CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

AN UNCERTAIN TRUMPET: TERRORISM AND LOSS OF AMERICAN CITIZENSHIP

Posted on May 26, 2010 by Cyrus Mehta

By Gary Endelman and Cyrus D. Mehta

After the foiling of the plot of would be Times Square bomber in New York on May 1, 2010, Faisal Shahzad, and the terrorism inspired through the preachings of Anwar al-Awlaki, an American citizen operating out of Yemen, there have been calls to strip Americans of their citizenship if suspected to have ties with terrorist organizations. The urge to strip citizenship is nothing new. Even shortly after the founding of the nation, there was concern about the status of those who had remained loyal to the British during the Revolution. And until the latter part of the 20th century, it was not uncommon for the State Department to strip Americans of their citizenship if they voted in a foreign election or took up the citizenship of a foreign country.

Shortly following the heels of the Times Square incident in New York, Senators Lieberman and Brown have proposed a bill, the Terrorist Expatriation Act, which would expand Section 349 of the Immigration and Nationality Act. Section 349 provides for loss of US nationality or citizenship for various expatriating acts. Under Section 349, a person can lose citizenship, among other things, for obtaining naturalization in a foreign state, entering the armed forces of a foreign state as an officer or if such armed forces are in hostilities against the United States, obtaining employment in the government of a foreign state after acquiring the nationality of that foreign state or making a formal renunciation of nationality before a consular officer. Section 349 also provides for loss of nationality if one is convicted of treason or related subversive acts. While Section 349 provides very broad grounds for expatriation, it requires that the individual voluntary perform these expatriating acts “with the intention of relinquishing United States nationality.”

Senators Liberman and Brown, in their proposed Terrorist Expatriation Act, http://lieberman.senate.gov/assets/pdf/TEA_full.pdf, add expatriating acts such as providing material support or resources to a foreign terrorist organization (as designated by the State Department) or engaging in purposefully and materially supporting hostilities against the United States or purposefully and materially engaging in supporting hostilities against any country that is directly engaged with the United States in hostilities engaged by the United States. Since the Senators proposed their bill, most from the left and right of the political spectrum have been critical, including no less than conservative commentator David Frum, http://tiny.cc/g29bn

Why should the Lieberman-Brown proposal trouble all of us even though polls show that it is supported by a majority of Americans? Some will argue that it adds an additional expatriating ground to a statute that has been on the books for a very long time. Moreover, this statute, Section 349, still requires that the government bears the burden through a preponderance of evidence that the expatriating act was committed with the intention of relinquishing United States nationality. So what's the fuss about especially when the expansion of Section 349 is supposed to protect us against terrorists? Supporters of such proposals must constantly be reminded of a seminal Supreme Court decision, *Afroyim v. Rusk*, 387 U.S. 253 (1967), which involved a challenge by an American who had been expatriated because he voted in a foreign election. Justice Black who wrote the majority opinion held that Congress does not have any power, express or implied, to take away an American citizen's citizenship without his assent. The majority essentially rested on the expansive protection in the Fourteenth Amendment:

We hold that Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color or race. Our holding does no more than to give this citizen that which is his own, a constitutional right to remain in a free country unless he voluntarily relinquishes that citizenship.

Id. at 268. Indeed, prior to Afroyim, and a subsequent decision, *Vance v. Terrazas*, 444 U.S. 253 (1980), Section 349 was broader, and it was only in 1986 that Congress amended the statute to include a demonstration by the government that the expatriating acts within were performed "with the intention of relinquishing United States nationality." However, notwithstanding this limitation, Section 349 is still broad because it does not require any

administrative or judicial action. An American citizen who applies for a renewal of his or her passport overseas at a consulate can be prevented from doing so if suspected of performing one of the enumerated expatriating acts under Section 349. Thus, if Senator Lieberman's proposal took effect, one suspected of providing material support or resources to a foreign terrorist organization would be stripped of United States citizenship through a finding by a junior consular official. This might be the case even if a doctor gave emergency medical assistance to a dying terrorist or if a grandmother unwittingly provided food to a group of people who belonged to a terrorist organization after they knocked on her door. Indeed, someone like Dr. Samuel Mudd who treated John Wikes Booth's broken leg after the assassination of President Lincoln and who was ultimately pardoned, http://en.wikipedia.org/wiki/Samuel_Mudd, could potentially lose citizenship if he were to treat a terrorist today. Moreover, it could also snare a lawyer who provided legal advice to a terrorist organization on how to promote its political agenda through peaceful means. Of course, the person stripped of citizenship could still seek administrative review and have access to the courts, but the Lieberman-Brown proposals would give broad leeway to the government official to determine that there has been a loss of citizenship first before any recourse can be taken. Another constitutional objection, actually two of them , to the Lieberman-Brown proposal are : (1) one can lose citizenship status for taking action to the detriment not of the United States itself but to an ally of the United States. We know of no other instance where United States citizenship can be lost by action taken against another country;(2) the well-settled doctrine of void for vagueness. What is meant by "hostilities"? A "conflict subject to the laws of war" the concept of "conflict" is nowhere defined; which "laws of war" would apply and are there "conflicts" that would NOT be so subject?

We do not know how it would be possible for the United States government to prove that anyone provided material support to alleged terrorist activities with the intention of giving up United States citizenship as opposed to viewing such action as a protest against specific policies of the United States government. This is not, using the gloss to *Afroyim* that Justice White provided in *Terrazas*, a "fair inference from proven conduct" but goes way beyond it. It eliminates via the backdoor the intent requirement from INA 349 expatriation test and seeks to return the law of expatriation to where it was before *Afroyim* so that the decisions on loss of citizenship become an issue to be decided not by the intent

of the citizen but by the government in its conduct of US foreign policy, a return, in other words, to proposition rightly criticized by Chief Justice Warren in *Trop v. Dulles*, 356 U.S. 86, namely that "citizenship is not a license that expires upon misbehavior." Interestingly, the high water mark of the idea that loss of citizenship can be decided by the government without reference to the intent of the citizenship as an aspect of foreign policy, *Perez v.Brownell*, 356 U.S. 44, involved voting in a Mexican election - the very act that the Court in *Afroyim* found insufficient, which in that case involved voting in an Israeli election. What the Liebermann-Brown proposal does is to equate an expression of political opinion through material support of a terrorist organization, even if considered criminal conduct, into an intent to expatriate.

We further remind the supporters of the Lieberman-Brown bill that, when the loss of citizenship is at issue, "a statute which attaches such a penalty to certain conduct should be construed strictly to avoid an imposition which goes beyond the manifest intent of Congress." *In re Rego*, 289 F.2d 174, 176 (3rd Cir. 1966) (citing *United States v. Minker*, 350 US 179 (1956)). The involuntary deprivation of citizenship deprives one of "all that makes life worth living." *Ng Fung Ho. v. White*, 259 US 276, 284 (1922). When arising under, and protected by, the Fourteenth Amendment, US citizenship is a condition or status "which a citizen keeps unless he voluntarily relinquishes it." *Afroyim v. Rusk*, 387 US 253, 262 (1967). The reason for such a rule derives from the fundamental truth that, as Mr.Justice Black so eloquently articulated it, "in our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship." Id. at 257, *See also Nishikawa v. Dulles*, 356 US 129, 138-139 (1958) (Black, J.). The whole point of *Vance v. Terrazas* is that, without more, the voluntary performance of a statutorily-designating expatriating act is not sufficient to cause or justify an involuntary loss of US citizenship. For Danny Terrazas to lose his US citizenship it was not enough for him to swear allegiance to Mexico to avoid conscription; Uncle Sam also had to prove that he "also intended to relinquish his citizenship." *Vance v. Terrazas*, 444 US 252, 261 (1980) .While it is undeniably true, as made clear in INS Interpretation 349.4(b) that service in the armed forces of a foreign state then engaged in hostilities against the USA is "highly persuasive evidence of the intention to relinquish United States citizenship required for expatriation under the *Afroyim* principle," how much less probative of such an intent is non-combatant support in the absence of any declaration of war and outside the

context of formal military combatants.

None of the expatriating acts in the Liberman-Brown proposal first require a conviction. Indeed, a somewhat parallel expatriating provision, Section 349(a)(7), requires a conviction under 18 USC Sections 2383, 2384 and 2385 relating to acts of treason or attempting to overthrow the United States government by force or for bearing arms against the United States. And even after the conviction, the government must demonstrate that there was an intention on the part of the perpetrator of such subversive acts to relinquish United States nationality. There is no reported case of a person convicted under any of the above provisions being found to have expatriated himself or herself. Even a bill proposed in the Israeli Knesset will strip a person of Israeli citizenship after being convicted of terrorist activity or espionage on behalf of a terrorist organization although it does not require an intent to relinquish such citizenship, http://tiny.cc/6ii58. The proposed bill of Senators Lieberman and Brown, will make expatriation easier, thus violating the protection of the Fourteenth Amendment, as enunciated in Afroyim and many other Supreme Court decisions, which will only further erode the rights of American citizens. Our constitution protects the citizenship of law abiding and criminal alike. Other countries will also be tempted to pass similar measures to strip persons of citizenship on broad terrorism related grounds in a post 9/11 world, but the sponsors of such potential laws must be reminded that citizenship stripping provisions will not dissuade terrorism, and will instead, ultimately undermine the rights of their own citizens.

Finally, international law also rejects statelessness and there exists a UN Convention on the Reduction of Statelessness, http://www.unhcr.org/refworld/pdfid/3ae6b39620.pdf, which sets forth narrow grounds under which a person can be stripped of citizenship as well as the ability to seek a hearing in case of such an eventuality. When a citizen is stripped of citizenship, it results in statelessness, if he or she does not have another nationality. As the nation state has become the primary vehicle for defining political identity, statelessness has come to mean a reduction to anonymity and a consequent inability to express or protect the personal freedoms basic to political life. It is the ultimate exile. Governments have universally abhorred the possibility of statelessness. Even Chief Justice Warren married this abhorrence with his theory that the Fourteenth Amendment deprived Congress of the power to denationalize in *Trop v. Dulles*, which was

then rejected in several Supreme Court cases but ultimately became the majority view in the *Afroyim* case. In Justice Warren's view, denationalization constituted cruel and unusual punishment in violation of the Eight Amendment because it resulted in statelessness.

Citizenship is the most precious right under United States law. What if the Lieberman bill becomes law? What then? These cases demand an attorney's best effort. Learn the facts, know the law and work hard for your client. Do not necessarily accept the interpretation advanced by the State Department. Always remember the bottom line: citizenship is not lost by ambiguity or inaction. There are few victories you will savor more than preventing or reversing a loss of citizenship determination.