way of Congress taking a stand against what it believes to be an incorrect interpretation of the law. *See* Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 *STAN. L. REV.* 573, 585–86 (2008).

80. *See* Savage, *supra* note 7 (reporting the qualified positive responses to the Lieberman measure from House Speaker Nancy Pelosi and Secretary of State Hillary Clinton).

81. *See* Chris Woods et al., *British Terror Suspects Quietly Stripped of Citizenship . . . Then Killed by Drones*, *INDEPENDENT* (Feb. 28, 2013), <http://www.independent.co.uk/news/uk/crime/british-terror-suspects-quietly-stripped-of-citizenship-then-killed-by-drones-8513858.html>.

82. *See, e.g.*, Jonathan Lis, *Knesset Passes Law To Strip Terrorists of Israeli Citizenship*, *HAARETZ* (Mar. 28, 2011, 10:50 PM), <http://www.haaretz.com/news/national/knesset-passes-law-to-strip-terrorists-of-israeli-citizenship-1.352412>. For a cataloguing of states that provide for loss of citizenship on the basis of treason or disloyalty, *see Comparing Citizenship Laws: Loss of Citizenship*, EUR. U. INST., <http://eudo-citizenship.eu/global-modes-of-loss> (last visited Mar. 25, 2014) (select “L07 => Disloyalty or treason” under “Search by Mode”; then follow “Search” hyperlink).

83. *See* Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 *U. PA. J. CONST. L.* 1001 (2004). This is not to say that terrorist expatriation measures are unproblematic under international law. To the extent that expatriation results in statelessness, it may violate a state’s treaty obligations and would in any case conflict with a norm against statelessness under international law. To avoid this conflict, the U.K. expatriation measure applies only to dual citizens, that is, persons who will still have a nationality following termination of U.K. nationality. But that scheme gave rise to the charge that the measure discriminates against dual citizens. *See* Rayner Thwaites, *The Security of Citizenship: Finnis in the Context of the United Kingdom’s Citizenship Stripping Provisions*, in *ALLEGIANCE AND IDENTITY IN A GLOBALISED WORLD* (Fiona Jenkins et al. eds., forthcoming 2014); *see also* Peter J. Spiro, *Dual Citizenship As Human Right*, 8 *INT’L J. CONST. L.* 111 (2010) (arguing that international practice is coming to recognize a right to maintain dual citizenship status).

Some lawmakers and commentators responded with apparent noncomprehension. As John Boehner remarked, “If they’re a U.S. citizen, until they’re convicted of some crime, I don’t know how you would attempt to take their citizenship away.”⁸⁴ The prospect of depriving someone of citizenship seemed to strike a deep chord with some. Although it was not well articulated, this response was in the tradition of the Warren Court expatriation decisions, conceiving of citizenship as constitutive of political existence, the right to have rights, its loss akin to political death.⁸⁵ The sentiment may have undergirded snap editorial judgments of the measure’s unconstitutionality.⁸⁶ This view echoes the status essentialism of Justice Antonin Scalia’s dissent in *Hamdi*. Scalia, otherwise hardly solicitous of the rights of alleged enemy combatants, drew a sharp line at the boundaries of citizenship, with full rights attendant to the status.⁸⁷ But Scalia’s position was set forth in dissent, as the Court found the detention outside ordinary criminal justice to have been constitutional. A variant of the reflex opposition to the expatriation proposal may also have worked from anti-government impulses. Conservative former congressman Bob Barr, for example, argued that native-born Americans could be stripped of the “fundamental right” of citizenship “by a government bureaucrat without ever having had their day in court.”⁸⁸

84. See Hunt, *supra* note 46.

85. See, e.g., *Threats To Strip Citizenship Are Un-American*, ST. LOUIS POST-DISPATCH, (May 11, 2010, 9:00 PM), http://www.stltoday.com/news/opinion/columns/the-platform/threats-to-strip-citizenship-are-un-american/article_a11c345c-0289-5295-bf6d-4100b66ca9cb.html (“Citizenship is not a license that expires upon misbehavior . . .” (quoting *Trop v. Dulles*, 356 U.S. 86, 92 (1958))).

86. See, e.g., *Threat To Strip Citizenship Won’t Dissuade Terrorists*, *supra* note 79 (characterizing the bill as “probably unconstitutional”). Lieberman was slow to defend the measure’s constitutionality, for instance, against charges that it would violate due process. The timing of the proposal may also have contributed to its demise; the Times Square bombing case, involving a naturalized citizen residing in the United States, may not have resonated in the same way that one involving an alleged terrorist holed up in the Near East might have. Finally, Lieberman’s association with the bill could not have been an asset, given his status at the time as an Independent who had angered Democratic loyalists at the same time that he was regarded with suspicion by the Republican rank-and-file. See, e.g., Charles Mahtesian, *The Trouble with Joe Lieberman*, POLITICO (Jan. 11, 2011, 7:54 PM), <http://www.politico.com/news/stories/0111/47858.html> (noting Lieberman’s “near-pariah status”). However, the inclusion of a similar expatriation measure in the failed 2005 draft Patriot II legislation would appear to control for the last two factors. See *supra* note 49.

87. Although citizenship status was not itself at issue in *Hamdi*, Scalia did not take the bait of an amicus arguing that *Hamdi* did not have citizenship in the first place as the child of parents residing only temporarily in the United States. See Brief for the Claremont Institute Center for Constitutional Jurisprudence As Amicus Curiae Supporting Respondents, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696).

88. See Bob Barr, *Knee-Jerk “Loss of Citizenship” Bill Is Unconstitutional and Unnecessary*, ATLANTA J.-CONST. (May 21, 2010, 6:00 AM), <http://blogs.ajc.com/bob-barr-blog/2010/05/21/knee-jerk-loss-of-citizenship-bill-is-unconstitutional-and-unnecessary/>.

Bob Barr has been notably outspoken in opposing other counterterror practices from the right. See, e.g., *Defeated G.O.P. Congressman To Be Consultant to A.C.L.U.*, N.Y. TIMES, Nov. 23, 2002, at A15. Though he was not yet in Congress at the time of the Lieberman proposal, Senator Rand Paul might also have been expected to oppose the measure given his opposition to the use of drones against U.S. citizens. See, e.g., Kevin Robillard, *Rand Paul Urges Drone Due Process Fixes*, POLITICO (May 26, 2013, 10:33 AM), <http://www.politico.com>.

The other possible explanation is that suspected terrorists do not seem different enough, from a social-cultural perspective, to warrant the termination of citizenship. That is, however heinous their actions, citizen terrorists may be still perceived as being within the membership fold—our bad guys, not someone else's. From this perspective, expatriation on terrorism grounds would not map out onto the social realities of those to whom it would be applied. In this view, expatriation would look more like banishment or exile—practices antithetical to American constitutional culture—rather than a reflection of transferred affiliation.⁸⁹ This in turn would diminish the expressive value of terrorist expatriation measures. Senator Graham opposed the Lieberman measure on the ground that it would take treason charges off the prosecutorial table, which can only be lodged against citizen defendants.⁹⁰

This explanation finds plausible support in a range of post-9/11 terrorism episodes. John Walker Lindh looked everything like a troubled suburban teenager who, however far he had wandered from the path, still seemed “American” notwithstanding his joining Taliban forces in Afghanistan.⁹¹ Adam Gadahn was born Adam Pearlman—his father was on the board of directors of the Anti-Defamation League, and Adam grew up playing Little League as a boy in California.⁹² Even Anwar al-Awlaki had some

com/blogs/politico-live/2013/05/paul-drone-program-still-needs-due-process-improvements-164799.html. This strain of antigovernmental opposition might also have been sensitive to the broad framing of the material support element of Lieberman's original bill, insofar as it could conceivably have triggered expatriation in cases involving “freedom fighters,” that is, armed movements opposing repressive regimes, or against domestic terror groups. *Cf. In re S-K-*, 23 I. & N. Dec. 936, 945 (B.I.A. 2006) (finding an alien inadmissible to the United States on the grounds that he provided material support to a group resisting a regime in Burma that violated human rights).

89. See Matthew J. Gibney, *Should Citizenship Be Conditional? The Ethics of Denationalization*, 75 J. POL. 646, 647–48 (2013) (describing the delegitimization of banishment in the modern liberal state).

90. See Jacob Solum, *Terrorists Don't Deserve Citizenship*, HIT & RUN BLOG (May 6, 2010, 11:09 AM), <http://reason.com/blog/2010/05/06/lieberman-terrorists-dont-dese>. Treason charges may remain a prosecutorial option, as demonstrated by the Gadahn indictment. There have, however, been no treason convictions since *Kawakita*. See, e.g., Kristen E. Eichensehr, *Treason in the Age of Terrorism: An Explanation and Evaluation of Treason's Return in Democratic States*, 42 VAND. J. TRANSNAT'L L. 1443, 1455 (2009). This may be explained by heightened, express constitutional hurdles to treason convictions. See U.S. CONST. art. III, § 3. Prosecutors have a number of more tried-and-true tools in cases involving treason-like conduct, including the Espionage Act and various conspiracy statutes. See, e.g., Indictment, *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002) (No. Crim. 02-37-A), available at <http://www.justice.gov/ag/2ndindictment.htm> (charging Lindh with conspiracy among other charges); Peter Finn & Sari Horwitz, *U.S. Charges Snowden with Espionage*, WASH. POST (June 21, 2013), http://www.washingtonpost.com/world/national-security/us-charges-snowden-with-espionage/2013/06/21/507497d8-dab1-11e2-a016-92547bf094cc_story.html. Unlike expatriation, a treason prosecution would require that an individual be in custody; expatriation may be effected in absentia.

91. See Evelyn Nieves, *A U.S. Convert's Path from Suburbia to a Gory Jail for Taliban*, N.Y. TIMES, Dec. 4, 2001, at B1.

92. See Peggy Lowe, *Radical Conversion: How a Man with O.C. Roots Turned Toward Al-Qaida*, ORANGE CNTY. REG. (Sept. 24, 2006), <http://www.oregister.com/articles/pearlman-40891-county-orange.html>; see also Andrea Elliott, *The Jihadist Next Door*, N.Y.

significant U.S. ties. Born in New Mexico and spending his early childhood in the United States, he returned to the United States to undertake undergraduate studies at Colorado State University (where he received a B.S. degree), during which time he fathered a child (who thus, himself, had U.S. citizenship at birth).⁹³

The explanation is also attractive to the extent it self-situates in a globalization narrative, in which the lines of national identity have been scrambled. “Us” and “them” have been destabilized as metatypes in the face of increasing global mobility. To the extent they persist, terrorism supplies a particularly poor bulwark. In the past, participation in hostilities against the United States implicated transfer of loyalty to symmetrical entities, namely, other states. Loyalty to a terrorist organization, by contrast, implicates affiliation to a different type of association. Many terrorists are citizens of states that are allied to the United States. To the extent that blurred identities were also pervasive in earlier eras, the advent of conflict involved the choice to put in one’s lot with one of two like entities.

However congruent this explanation may be with academic understandings of globalization and citizenship,⁹⁴ it seems an unlikely optic through which to understand the rejection of terrorist expatriation measures. As with many al Qaeda and Taliban leaders, Gadhafi and al-Awlaki fit the stereotypical image of a turban- and robe-garbed, bearded Middle Easterner cum jihadist, an image that (however false the equivalence, both in general and in these cases) coincides with American understandings of “foreignness.” Beyond Gadhafi and al-Awlaki, there are other alleged citizen terrorists who have been more clearly foreign in social membership terms. Yaser Hamdi is the notable example. Hamdi was born in the United States while his father worked on an oil rig in Louisiana and thus enjoyed birthright citizenship. But he left in infancy, never to return before his apprehension in Afghanistan and detention at Guantanamo Bay. In no respect other than formal citizenship status was Hamdi an “American.” Indeed, it appears that he was ignorant of his citizenship until informed of it by U.S. authorities.

In the last analysis, then, conceptions of citizenship supply imperfect explanations for the rejection of terrorist expatriation proposals. The flawed packaging of the Lieberman measure obscures the grounds for its rejection, which was contingent and overdetermined. The lack of instrumental value was probably the main driver, eliminating material incentives to support the proposal as a counterterror tactic. In the absence of such advantage, the expressive value of the measure could not outweigh other reasons to resist, or ignore, the proposal.

TIMES, Jan. 27, 2010, (Magazine), at 26 (recounting the Alabama roots of Shabab leader Omar Hammami).

93. See Nasser al-Awlaki, Op-Ed, *The Drone That Killed My Grandson*, N.Y. TIMES, July 18, 2013, at A23 (describing al-Awlaki family ties to the United States).

94. Including my own. See, e.g., PETER J. SPIRO, *BEYOND CITIZENSHIP* (2008).

CONCLUSION

I have two thoughts in closing. First, the coda to *Hamdi* suggests that the existing expatriation regime has some continuing application in the counterterrorism context. As part of the deal leading to his release and return to Saudi Arabia in the wake of the Supreme Court's ruling in his case, Hamdi agreed to renounce his U.S. citizenship.⁹⁵ The circumstances regarding this component of the deal are opaque; it is not clear whether the stipulation was forced on Hamdi as a condition of his release or whether he freely agreed to it. The latter is possible, given the circumstances; Hamdi showed no love for the United States, to which he had no organic connection, and nothing about his treatment as a detainee would have changed that. Where an alleged citizen terrorist is in custody, citizenship itself can be put on the table in a way that might sort those who are members of the community from those who are not. One wonders if existing practice dispensed with the requirement to appear at a U.S. consulate to deliver a notice of relinquishment whether the likes of al-Awlaki and Gadahn might willingly, perhaps even with fanfare, undertake the process.⁹⁶ Individuals with a continuing American identity, such as John Walker Lindh, would maintain their citizenship. To the extent that allegiance is at issue, individuals might do the sorting.⁹⁷

But the broader lesson is that citizenship is not much of a battleground any longer, reflecting its declining salience. The expatriation proposal proved little more than a political blip. The proposal was never fully pressed and thus never required coordinated opposition. The measure might not have been opposed by the public (no polls appear to have been

95. See Eric Lichtblau, *U.S., Bowing to Court, To Free 'Enemy Combatant,'* N.Y. TIMES, Sept. 23, 2004, at A1. For the release agreement in which Hamdi agreed to renounce his U.S. citizenship, see Motion To Stay Proceedings, *Hamdi v. Rumsfeld*, No. 2:02CV439 (E.D. Va. Sept. 24, 2004), available at <http://notablecases.vaed.uscourts.gov/2:02-cv-00439/docs/70223/0.pdf>.

96. By statute, renunciation can only be undertaken before a consular official. See Immigration and Nationality Act § 349, 8 U.S.C. § 1481 (2012). However, individuals can also secure recognition of relinquishment of citizenship through the performance of an expatriating act with intent to relinquish citizenship. See U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, OMB NO. 1405-0178, DS-4079, REQUEST FOR DETERMINATION OF POSSIBLE LOSS OF UNITED STATES CITIZENSHIP (2011). The Department of State appears to have suggested that in the future, it may accept requests for recognition of relinquishment by mail or through electronic submission. See 60-Day Notice of Proposed Information Collection: Request for Determination of Possible Loss of United States Citizenship, 78 Fed. Reg. 39,823 (July 2, 2013). The relinquishment route is being rediscovered in the face of increasingly burdensome tax requirements as imposed on U.S. citizens living outside the United States. See Atossa Araxia Abrahamian, *Special Report: Tax Time Pushes Some Americans To Take a Hike*, REUTERS (Apr. 16, 2012, 12:34 PM), <http://www.reuters.com/article/2012/04/16/us-usa-citizen-renounce-idUSBRE83F0UF20120416>. Securing loss of citizenship through relinquishment rather than renunciation avoids a fee associated with renunciation and may have other advantages to individuals seeking to shed their citizenship.

97. This would resemble the regime that existed before *Afroyim* and *Terrazas*. As noted above, during World War II, many dual German and Japanese American citizens freely chose to relinquish their U.S. citizenship by enlisting in a foreign armed service. See *supra* note 16.

conducted on the question, itself evidence that it proved a nonissue), but neither did it garner a groundswell of support. One might imagine a different response in an earlier time.