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THE TERRORIST EXPATRIATION ACT: UNCONSTITUTIONAL AND UNNECESSARY. HOW THE PROPOSED LEGISLATION IS UNCONSTITUTIONAL AND REDUNDANT

LAUREN PRUNTY*

INTRODUCTION

In October of 2010, Farooque Ahmed, a naturalized American citizen, was arrested and indicted for his role in what he believed was an al-Qaeda supported plan to bomb the Washington, D.C. metro.¹ A few weeks earlier, a group of Minnesotans, including middle-aged and elderly women, were arrested for collecting door-to-door donations for charities providing food and humanitarian aid to the people of impoverished, war-torn Somalia.² In both of these instances, the involved parties were charged with “providing material support to terrorists.”³

Few Americans would disagree with the terrorism charges brought in response to the reprehensible and deliberate actions of Farooque Ahmed, or

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¹ Alicia A. Caldwell, *Va. Man Charged in Fake Bomb Plot Against Metro*, WASH. TIMES, Oct. 27, 2010, available at <http://www.washingtontimes.com/news/2010/oct/27/fbi-arrests-va-man-plot-bomb-dc-metro-stations/>. Farooque Ahmed, a Pakistani born naturalized citizen provided information to undercover federal agents posing as al-Qaeda operatives. He was indicted on charges of attempting to provide material support to a designated terrorist organization, collecting information to assist in planning a terrorist attack on a transit facility, and attempting to provide material support to carry out multiple bombings to cause mass casualties at a Washington-area Metro station.

² Kavitha Rajagopalan, *Charitable donation or material support for terrorism?*, PBS.org (Aug. 18, 2010), <http://www.pbs.org/wnet/need-to-know/voices/charitable-donation-or-material-support-for-terrorism/2905/>. In August 2010, 14 people from a Somali community in Minnesota were charged with channeling funds to a militant Somali group, Al Shabab. Al Shabab, like many other groups labeled “terrorist organizations” by the U.S. Department of Justice, carries on extensive humanitarian and community development programs in their impoverished nations.

³ 18 U.S.C. § 2339A(b)(1) (2006). “The term ‘material support or resources’ means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe-houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation, except medicine or religious materials.”

Faisal Shahzad, the Times Square Bomber.⁴ However, the current anti-terrorism statutes⁵ provide a broad definition of the term “material support,”⁶ allowing individuals who have acted innocently or unknowingly to be subject to the same repercussions as these men.⁷ Under current law, these charges are prosecuted in Federal district court and may result in a sentence of life in prison.⁸ As American citizens, suspects are given the rights and protections of due process as guaranteed under the Constitution.

In May of 2010, Senators Joe Lieberman and Scott Brown proposed an addition to the current expatriation statute,⁹ making the provision of “material support or resources to a Foreign Terrorist Organization” an action for which a U.S. citizen may lose his or her citizenship.¹⁰ The proposed amendment relies on the same broad definition of “material support” found in the anti-terrorism statutes.¹¹ Furthermore, the provision falls among a list of actions for which a citizen may be stripped of his or her citizenship without the safeguards of pre-conviction due process.¹²

Subsection (a)(7) of the Expatriation Act lists treason as grounds for citizenship revocation, “if and when he is convicted thereof by a court martial or by a court of competent jurisdiction.”¹³ Unlike the other actions listed in the statute, treason is a criminal offense requiring conviction and requisite due process protections.¹⁴ Treason, as defined in the United States Code,¹⁵ involves the rebellion or insurrection against the authority of the United States, or otherwise “engaging in a conspiracy to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them.”¹⁶

⁴ See William K. Rashbaum et al., *U.S. Arrests S.U.V. Owner in Times Square Case*, N.Y. TIMES, May 4, 2010, at A1.

⁵ 18 U.S.C. § 2339A.

⁶ 18 U.S.C. § 2339A(b)(1).

⁷ Rajagopalan, *supra* note 2. “We may not know the true nature of these and the remaining 12 indictees’ intentions and activities for some time to come, but these indictments, and the not guilty pleas of these two women, once again shine a bright light on how we define and prosecute terrorism.”

⁸ 18 U.S.C. § 2339A(a).

⁹ 8 U.S.C. § 1481 (2006).

¹⁰ Terrorist Expatriation Act, H.R. 5237, 111th Cong. (2010).

¹¹ *Id.* at §(2)(c)(3); see generally U.S.C § 2339A(b)(1).

¹² See 8 U.S.C. § 1481(b) (stating that in any action challenging a loss of citizenship, the burden falls upon the party who claims such loss has occurred and must prove their claim by a preponderance of the evidence. Furthermore, such party must rebut the presumption, by a preponderance of the evidence, that the action in question was performed voluntarily). See also *Vance v. Terrazas*, 444 U.S. 252 (1980); *infra* p. 20.

¹³ 8 U.S.C. § 1481(a)(7).

¹⁴ See *Gillars v. United States*, 182 F.2d 962, 966 (D.C. Cir. 1950). “Treason alone of crimes is defined in the Constitution.”

¹⁵ 18 U.S.C. §2383-86 (2006).

¹⁶ 8 U.S.C. § 1481(a)(7).

Loss of citizenship is a serious and extreme punishment.¹⁷ The idea that such a finite and harsh punishment may be imposed upon a U.S. citizen based upon a broad and vaguely worded statute without the protection of a trial and conviction goes against everything this nation stands for. Part I of the Note provides the history and background surrounding both expatriation and treason. Part II of the Note discusses the problems with the broad language of the “material support” definition found in the anti-terrorism statutes.¹⁸ Part III will discuss the proposed legislation, its inherent constitutional problems, and its invalidity. Finally, Part IV will discuss a proposal that punishment for those suspected of providing material support to terrorists can be achieved by recognizing terrorism as modern day treason, ultimately allowing for the revocation of citizenship under the statute as it currently stands.¹⁹

I. THE EVOLUTION OF EXPATRIATION: FROM A PROTECTED RIGHT OF CITIZENSHIP TO A FINITE AND SEVERE PUNISHMENT

A. *The Natural and Inherent Right of Expatriation*

Expatriation is defined as “the voluntary relinquishment of nationality and allegiance.”²⁰ Beginning in 1868, Congress statutorily recognized a citizen’s “natural and inherent right” to voluntarily relinquish citizenship.²¹ By the beginning of the twentieth century, the idea of expatriation began to evolve towards its contemporary meaning as Congress shifted from recognizing expatriation as a constitutionally guaranteed right of citizenship, to a punishment for certain acts.²² In the past one hundred years, expatriation legislation has generally fallen within three different objectives: 1) to create a formal procedure to exercise the right of expatriation;²³ 2) to reduce the number of dual nationals among United

¹⁷ *Contra Vance v. Terrazas*, 444 U.S. 252, 266 (1980). “[E]xpatriation proceedings are civil in nature and do not threaten a loss of liberty.”

¹⁸ 18 U.S.C. § 2339A(b) (2006).

¹⁹ 8 U.S.C. § 1481.

²⁰ 1 ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 562 (Paul Finkelman, ed., 2004).

²¹ Stephan F. Pollak, *The Expatriation Act of 1954*, 64 YALE L.J. 1164, 1171 (1955). “The Act of 1868 declared the willingness of the United States to permit its nationals to renounce American citizenship, and served notice that it would unalterably oppose governmental interference with any individual’s right to change his nationality.” See also Edwin M. Borchard, *Decadence of the American Doctrine of Voluntary Expatriation*, 25 AM. J. INT’L L. 312, 313 (1931).

²² Pollak, *supra* note 21, at 1171. “Beginning in 1907 with the first expatriation statute and continuing to date, voluntary expatriation has taken on a markedly different meaning.”

²³ There is only one such statute enacted to primarily implement this right. 8 U.S.C. § 1481(a)(6) provides for formal renunciation of citizenship, in writing, before an appropriate officer of the United

Sates citizens; and 3) to punish American citizens who engage in criminal activities and thereby to enforce the federal criminal law.²⁴

The Fourteenth Amendment of the United States Constitution grants the right of citizenship to individuals born or naturalized in the United States.²⁵ However, no provision of the Constitution authorizes Congress to deprive an individual of United States citizenship.²⁶ Early Supreme Court decisions narrowly construed the Constitutional grant of nationalization and therefore denied Congress the power to provide for denationalization of citizens.²⁷ As noted above, by the late nineteenth century, Congressional acquiescence of an individual's inherent right to denounce citizenship prevailed,²⁸ and the Court eventually justified such action on the grounds of inherent powers of sovereignty.²⁹

As the nature and purpose of the expatriation statutes began to change, so did the meaning of the term "voluntary." While the "natural and inherent" right of an individual to renounce one's citizenship³⁰ is indeed voluntary in every sense of the word,³¹ not all instances of expatriation are as clear. For example, "Congress declared that the voluntary performance of certain acts by dual nationals would result in expatriation Performance of such acts indicated that the individual had elected to perform duties of citizenship for the State of his foreign allegiance."³² Congress recognized that by requiring deliberate renunciation, few individuals would choose to relinquish their United States citizenship when they could instead retain the double benefits and protections of dual citizenship.³³ Therefore, Congress dispensed with the subjective intent

States, during a time of war.

²⁴ Pollak, *supra* note 21, at 1172; Shai Lavi, *Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach*, 61 U. TORONTO L.J. 783, 788-89 (2011).

²⁵ U.S. CONST. amend. XIV, § 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States"

²⁶ John P. Roche, *The Loss of American Nationality – The Development of Statutory Expatriation*, 99 U. PA. L. REV. 25, 26 (1950).

²⁷ See *Osborn v. Bank of the United States*, 22 U.S. 738, 827 (1824) ("The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual."); see also *United States v. Wong Kim Ark*, 169 U.S. 649, 703 (1898) ("The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away.")

²⁸ Pollak, *supra* note 21, at 1171. "Motivated by the desire to free recently naturalized Americans from claims to allegiance advanced by states from which they had emigrated, Congress in 1868 recognized voluntary expatriation as a 'natural and inherent right of all people.'"

²⁹ *Id.* at 1176-77; Roche, *supra* note 26, at 27. "[I]t was constitutional for Congress to pass statutes regulating nationality, for without this power the United States would not be fully sovereign."

³⁰ Pollak, *supra* note 21, at 1171.

³¹ *Id.* at 1173.

³² *Id.* at 1174.

³³ *Id.* at 1175.

element of voluntariness, deciding instead that an objective standard of intent would satisfy the voluntary requirement of expatriation.³⁴

In 1915, the Supreme Court heard a challenge to the objective intent standard when an American woman lost her citizenship, pursuant to statute, upon marrying a British man.³⁵ In *Mackenzie v. Hare*,³⁶ Mrs. Mackenzie alleged that Congress had no power to withdraw her citizenship without her concurrence, and that she had never intended or desired to renounce her citizenship.³⁷ The Court concluded that that Mrs. Mackenzie's marriage was "a condition voluntarily entered into, with notice of the consequences," and the legislation under attack was therefore constitutional.³⁸ This case, although later distinguished on the grounds that it dealt exclusively with dual nationals,³⁹ represents the beginning of the Court's acceptance of a diminished standard of voluntariness.

Perhaps most importantly, while upholding the expatriation statute at issue in *Mackenzie*, Congress also recognized the statute as a tool for accomplishing foreign policy objectives.⁴⁰ In this instance, the foreign policy that Congress was looking to influence involved a problem of that time regarding dual nationals. The Court stated that the statute "has purpose, if not necessity, in purely domestic policy; it has greater purpose and, it may be, necessity, in international policy."⁴¹ Essentially, Congress recognized that the statute in question was not enacted solely to facilitate the voluntary expatriation of individuals, but perhaps more importantly, to carry out important foreign policy objectives.⁴²

³⁴ *Id.*

³⁵ Expatriation Act, Pub. L. No. 59-193, §3, 34 Stat. 1228 (1907) ("That any American woman who marries a foreigner shall take the nationality of her husband.").

³⁶ 239 U.S. 299 (1915).

³⁷ *Id.* at 306-07; Pollak, *supra* note 21 at 1176.

³⁸ *Mackenzie*, 239 U.S. at 312.

³⁹ Pollak, *supra* note 21, at 1177. "Dual nationals have been a perennial source of international friction, and their nationality is itself the cause of the difficulty. For Congress to forbid dual national to perform acts which would tend to breed external problems, on pain of deprivation of nationality, or to impose loss of nationality when a second citizenship is acquired, seems neither arbitrary nor unreasonable." David Fitzgerald, *A Tribute to the Work of Kim Barry: The Construction of Citizenship in an Emigration Context: Symposium: Rethinking Emigrant Citizenship*, 81. N.Y.U. L. REV. 90, 95 (2006).

⁴⁰ *Mackenzie*, 239 U.S. at 311-12; Pollak, *supra* note 21, at 1176. "[I]n the expatriation legislation considered in *Mackenzie*, Congress was not merely facilitating exercise of the citizen's right to renounce citizenship voluntarily. It was using its power over foreign affairs to accomplish an affirmative policy purpose."

⁴¹ *Mackenzie*, 239 U.S. at 311.

⁴² *Id.* at 312. "But there is involved more than personal considerations. As we have seen, the legislation was urged by conditions of national moment. . . . [T]his is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid but demanded."

Finally, in the 1940's Congress began passing legislation⁴³ that used expatriation as a means to neither facilitate a constitutional right nor address the issue of dual citizenship- but rather as punishment for a crime.⁴⁴ Over the next fifteen years, Congress compiled a list of crimes for which a citizen may face expatriation as punishment. These acts, which include treason, desertion in the time of war, rebellion, insurrection and the like, required conviction by court martial or other "court of competent jurisdiction," before an individual is relieved of their citizenship.⁴⁵ Although these statutes retain the language of the voluntariness requirement, it is clear they can no longer hide behind the shield of constitutional right as a rationale for legislatively prescribed citizenship revocation.⁴⁶

The notion of expatriation as punishment has raised several constitutional questions. By enacting expatriation statutes for penal purposes,⁴⁷ Congress must act in accordance with the constitutional provisions applicable to penal legislation.⁴⁸ Therefore, in order for the statutes to be constitutionally valid, the imposition of denationalization may only be imposed after due process and conviction.⁴⁹ When used as a punishment, any question of voluntariness was essentially moot.⁵⁰ "By carrying the concept of voluntary to final meaninglessness, the Expatriation Act of 1954 makes it virtually certain that the courts will at last disregard it, turn afresh to the Constitution itself and make the new analysis for which penal expatriation seems to call."⁵¹

⁴³ Act of Sept. 27, 1944, Pub. L. No. 78-431, 58 Stat. 746 (1944); 8 U.S.C. § 1481.

⁴⁴ Pollak, *supra* note 21, at 1178-79; Consuelo A. Vasquez, *Prometheus Rebound By the Devolving Standards of Decency: The Resurrection of the Chain Gang*, 11 ST. JOHN'S J. L. COMM. 221, 251 (1995).

⁴⁵ Pollak, *supra* note 21, at 1179.

⁴⁶ *Id.*

⁴⁷ The congressional debates on the amendment to the Nationality Act of 1940, Pub. L. No. 78-431, 58 Stat. 746 (1944), which made draft avoidance an expatriating act, indicate that Congress was intent on punishment and deterrence at that time also. 90 CONG. REC. 7629 (1944); *Recent Decisions*, 61 Mich. L. Rev. 1561, 1561 (1963).

⁴⁸ Pollak, *supra* note 21, at 1182 ("[A] determination that expatriation is a penal sanction would bring into operation the constitutional protections afforded by the fourth, fifth, sixth and eighth amendments.").

⁴⁹ *Id.* at 1182 n. 98.

⁵⁰ *Id.* at 1179 ("To apply the label 'voluntary incarceration' to the imprisonment which follows conviction of a subversive crime would not alter its nature as a criminal punishment. 'Voluntary expatriation' is an equally inappropriate label for the loss of nationality which now results from the same conviction.").

⁵¹ *Id.* at 1182.

B. Modern Expatriation: Focus on Intent

Today, expatriation is codified in Title 8 of the United States Code, at § 1481.⁵² The statute, originally passed in 1952, embraces the evolvement of expatriation from a constitutional right to a form of punishment, reflecting many of the aspects and considerations discussed above. However, in the half century following the original enactment, the statute has undergone significant amendments. In 1961, subsection (c)⁵³ was added, providing for a statutory presumption of voluntariness for any act of expatriation committed under the statute.⁵⁴ In 1980, the Supreme Court heard a challenge to this provision in *Vance v. Terrazas*.⁵⁵ In that case, a Mexican dual national contested his denaturalization on due process grounds.⁵⁶ The Court upheld the provision, but stated that under the Court's previous rulings⁵⁷ it would be inconsistent to treat the expatriating acts in § 1481(a) as conclusive evidence of the voluntary assent of the citizen.⁵⁸ Therefore, the Court reiterated their holding that the commission of an expatriating act must be accompanied by the intent to terminate United States citizenship.⁵⁹ This holding was eventually reflected in a 1986 amendment to 8 U.S.C. § 1481(a), which added to the introductory clause, providing that "voluntarily performing any of the following acts with the intention of relinquishing United States nationality"⁶⁰ shall result in a loss of nationality.

Following the 1986 amendment, the courts struggled with the question of intent. Some courts found that specific intent only required an individual to have knowledge that loss of citizenship was likely to result from the

⁵² 8 U.S.C. § 1481 (2006).

⁵³ Currently § 1481(b).

⁵⁴ *Id.*

⁵⁵ 444 U.S. 252 (1980).

⁵⁶ *Id.* at 254. Appellee Terrazas lost his citizenship pursuant to § 1481(a)(2), which provides that "a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by ... taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof." § 1481(c) provides that the party claiming the loss of citizenship must establish a claim by a preponderance of the evidence that the voluntariness of the expatriating conduct is rebuttably presumed.

⁵⁷ See *Afroyim v. Rusk*, 387 U.S. 253 (1967) (holding that a citizen has a constitutional right to remain a citizen in a free country unless such citizenship is voluntarily relinquished).

⁵⁸ *Vance*, 444 U.S. at 261.

⁵⁹ *Id.* at 263 ("As we have said, *Afroyim* requires that the record support a finding that the expatriating act was accompanied by an intent to terminate United States citizenship"); see also *Richards v. Secretary of State*, 752 F.2d 1413, 1420 (9th Cir. 1983) (holding that Congress is without power to provide that citizens lose their citizenship by mere performance of specified acts; a person loses citizenship if he voluntarily performs an expatriating act enumerated by Congress if, in performing the act, he intends to relinquish citizenship).

⁶⁰ 8 U.S.C. § 1481(a) (2006).

commission of an expatriating act.⁶¹ Other courts examined the intent requirement subjectively, looking at all the facts and circumstances surrounding an individual's alleged relinquishment of nationality. In *Parness v. Shultz*,⁶² the D.C. District Court found that the government failed to show by a preponderance of evidence that a naturalized Israeli citizen specifically intended to relinquish his United States citizenship, despite his desire to become an Israeli citizen. The court stated that although the individual failed to investigate all of the options and regulations regarding dual citizenship, he never intended to renounce his U.S. citizenship.⁶³

Although the Supreme Court's failure to define the intent requirement has left district courts with a variety of inconsistent precedent,⁶⁴ the Department of State has attempted to clarify expatriation procedures by emphasizing the importance of individual intent.⁶⁵ They have stated that intent may not be presumed from the performance of specific acts, but rather determined by the well-developed and specific facts of each case.⁶⁶ In light of the fundamental importance placed on U.S. citizenship, courts should undertake extensive inquiry, consistent with the State Department's approach, into the facts and circumstances surrounding the alleged acts of expatriation, as well as the thought processes of the individual, in order to determine subjective intent.⁶⁷

C. Treason: The Only Constitutional Crime

In its current form, 8 U.S.C. § 1481(a)(7) lists treason as an action for which a citizen may be expatriated.⁶⁸ Treason, listed under Title 18 of the

⁶¹ Steven S. Goodman, *Protecting Citizenship: Strengthening the Intent Requirement in Expatriation Proceedings*, 56 GEO. WASH. L. REV. 341 (1988); *Richards*, 752 F.2d at 1420.

⁶² 669 F. Supp. 7 (D.D.C. 1987).

⁶³ *Id.* at 10; see also *Kahane v. Shultz*, 653 F. Supp. 1486, 1494 (E.D.N.Y. 1987) (holding that a U.S. citizen with dual citizenship in Israel did not intend to relinquish his U.S. citizenship when he committed the expatriating act of accepting a seat in the Israeli Knesset. His actions and statements emphasized beyond doubt that the individual wanted to remain an American citizen, manifesting such intent both before and after he joined the Israeli parliament).

⁶⁴ Goodman, *supra* note 61, at 372; see *Vance v. Terrazas*, 444 U.S. 252, 258-63.

⁶⁵ Goodman, *supra* note 61, at 371; Department of State Airgram on Loss of Nationality Policy and Procedures (Aug. 27, 1987), reprinted in 5 Fed. Immigration L/ Rep. (WSB) 17,523, at 12-45 to -48.

⁶⁶ Goodman, *supra* note 61, at 351 ("This individualized inquiry focuses on the citizen's intent and recognizes that indications of intent to relinquish citizenship may not be explicit or may be mixed with indications of intent to retain citizenship."); Department of State Airgram, *supra* note 65.

⁶⁷ Goodman, *supra* note 61, at 366 ("In light of the importance of citizenship, the government's burden should not be eviscerated by the use of an objective standard of intent.")

⁶⁸ 8 U.S.C. § 1481(a)(7) ("[C]ommitting any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States, violating or conspiring to violate any of the provisions of [18 U.S.C. § 2383], or willfully performing any act in violation of [18 U.S.C. § 2385], or

United States Code,⁶⁹ is the only crime explicitly mentioned in the Constitution.⁷⁰ Treason has a long and significant history in American law. The American Revolution itself, fresh in the mind of the founding fathers upon the drafting of the Constitution, was an act of treason against Great Britain. American legal tradition has long viewed treason as a serious crime, deserving of the utmost punishment.⁷¹

Despite the fact that expatriation proceedings themselves are “civil in nature and do not threaten a loss of liberty,”⁷² treason is a criminal offense for which conviction and the requisite due process is required. Therefore, Section (a)(7) includes language not present in the preceding clauses: the requirement that citizenship may only be lost upon conviction of such expatriating act.⁷³ Congress and the Supreme Court do not consider the loss of citizenship to be a criminal sanction, loss of liberty or any such penalty that would require conviction prior to imposition. However, in the instance of a specific criminal action, such as treason, the due process requirement of conviction cannot be superseded.

Over time, treason laws have evolved with the changing notions of war and perceptions of enemies. Under the earliest treason statutes in the late eighteenth century, violations primarily involved armed insurrections and attempts to prevent federal enforcement of tax laws.⁷⁴ During the Civil War era, the government unsuccessfully attempted to apply treason laws to abolitionists who forcibly liberated a slave from government custody.⁷⁵ World War II gave rise to treason cases involving espionage, enemy agents

violating [18 U.S.C. § 2384] of said title by engaging in a conspiracy to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, *if and when he is convicted thereof by a court martial or by a court of competent jurisdiction.*”) (emphasis added).

⁶⁹ Title 18 of the United States Code deals exclusively with criminal statutes.

⁷⁰ U.S. CONST. art. III, § 3 (“Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.”). See also, Melysa H. Sperber, *John Walker Lindh and Yaser Esam Hamdi: Closing the Loophole in International Humanitarian Law for American Nationals Captured Abroad While Fighting with Enemy Forces*, 40 AM. CRIM. L. REV. 159, 191 (2003) (“The Constitution defines only one crime--treason--indicating that the framers devoted significant attention to crafting its parameters, specifying its scope and delineating the exact circumstances under which it could be proved.”).

⁷¹ 1 Stat. 112 (1790) c IX § 1 (providing for punishment of treason by death).

⁷² *Vance v. Terrazas*, 444 U.S. 252, 266 (1980).

⁷³ 8 U.S.C. § 1481(a)(7)(2006).

⁷⁴ Richard Z. Steinhaus, *Treason, A Brief History with Some Modern Applications*, 22 BROOK. L. REV. 254, 258 (1956).

⁷⁵ *Id.* at 259-60. The court ruled that a treason charge was unsustainable absent a preconceived plan formulated during a time of war.

and saboteurs.⁷⁶ In recent times, treason prosecutions have become increasingly rare. This decrease is often attributed to the Supreme Court's 1945 opinion in *Cramer v. United States*,⁷⁷ which has been largely criticized as "cast[ing] such a net of ambiguous limitations about the crime of 'treason' that it is doubtful whether a careful prosecutor will ever again chance an indictment under that head."⁷⁸

II. MATERIAL SUPPORT: LOOSELY DEFINED AND STRICTLY PUNISHED

"Material support" is an ambiguous term on its face. Taking the plain language of the two words separately, it would appear to mean something that is of substantial import or consequence and provides a basis for existence or subsistence.⁷⁹ As evidenced from the basic dictionary definition, the term is open-ended and gives no indication of the specificity or breadth of its reach. 18 U.S.C. § 2339A describes the criminal action of providing material support to terrorists. The statute provides that an individual convicted of such action may face a sentence ranging from a fine to life in prison.⁸⁰ Subsection (b) of the statute defines the term as follows:

the term 'material support or resources' means any property tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe-houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.⁸¹

By providing specific examples of conduct that constitutes material support, the statutory definition provides more insight into the type of offense that may be punishable under the statute. However, as with most statutory language, many ambiguities persist.

In order for statutes to be necessarily pliable and adaptive, "statutory language can never be so precise as to eliminate the need for authoritative interpretation."⁸² However, in drafting legislation, Congress must find the

⁷⁶ *Id.* at 261.

⁷⁷ 325 U.S. 1 (1945).

⁷⁸ Kristen E. Eichensehr, *Treason in the Age of Terrorism: An Explanation and Evaluation of Treason's Return in Democratic States*, 42 VAND. J. T. TRANSNAT'L L. 1443, 1456 (2009).

⁷⁹ Merriam-Webster's Collegiate Dictionary 765, 1256 (11th ed. 2007).

⁸⁰ 18 U.S.C. § 2339A(a) (2006).

⁸¹ 18 U.S.C. § 2339A(b).

⁸² Arthur S. Miller, *Statutory Language and the Purposive Use of Ambiguity*, 42 VA. L. REV. 23

balance between allowing for growth and interpretation in statutory language and the sort of vague open-endedness that is often deemed unconstitutional.⁸³ Drafters are well aware of this balance, and their decision to use imprecise language is often purposeful and deliberate.⁸⁴ By leaving statutes inexact and pliable, Congress has effectively delegated a great deal of discretion to the courts, leaving it to their prudence to shape the laws within the bounds of the Constitution.⁸⁵

The courts have upheld challenges regarding the vagueness of the “material support” language. In *United States v. Sattar*,⁸⁶ the court stated that anyone of ordinary intelligence could ascertain what conduct was prohibited by [18 U.S.C. § 2339A] and the statute was laid out with sufficient definiteness so that its enforcement was not left to arbitrary and discriminatory choices of law enforcement officials.⁸⁷ Additionally, in *United States v. Awan*,⁸⁸ the court found that § 2339A(b)(1)’s definition of material support was not unconstitutionally vague as applied to the defendant. In that instance, the defendant was charged with providing funds and recruits to further a conspiracy to commit violence. The court stated that anyone of ordinary intelligence would have understood defendant’s alleged activities to be illegal.⁸⁹

It is essential to point out that the above cases represent challenges by defendants charged with crimes proscribed by 18 U.S.C. § 2339A. The substantive language of that section provides a scienter requirement, and only criminalizes provisions of material support “knowing or intending that [such support] be used in preparation for, or in carrying out” certain crimes.⁹⁰ However, the plain language of § 2339A(b) defining material

(1956).

⁸³ James C. Quarles, *Some Statutory Construction Problems and Approaches in Criminal Law*, 3 VAND. L. REV. 531, 541-42 (1950). Indefinite statutes are invalid on the basis that an individual does not have sufficient warning. Pursuant to Amendments V and VI of the Constitution, an individual accused of a crime shall receive due process of law and shall be adequately informed of the nature and cause of the accusation. Furthermore, if a standard is not definite enough to guide a judge and jury, the statute is effectively meaningless.

⁸⁴ Miller, *supra* note 82, at 24; *contra* Quarles, *supra* note 83 (“The language of these legislatures usually lacks mathematical precision. This imprecision is in part due to poor draftsmanship, but is primarily due to the innate frailties of human language.”).

⁸⁵ Miller, *supra* note 82, at 23-24; *see also* GEORGE I. LOVELL, LEGISLATIVE DEFERRALS; STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY (Cambridge University Press 2003).

⁸⁶ 314 F. Supp. 2d 279 (S.D.N.Y. 2004).

⁸⁷ *Id.*

⁸⁸ 459 F. Supp. 2d 167 (E.D.N.Y. 2006).

⁸⁹ *Id.*

⁹⁰ *Id.* at 179.

support,⁹¹ does not raise any element of intent or provide for a scienter requirement. In *Humanitarian Law Project v. Gonzales*,⁹² plaintiff alleged that because the prohibition on providing material support to terrorists involves vicarious criminal liability without requiring proof of specific intent, the statute violated the Fifth Amendment.⁹³ Plaintiff urged the court to read a specific intent mens rea requirement into the definition, but the court declined, stating that such a requirement would be contrary to congressional intent.⁹⁴

In light of the courts' conclusions regarding the intent requirement of § 2339A(b)'s definition of material support,⁹⁵ it is evident that the language may result in unjust applications. In 2010, the Supreme Court released their opinion in *Holder v. Humanitarian Law Project*,⁹⁶ concluding that the "knowing" requirement cannot be evaluated to consider the defendant's intentions in providing such material support.⁹⁷ Therefore, individuals who seek to assist oppressed victims of foreign terrorist organizations, or to facilitate any lawful, nonviolent purposes of these organizations, may be convicted under applicable anti-terrorism laws.⁹⁸

The Court's decision in *Holder*, which categorized humanitarian aid as material support for terrorism, demonstrates one point along the broad spectrum of instances in which courts have found material support.⁹⁹ The case of Salim Ahmed Hamdan, Osama bin Laden's former driver, demonstrates an overt and egregious instance of supporting terrorism.¹⁰⁰ There is little doubt that acting as a driver and personal bodyguard to

⁹¹ See *supra* pp. 10-11.

⁹² 380 F. Supp. 2d 1134 (C.D. Cal 2005), *aff'd*, 509 F. 3d 1122 (9th Cir. 2007).

⁹³ *Id.* at 1142.

⁹⁴ *Id.* at 1145-46. (Congress unambiguously and purposefully failed to provide an intent requirement in § 2339A(b). By providing a "knowing or intending" requirement in § 2339A(a), it can be ascertained that Congress acted deliberately in excluding such an intent requirement in § 2339A(b)).

⁹⁵ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2708 (2010) ("Over the years, § 2339B and the definition of 'material support or resources' have been amended, *inter alia*, to clarify that a violation requires knowledge of the foreign group's designation as a terrorist organization or its commission of terrorist acts.").

⁹⁶ *Id.*

⁹⁷ *Id.* at 2708-09 ("That reading is inconsistent with § 2339B's text, which prohibits 'knowingly' providing material support and demonstrates that Congress chose knowledge about the organization's connection to terrorism, not specific intent to further its terrorist activities . . .").

⁹⁸ *Id.* at 2712

⁹⁹ *Id.*

¹⁰⁰ *After 5 Years at Gitmo, Alleged Bin Laden Aide Charged*, THE ASSOCIATED PRESS, May 11, 2007, available at <http://www.chron.com/disp/story.mpl/politics/4794735.html>; Robert F. Worth, *Bin Laden Driver to Be Sent to Yemen*, N.Y. TIMES, Nov. 25, 2008, available at http://www.nytimes.com/2008/11/26/washington/26gitmo.html?_r=0. Haman was charged with conspiracy and providing material support for terrorism in 2007 while being detained at Guantanamo Bay. The charges were later dropped on jurisdictional grounds when Haman was deemed an illegal enemy combatant and therefore subjected to a military tribunal.

Osama bin Laden, as well as transporting and delivering weapons to al-Qaeda, constitutes material support for terrorism.¹⁰¹ Such blatantly illegal actions stand in sharp contrast to those of Hawo Mohamed Hassan, the 63-year-old Minnesota woman who went door-to-door in her community to collect donations for humanitarian aid for the people of Somalia.¹⁰² Yet given the application of the term “material support,” these actions are equal in the eyes of the law.

III. THE TERRORIST EXPATRIATION ACT: AN UNJUST AND UNCONSTITUTIONAL PROPOSITION

A. The Legislation: Background and Troubling Repercussions

Proposed bill H.R. 5237 seeks to bring the existing federal expatriation law up to date by including provisions applicable to the current war on terror.¹⁰³ As Senator Lieberman stated, the current war on terror involves “fighting an enemy who doesn’t wear the uniform of a conventional army or follow the law of war.”¹⁰⁴ Furthermore, these enemies are often domestic- United States citizens, living among us and enjoying the rights and privileges of citizenship, all while plotting against the very nation they claim to be a part of. Congressman Charlie Dent, a co-sponsor of the bill, said “[b]eing an American citizen is more than a right, it is a responsibility. When individuals. . . take actions that are proven threats against our nation – they violate that responsibility.”¹⁰⁵

In its current form, the proposed Terrorist Expatriation Act¹⁰⁶ adds an eighth section to the list of expatriating acts currently proscribed by 8 U.S.C. § 1481. Proposed subsection 8 states that a person may lose their United State nationality for:

- (A) providing material support or resources to a foreign terrorist organization; (B) engaging in, or purposefully and materially supporting hostilities against the United States; or (C) engaging in, or purposefully and materially supporting hostilities against any country or armed force that is (i) directly engaged along with the

¹⁰¹ *Id.*

¹⁰² Discussed *supra*, p. 1.

¹⁰³ Press Release, Sen. Joseph Lieberman, *Terrorist Expatriation Act Summary*, May 6, 2010, available at <http://lieberman.senate.gov/index.cfm/news-events/news/2010/5/lieberman-brown-altmire-dent-introduce-terrorist-expatriation-act>.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Terrorist Expatriation Act, H.R. 5237, 111th Cong. (2010).

United States in hostilities engaged in by the United States or (ii) providing direct operational support to the United States in hostilities engaged in by the United States.¹⁰⁷

This clause, like the preceding seven, fall under § 1481(a), which states that such loss shall occur upon “*voluntarily performing any of the following acts with the intention of relinquishing United States nationality*” (emphasis added).¹⁰⁸ Furthermore, the proposed amendment includes the addition of subsection (c) which states that the definition of material support found in 18 U.S.C. § 2399A will be applicable to the proposed subsection.¹⁰⁹

An individual found to have committed one of the expatriating acts listed in the statute, including that of proposed subsection (8), would be subject to an administrative determination by the State Department that the individual has lost his or her nationality.¹¹⁰ These determinations fall outside the realm of formal court proceedings and therefore do not guarantee that an individual will receive the constitutional protections of due process. The Court has long held that expatriation statutes are not penal in nature and therefore the constitutional limitations on the power of Congress to punish are inapplicable.¹¹¹ As the Supreme Court stated in *Vance*, “expatriation proceedings are civil in nature and do not threaten a loss of liberty.”¹¹²

To say that stripping an individual of their citizenship does not constitute a “loss of liberty”¹¹³ seems contrary to the inherent nature of citizenship and liberty that the United States claims to protect so dearly. As Chief Justice Warren stated, “man’s basic right for [citizenship] is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen.”¹¹⁴ Denationalized individuals are no longer a member of any

¹⁰⁷ *Id.* at § 2.

¹⁰⁸ 8 U.S.C. § 1481(a).

¹⁰⁹ H.R. 5237, 111th Cong. § (c)(3).

¹¹⁰ Lieberman, *supra* note 103.

¹¹¹ *Trop v. Dulles*, 356 U.S. 86, 94-96 (1958). In considering the constitutionality of Section 401(g) of the Nationality Act of 1940, the Court looked at the purpose of the statute when deciding on its penal nature. “If the statute imposes a disability for the purposes of punishment -- that is, to reprimand the wrongdoer, to deter others, etc. -- it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.” When a statute contains aspects of both of these elements, the intention of the legislature will prevail. In *Trop*, the Court held that the statute in question was penal and therefore unconstitutional, as the sole purpose of the statute was to inflict punishment; there was no element of foreign policy control involved in the statute.

¹¹² *Vance v. Terrazas*, 444 U.S. 252, 266 (1980).

¹¹³ *Id.*

¹¹⁴ *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

organized community and therefore not afforded the rights and protections associated with such membership, and effectively have no right to stay anywhere on the face of the earth.¹¹⁵ Furthermore, every sovereign nation has the right to expel aliens from their borders, often in a discriminatory and arbitrary fashion.¹¹⁶ As a stateless being, such alien would have no avenue of recourse, and no legal standing for a sovereign or international organization to intervene on his or her behalf.¹¹⁷

American citizenship is regarded as “one of the most valuable rights in the world.”¹¹⁸ Americans who have been stripped of their citizenship lose their basic political and economic rights, including the right to practice their profession, vote, hold public office and countless others.¹¹⁹ In many of the leading cases brought before the Supreme Court, the individuals weren’t even aware of their expatriated status until they encountered trouble securing a passport or registering to vote.¹²⁰ Often, by the time an individual becomes aware of his or her expatriated status, significant time has elapsed since the administrative decision was made. Although the Supreme Court has upheld the constitutionality of expatriation proceedings,¹²¹ the lack of notice regarding such decisions is alarming and unjust. Furthermore, because expatriation statuses are deemed to be non-penal in nature,¹²² there is no requirement that the basis for an individual’s denaturalization be demonstrated beyond a reasonable doubt.¹²³ Rather, it is the individual who must rebut the presumption that their denouncement

¹¹⁵ Pollak, *supra* note 21, at 1190.

¹¹⁶ *Id.* at 1190-91.

¹¹⁷ *Id.* at 1191.

¹¹⁸ REPORT OF THE PRESIDENT’S COMMISSION ON IMMIGRATION AND NATURALIZATION 235 (1953).

¹¹⁹ Pollak, *supra* note 21, at 1189; Brad K. Blitz, REFUGEE STUDIES CENTER, STATELESSNESS, PROTECTION AND EQUALITY 1 (2009) (“While stateless people enjoy human rights under international law they often face barriers that prevent them from accessing their rights. These include the right to establish a legal residence, travel, work in the formal economy, send children to school, access basic health services, purchase or own property, vote, hold elected office, and enjoy the protection and security of a country.”).

¹²⁰ See *Trop v. Dulles*, 356 U.S. 86 (1958); see also *Mackenzie v. Hare*, 239 U.S. 299, 305 (1915).

¹²¹ See *Vance v. Terrazas*, 444 U.S. 252 (1980).

¹²² See *supra* text accompanying note 111.

¹²³ *Vance*, 444 U.S. at 260, 260, 268 (“It is enough . . . to establish one of the expatriating acts specified in [8 U.S.C.] § 1481(a) because Congress has declared each of those acts to be inherently inconsistent with the retention of citizenship. . . . It is difficult to understand that ‘assent’ to loss of citizenship would mean anything less than an intent to relinquish citizenship, whether the intent is expressed in words or is found as a fair inference from proved conduct. . . . Section 1481(c) provides that any of the statutory expatriation acts, if proved, are presumed to have been committed voluntarily. It does not also direct a presumption that the act has been performed with the intent to relinquish United States citizenship. That matter remains the burden of the party claiming expatriation to prove by a preponderance of the evidence.”).

of citizenship was voluntary, by a preponderance of the evidence.¹²⁴ Despite the fact that the Supreme Court has long upheld the constitutionality of both the nature of expatriation statutes and the procedures for their implementation, the questions regarding the fairness and justice served by these measures are without resolution.

B. Applying Precedent to the Terrorist Expatriation Act

For over a century, the Supreme Court has looked at two main questions surrounding expatriation statutes. First, the question of whether such statutes themselves are constitutional. As discussed above, citizenship is a natural and inherent right, which cannot be divested without the assent of the individual.¹²⁵ Furthermore, Congress does not have a right to involuntarily strip an individual of his or her citizenship under the guise of sovereignty or immigration and naturalization powers.¹²⁶ Rather, a citizen must voluntarily relinquish such citizenship, either expressly or implicitly through certain actions.¹²⁷ As applied to the proposed Terrorist Expatriation Act,¹²⁸ the addition of subsection (8) would fall under § 1481(a), which provides that any action for which citizenship shall be revoked, must be performed voluntarily and with the express intention of relinquishing United States nationality.¹²⁹

On its face, the proposed amendment retains the requirement that any renouncement of citizenship must be voluntary and intentional. However, when combining this requirement with the Court's historically broad and loose interpretation of the term "material support,"¹³⁰ lots of holes for possible injustices become apparent. Consider again, Hawo Mohamed Hassan, the 63-year-old Minnesota woman soliciting donations for war torn Somalia. It appears that, given the Court's sweeping application of "material support," this woman would be convicted of providing material support to a terrorist organization.¹³¹ So then, does it necessarily follow that she made such voluntary collections with the intention of relinquishing

¹²⁴ *Id.* at 267 ("[T]he preponderance standard of proof provides sufficient protection for the interest of the individual in retaining his citizenship.").

¹²⁵ *See supra* Part I.

¹²⁶ *Id.*

¹²⁷ *Vance*, 444 U.S. at 261-62 ("Voluntary relinquishment is 'not confined to a written renunciation,' but 'can also be manifested by other actions declared expatriative under the [A]ct, if such actions are in derogation of allegiance to this country.'"). *See also* 8 U.S.C. § 1481(a).

¹²⁸ Terrorist Expatriation Act, H.R. 5237, 111th Cong. (2010).

¹²⁹ § 1481(a).

¹³⁰ *See supra* Part II.

¹³¹ *See supra* p. 13; *see also* *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (2010).

her United States nationality? Most likely not, but the Court has taken the actions listed in § 1481(a) as *prima facie* evidence of such intention.¹³² Looking at the historical evidence as well as the original intentions and evolution of expatriation statutes, it is simply incongruent to say that by collecting aid for a terrorist ravaged nation, Ms. Hassan is exercising her “natural and inherent right” to expatriate herself from the United States.¹³³

To better ascertain Congress’s intent behind the proposed legislation, it is significant to look at the second problem expatriation statutes often involve – due process. As noted above, subsection (7) of the current expatriation statute¹³⁴ is the only provision that requires conviction. Treason, as discussed in that section, is a criminal offense, codified at 18 U.S.C. § 2385. As a criminal statute, any individual charged under this offense must be afforded the constitutional protections of due process before any punishment can be imposed. It is only after such processes have been implemented and the defendant has been convicted that 8 U.S.C. § 1481(a)(7) becomes applicable and the defendant may face denationalization.

Due process and conviction are constitutionally required before a criminal offense may be punished. Although such procedures are not constitutionally required for the “nonpenal” “civil proceedings” surrounding expatriation, formal conviction of the underlying offense eliminates some of the ambiguities and injustices inherent in § 1481(a). Presumably, upon conviction, questions regarding the intention and voluntariness of the underlying action will have been resolved at trial. At that point, there is little or no doubt, that an individual convicted of treason¹³⁵ acted voluntarily and intentionally in a manner inconsistent with an intention to retain one’s identity as a United States citizen.

Despite the fact that the conviction of the underlying offense may eliminate some injustices in the expatriation statute, it is not required of subsections (a)(1)-(a)(6), as those actions are not criminal offenses. However, proposed subsection (8) is. Providing materials support to a terrorist organization is a criminal offense, codified at 18 U.S.C. § 2339A. The imposition of any punishment for such action, without due process and conviction, is unconstitutional and invalid.

¹³² *Vance*, 444 U.S. at 469 (“It is enough . . . to establish one of the expatriating acts specified in § 1481(a) because Congress has declared each of those acts to be inherently inconsistent with the retention of citizenship.”).

¹³³ *See supra* p. 1, 4.

¹³⁴ 8 U.S.C. § 1481(a)(7).

¹³⁵ *Id.*

IV. TREASON AND TERRORISM

As noted above,¹³⁶ treason has a long history of strict punishment in the United States. Historically, during times of conventional war, an individual aiding the enemy by providing information, support or other resources would be subject to prosecution for treason. In the 1940's and 50's when the statute was enacted and amended, largely in its present form, the nation was still ringing with fears from World War II and suspicion of the future of the communist movement. However, in the twenty-first century, questions of war and treason in the United States do not involve conventional enemies. As noted by Senator Scott Brown in advocating for the Terrorist Expatriation Act, “[i]t is critical to our homeland security that we adjust and adapt our defense measures to keep terrorism out of our country.”¹³⁷

Constitutionally, the Treason Clause defines such an act as that of “levying war against the United States.”¹³⁸ 18 U.S.C. § 2385 discusses treason in terms of advocating overthrow of Government.¹³⁹ The very nature of terrorists’ missions, as evidenced by al-Qaeda, involves levying war against the United States and all that it stands for. The September 11th attackers assembled men and employed force against the United States government for such purposes.¹⁴⁰ The avowed purpose of attackers was to alter the policies of the United States, rendering their conduct treasonous.¹⁴¹ In sentencing the 1993 World Trade Center bombers, an appellate judge upheld a lower court’s imposition of a treason sentencing guideline, saying that defendant’s actions were “tantamount to waging war” against the United States.¹⁴²

Today, a conviction for the crime of treason requires the finding of four specific elements: 1) there must be an overt act; 2) two witnesses must

¹³⁶ See *supra* p. 9.

¹³⁷ Lieberman, *supra* note 103.

¹³⁸ U.S. CONST. art. III, § 3.

¹³⁹ 18 U.S.C. § 2385 (2006) (“Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States of the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence or by the assassination of any officer of any such government; or . . . Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof . . .”).

¹⁴⁰ Carlton F. W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 913 (2006); Mohammad-Mahmoud Ould Mohamedou, *Responsibility, Injustice and the American Dilemma*, 11 BUFF. HUM. RTS. L. REV. 3, 7, n.13 (2005).

¹⁴¹ Larson, *supra* note 140, at 913.

¹⁴² *United States v. Rahman*, 189 F. 3d 88, 103 (2d Cir. 1999).

testify to support the government's allegations regarding the overt act executed by the individual that allegedly constituted treason; 3) the individual must possess an intent to betray the United States, as evidenced by the overt act, and 4) the overt act must have provided aid and comfort to the enemy.¹⁴³ Consider the actions of Salim Ahmed Hamdan, Osama bin Laden's driver. Surely his actions satisfy the four elements of treason. What about the actions of Hawo Mohamed Hassan, collecting money for the impoverished people of Somalia? It appears that her actions did not evidence intent to betray the United States. Trying those individuals who have allegedly provided material support to terrorists under the treason statutes will ensure a more searching, and ultimately more just, inquiry.

As stated above, treason convictions have been rare since the World War II era.¹⁴⁴ However, in 2006 the United States issued their first treason indictment since that time, in the case of Adam Gadahn, a U.S. citizen who appeared in several al-Qaeda propaganda videos.¹⁴⁵ The indictment alleges that Gadahn, "owing allegiance to the United States, knowingly adhered to an enemy of the United States, namely, al-Qaeda, and gave al-Qaeda aid and comfort, within the United States and elsewhere, with intent to betray the United States."¹⁴⁶ This indictment significantly recognizes the inherent overlap in the prosecution of federal anti-terrorism statutes and treason.

By recognizing terrorism as the modern day incarnation of treason, the proposed Terrorist Expatriation Act is redundant and unnecessary. In addition to being constitutionally invalid, the proposed subsection merely reiterates that which is already protected by subsection (7). In looking at the future of both domestic and foreign policy, the United States must recognize that modern day terrorists, in declaring holy wars and attacking the very essence of America, are in fact, committing treason. Today's world no longer involves Benedict Arnold, or Russian double agents. Rather, treason today takes the form of Farooque Ahmed, Faisal Shahzad and other domestic terrorists, living among us, levying war against the United States and advocating for the overthrow of this nation.

¹⁴³ Sperber, *supra* note 70, at 191-92; Henry Mark Holzer, *Why Not Call It Treason?: From Korea to Afghanistan*, 29 S.U. L. REV. 181, 189 (2002).

¹⁴⁴ See *supra*, p. 12.

¹⁴⁵ See First Superseding Indictment, *United States v. Adam Gadahn a.k.a. Azzam al-Amriki*, SA CR 05-254(A) (C.D. Cal. Oct. 11, 2006), available at http://www.usdoj.gov/opa/documents/adam_indictment.pdf; Eichensehr, *supra* note 78, at 1458.

¹⁴⁶ Eichensehr, *supra* note 78, at 1458.

