

What OLC Missed: Anwar al-Aulaqi and the Case for Citizenship Forfeiture

*As the nature of terrorism changes, so does the government's response to the issue. This Note discusses one of the most significant changes undertaken by allied nations to address the terrorist threat. Western States have slowly adopted some form of citizenship revocation to address the threat of homegrown terrorism. Through the lens of the Anwar al-Aulaqi case, this Note argues that the Office of Legal Counsel should view a particular class of individuals as having forfeited the right to their U.S. citizenship as a result of their involvement in terrorist activities. In order to fall within the proposed framework, an individual must be a dual citizen. Further, he or she must engage in an overt terrorist act that contains a nexus to the United States. Finally, the actor must have manifested clear intent when engaging in the terrorist activity. This framework would reconcile the tension in current doctrine, which maintains that senior terrorist operatives, such as al-Aulaqi, should be subject to the *Matthews v. Eldridge* balancing test. This approach would also follow the course taken by other allied nations like the United Kingdom, Canada, and France, who have adopted this kind of policy in some form or another.*

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INTRODUCTION

The nature of terrorism is changing. Groups like the Islamic State of Iraq and Syria (“ISIS”) continue to recruit individuals through the internet, minimizing the traditional footprints—such as overseas travel—left by terrorist recruits.¹ According to Fordham Law School’s Center on National Security, law enforcement has detained or questioned thirty-three people in the United States for attempting to aid or join ISIS in the past year, and twenty-four cases resulted in federal charges.² The increasing number of “homegrown” terrorists presents distinct challenges for the current legal framework addressing terrorism. While the current approach often looks outward and internationally,³ thinking about how to eradicate the threat abroad, the changing nature of the threat merits an inward

1. See Janet Reitman, *The Children of ISIS*, ROLLING STONE (Mar. 25, 2015), <http://www.rollingstone.com/culture/features/teenage-jihad-inside-the-world-of-american-kids-seduced-by-isis-20150325>.

2. *Id.* Three teenage siblings from a Chicago suburb communicated online with recruiters from the Islamic State and were arrested at Chicago O’Hare airport. *Id.* The orchestrator was charged with material support of a terrorist organization under 18 U.S.C. § 2339(b). *Id.*

3. See, e.g., discussion *infra* Section I.C.

perspective: what is the best way to deal with the new phenomenon of domestic terrorists?

These challenges are particularly poignant when considered against the backdrop of the Obama administration's approach to national security policy, which was defined in the increased use of drone strikes.⁴ The Bureau of Investigative Journalism estimates that, as of February 2, 2015, U.S. drone strikes killed almost 2500 people since Obama's inauguration.⁵ Noah Feldman referred to targeted killing as the "hallmark" of the Obama administration's war on terrorism, a term that has its roots in rejecting the legal justifications once offered by the Bush administration for waterboarding suspected terrorists.⁶ However, the targeted killings present legal questions of their own, and the justification given for these policies raises significant concerns about not only the constitutionality of the drone strikes, but also about the impact that these justifications will have on the due process rights of citizens that do not pose a threat to national security. The case of Anwar al-Aulaqi, a U.S. and Yemeni dual citizen who was killed by a drone strike in 2011, embodies these concerns.

Al-Aulaqi was a U.S.-born Muslim scholar and cleric who acted as an al-Qaeda spokesperson.⁷ The administration connected him to series of terrorist attacks, including 9/11, the failed "underwear bombing" in Detroit, and the shooting at Fort Hood.⁸ In fact, al-Aulaqi has continued to serve as inspiration for recent terrorist attacks on U.S. soil.⁹ In 2010, al-Aulaqi was designated a global terrorist by the U.S. Treasury Department.¹⁰ He was then

4. Noah Feldman, *Obama Team's Al-Awlaki Memo Furthered Bush Legacy*, BLOOMBERG VIEW (Oct. 16, 2011), <http://www.bloombergview.com/articles/2011-10-17/obama-team-s-al-awlaki-memo-furthered-bush-legacy-noah-feldman>.

5. See Jack Serle, *Almost 2,500 Now Killed by Covert US Drone Strikes Since Obama Inauguration Six Years Ago: The Bureau's Report for January 2015*, BUREAU INVESTIGATIVE JOURNALISM (Feb. 2, 2015), <https://www.thebureauinvestigates.com/stories/2015-02-02/almost-2-500-now-killed-by-covert-us-drone-strikes-since-obama-inauguration-six-years-ago-the-bureaus-report-for-january-2015>.

6. Feldman, *supra* note 4.

7. *Anwar al-Awlaki Fast Facts*, CNN LIBRARY, <http://www.cnn.com/2013/08/23/world/meast/anwar-al-awlaki-fast-facts> (last updated Mar. 1, 2017).

8. *Id.*

9. See, e.g., Joshua Keating, *Bombers Keep Using an Old Recipe From al-Qaida's Magazine*, SLATE (Sept. 19, 2016), http://www.slate.com/blogs/the_slatest/2016/09/19/chelsea_was_the_latest_bombing_to_use_a_design_from_al_qaida_s_english_language.html.

10. *Anwar al-Awlaki Fast Facts*, *supra* note 7.

killed by a drone strike in Yemen in 2011.¹¹ Because of his U.S. citizenship, his killing raised questions about the government's ability to treat U.S. citizens abroad as enemy combatants.¹² In short, the administration, through the Department of Justice Office of Legal Counsel ("OLC"), reasoned that, because al-Aulaqi was a U.S. citizen, he should be viewed as retaining the due process rights afforded to him by virtue of this status.¹³ OLC then applied the *Mathews v. Eldridge* balancing test, which asks whether or not the individual was afforded sufficient procedural protections prior to being deprived of his rights, and concluded that al-Aulaqi's private interest was not outweighed by the government's interest in national security and the threat he posed to it.¹⁴ This approach was understandably criticized by many legal scholars and demonstrates a gap between the American legal understanding of citizenship rights and the needs of national security policy.¹⁵ However, some of the concerns raised by legal scholars at the time the OLC opinion was published can be addressed by looking to the approaches taken by other nations in their respective national security policies.

Many allied nations have recently adopted measures that expand the state's power to revoke citizenship from individuals who are accused of participating in terrorist activities.¹⁶ The growing popularity of these measures¹⁷ indicates that allied states are aware of the challenges created by the changing nature of terrorism. These measures can inform the way that the United States deals with cases like al-Aulaqi's. For example, the British approach has relaxed standards for citizenship stripping, which is now used as a law enforcement mechanism to track and deport suspected terrorists prior to any formal charges or convictions.¹⁸ Canada recently passed a bill that empowers the State to revoke citizenship if an individual was

11. *Id.*

12. See discussion *infra* Section I.B.

13. Memorandum from the Office of the Legal Counsel at the Dep't of Justice to the Attorney Gen. 6 (Feb. 19, 2010), <https://assets.documentcloud.org/documents/1275497/olc-opinion-aa.pdf>.

14. *Id.*; see also *Mathews v. Eldridge*, 424 U.S. 319 (1976); discussion *infra* Section I.B.

15. See discussion *infra* Section I.B.

16. See discussion *infra* Section II.B.

17. See discussion *infra* Section II.B (discussing four allied nations approaches to citizenship stripping).

18. Immigration Act 2014, c. 22, §66 (UK) (inserting section 40(4A) into the British Nationality Act 1981).

convicted of terrorism-related charges.¹⁹ Australia also passed a similar bill.²⁰ Although legislators have proposed similar measures throughout U.S. history, many have failed due to concerns about their legality within the current doctrinal framework.²¹

Treating certain individuals as having forfeited their citizenship would serve as a more coherent justification for the al-Aulaqi killing than that offered by OLC. This Note argues that the United States should allow for citizenship forfeiture under a specific set of circumstances because it would serve to advance U.S. national security policy, protect and strengthen the procedural due process rights of citizens in other contexts, and offer a more natural justification for a policy that is already well in effect. Further, the proposed policy would protect civil rights and civil liberties by creating accountability and transparency—two features that the status quo is lacking. Part I explores the circumstances in which the executive branch can treat a U.S. citizen as having forfeited his or her citizenship. Part I also explains the existing legal framework in this area and then closely examines the legal reasoning of the OLC opinion. Part II explores prior proposals, analyzes the measures adopted by allied nations, and highlights the elements that should be adopted in a U.S. policy. Part III of this Note proposes a series of requirements that should be adopted by the executive branch when making decisions about targeted killings and citizenship revocation.²² These requirements are: 1) dual citizenship, 2) intent, 3) nature of

19. Strengthening Canadian Citizenship Act, S.C. 2014, c 22 (Can.); *see also* Audrey Macklin, *Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien*, 40 QUEENS L.J. 1, 13 (2014).

20. *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth); *see also* *Australia Enacts Law to Strip Citizenship Over Terror Offences*, BBC (Dec. 4, 2015), <http://www.bbc.com/news/world-australia-34980945>; Shalailah Medhora, *Law to Strip Dual Nationals of Australian Citizenship Set to Pass Parliament*, GUARDIAN (London) (Nov. 10, 2015), <http://www.theguardian.com/australia-news/2015/nov/10/law-to-strip-dual-nationals-of-australian-citizenship-set-to-pass-parliament>.

21. For example, the Patriot Act II was a bill proposed in the wake of the September 11, 2001 attacks. *ACLU Fact Sheet on Patriot Act II*, AM. C.L. UNION, <https://www.aclu.org/other/aclu-fact-sheet-patriot-act-ii> (last visited Mar. 6, 2017); *see also* discussion *infra* Section II.A.

22. There are many nuances within citizenship stripping doctrine that grapple with the differences between naturalized citizens and birthright citizens. Some countries maintain different sets of requirements depending on how citizenship was obtained, but this Note will only discuss the most prominent policy changes in each State. *See* Macklin, *supra* note 19, at 4 (“Citizenship is the highest and most secure legal status one can hold in a state, but it is not inviolate. States that prohibit dual nationality may revoke the citizenship of a person who naturalizes elsewhere. Many states also retain the power to denaturalize a citizen who obtained citizenship through fraud or misrepresentation.”).

the action, and 4) nexus between the planned attack and the United States.

I. U.S. CITIZENSHIP REVOCATION DOCTRINE & THE CASE OF ANWAR AL-AULAQI

This Part first explains the existing statutory framework in the United States. The Immigration and Nationality Act allows for citizenship revocation, and has been amended significantly over time to limit the possible ways to revoke citizenship or expatriate a U.S. citizen. Next, this Part discusses the Supreme Court's jurisprudence in this area, which maintains that an individual must intend to forfeit citizenship in order for the government to revoke it. It also discusses how lower courts have interpreted the key decisions and why these lower court interpretations leave room for citizenship forfeiture in a particular set of terrorism cases. Finally, it closely analyzes the OLC Memorandum in the case of Anwar al-Aulaqi. It discusses the criticisms aimed at the approach and the legal issues raised by OLC's analysis for today's terrorism.

A. *United States Legal Doctrine*

Loss of nationality can occur in two distinct ways: through expatriation—which is the “voluntary relinquishment of citizenship by an individual”—and denationalization—which is “the deprivation of citizenship by governmental action.”²³ Scholarly work has recognized that “[e]xpatriation” is often used as a generic term for both.²⁴ The existing legal doctrine in this area involves a balance between the bases for expatriation set out in the Immigration and Nationality Act (“INA”)²⁵ and the Supreme Court's interpretation of the statute. While the INA sets forth specific grounds for expatriation, the Court has held that these requirements can only truly be satisfied if an individual intends to relinquish his or her citizenship.²⁶ Because of this requirement, the United States's approach towards citizenship stripping can be seen as more of a

23. Lawrence Abramson, Note, *United States Loss of Citizenship Law After Terrazas: Decisions of the Board of Appellate Review*, 16 N.Y.U. J. INT'L L. & POL. 829, 831 (1984).

24. *Id.*

25. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

26. *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967).

categorical understanding than that adopted by other States—that is, the United States is categorically constrained by the individual’s intent, whereas other States can act on a case-by case basis. Loss of citizenship occurs automatically when a citizen performs a statutorily expatriating act.²⁷ Therefore, any action, whether initiated by the executive branch or through the judicial branch, “does not center upon the question of whether a person should lose his citizenship, but rather upon the question of whether the loss has, in fact, already occurred.”²⁸

Expatriation often occurs through a State Department process whereby consular offices transmit letters informing the citizen of his or her allegedly expatriating act; and an administrative proceeding follows.²⁹ The citizen can also appeal to the Board of Appellate Review.³⁰ The Board of Appellate Review serves an important role in certain cases; however, it is inadequate for cases such as that of Anwar al-Aulaqi, where important national security concerns exist. The processes that the State Department engages in are unrealistic when dealing with high-level terrorists. For example, if a consular office suspects that a citizen has committed an expatriating act, the office is required to send the citizen “a questionnaire and accompanying transmittal letter, which informs the citizen of the alleged act and the possible resulting loss of citizenship.”³¹ The person must indicate that the actions taken were “performed voluntarily and with the intention of relinquishing U.S. citizenship.”³² This extensive process, which involves communication with the citizen through the questionnaire, is unfeasible in the terrorism context because it is unlikely that the government would be able to locate suspected terrorists, mail them the requisite questionnaire, and proceed as they would in a situation lacking the underlying national security concerns. Therefore, for cases like Anwar al-Aulaqi, an alternative process is needed.

27. Abramson, *supra* note 23, at 838.

28. *Id.* at 838–39.

29. *Id.* at 840.

30. *Id.* at 843–47.

31. *Id.* at 840. Other items on the form inform the citizen that loss of citizenship requires that the act have been “performed voluntarily and with the intent to relinquish U.S. citizenship.” *Id.* The questionnaire continues, and if the consular office and State Department deem the case appropriate, a Certificate of Loss of Nationality is issued. *Id.* at 842. The individual may then appeal to the Board of Appellate Review. *Id.* at 843.

32. *Id.* at 840.

1. The Immigration and Nationality Act and Citizenship Revocation

The Immigration and Nationality Act sets out the ways in which an individual can lose his or her U.S. citizenship.³³ The statute reads: “A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts *with the intention* of relinquishing United States nationality”³⁴ It then lists a series of actions that could serve as the basis for revocation.³⁵ Some of the notable actions include “taking an oath, affirmation or other formal declaration of allegiance to a foreign state or its political subdivisions”;³⁶ “entering, or serving in, the armed forces of a foreign state . . . engaged in hostilities against the United States”³⁷; and “committing any act of treason against . . . the United States.”³⁸ The Court struck down additional provisions, such as those which provided for expatriation upon deserting the armed forces or voting in a foreign election, and these rulings are reflected in the most recent amendments to the statute.³⁹

The statute and the Court’s interpretation of it changed significantly after World War II. Typically, U.S. citizens who took oaths of allegiance to a foreign State while the United States was at war were considered to have lost their citizenship upon termination of the war.⁴⁰ As such, many early federal court cases dealing with the issue address the armed forces provision. Courts examined a wide range of circumstances in order to determine if a particular set of facts constituted “entering or serving in the armed forces of a foreign state.”⁴¹ However, after World War II, the Supreme Court

33. The INA replaced earlier statutory schemes governing citizenship, such as the Nationality Act of 1940.

34. 8 U.S.C. §1481(a) (2012) (emphasis added); *see also* Perkins v. Elg, 307 U.S. 325, 334 (1938).

35. 8 U.S.C. § 1481(a)(1)–(7).

36. *Id.* § 1481(a)(2).

37. *Id.* § 1481(a)(3)(A).

38. *Id.* § 1481(a)(7).

39. *See* Trop v. Dulles, 356 U.S. 86 (1958) (invalidating section 401(g) of the Nationality Act of 1940, under which a U.S. citizen would lose nationality by deserting the Armed Forces); *see also* Afroyim v. Rusk, 387 U.S. 253 (1967) (invalidating section 401(e) of the Nationality Act of 1940, under which a U.S. citizen would lose nationality upon voting in a political election in a foreign state).

40. *See* Loss of Citizenship Through Marriage to Alien, Foreign Naturalization, or Foreign Oath of Allegiance, 39 Op. Att’y Gen. 474 (1940).

41. Minoru Hamamoto v. Acheson, 98 F. Supp. 904, 905 n.1 (S.D. Cal. 1951) (holding

took up the Nationality Act of 1940 in a series of cases, which altered the nature of citizenship revocation in the United States.

2. *Afroyim*, *Terrazzas*, and *Trop*: The Supreme Court's Seminal Cases on Citizenship Stripping

Although federal district courts took up the issue of citizenship revocation in the wartime context, the Supreme Court altered the citizenship revocation doctrine as it had been applied by lower courts by holding that an individual must specifically intend to relinquish his or her citizenship in order for the revocation to be constitutional.⁴² This new approach adopts a more categorical understanding than that adopted by other States in that the U.S. approach is constrained by specific intent, whereas other States can analyze such situations on a case-by-case basis.⁴³ It is now extremely difficult for the government to strip a birthright citizen⁴⁴ of his or her citizenship, as the government must demonstrate specific intent, even if the act is considered a *per se* basis for expatriation under the INA.⁴⁵ The shift towards the specific intent requirement began in the mid-1960s, with the high watermark of the Court's doctrine occurring in 1980.

The Court, in 1958, upheld the Nationality Act of 1940 in *Perez v. Brownell*, explaining and accepting the reasoning for the statutory scheme in light of World War II: "The legislators . . . were concerned about actions by citizens in foreign countries that create problems of protection and are inconsistent with American allegiance."⁴⁶ The Court further upheld congressional authority under the Nationality Act of 1940 to denationalize a citizen for voting in a foreign election, reasoning that this authority stemmed from Congress's power to regulate foreign affairs.⁴⁷ As wartime

that an U.S.-born Japanese man lost his citizenship where he was conscripted into the Japanese army even though he testified that service in the army was involuntary); *see also* *Tomasichio v. Acheson*, 98 F. Supp. 166 (D.D.C. 1951) (holding that a birthright citizen did not lose citizenship as a result of service in the Italian army where service was required under Italian conscription laws).

42. *See Afroyim*, 387 U.S. at 257.

43. *See* discussion *infra* Section II.B.

44. For purposes of this discussion, references to "birthright citizenship" mean that the person acquired citizenship because he or she was born in the United States.

45. *See* *Vance v. Terrazas*, 444 U.S. 252, 261 (1980); *Afroyim*, 387 U.S. at 257.

46. *Perez v. Brownell*, 356 U.S. 44, 57 (1958).

47. *Id.* at 62.

concerns faded, additional challenges to the Act were raised, causing the Court to shift its approach. The first relevant case was decided in 1967. In *Afroyim v. Rusk*, the Court essentially overruled *Perez*, finding that Congress lacks the power to revoke an individual's citizenship.⁴⁸ Afroyim was a naturalized citizen of the United States who had been living in Israel for ten years.⁴⁹ While abroad, he voted in the Israeli legislative election,⁵⁰ and the State Department subsequently refused to renew his passport, maintaining that petitioner lost his citizenship under section 401(e) of the Nationality Act of 1940.⁵¹ Given that *Perez* engendered significant confusion among lower courts,⁵² the Court granted certiorari in *Afroyim* to reconsider the constitutionality of 401(e). The Court concluded that the provision was inconsistent with the Fourteenth Amendment, reasoning that there is no express power granted to Congress by the Constitution to strip people of their citizenship, "whether [it is] in the exercise of the implied power to regulate foreign affairs or in the exercise of a specifically granted power."⁵³

The Court went even further in 1980, adopting the specific intent requirement in *Vance v. Terrazas*.⁵⁴ Laurence Terrazas was a natural-born U.S. citizen and the son of a Mexican citizen.⁵⁵ While he was a student in Monterrey, Mexico, Terrazas completed an application for a certificate of Mexican nationality, in which he swore adherence and submission to the authority of the Mexican Republic and expressly renounced his U.S. citizenship and any

48. *Afroyim*, 387 U.S. at 257 ("First we reject the idea expressed in *Perez* that, aside from the Fourteenth Amendment, Congress has any general power, express or implied, to take away an American citizen's citizenship without his assent.").

49. *Id.* at 270 n.2 (Harlan, J., dissenting).

50. *Id.* at 254. The lower court presumed that Perez had acquired Israeli citizenship based in part on the fact that he was able to vote in the Israeli election. *Id.* at 270 n.2 (Harlan, J. dissenting).

51. *Id.* at 254. Section 401(e) provided that a citizen could be stripped of his or her citizenship upon voting in a foreign election. Nationality Act of 1940, Pub. L. No. 76-853, 54 Stat. 1137 (repealed and superseded by Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.)).

52. *Afroyim*, 387 U.S. at 255 ("[*Perez*], decided by a 5-4 vote almost 10 years ago, has been a source of controversy and confusion ever since, as was emphatically recognized in the opinions of all the judges who participated in this case below.").

53. *Id.* at 257. This reasoning is arguably in tension with the modern-day national security apparatus, which allows Congress to significantly regulate the protections afforded to U.S. citizens by virtue of their citizenship.

54. See *Vance v. Terrazas*, 444 U.S. 252, 263 (1980).

55. *Id.* at 255.

allegiance to the country.⁵⁶ A few months after the application was submitted, “proceedings were instituted to determine whether [Terrazas] had lost his American citizenship by obtaining Mexican nationality.”⁵⁷ Terrazas tried to argue that he retained his U.S. citizenship despite the certificate, and the government argued that it would be consistent with *Afroyim* to find that Terrazas’s actions constituted voluntary assent to relinquish citizenship.⁵⁸ However, the Court found that “it would be inconsonant with *Afroyim* to treat the expatriating acts specified in § 1481(a) as the equivalent of or as conclusive evidence of the indispensable voluntary assent of the citizen.”⁵⁹ In establishing the terms for expatriation, the “expatriating act and [] intent to relinquish U.S. citizenship must be proven by a preponderance of the evidence.”⁶⁰ Ultimately, the Court remanded the factual question to the district court, but upheld the preponderance of the evidence standard as governing the question of specific intent.⁶¹

In addition to the specific intent requirement, the Court ruled that citizenship cannot be revoked as punishment for a crime, for doing so would violate the Eighth Amendment.⁶² In *Trop v. Dulles*, decided in 1958, the Court addressed the constitutionality of a statutory provision that revoked the citizenship of an army deserter.⁶³ The Court found that the purpose of the provision was solely to punish army deserters, and the citizen’s action did not necessarily demonstrate that he intended to involve himself with a foreign state.⁶⁴ The Court concluded that because there “was no dilution of his allegiance to this country,” the petitioner should not have been subject to the revocation provision.⁶⁵ It went on to state that citizenship may not be divested as a punishment, even assuming that

56. *Id.*

57. *Id.* at 256.

58. *Id.* at 260.

59. *Id.* at 261.

60. *Id.* at 270.

61. *Id.*

62. *See generally* *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (“We believe, as did Chief Judge Clark in the court below, that use of denationalization as a punishment is barred by the Eighth Amendment.” (footnote omitted)).

63. *Id.* at 87.

64. *Id.* at 92–93 (discussing how the Nationality Act of 1940 provided for citizenship revocation when an individual involved himself with a foreign state, often through voting in a foreign election or joining a foreign military).

65. *Id.*

the government possesses the necessary constitutional authority to do so because “the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen’s conduct.”⁶⁶ This feature of the U.S. perspective on citizenship stripping is particularly constraining in the context of terrorism prosecutions of U.S. citizens allegedly involved in terrorist activities. Allied states like Canada and Australia passed measures that allow the State to revoke citizenship from those engaged in terrorist offenses,⁶⁷ but this decision significantly impairs the likelihood that any such provision would be adopted or even introduced in the United States.

3. District Courts’ Application of Doctrine to Support Citizenship Revocation

While the Supreme Court took a seemingly narrow view of permissible citizenship stripping, lower courts have construed the “specific intent” requirement discussed in *Afroyim* and *Terrazas* to include inferred intent, which can be proven by certain acts deemed utterly inconsistent with notions of citizenship. *Trop* is fairly explicit about the government’s inability to revoke citizenship as punishment for a crime, but *Afroyim* and *Terrazas* have not been interpreted so rigidly. In fact, lower courts interpreted the decisions to allow for a necessary limitation to the specific intent question. For example, in *United States v. Schiffer*, a U.S. citizen served in the Romanian army, participated in death marches,⁶⁸ and guarded Nazi concentration camps.⁶⁹ The government moved to strip him of his citizenship based on expatriating actions taken during his time in the military.⁷⁰ The district court for the Eastern District of Pennsylvania ruled that the individual’s intent to renounce “citizenship was manifested by his conduct prior to and upon entering and serving in the Romanian

66. *Id.* at 92–93.

67. See discussion *infra* Sections II.B.2, II.B.4.

68. *United States v. Schiffer*, 831 F. Supp. 1166, 1205 (E.D. Pa. 1993), *aff’d*, 31 F.3d 1175 (3d Cir. 1994).

69. *Id.* at 1197.

70. *Id.* at 1190 (“The Government asserts that between 1940 and 1945, Schiffer committed four expatriating acts: (1) voluntarily serving in the Romanian army at a time it was engaged in hostilities with the United States; (2) swearing an oath of allegiance to King Carol II of Romania; (3) voluntarily joining and serving in the *Waffen-SS*, an armed paramilitary force of the Nazi party, at a time that Nazi Germany was engaged in hostilities with the United States; and (4) swearing an oath of allegiance to Adolf Hitler.”).

army.”⁷¹ The court continued to discuss the actions he took during his participation in the concentration camps, stating that, “[t]he actions of concentration camp guards, such as Schiffer, in guarding prisoners, including U.S. citizens, was utterly inconsistent with an intent to retain United States citizenship. Schiffer’s oath of allegiance to Adolf Hitler was similarly inconsistent.”⁷² Federal district courts continued to follow *Schiffer* in concluding that these actions, taken either during the course of war or in the process of attaining citizenship, are grounds for revocation.⁷³ *Schiffer* demonstrates that lower courts have deemed certain actions to be incompatible with intent to retain citizenship.

Although few cases since *Schiffer* take up this exact issue, the case demonstrates that there is at least some foundation for interpreting *Terazzas* and *Afroyim* to allow courts to infer intent based on the action itself. This is extremely significant for terrorism cases, because in many circumstances, the targets of U.S. drone strikes are those that have already spoken out against the United States and taken steps towards planning terrorist attacks. For example, Anwar al-Aulaqi himself espoused the idea “that the land of his birth was at war with Islam.”⁷⁴ As an English-speaking Muslim cleric, the strength of his message resonated with many would-be terrorists in America and other allied nations, and his exhortations to jihad “turned up repeatedly on the computers of young plotters of violence arrested in Britain, Canada and the United States.”⁷⁵ The explicit and public nature of his calls to jihad demonstrates that the facts of his case are congruent with the parameters set out by the Court in *Terazzas*.

The executive branch, when making determinations about citizenship forfeiture, should consider clarity of purpose as a factor.⁷⁶

71. *Id.* at 1194.

72. *Id.* at 1195.

73. *See, e.g.*, *United States v. Kalymon*, No. 04-60003, 2007 WL 1012983, at *19 (E.D. Mich. Mar. 29, 2007) (canceling defendant’s certificate of naturalization upon finding that bases for denaturalization were satisfied), *aff’d*, 541 F.3d 624 (6th Cir. 2008); *United States v. Firishchak*, 426 F. Supp. 2d 780, 803, 806 (N.D. Ill. 1995) (finding that defendant’s membership in the Ukrainian Auxiliary Police made defendant accountable for enforcing persecutory measures, thus justifying revocation of his citizenship), *aff’d*, 468 F.3d 1015 (7th Cir. 2006).

74. Mark Mazzetti et al., *How a U.S. Citizen Came to Be in America’s Cross Hairs*, N.Y. TIMES (Mar. 9, 2013), <http://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-americas-cross-hairs.html>.

75. *Id.*

76. *See* discussion *infra* Section III.B.

Al-Aulaqi's actions demonstrate clarity of purpose in a way that was not contemplated by the Supreme Court when the relevant doctrine was developed. While the Court seemed hesitant to assign intent to individuals like Terrazas, who may or may not have contemplated the implications of his oath, cases like al-Aulaqi's present such an unequivocal view towards the United States that there should be no concern about "implied intent." His intent was not only publicly stated, but it was also acted upon on several occasions, eliminating any concern that the executive branch would be designating a mental state to this class of persons.

B. The Office of Legal Counsel Memorandum

The distinction between citizens and non-citizens is relevant in the targeted killing context for several reasons. While there are a variety of nuances involved in analyzing whether or not non-citizens have due process rights, there is no question that non-citizens are afforded fewer legal protections than citizens, especially when the non-citizens are physically outside of the United States.⁷⁷ For this reason, al-Aulaqi and other U.S. citizens could be considered to retain their due process rights vis-à-vis the U.S. government even when they are abroad. This would require the U.S. government to apply a due process analysis and consider whether the private interests are outweighed by the government interests, a solution that is flawed and limited in application.⁷⁸ Instead, this Note argues that the more logical solution would be to find that those individuals forfeit their citizenship, rather than applying the same due process analysis that is used for determining whether or not public benefits have been properly taken away.⁷⁹

Of the estimated eight U.S. citizens killed in U.S. drone

77. The Supreme Court held that U.S. citizens have the same rights against the government when it acts against them abroad, but aliens do not have constitutional rights against the U.S. government outside of U.S. territory. *See generally* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (holding that there is no Fourth Amendment protection for searches of a foreign national's overseas residence by U.S. authorities when the foreign national has no voluntary connection to the United States); Reid v. Covert, 354 U.S. 1 (1957) (holding that the provisions extending court-martial jurisdiction to persons outside of the United States were not applicable in trials against the civilian dependents of members of the military stationed overseas).

78. *See* discussion *infra*, Section II.C.

79. *Mathews v. Eldridge* addressed whether or not the Due Process Clause of the Fifth Amendment required a pre-termination evidentiary hearing prior to the termination of Social Security disability payments. 424 U.S. 319 (1976).

strikes, only Anwar al-Aulaqi was deliberately targeted and placed on a kill list by the administration.⁸⁰ The administration connected him to a series of terrorist attacks⁸¹ and he was killed by a drone strike in Yemen in 2011.⁸² Shortly after the drone strike, Charlie Savage of the *New York Times* revealed that OLC had written a memorandum aimed at justifying the government's use of drone technology against a U.S. citizen, namely al-Aulaqi.⁸³ Initially, the Obama administration refused to release the OLC legal opinion and also denied its existence, but the American Civil Liberties Union and the *New York Times* filed and won a Freedom of Information Act ("FOIA") lawsuit calling for the release of the memorandum.⁸⁴ Parts of the memorandum remain redacted, but the published portions explain the legal justification for the drone strike.⁸⁵ It essentially states that, as a U.S. citizen, al-Aulaqi retained his procedural due process rights, but that his private interest in his liberty—i.e. his life—was outweighed by the nature of the government's national security interest.⁸⁶

OLC begins its analysis by acknowledging that al-Aulaqi retains his U.S. citizenship and states, "[W]e must also consider whether his citizenship precludes the [Authorization for Use of Military Force Against Terrorists⁸⁷] from serving as the source of

80. Scott Shane, *Drone Strikes Reveal Uncomfortable Truth: U.S. Is Often Unsure About Who Will Die*, N.Y. TIMES (Apr. 23, 2015), <http://www.nytimes.com/2015/04/24/world/asia/drone-strikes-reveal-uncomfortable-truth-us-is-often-unsure-about-who-will-die.html>.

81. Press Release, U.S. Dep't of Treasury, Treasury Designates Anwar Al-Aulaqi, Key Leader of Al-Qa'ida in the Arabian Peninsula (July 16, 2010), <https://www.treasury.gov/press-center/press-releases/Pages/tg779.aspx>.

82. Shane, *supra* note 80.

83. H. JEFFERSON POWELL, TARGETING AMERICANS: THE CONSTITUTIONALITY OF THE U.S. DRONE WAR 106 (2016).

84. See Zeke J. Miller, *Here's the Secret Memo That Justified Anwar al-Awlaki Killing*, TIME (Jun. 23 2014), <http://time.com/2912137/memo-anwar-al-awlaki-doj-drone>.

85. See Memorandum from the U.S. Off. of Legal Counsel to the Attorney Gen. (July 16, 2010) [hereinafter "OLC Memorandum"], <http://www.nytimes.com/interactive/2014/06/23/us/23awlaki-memo.html>. The memorandum itself was not published by the Department of Justice, but portions of it were made available by the *New York Times*.

86. See *id.* *Mathews v. Eldridge* requires the reviewing court to balance the private interest, the government interest, and the risk of erroneous deprivation in order to determine whether the due process available in any given proceeding is sufficient. 424 U.S. 319, 335 (1976).

87. The Authorization for Use of Military Force Against Terrorists was passed by Congress on September 14, 2001 and authorizes the use of the United States Armed Forces against those responsible for the attacks on September 11, 2001. Authorization for Use of

lawful authority for the contemplated [Department of Defense] operation.”⁸⁸ This indicates that the question of citizenship is dispositive when making certain decisions about intelligence, defense, and national security.⁸⁹ OLC assumes outright that, “[b]ecause Al-Aulaqi is a U.S. citizen, the Fifth Amendment’s Due Process clause, as well as the Fourth Amendment, likely protects him in some respects even while he is abroad.”⁹⁰ However, this approach is inconsistent with the philosophy adopted by many allied nations as the threat of homegrown terrorism continues to evolve. The approach of these allied nations seems to be one that is grounded in allegiance to that country. Emanuel Gross, Professor at University of Haifa Law School, best summarizes this view. According to Gross, assuming that terrorism, which places “the lives of civilians in real danger . . . is a prohibited act for which the perpetrators must answer,”⁹¹ it follows that “an act which places civil society as a whole in existential danger contravenes the social charter created by the citizens.”⁹² “It is inconceivable that a person committing such an act can be considered a citizen.”⁹³ Even OLC admits that “[h]igh-level government officials have concluded, on the basis of al-Aulaqi’s activities in Yemen, that [he] was a leader of [al-Qaeda in the Arabian Peninsula].”⁹⁴ His activities in Yemen were seen as posing a “‘continued and imminent’ threat of violence to United States persons and interests.”⁹⁵ Under an allegiance-based approach to citizenship, this evidence should have constituted a basis for revocation.

OLC concluded the memorandum “with a discussion of the potential constitutional limitations on the operations due to al-

Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

88. OLC Memorandum, *supra* note 85, at 22.

89. POWELL, *supra* note 83, at 107 (noting that President Obama had previously stated, “For the record, I do not believe it would be constitutional for the government to target and kill any U.S. citizen—with a drone, or a shotgun—without due process”).

90. OLC Memorandum, *supra* note 85, at 38.

91. Emanuel Gross, *Defensive Democracy: Is It Possible to Revoke the Citizenship, Deport, or Negate the Civil Rights of a Person Instigating Terrorist Action Against His Own State?*, 72 UMKCL. REV. 51, 55 (2003).

92. *Id.*

93. *Id.*

94. OLC Memorandum, *supra* note 85, at 21.

95. *Id.* The memo also states, “al-Aulaqi has been involved . . . in abortive attacks within the United States and continues to plot attacks and intended to kill Americans from his operational base in Yemen.” *Id.*

Aulaqi's status as a U.S. citizen."⁹⁶ The Department of Justice then engaged in a *Mathews v. Eldridge* balancing test⁹⁷ in order to determine if depriving al-Aulaqi of his life was a violation of his due process rights. The test requires the adjudicatory body to balance 1) "the private interest that will be affected by the official action"; 2) "the risk of erroneous deprivation of such interest through the procedures used"; and 3) "the Government's interest."⁹⁸ OLC invoked *Hamdi v. Rumsfeld* when conducting the balancing test, as that case discussed the procedural due process necessary for the government to detain a citizen at Guantanamo Bay.⁹⁹ OLC quoted *Hamdi*:

Although in the "circumstances of war" . . . "the risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process . . . is very real" . . . "the realities of combat" render certain uses of force "necessary and appropriate," including against U.S. citizens who have become part of enemy forces—and that "due process analysis need not blink at those realities."¹⁰⁰

In conducting the balancing test, OLC considered other factors in favor of the government interest besides the fact that al-Aulaqi posed a continued and imminent threat to the United States.¹⁰¹ For example, OLC considered the infeasibility of capturing the target¹⁰² as well as his physical location abroad.¹⁰³ Ultimately, OLC stated that the weight of the government interest does not require the government to provide further process than that which was provided in this case.¹⁰⁴ OLC never discussed what process, if any, was given

96. *Id.* at 38.

97. *See generally* *Mathews v. Eldridge*, 424 U.S. 319 (1976).

98. *Id.* at 335.

99. *See generally* *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (applying the balancing test and concluding that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker").

100. OLC Memorandum, *supra* note 85 at 40 (citations omitted) (quoting *Hamdi*, 542 U.S. at 530–31).

101. *Id.* at 39.

102. *Id.* at 40 ("In addition to the nature of the threat posed by al-Aulaqi's activities, both agencies here have represented that they intend to capture rather than target al-Aulaqi if feasible; yet we also understand that an operation by either agency to capture al-Aulaqi in Yemen would be infeasible at this time.").

103. *Id.*

104. *Id.*

to al-Aulaqi.

C. Criticisms of OLC's Approach

OLC's analysis was the subject of significant criticism from legal scholars around the country. While some of the criticism focused on the perverse nature of OLC's due process analysis, none touched on the fact that OLC assumed that al-Aulaqi would retain his citizenship.

Noah Feldman, professor at Harvard Law School, compared the OLC memo to the "Torture Memos" of the Bush administration.¹⁰⁵ He explained that "critics rejected Bush's policies . . . because they thought there was something wrong with the president acting as judge and jury in the war on terrorism."¹⁰⁶ Yet he noted that there is little functional difference between the capture and indefinite detention of a suspected terrorist and the targeting and killing of one.¹⁰⁷ While the OLC memo emphasized the applicability of law of war principles when justifying the killing, Feldman points out that this approach does not eliminate concerns about excessive executive power.¹⁰⁸ In other words, the Obama administration's drone policies were functioning in effectively the same way as the Bush administration's detention policies: "[W]e have only the president's word that he was an active terrorist—and that is all we will ever have."¹⁰⁹

Trevor Morrison, dean of New York University Law School, specifically addressed the perverse nature of the *Mathews* application. He noted that the memo "fails to acknowledge the broader doctrinal framework within which the *Mathews* test exists."¹¹⁰ The purpose of the *Mathews* test is not to decide whether a given individual is entitled to notice and an opportunity to be heard before an impartial trier of fact; rather, it is to determine how best to

105. Feldman, *supra* note 4.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*; see also POWELL, *supra* note 83, at 143 ("The administration's procedures *in no sense* provide the person targeted with any voice, even a notional one, and *in no sense* do they place the decision to allow the killing in the hands of a neutral decision maker. They involve the executive branch talking to itself, and deciding whether it believes that its reasons for the killing it is contemplating are convincing.").

110. Trevor Morrison, *The White Paper and Due Process*, LAWFARE (Feb. 7, 2013), <https://www.lawfareblog.com/white-paper-and-due-process>.

satisfy the requirements of procedural due process in any given case.¹¹¹ Morrison argued that OLC's treatment of the test ignores the fact that it has historically been "tethered to the organizing principles of notice and opportunity to be heard."¹¹² This ignorance necessarily alters the role of the *Mathews* analysis in domestic contexts because OLC has applied a test intended to govern domestic constitutional law to the context of an armed conflict abroad.¹¹³ While Morrison criticizes this application of the due process framework, he seems to agree that due process should have applied to al-Aulaqi in the first place.¹¹⁴

H. Jefferson Powell, professor at Duke University School of Law, also criticizes OLC's version of the *Mathews* test, writing, "The 'process' that the administration concluded sufficient to meet constitutional requirements bears no resemblance to the requirements that *Hamdi* found minimally necessary."¹¹⁵ Yet Powell also takes the position that due process should not have applied at all.¹¹⁶ He states that the President's "reasoning may undercut the meaning of due process in other circumstances where [due process] does apply."¹¹⁷ He agrees with OLC's invocation of *Hamdi*'s reasoning, but states that the Office's understanding of the constitutional requirements under *Hamdi* could not be more at odds with Justice O'Connor's opinion.¹¹⁸ He discusses the protections that the *Hamdi* plurality deemed essential for detention of enemy combatants, but concludes

111. *Id.*

112. *Id.*

113. *Id.* Morrison continues by arguing that the application of the test in a context for which it was not intended will create difficulties for adjudicators moving forward. *Id.*

114. *Id.* ("To be clear, I am not saying that the White Paper was wrong to assume that constitutional due process applies to the targeting of a U.S. citizen in an armed conflict abroad.").

115. POWELL, *supra* note 83, at 142.

116. Wells Bennett, *Jeff Powell on Targeted Killing and Due Process*, LAWFARE (Jun. 21, 2013), <https://www.lawfareblog.com/jeff-powell-targeted-killing-and-due-process> (publishing a guest post by Professor Powell).

117. *Id.*

118. *Id.* Powell quotes Justice O'Connor's opinion:

Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner . . . [by] [a] neutral and detached judge.

Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004). Powell then argues that "the White Paper—and I think we can assume the President as well—apparently find these promises inapplicable in the context of targeted killings." Bennett, *supra* note 116.

that the analysis repudiates these same requirements by holding that al-Aulaqi's right to due process was satisfied despite their absence.¹¹⁹ Powell also criticizes the lack of a neutral arbiter—"the ultimate decisionmaker [in these scenarios] is the president . . . , who (we should hope) is not in the least neutral or detached in carrying out his responsibility for national security."¹²⁰ This is similar to Feldman's argument about excessive executive power, and highlights the dangerous nature of post hoc legal justifications in wartime scenarios.

The implications of the memorandum extend far beyond this individual case. The number of U.S. citizens who have carried out terrorist attacks on U.S. soil continues to grow. In September 2016 the Chelsea bomber, Ahmed Khan Rahami, committed an attack in New York City—he was born in Afghanistan but moved to the United States and obtained citizenship.¹²¹ While Rahami was not born in the United States, the San Bernardino shooter, Syed Rizwan Farook, was born and raised in the United States.¹²² The Orlando nightclub shooter, Omar Mateen, was born in New York and was also therefore a U.S. citizen.¹²³ In fact, "[e]very lethal terrorist attack in the United States in the past decade and a half has been carried out by American citizens or legal permanent residents."¹²⁴ While these individual attacks do not rise to the level of the attacks executed by al-Aulaqi, they demonstrate that the individuals holding U.S. citizenship have been and will likely continue to commit attacks against the United States, indicating that the government must think critically about the best way to deal with the changing nature of terrorism.

119. Bennett, *supra* note 116 ("Calling the executive's own procedures the due process that is meant to check arbitrary executive decisions isn't merely an erosion of the 'essential constitutional promises' but their wholesale repudiation. If Mr. Awlaki was entitled to due process, then his killing violated the Constitution.").

120. *Id.*

121. Cristina Silva, *Who Is Ahmad Khan Rahami? New York Bombing Suspect US Citizen of Afghan Descent*, INT'L BUS. TIMES (Sept. 19, 2016), <http://www.ibtimes.com/who-ahmad-khan-rahami-new-york-bombing-suspect-us-citizen-afghan-descent-2418320>.

122. Julie Turkewitz, *Suspect Was Born and Raised in U.S., Officials Say*, N.Y. TIMES (Dec. 3, 2015), <http://www.nytimes.com/live/san-bernardino-shooting/suspect-born-and-raised-in-the-united-states-parents-from-pakistan>.

123. Peter Bergen, *The Real Terror Threat in America Is Homegrown*, CNN (June 13, 2016), <http://www.cnn.com/2016/06/12/opinions/orlando-homegrown-terror-bergen>.

124. *Id.*

II. PAST U.S. CITIZENSHIP STRIPPING PROPOSALS AND CURRENT FOREIGN PRACTICES

The citizenship stripping debate is not new to America, but efforts to revive the practice have experienced little success in recent history. Section A of this Part explores the features of those proposals and explains why they are disfavored. Section B introduces the Note's key proposal and demonstrates why citizenship stripping should be revived in a limited cross-section of cases that are analogous to that of al-Aulaqi. Finally, the Part explores the approaches adopted by other States in order to establish a framework for the more limited measure advocated in Part III.

A. Past Citizenship Stripping Proposals

Legislators throughout U.S. history have introduced several bills aiming to facilitate citizenship stripping. Many of these bills cite national security or wartime concerns as their main justification.¹²⁵ The Patriot Act II was draft legislation prepared by the Bush administration aimed to introduce terrorism convictions as a statutory basis for citizenship revocation.¹²⁶ The bill declared “that involvement with a terrorist group would be *prima facie* evidence of intent to relinquish citizenship.”¹²⁷ Convictions under material support statutes¹²⁸ would have satisfied the aforementioned “involvement” standard.¹²⁹ The bill appeared to be facially unconstitutional given *Afroyim* and *Terrazas* because it established membership or support of terrorist groups as *prima facie* evidence of intent to relinquish citizenship.¹³⁰

The Expatriate Terrorist Act, introduced by Senator Ted Cruz

125. See, e.g., Mario Trujillo, *Cruz: Strip Citizenship from Americans in ISIS*, HILL (Sept. 5, 2014), <https://thehill.com/policy/international/216791-cruz-want-citizenship-stripped-from-us-fighters-linked-to-isis>.

126. Charles Lewis & Adam Mayle, *Justice Dept. Drafts Sweeping Expansion of Anti-Terrorism Act*, CTR. FOR PUB. INTEGRITY (Feb. 7, 2003, 5:48 PM), <https://www.publicintegrity.org/2003/02/07/3159/justice-dept-drafts-sweeping-expansion-anti-terrorism-act>.

127. Nora Graham, Note, *Patriot Act II and Denationalization: An Unconstitutional Attempt to Revise Stripping Americans of Their Citizenship*, 52 CLEV. ST. L. REV. 593, 594–95 (2004–2005).

128. See 18 U.S.C. § 2339A, 2339B (2012).

129. Graham, *supra* note 127, at 595.

130. See generally *id.* at 594–95.

in September 2014, does not treat the aforementioned actions as prima facie evidence, meaning that it may be more acceptable given the restrictions established by the Court.¹³¹ However, the bill would still allow for convictions under material support statutes to serve as the basis for citizenship stripping.¹³² Despite these changes, the proposal is in tension with the Court's Eighth Amendment jurisprudence, which holds that involuntary expatriation is a form of cruel and unusual punishment.¹³³

Critics balked at these proposals, citing a variety of different concerns.¹³⁴ The 2015 version of Senator Cruz's proposed bill would allow for material assistance, oaths, or training to constitute the basis for revocation regardless of whether or not the individual engages in hostilities against the United States.¹³⁵ While these actions would not necessarily serve as clear evidence like they would under the draft legislation, they still merit concern.¹³⁶

For example, in 2010, Syed Fahad Hashmi pled guilty to one count of conspiracy to provide material support to a foreign terrorist organization.¹³⁷ The charges were based on testimony of a cooperating witness, an acquaintance of the defendant, who stored luggage, raincoats, ponchos, and socks in the defendant's apartment.¹³⁸ The cooperating witness later sent those same

131. See Expatriate Terrorist Act, S.2779, 113th Cong. (2014).

132. *Id.* §2.

133. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

134. See, e.g., Joanne Mariner, *Patriot II's Attack on Citizenship*, CNN (Jan. 22, 2004), <http://www.cnn.com/2003/LAW/03/06/findlaw.analysis.mariner.patriotII> ("Patriot II's new rule on the loss of citizenship. Patriot II extends to a citizen's support of even the legal activities of an organization that the executive branch has deemed terrorist. . . . Considering the almost non-existent due process safeguards of the laws on labeling terrorist organizations, the political uses of the terrorist label, and its inherent malleability is dangerously broad.").

135. Expatriate Terrorist Act, S.247, 114th Cong., § 2(a)(2) (2015) (proposing to amend the INA to allow revocation when an individual is discovered "[t]aking an oath or making an affirmation or other formal declaration of allegiance to a foreign state, a political subdivision thereof, or a foreign terrorist organization designated under section 219, after attaining 18 years of age").

136. Jeanne Theoharis, *The Legal Black Hole in Lower Manhattan*, SLATE (Apr. 27, 2010), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/04/the_legal_black_hole_in_lower_manhattan.html.

137. Judgment at 1, *United States v. Hashmi*, No. 06-442 (S.D.N.Y. June 10, 2010), <https://ia600209.us.archive.org/12/items/gov.uscourts.nysd.285433/gov.uscourts.nysd.285433.161.0.pdf>; see also Theoharis, *supra* note 136.

138. Theoharis, *supra* note 136.

materials to a third-ranking member of al-Qaeda.¹³⁹ Under Cruz's proposal, this set of facts could serve as the basis for citizenship revocation, which raises significant concerns about the accuracy of the proposal and whether the statutory scheme would actually "catch" the intended suspects. Further, the possibility that individuals will be wrongfully identified as targets of the bill cannot be overstated. While the details of its implementation are not clear from the face of the bill, it places excessive power in the hands of bureaucrats tasked with making significant decisions about an individual's fate without the check of procedural protections,¹⁴⁰ further exacerbating existing concerns that the bill would be over-inclusive.

The bill might also violate international law. State power to revoke citizenship is limited by international commitments, beginning with the Universal Declaration of Human Rights, which proclaims that every person has a right to nationality.¹⁴¹ Article 15(2) of the Declaration states that "no one shall be arbitrarily deprived of nationality."¹⁴² However, arbitrariness is undefined by the Declaration. While the Declaration is not a binding legal document, it does raise an initial set of concerns as to the potential for statelessness. The 1961 Convention on the Reduction of Statelessness directly addresses denationalization and the consequences for those who are citizens of only one State.¹⁴³ The Convention prohibits denationalization when it would result in statelessness, unless citizenship was obtained by fraud.¹⁴⁴ Denationalization may also occur if the citizen engages in conduct "seriously prejudicial to the vital interests of the state," but in order to qualify under this provision, the State must have had a provision in its existing citizenship laws that allowed for revocation on such grounds.¹⁴⁵ Despite this framework, the United States is not a party to the Convention on Statelessness, meaning that the bill would not

139. *Id.*

140. See, e.g., Gabriel Malor, *How Not to Fight Terrorism*, NAT'L REV. (Jan. 28, 2015), <http://www.nationalreview.com/article/397317/how-not-fight-terrorism-gabriel-malor> ("[The bill] put[s] the determination of who will retain citizenship in the hands of unelected bureaucrats at the Departments of Justice, State, and Homeland Security.").

141. G.A. Res. 217 (III) A, art. 15(1), Universal Declaration on Human Rights (Dec. 10, 1948) [hereinafter UDHR].

142. *Id.* art. 15(2).

143. Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175.

144. *Id.* art. 8.

145. Macklin, *supra* note 19, at 13 (quoting Convention on the Reduction of Statelessness, *supra* note 143, art. 8(3)(a)(ii)).

place the United States in direct violation of its treaty obligations. Nevertheless, the right to a nationality is a recognized fundamental human right, and if the United States were to render persons stateless through such a proposal, it could be in violation of customary international law.¹⁴⁶ Further, the State Department's position is that it "provides humanitarian assistance and engages in diplomacy to prevent and resolve statelessness . . . [and] advocates on behalf of stateless people with foreign governments."¹⁴⁷ Given that the right to a nationality is listed both in the Universal Declaration on Human Rights¹⁴⁸ and the International Covenant on Civil and Political Rights,¹⁴⁹ the United States should be wary of adopting a proposal that is incompatible with what is considered a fundamental right.

Finally, another concern with this framework is the potential spillover effect of denationalization on other nations. By revoking citizenship from suspected terrorists, the State retains the right to remove the individual and send him or her to another country.¹⁵⁰ If the government were to deport this class of persons, it would effectively be exporting national security concerns to other States, when it may be preferable to track and monitor suspected terrorists at home. Assuming that these individuals would be deported to States where they retain citizenship, the United States is better equipped to deal with terrorist threats as opposed to relying on a country with fewer resources. This would be consistent with past practices, as detainees from Guantanamo have been sent to lesser developed countries. In fact, over 200 Guantanamo detainees were later sent to Afghanistan, over 100 were sent to Saudi Arabia, and over fifty were

146. See, e.g., *Right to Nationality and Statelessness*, U.N. HUMAN RTS. OFF. HIGH COMM'R (Mar. 14, 2015), <http://www.ohchr.org/EN/Issues/Pages/Nationality.aspx> ("The right to a nationality is recognized in a series of international legal instruments, including the Universal Declaration of Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Nationality of Married Women, the Convention on the Rights of Persons with Disabilities and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.").

147. *Statelessness*, U.S. DEP'T. STATE, <http://www.state.gov/j/prm/policyissues/issues/c50242.htm> (last visited Mar. 6, 2017).

148. UDHR, *supra* note 141, arts. 15–16.

149. International Covenant on Civil and Political Rights art. 24, Dec. 16, 1966, 999 U.N.T.S. 171.

150. See, e.g., 8 U.S.C. § 1227 (2012) (listing classes of deportable aliens). If the U.S. were to revoke a person's citizenship, she would presumably be in violation of law, which would render her deportable under 8 U.S.C. § 1227(a)(1)(B).

sent to Pakistan.¹⁵¹ Another related concern is the creation of a two-tracked justice system, where individuals would be either treated as citizens (and presumably adjudicated in civilian court), or they would be funneled to a “secondary” system, subverting certain constitutional protections that would be afforded to them in the primary system.¹⁵² This potential feature of the new national security state was recognized and criticized by Professor Jack Balkin in 2008, prior to al-Aulaqi’s killing.¹⁵³ Professor Balkin focused on features of what he calls the “National Surveillance State,” emphasizing the government’s ability to monitor private communication through the National Security Agency.¹⁵⁴ He writes, “Because the National Surveillance State emphasizes *ex ante* prevention rather than *ex post* apprehension and prosecution, the . . . danger is that government will create a parallel track of preventative law enforcement that routes around the traditional guarantees of the Bill of Rights.”¹⁵⁵ Similarly here, revoking citizenship from suspected terrorists in the manner proposed by Cruz would allow for the government to circumvent constitutional protections, such as the rights enumerated in the Fifth and Sixth Amendments, either by adjudicating the individuals in separate forums, such as military tribunals, or by exporting the individuals to other States. The impact of such exportation is unclear, but it is likely that, if these individuals were deported to a foreign State, it would undermine the government’s ability to monitor their activities.

The proposal discussed in Part III would serve to protect civil rights and civil liberties if the OLC approach has negative spillover effects on due process doctrine, as suggested by Morrison¹⁵⁶ and Balkin. By ignoring the context in which the *Mathews* test was created, OLC created an analysis that is ripe for abuse and manipulation. The proposal established in Part III sets out clear requirements that would need to exist in order for one’s citizenship to be revoked. These clear requirements ensure that the approach could be contained. These proposed requirements also increase transparency, something OLC’s approach lacks. The lack of transparency is evidenced by the fact that several FOIA lawsuits were

151. *The Guantánamo Docket: Transfer Countries*, N.Y. TIMES, <https://www.nytimes.com/interactive/projects/guantanamo/transfer-countries> (last visited Mar. 2, 2017).

152. Jack M. Balkin, Essay, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1 (2008).

153. *Id.*

154. *Id.*

155. *Id.* at 15.

156. See Morrison, *supra* note 110.

involved in making the memorandum available for public review.¹⁵⁷ The proposed approach would allow for simpler review by the legislative and judicial branches, as well as by the public, because the executive would be working within a clearly defined framework.

B. A Different Framework: Using Allied Nations' Approaches to Inform the U.S. Approach to Citizenship Forfeiture

Unlike the United States, other countries often use citizenship forfeiture as a response to national security concerns. Using this approach in a limited cross-section of cases would avoid the issues discussed in Section I.C. The following discussion reviews OLC's framework and explains why it is inadequate. It then highlights allied States' best practices for citizenship revocation, which inform the recommendations for a new U.S. approach laid out in Part III.

In examining the memorandum and the underlying legal doctrine concerning procedural due process, it becomes clear that OLC is engaging in legal gymnastics in concluding that al-Aulaqi not only retains his right to procedural due process, but also that said right is not outweighed by the government's interest in killing him.¹⁵⁸ The nature of this reasoning is perverse because the doctrine leaves room for an interpretation of citizenship rights that would think of individuals like al-Aulaqi as having forfeited their citizenship. This misguided constitutional analysis treats as citizens a group of people who would be treated as non-citizens in many allied nations, whereas the approaches taken by other nations support adopting a framework under which terrorists would be seen as surrendering their citizenship. The United States should revise its current approach so that these individuals would have to meet a series of requirements in order for their citizenship to be justifiably revoked. The requirements are dual citizenship, clarity of intent, overt action, and nexus. Although the requirements would expand citizenship stripping to this one limited class of cases, the approach would lead to a more honest and restrained national security policy with less potential for overreach and manipulation than the current approach. The following Section examines the policies adopted by allied nations and notes the best practices of each country. It then explores the philosophical and policy justifications for such measures. By using the best practices of allied States to craft the U.S. approach, the proposal takes into account the criticisms and weaknesses of those

157. See *supra* note 84 and accompanying text.

158. See discussion *infra* Section II.C.

approaches to create a narrowly defined set of circumstances under which citizenship stripping can occur, thus minimizing the potential for overreach and increasing transparency.

1. British Approach

The relevant British measure is an amendment to the British Nationality Act that allows for the Home Secretary to deprive British nationals of their citizenship based on certain criteria.¹⁵⁹ The regime has changed significantly over the course of the last ten years, but the current framework allows the Home Secretary to render naturalized citizens stateless if the person “has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom,”¹⁶⁰ and the Home Secretary “has reasonable grounds for believing that the person is able . . . to become a national of [another country].”¹⁶¹ The British approach is an example of wide-ranging citizenship revocation with significant control vested in one decision-maker. This approach exhibits many of the same issues—such as transparency and excessive autonomy—that plague the U.S. approach.¹⁶²

The British government used these powers to strip the citizenship of fifty-three British citizens.¹⁶³ Twenty-seven were deprived on the grounds of being “conducive to the public good,” and the remainder were stripped for fraud or misrepresentation in the acquisition of citizenship.¹⁶⁴ These powers have been used to revoke the passports of sixteen individuals since 2010 alone, at least five of whom were born in the UK.¹⁶⁵ At least two of those individuals were

159. Nationality, Immigration and Asylum Act 2002, c. 41, § 4 (UK) (amending the British Nationality Act 1981, c. 61); *see also* Ashwini Vasanthakumar, *Treason, Expatriation and ‘So-Called’ Americans: Recovering the Role of Allegiance in Citizenship*, 12 GEO. J.L. & PUB. POL’Y 187, 189 (2014).

160. Immigration Act 2014, c. 22, § 66 (UK) (amending the British Nationality Act 1981, c. 61, § 40(4A)(b)).

161. Immigration Act 2014, c. 22, § 66(1) (amending the British Nationality Act 1981, c. 61, § 40(4A)(c)).

162. *See* discussion *supra* Section II.A.

163. MELANIE GOWER, DEPRIVATION OF BRITISH CITIZENSHIP AND WITHDRAWAL OF PASSPORT FACILITIES 4 (Jan. 30, 2015), <http://researchbriefings.files.parliament.uk/documents/SN06820/SN06820.pdf>.

164. *Id.*

165. Chris Woods et al., *British Terror Suspects Quietly Stripped of Citizenship . . . Then Killed by Drones*, INDEPENDENT (London) (Feb. 27, 2013), <http://www.independent.co.uk/news/uk/crime/british-terror-suspects-quietly-stripped-of->

subsequently killed by U.S. drone strikes.¹⁶⁶

These statistics demonstrate the significance of citizenship status to a suspected terrorist; however, the British approach fails to identify key factors that the Home Secretary considers dispositive when deciding whether or not someone is engaging in activity that is “seriously prejudicial to the vital interests of the United Kingdom.”¹⁶⁷ In fact, legal scholars criticized the approach’s emphasis on executive power.¹⁶⁸ Leading human rights lawyer Gareth Peirce notes that British citizens are being stripped of their citizenship “without a single word of explanation of why they have been singled out and dubbed a risk.”¹⁶⁹ However, the Home Office maintains that “[c]itizenship is a privilege not a right,”¹⁷⁰ which presumably justifies the opaque nature of the processes. The British approach has been upheld by the European Court of Human Rights (“ECHR”). In February 2017, the ECHR upheld the British practice, finding that it did not violate the petitioner’s right under the European Convention on Human rights because the policy had sufficient procedural safeguards¹⁷¹ and the decision to strip citizenship was not made arbitrarily.¹⁷² This decision indicates that the criticisms of Mr. Pierce (who represented the petitioner in the aforementioned case), are ill-founded and will likely not be an obstacle to the continuation of this process both in the U.K. and for other members of the Convention. Despite the support and justification of the British approach, the United States takes a different approach to citizenship, viewing it as a

citizenship-then-killed-by-drones-8513858.html.

166. *Id.*; see also Vasanthakumar, *supra* note 159, at 189 n.9. The attorney for Mohaed Sakr, one of the British citizens stripped of his nationality and then killed by a U.S. drone strike, argued that “[i]t appears that the process of deprivation of citizenship made it easier for the U.S. to then designate Mr. Sakr as an enemy combatant, to whom the U.K. owes no responsibility whatsoever.” Woods et al., *supra* note 165. Ian MacDonald, president of the Immigration Law Practitioners’ Association maintains that depriving these individuals of their citizenship “means that the British government can completely wash their hands if the security services give information to the Americans who use their drones to track someone and kill them.” *Id.*

167. British Nationality Act 1981, c.61, § 40(4A)(b).

168. See, e.g., Celia Rooney, *The UK Immigration Act 2014: Last Minute Amendments—Too Little, Too Late?*, BORDER CRIMINOLOGIES: BLOG (May 19, 2014), <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2014/05/uk-immigration>.

169. Woods et al., *supra* note 165.

170. *Id.*

171. *K2 v. United Kingdom*, App. No. 42387/13, Decision, ¶¶54–61 (ECHR Feb. 7, 2017), <http://hudoc.echr.coe.int/eng?i=001-172143>.

172. *Id.* ¶52.

right that is very difficult to take away.¹⁷³

The British approach demonstrates that obscure procedures where officials are making unchecked decisions is an unfavorable framework for citizenship stripping in the United States, as it is likely to receive significant pushback from the public and will not cure the problems of the current drone regime that have already been identified by leading scholars.¹⁷⁴ However, as the United States crafts its own approach, the British approach is instructive insofar as it requires that the Home Secretary have reasonable grounds for believing that the individual in question can obtain citizenship in another country.¹⁷⁵ While the United States is not a party to the Statelessness Convention, the UK is, which probably explains why this requirement is present.¹⁷⁶ Other states have also adopted provisions allowing for revocation only where the individual is, or can become, a citizen of another state.¹⁷⁷

2. Canadian Approach

Canadian legislation allows for citizenship stripping if the person has engaged in certain enumerated actions. The policy, Bill C-24, takes a different approach from the UK and United States by listing particular criminal offenses and minimum sentences as grounds for citizenship revocation. The bill also explicitly connects citizenship revocation to criminal convictions.¹⁷⁸ The bill expands revocability by adding new grounds for citizenship stripping.¹⁷⁹ Section 10(2) of the amended Citizenship Act allows for revocation if

173. See discussion *supra* Section I.A.

174. See Mahita Gajanan, *Here Are the Only Times the U.S. Government Can Revoke Your Citizenship*, TIME (Nov. 29, 2016), <http://time.com/4584784/donald-trump-flag-burn-citizenship>; David A. Graham, *The Republican Vogue for Stripping Citizenship*, ATLANTIC (Nov. 29, 2016), <https://www.theatlantic.com/politics/archive/2016/11/the-republican-vogue-for-stripping-citizenship/508979>; David Bier, *Cruz Bill Eases Revocations of U.S. Citizenship Without Due Process*, HUFFINGTON POST: BLOG (Jan. 20, 2017), http://www.huffingtonpost.com/david-bier/ted-cruz-expatriate-terrorist-act_b_9029984.html.

175. Immigration Act 2014, c. 22, § 66(1)(4A)(c).

176. *States Party to the Statelessness Conventions: As at 1st October 2016*, U.N. HIGH COMM’R FOR REFUGEES (Oct 18, 2016), <http://maps.unhcr.org/en/resource?download&id=3160>.

177. See discussion *infra* Sections II.B.3–II.B.4.

178. See generally Macklin, *supra* note 19, at 29 (discussing the relevant convictions which are found throughout the bill).

179. An Act to Amend the Citizenship Act and to Make Consequential Amendments to Other Acts, S.C. 2014, c 22, art. 8 (Can.).

the individual has committed certain crimes, including treason, spying, or any terrorism offense.¹⁸⁰ The new provision can be read to include individuals who have served as members of a terrorist group.¹⁸¹

Further, section 10.1(2) of the Act authorizes citizenship revocation if an individual “served as a member of an armed force of a country or as a member of an organized armed group and that country or group was engaged in an armed conflict with Canada.”¹⁸² There are comparable provisions in the INA allowing for citizenship revocation for those who fight in a foreign army, which is considered a traditional ground for citizenship revocation.¹⁸³ The process for revocation for engaging in military service with an enemy is different from the process for revocation under a criminal conviction justification. For revocation based on engaging in military service, the Citizenship and Immigration Minister refers the question of whether the person actually served as a member of an armed force to a Federal Court Judge.¹⁸⁴ A judge’s declaration that the individual did engage in those actions would result in the person’s citizenship being revoked.¹⁸⁵ If the revocation is based on a criminal conviction, underlying proceedings must take place. In order for stripping to occur post-conviction, the citizen must first be sentenced by a judge to imprisonment and then again by the Minister to denationalization.¹⁸⁶

Similar to the British approach, the Canadian approach entrusts a significant amount of responsibility in individual adjudicators such as the Immigration Minister or a Federal Court

180. *Id.*; see also Hannah Buckley, *Bill C-24: Strengthening Canadian Citizenship—Weakening Global Security*, ABLAWG: U. CALGARY FAC. L. BLOG, (July 30, 2015), <http://ablawg.ca/2015/07/30/bill-c-24-strengthening-canadian-citizenship-weakening-global-security>.

181. Macklin, *supra* note 19, at 39.

182. An Act to Amend the Citizenship Act and to Make Consequential Amendments to Other Acts, S.C. 2014, c 22, art. 8.

183. See *supra* note 41 and accompanying text.

184. An Act to Amend the Citizenship Act and to Make Consequential Amendments to Other Acts, S.C. 2014, c 22, art. 8 (“If the Minister has reasonable grounds to believe that a person . . . served as a member of an armed force of a country or as a member of an organized armed group and that country or group was engaged in an armed conflict with Canada, the person’s citizenship may be revoked only if the Minister—after giving notice to the person—seeks a declaration, in an action that the Minister commences, that the person so served . . . and the Court makes such a declaration.”).

185. *Id.*

186. Macklin, *supra* note 19, at 40.

Judge. However, Bill C-24's emphasis on punishment rather than incapacitation is the subject of much criticism.¹⁸⁷ If the purpose of the bill is to inhibit terrorists from plotting and carrying out attacks, the additional post-conviction punishment seems futile.¹⁸⁸ Another similarity to the British approach is that the bill only applies to dual citizens; however, unlike in the UK, Canadian scholars are critical of this aspect, for fear that the law discriminates against those with multiple citizenships. Audra Macklin, Professor of Law and Human Rights at the University of Toronto, points out that the bill would permit the Minister to revoke citizenship from a dual citizen sentenced to a term of imprisonment for "providing, making available, etc., property or services for terrorist purposes."¹⁸⁹ She also mentions that the new reforms would not allow the State to strip the citizenship of a person—retaining only Canadian citizenship—who has engaged in heinous crimes, such as sexual assault and murder, which also, according to Macklin, demonstrate "gross disloyalty" to the nation.¹⁹⁰

The United States can learn several lessons from the criticisms of the Canadian approach. The first is that a measure focusing on punishment rather than incapacitation or killing will likely be viewed unfavorably. In fact, such a framework would likely violate the Supreme Court's Eighth Amendment jurisprudence, as expressed in *Trop*.¹⁹¹ However, Canada has created a stricter framework that only allows for revocation in an enumerated number of circumstances, which seems to be a promising approach.¹⁹² The clear enumeration of elements alleviates some of the opacity issues raised by sole executive decision-making.¹⁹³ Even though the judges and relevant ministers are making decisions that are not appealable, the statute still constrains how those decisions can be made. The United States should adopt this kind of limitation as part of the

187. See, e.g., Leslie Esbrook, *Citizenship Unmoored: Expatriation as a Counter-Terrorism Tool*, 37 U. PA. J. INT'L L. 1273, 1287 (2016); Stephanie Levitz, *Bill C-24: New Citizenship Rules Worry Some Ethnic Groups*, HUFFINGTON POST (July 6, 2015), http://www.huffingtonpost.ca/2015/07/06/some-ethnic-groups-worry-_n_7738758.html.

188. One might argue that post-conviction punishment would deter potential terrorists from committing attacks; however, these proposals are so new that there has been no analysis regarding whether deterrence has actually been one of the effects.

189. Macklin, *supra* note 19, at 30 (quoting Criminal Code, R.S.C. 1985, c C-46, § 83.03 (Can.)).

190. *Id.*

191. See discussion *supra* Section I.A.2.

192. See *supra* notes 180–83 and accompanying text.

193. See Feldman, *supra* note 4.

proposed regime because it allows for the kind of constraint that has been called for by legal scholars denouncing the approaches adopted by the Obama administration's drone policy.¹⁹⁴ Given that many of the decisions involved in the current drone policy occur behind closed doors, this policy would be much less ripe for abuse than the current regime.

3. French Approach

France has approved similar tactics and planned to expand¹⁹⁵ these measures as a result of the November 2015 Paris attacks. Prior to the attacks, France's highest court had ruled that it was permissible to strip the nationality of a Franco-Moroccan man who was convicted of terrorism charges.¹⁹⁶ That man, Ahmed Sahnouni el-Yaacoubi, was a naturalized French and Moroccan citizen who claimed that stripping him of his French citizenship violated human rights because it "set him apart from native-born citizens."¹⁹⁷ Currently, a provision in the French Civil Code allows for the State to revoke citizenship from individuals convicted on terrorism charges.¹⁹⁸ The Constitutional Council examined Yaacoubi's claims and explained that the measure does not violate the French Constitution's equality principle.¹⁹⁹ The principle of equality in French law maintains that everything that is alike must be treated the same, so individuals similarly situated must be treated identically.²⁰⁰ The Council

194. See discussion *supra* Section I.C.

195. It is the understanding of the author that these proposals are now viewed as longshots. Kim Willsher, *Hollande Drops Plan to Revoke Citizenship of Dual-National Terrorists*, GUARDIAN (London) (Mar. 30, 2016), <https://www.theguardian.com/world/2016/mar/30/francois-hollande-drops-plan-to-revoke-citizenship-of-dual-national-terrorists>.

196. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2014-439 QPC, Jan. 23, 2015, J.O. 1150 (Fr.); see also *French Court Approves Stripping Nationality of Franco-Moroccan Jihadist*, REUTERS, Jan. 23, 2015, <http://www.reuters.com/article/us-france-shooting-nationality-idUSKBN0KW1HI20150123#KoUP3yU7FUSm1IrF.97>.

197. *French Court Approves Stripping Nationality of Franco-Moroccan Jihadist*, *supra* note 196.

198. CODE CIVIL [C. CIV] [CIVIL CODE] art. 25(1) (Fr.). The provision has only been used on eight occasions since its inception in 1998. *French Court Approves Stripping Nationality of Franco-Moroccan Jihadist*, *supra* note 196. Revocation is also available for non-terrorist related crimes if the dual citizen obtained French citizenship within ten years preceding the offense. CODE CIVIL [C. CIV] [CIVIL CODE] art. 25-1 (Fr.). For terrorism crimes, the relevant period is fifteen years. *Id.*

199. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2014-439 QPC, Jan. 23, 2015, J.O. 1150.

200. *Id.* ("que le principe d'égalité ne s'oppose ni à ce que législateur règle de façon

affirmed that dual citizens who have acquired French nationality are in a different situation from those who have a single citizenship or those who were born in France.²⁰¹ Because Yaacoubi has dual citizenship and was accused of a crime of terrorism, he could be treated differently from those who have committed crimes of terrorism and have single citizenship.²⁰² Yaacoubi also alleged that the law violated principles of proportionality in punishment, but the Council rejected this argument.²⁰³

Since the November 2015 attacks, President Hollande called for amendments to the French Constitution that would allow the government to revoke the citizenship of dual citizens born in France during a state of emergency.²⁰⁴ Currently, the provision allows stripping only for naturalized citizens.²⁰⁵ The new measure would have expanded the government's current power by extending the provision to natural-born citizens.²⁰⁶

The Constitutional Council's logic is informative for deciding what factors the United States should examine in determining whether citizenship can be revoked. The Council ensures that principles of equality and proportionality are not violated by the provision. These considerations should also be relevant in the United States's calculus, especially because the current framework would not require decision makers to publish opinions explaining the logic behind revocation, such as the French court did. Another possibility would be to require published decisions by OLC or another organization in order to ensure greater accountability. The French

différente des situations différentes, ni à ce qu'il déroge à l'égalité pour des raisons d'intérêt général, pourvu que, dans l'un et l'autre cas, la différence de traitement qui en résulte soit en rapport direct avec l'objet de la loi qui l'établit") ("that the principle of equality is not in opposition to either that which the legislator regulated in a different manner in different situations, or those times he derogates from equality for general interest reasons, provided that, in either case, the difference in treatment that results is in direct relation to the objective of the law that it establishes").

201. *Id.*

202. *Id.*

203. *Id.* Yaacoubi had appealed the government's decision directly to the Constitutional Council. *French Court Approves Stripping Nationality of Franco-Moroccan Jihadist*, *supra* note 196.

204. Henry Samuel, *France Wants to Change Constitution to Extend Powers in State of Emergency*, TELEGRAPH (London) (Dec. 3, 2015), <http://www.telegraph.co.uk/news/worldnews/europe/france/12030960/France-wants-to-change-constitution-to-extend-powers-in-state-of-emergency.html>.

205. *French Court Approves Stripping Nationality of Franco-Moroccan Jihadist*, *supra* note 196.

206. Samuel, *supra* note 204.

approach appears to be more transparent than the Canadian and British approaches and should therefore serve as a model for a U.S. framework. Borrowing from the French approach could ameliorate some of the concerns with the executive's current approach, which has been heavily criticized for its lack of transparency.

While the French approach is more transparent than others, it has been roundly criticized by some French politicians. Christiane Taubira, the French Justice Minister, recently resigned as a result of her disagreement with President Hollande over the new citizenship stripping proposal, which would require a constitutional amendment.²⁰⁷ Taubira and many of her supporters believe that the measure discriminates among French citizens and would have no impact on deterring would-be terrorists.²⁰⁸ However, it seems that the Constitutional Council directly addressed the discrimination concern in its Yaacoubi decision. It is unclear whether or not the measure would actually deter would-be terrorists, but this can be said to be a concern with any counter-terrorism proposal. While the new proposal saw much support in the direct aftermath of the November 2015 attacks, Hollande dropped the proposed constitutional amendment in late March 2016.²⁰⁹ The language of the proposal had been altered multiple times by both legislative houses, and "a compromise . . . appear[ed] out of reach."²¹⁰

However, the United States would not necessarily face these sorts of hurdles. First, the United States would not need to adopt a constitutional amendment in order to adopt the proposals outlined in Part III. Second, discrimination could impact the analysis for a U.S. policy,²¹¹ so an approach would have to be crafted with this concern in mind. Finally, the French approach has been criticized as ineffective at deterring terrorists; however, this criticism is true of

207. Aurelien Breeden, *French Justice Minister Quits Over Plan to Strip Citizenship from Terrorists*, N.Y. TIMES (Jan. 27, 2016), <http://www.nytimes.com/2016/01/28/world/europe/france-christiane-taubira-justice-minister-resigns.html>.

208. *Id.*

209. Krishnadev Calamur, *The End of the Plan to Strip French Terrorists of Their Citizenship*, ATLANTIC (Mar. 30, 2016), <http://www.theatlantic.com/international/archive/2016/03/france-citizenship-law-dropped/475980>.

210. *Id.* The lower legislative house removed references to dual citizenship when it approved the bill due to criticisms that this specific reference would largely target the children of Muslim immigrants to France. *Id.* However, the upper legislative house restored the language and the debate continued to play out until it was clear that neither version of the measure had the required three-fifths support in both parliamentary houses. *Id.*

211. For example, such a policy could affect equal protection analysis traditionally undertaken by the courts on issues of discrimination.

almost any counterterrorism measure. Whether or not any policy actually deters would-be terrorists is a difficult question to answer, and any answer given would contain significant uncertainty.

4. Australian Approach

Australia also adopted a measure to facilitate citizenship revocation.²¹² The Minister for Immigration and Border Protection introduced the Australian Citizenship Amendment into the House of Representatives on June 24, 2015, stating that the bill was a response to the growing challenges presented by homegrown terrorism in Australia.²¹³ In this same introductory speech, the Minister stated that the bill “emphasises the central importance of allegiance to Australia in the concept of citizenship.”²¹⁴

The bill contains a purpose clause, which states, in relevant part, that the intention of the bill is to protect the community and uphold its values.²¹⁵ It is not “punishing terrorist or hostile acts.”²¹⁶ Under the prior regime, “a dual national may only renounce citizenship by a written application to the Minister.”²¹⁷ The new section 33AA, entitled “Renunciation by conduct,” provides for automatic renunciation if the individual “acts inconsistently with their allegiance to Australia by engaging in [certain conduct enumerated by the statute].”²¹⁸ When the Minister becomes aware of a person who has engaged in conduct²¹⁹ that would result in a loss of

212. *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth); *Australia Enacts Law to Strip Citizenship over Terror Offences*, BBC (Dec. 4, 2015), <http://www.bbc.com/news/world-australia-34980945>; see also Medhora, *supra* note 20.

213. PARLIAMENTARY JOINT COMM. ON INTELLIGENCE & SEC., ADVISORY REPORT ON THE AUSTRALIAN CITIZENSHIP AMENDMENT (ALLEGIANCE TO AUSTRALIA) BILL 2015, at 1 (2015) (citing Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2015, 7369 (Peter Dutton, Member of Parliament, Minister for Immigration and Border Protection) (Austl.)) [hereinafter ADVISORY REPORT].

214. *Id.*

215. *Id.* at 10.

216. *Id.* (quoting Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) 4).

217. ADVISORY REPORT, *supra* note 213, at 11.

218. *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth) ss 33AA(1)–(2).

219. *Id.* s 33AA(2) (including as conduct, “(a) engaging in international terrorist activities using explosive or lethal devices; (b) engaging in a terrorist act; (c) providing or receiving training connected with preparation for, engagement in or assistance in a terrorist act; (d) directing the activities of a terrorist organization; (e) recruiting for a terrorist

citizenship, he or she must be given written notice to that effect,²²⁰ strengthening the due process afforded to the accused individual through the need for this timely notice. However, the Minister also has the power to rescind notices and exempt persons from the aforementioned section.²²¹

The bill also includes an amendment to section 35 of the Australian Citizenship Act, which governs revocability based on service in a foreign military. The section previously allowed for a person to be stripped of his or her citizenship if “they are a foreign national or citizen and they serve in the armed forces of a country at war with Australia.”²²² The amendment expanded this automatic ground for revocation to any person who “fights for, or is in the service of, a declared terrorist organization.”²²³ The loss of citizenship under both provisions is automatic, and a conviction would not be required for revocation to take effect.²²⁴

Further, the amendment to section 35A provides that a person automatically loses Australian citizenship if she is convicted of certain offenses enumerated in the Criminal Code.²²⁵ Some of the enumerated crimes include “[p]roviding or receiving training connected with terrorist acts”;²²⁶ “[f]inancing a terrorist”;²²⁷ “[p]roviding support to a terrorist organization”;²²⁸ and “[e]ntering or

organization; (f) financing terrorism; (g) financing a terrorist; [and] (h) engaging in foreign incursion and recruitment”).

220. *Id.* s 33AA(10).

221. *Id.* s 33AA(12).

222. ADVISORY REPORT, *supra* note 213, at 13.

223. *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth) s 35(1)(b)(ii).

224. ADVISORY REPORT, *supra* note 213, at 14.

225. *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth) ss 35A(1)(a)(i)–(vi) (defining the relevant crimes to include international terrorist activities using explosive or lethal devices; treason; terrorist acts; providing or receiving training connected with terrorist acts; other acts done in preparation for, or planning, terrorist acts; and others).

226. ADVISORY REPORT, *supra* note 213, at 15 (citing *Criminal Code Act 2015* (Cth) s 101.2); *see Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth) s 35A(1)(a)(iii).

227. ADVISORY REPORT, *supra* note 213, at 16 (citing *Criminal Code Act 2015* (Cth) s 103.2); *see Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth) s 35A(1)(a)(iii).

228. ADVISORY REPORT, *supra* note 213, at 16 (citing *Criminal Code Act 1995* (Cth) s 102.7); *see Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth) s 35A(1)(a)(iii).

remaining in a declared area.”²²⁹

These provisions are similar to the Canadian approach insofar as there are enumerated crimes that would satisfy the requirement for expatriation. Again, the fact that the statute lists particular actions enhances its transparency and ensures additional accountability for the adjudicators because they are constrained by certain statutory elements. Another notable feature of the Australian approach is its emphasis on allegiance. While many of the other approaches highlight the incapacitation of terrorists, Australia’s approach seems to be, at the very least, a strong symbol of a commitment to tie citizenship to actual allegiance with the State. The following Section discusses the philosophical support for this approach.

C. Symbolic Value: Allegiance as an Essential Element of Citizenship

Adopting citizenship stripping in a limited number of circumstances has significant symbolic justifications, as it would tie U.S. citizenship to allegiance and commitment to the State. Scholars like Ashwini Vasanthakumar maintain that policymakers should consider allegiance as an essential element of citizenship. He invokes Supreme Court doctrine, explaining that, “an American national is statutorily defined as any ‘person owing permanent allegiance to the United States.’”²³⁰ Vasanthakumar argues that allegiance is essential to citizenship and retains importance in U.S. jurisprudence. The fact that its importance is still contested “suggest[s] that references to allegiance are not purely ceremonial.”²³¹ While this may limit access to citizenship in a potentially undesirable way,²³² this underlying principle has a strong

229. ADVISORY REPORT, *supra* note 213, at 16 (citing *Criminal Code Act 1995* (Cth) s 119.2); see *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth) s 35A(1)(a)(iv). In a speech about the new law, the Minister for Immigration and Border Protection stated that a person who loses their citizenship under the new law “would be able to seek a declaration from a court that they have not in fact lost their citizenship. Members would be aware that there is no need to mention this explicitly in the bill because the Federal Court and High Court both have original jurisdiction over such matters.” ADVISORY REPORT, *supra* note 213, at 146.

230. Vasanthakumar, *supra* note 159, at 190 (quoting 8 U.S.C. §1101(a)(22) (2012)).

231. Vasanthakumar, *supra* note 159, at 190 (citing *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004), to demonstrate that the debate surrounding the pledge of allegiance indicates an ongoing debate with respect to the importance of allegiance in U.S. jurisprudence).

232. Vasanthakumar, *supra* note 159, at 192.

foundation in U.S. history and would be reinvigorated if the United States were to engage in citizenship revocation.²³³ Vasanthakumar writes that the Court's decisions leave room "for a category of acts that, irrespective of the citizen's stated intention, cannot but be deemed to be a voluntary abandonment of citizenship, and thereby justify expatriation."²³⁴ He argues that an allegiance-based view of citizenship would simplify the removal of citizenship because it would "check the liberalizing trend towards citizenship celebrated by many as a victory for individual rights."²³⁵

Additional philosophical scholarship exists supporting either the reintroduction of allegiance as a necessary component of citizenship or at least establishing allegiance as an element sufficient to justify denaturalization. Under Locke's, Mill's, and Rawls's conceptions of citizenship, the right "cannot apply to circumstances in which the citizen does not fulfill his primary obligation towards the state and towards its members—the obligation of loyalty."²³⁶ Under this philosophical approach, denaturalization need not be linked to a lapse in allegiance. Because the State is seen as granting benefits to the citizen, it may revoke the benefits of those that it believes are unworthy of them.²³⁷ While no liberal democracy has gone as far as to revoke citizenship on such a basis alone, changes abroad indicate that other countries have embraced, to at least some degree, allegiance as an element of citizenship.

Each of the allied States discussed in the previous Section have tied citizenship to allegiance in some way. The Australian approach is most explicit, explaining that a key justification behind the new proposal is to reinvigorate allegiance as an element of citizenship.²³⁸ However, the British and Canadian approaches can also be seen as embodying this philosophy because they allow for revocation if an individual engages in actions that subvert the State's interest.²³⁹ While this is certainly more vague, this language requires one to have some form of allegiance to the home State insofar as a

233. While there are competing conceptions of citizenship that do not involve allegiance, this Note only discusses allegiance because it has been frequently invoked by allied states in their justifications for citizenship stripping measures. *See, e.g.*, discussion *supra* Section II.B.4.

234. Vasanthakumar, *supra* note 159, at 213.

235. *Id.* at 192.

236. Gross, *supra* note 91, at 57.

237. *Id.* at 57 (citing T. Alexander Aleinikoff, *Symposium on Law and Community: Theories of Loss of Citizenship*, 84 MICH. L. REV., 1471, 1473–75 (1986)).

238. *See* discussion *supra* Section II.B.4.

239. *See* discussions *supra* Sections II.B.1–II.B.2.

citizen cannot act against its “vital interests.”²⁴⁰ Even the French approach, which hardly addresses allegiance, can be said to contain some sort of allegiance element, as it emphasizes terrorist acts specifically. By emphasizing terrorist activities, the French Civil Code identifies a set of actions that necessarily reject allegiance to the given state. Furthermore, the Constitutional Council’s decision emphasized the importance of equality under the law and proportionality of punishment, which are two features of liberal democracies that are repudiated by terrorist groups seeking to establish a caliphate where neither of those protections would exist. In this sense, the French approach is tethered to allegiance to a set of principles and not necessarily to one particular state.

Any change to the U.S. approach should also be grounded in allegiance to the state. As Vasanthakumar discusses, tying allegiance to citizenship is not a significant departure from the current doctrine for the United States.²⁴¹ There is significant expressive value in adopting an approach that would disallow individuals, who are serious threats to national security and seek to commit heinous crimes against U.S. citizens, from also reaping the benefits and protections of U.S. citizenship.

III. THE FUTURE OF CITIZENSHIP STRIPPING

By looking to the various approaches to citizenship stripping, philosophical perspectives on citizenship, and the needs of U.S. national security, it is possible to sketch a set of requirements that would help any future administration in determining which citizens should be seen as presumptively denaturalized. This Part identifies a set of requirements that should be present in order for the United States to revoke citizenship from a suspected terrorist.

These requirements would be operationalized by the executive branch’s adoption of an internal policy to govern the cases meeting the criteria below. Since the executive branch currently governs this area of law, it seems fitting that the branch would continue to deal with these cases internally rather than through the courts or through legislation. As discussed above, each element would have to be satisfied by a preponderance of the evidence.²⁴² Anwar al-Aulaqi’s decision was not subject to judicial review;

240. See discussion *supra* Section II.B.1.

241. Vasanthakumar, *supra* note 159, at 213.

242. See *supra* notes 60–61 and accompanying text.

however, decisions made regarding these factors could either be reviewed by courts or by an intermediate administrative body, such as the Board of Appellate Review or a similar tribunal.²⁴³

A. Dual Citizenship

While the United States is not member to any binding legal document prohibiting it from rendering a person stateless, one of the key criticisms of the allied States' approaches is the possibility of statelessness. The State Department's policies and positions in this area demonstrate that the government would be unlikely to adopt an approach that would render people stateless.²⁴⁴ As a result, any decision-making body should consider whether or not citizenship revocation would render the person in question stateless. If it did, it is likely that the revocation would receive significant criticism from the international community and, possibly, from domestic organizations as well. Further, Anwar al-Aulaqi was an U.S.-Yemeni dual citizen, meaning that this requirement would be consistent with the facts of his case.

On the other hand, criticisms of the French and Canadian approach are that they treat dual citizens differently from those with a single citizenship. It is possible that such a requirement would lead to equal protection challenges, such as it did in France.²⁴⁵ An equal protection challenge would require the dual citizen to argue that the distinction between sole and dual citizens violates the Equal Protection Clause. Strict scrutiny in equal protection claims is primarily reserved for a small subset of suspect classifications, including race, national origin, and alienage.²⁴⁶ On its face, citizenship status does not fit into any of the categories that would receive strict scrutiny, although the closest category that it aligns with is alienage.

Alienage could arguably be a basis for a court to apply strict scrutiny; however, the Supreme Court's doctrine in that area deals

243. See *supra* notes 30–32 and accompanying text.

244. See discussion *supra* Section II.A.

245. See discussion *supra* Section II.B.3.

246. Jenny Rivera, *An Equal Protection Standard for National Origin Subclassifications: The Context That Matters*, 82 WASH. L. REV. 897, 897 (2007) (stating that national origin-based classifications are subject to strict scrutiny); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L.J. 485, 489 (1998) (stating that classifications based on race and alienage are subject to strict scrutiny).

with the difference between citizens and non-citizens, and not with the difference between sole and dual citizens. For example, the Court struck down a law that conditioned the payment of state welfare benefits on citizenship.²⁴⁷ It also struck down a state law that limited bar membership to citizens, finding that citizenship was not closely related to one's ability to act as a lawyer.²⁴⁸ However, the Court has carved out an exception to strict scrutiny for alienage classifications if the classifications are "bound up with the operation of the State as a governmental entity."²⁴⁹ The Court has never applied strict scrutiny to a case distinguishing dual citizens from those with only one citizenship, indicating that any equal protection challenge would likely be subject to rational basis review. Under rational basis review, the equal protection challenge would likely fail because courts will often defer to the classifications made by the other branches of government in developing the policy in question.²⁵⁰

B. Expanding Intent

Intent and its clarity are the most important requirements under this framework because the Supreme Court is explicit about the necessity to ensure that individuals subjected to citizenship revocation intended to relinquish said citizenship through his or her actions.²⁵¹ Cases like *Schiffer* demonstrate that there is a way to interpret current doctrine that would allow for intent to be inferred based on the actions taken by the individual.²⁵² One possible extension of this doctrine could be to enumerate more specifically the conduct that would satisfy this requirement. It seems that one of the most important features of the Canadian and Australian approaches is

247. See *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (“[W]e hold that a state statute that denies welfare benefits to resident aliens and one that denies them to aliens who have not resided in the United States for a specified number of years violate the Equal Protection Clause.”).

248. See *In re Griffiths*, 413 U.S. 717, 724 (1973) (“Certainly the Committee has failed to show the relevance of citizenship to any likelihood that a lawyer will fail to protect faithfully the interest of his clients.”).

249. See *Ambach v. Norwick*, 441 U.S. 68, 73–74 (1979) (upholding a state law excluding aliens from work as a public school teacher using rational basis review). *But see* *Bernal v. Fainter*, 467 U.S. 216 (1984) (striking down a state law prohibiting aliens from becoming notary publics).

250. See generally Clark Neily, *No Such Thing: Litigating Under The Rational Basis*, 1 N.Y.U. J.L. & LIB. 898 (2005).

251. See *supra* notes 44–45, 53–59 and accompanying text.

252. See *supra* notes 68–73 and accompanying text.

the transparency that is created by virtue of the statute's elements.²⁵³ Similarly here, any measure that is adopted should list out the conduct that would be seen as presumptively expatriating. These actions should include, but are not limited to, taking a significant role in planning and executing terrorist attacks. For example, al-Aulaqi was a key participant in the attacks at the World Trade Center, Fort Hood, and the failed underwear bombing.²⁵⁴ For purposes of this analysis, merely planning an attack would be insufficient. The citizen would have to attempt to execute the attack in order to fall within the framework. Individuals who can be definitively tied to terrorist attacks should be seen as intending to relinquish citizenship.

Another potential factor for adjudicators to consider is the clarity of the intent. Al-Aulaqi made specific statements concerning the war against America and was incredibly clear about his intention to wage war against the United States. This clarity allows the government to assume that he intended to forfeit his citizenship and is in line with the statutory framework set out under the INA. Because the INA contains an expatriating provision for those fighting in a foreign army, the fact that al-Aulaqi stated that America was at war with Islam speaks to his perspective on engaging in "hostilities against the United States."²⁵⁵ The executive branch should consider the clarity of the intent when deciding whether or not it is appropriate to revoke a person's citizenship. The standard of review for clarity of intent should be preponderance of the evidence, as this mirrors the existing standard under *Afroyim*.²⁵⁶

This element and its consistency with the statutory scheme are particularly notable given the current threat because the Islamic State's goal is to create a global caliphate.²⁵⁷ ISIS has declared unilateral statehood,²⁵⁸ meaning that an individual who has pledged allegiance to ISIS may see himself or herself as fighting in the armed forces of a "State" engaged in hostilities against the United States. By looking to the individual's intention and his or her perspective on the conflict and their individual role, it seems that citizens who pledge allegiance and take actions to assist ISIS fall clearly within

253. See discussion *supra* Sections II.B.2 and II.B.4.

254. See *supra* notes 7–8 and accompanying text.

255. 8 U.S.C. § 1481(a)(3) (2012).

256. *Afroyim v. Rusk*, 387 U.S. 253, 261 (1967).

257. Tim Lister, *What Does ISIS Really Want?*, CNN (Dec. 11, 2015), <http://www.cnn.com/2015/12/11/middleeast/isis-syria-iraq-caliphate>.

258. Joe Boyle, *Islamic State and the Idea of Statehood*, BBC (Jan. 6, 2015), <http://www.bbc.com/news/world-middle-east-30150681>.

the bounds of the INA's elements.

Relatedly, OLC's analysis turned in part on the fact that the United States was in a congressionally authorized armed conflict with al-Qaeda and that al-Aulaqi was a leader of that force.²⁵⁹ While the United States is not formally at war with ISIS, President Obama has stated, "At the outset, I want to reiterate our objective in this fight. Our mission is to destroy [ISIS]."²⁶⁰ Even if the conflict against ISIS is not congressionally authorized, if an individual were to announce his or her loyalty to ISIS in connection with an attack, that declaration would certainly strengthen the intent element of the test. The same can be said for a person who is considered a high level operative in the terrorist group. The higher the individual ranks within the terrorist group, the easier it would be to infer that person's intent to relinquish citizenship. Considering these factors, which OLC deemed important, as elements within the intent requirement would limit the possibility for abuse of this policy.

C. Overt Action

An additional requirement should be that the citizen take overt actions in furtherance of a terrorist attack. Decisions to revoke citizenship should take into consideration the nature of the citizen's actions. This factor is connected to intent, but requires the executive branch to take a closer look at the impact of the citizen's actions on national security. Cruz's proposal, which would allow for revocation in the same circumstances that would satisfy the material support statutes, would be insufficient to address the risks of spillover and misidentification.²⁶¹ Looking to al-Aulaqi as an example indicates that the executive branch would have to tie the individual to actual terrorist attacks or plots in order to justify finding presumptive intent to forfeit citizenship.

In allied States, citizenship stripping often occurs when individuals have already been convicted and served their sentence for participating in a terrorist activity. For example, in France, Yaacoubi was convicted of participating in terrorist activities and authorities learned that he radicalized individuals while in prison for his

259. OLC Memorandum, *supra* note 85, at 23–24.

260. Michele Gorman, *Transcript: President Obama's Remarks on ISIS After Orlando Mass Shooting*, NEWSWEEK (Jun. 14, 2016), <http://www.newsweek.com/president-obamas-remarks-isis-after-orlando-mass-shooting-470429>.

261. See *supra* notes 131–36 and accompanying text.

crimes.²⁶² In Canada, Zakaria Amara is one of the first terrorists to have his citizenship revoked. Amara is the ringleader of the Toronto 18, a group of youths convicted of plotting a significant terrorist attack in Southern Ontario.²⁶³ Upon the passing of Bill C-24, Amara received a letter, while incarcerated, notifying him that he was no longer a Canadian citizen.²⁶⁴ Canadian legislators seem to view his actions as embodying intent to forfeit citizenship. In fact, Member of Parliament Jason Kenney tweeted on September 27, 2015, “[t]his man hate[s] Canada so much, he planned on murdering hundreds of Canadians. He forfeited his own citizenship.”²⁶⁵

In each of the aforementioned cases, the State tied the individual to actions taken in furtherance of legitimate terrorist plots. This kind of connection to legitimate threats is necessary in order to address the concerns regarding misidentification and over-inclusiveness discussed in Part II. Creating a framework that would require only statements or propaganda as proof of intent would run the risk of violating the First Amendment rights of law-abiding citizens by allowing for hate speech or other anti-American rhetoric to serve as the basis for citizenship forfeiture.²⁶⁶ Broadening the approach any wider would create an impossible line-drawing problem where the administration would be forced to engage in subjective analysis of the kind this Note seeks to challenge.²⁶⁷

262. *French Jihadi Stripped of Passport and Deported*, LOCAL (Sept. 24, 2015), <http://www.thelocal.fr/20150924/terrorist-stripped-of-french-passport>.

263. The targets of the Toronto 18 plot included Parliament Hill, the Canadian Security Intelligence Service headquarters, the Toronto Stock Exchange, and the Prime Minister. See Isabel Teotonio, *Toronto 18*, STAR (Toronto), <http://www3.thestar.com/static/toronto18/index.html>.

264. *Toronto 18's Zakaria Amara Among 1st to Lose Citizenship Under Bill C-24*, CBC (Sept. 26, 2015), <http://www.cbc.ca/news/canada/toronto-18-ringleader-citizenship-1.3245319>.

265. Jason Kenney (@jkenney), TWITTER (Sept. 27, 2015, 12:26 PM), <https://twitter.com/jkenney/status/648217283492315136>.

266. The First Amendment protects freedom of speech and associated rights such as freedom of assembly and religion. U.S. CONST. amend. I. Using propaganda or statements as proof of intent to engage in terrorism could raise First Amendment concerns because this approach runs the risk of chilling that category of speech, which is protected even if it is considered anti-American. S. Cagle Juhan, Note, *Free Speech, Hate Speech, and the Hostile Speech Environment*, 98 VA. L. REV. 1577, 1578 (2002).

267. Notice is an additional requirement that would curb the subjective and opaque nature of the citizenship stripping process. The amount of notice given could depend on a multitude of factors, such as whether the person has announced that she or her affiliated terrorist group is in an armed conflict with the United States. Other factors that could bear on notice include whether the person is living abroad and whether she has announced that she is a leader in the terrorist group. The notice requirement would be best employed using

D. Nexus

One additional element that emerges from the doctrine is a link between the planned attack and the United States. For example, al-Aulaqi was linked to domestic attacks. In *Schiffer* the court emphasized that the actions taken as a concentration camp guard in guarding prisoners, which included U.S. citizens, was inconsistent with intent to retain citizenship.²⁶⁸ Amara's actions in Canada also contained a nexus to domestic territory.²⁶⁹

The nexus could be satisfied either by linking the accused to attacks on U.S. soil or by linking the accused to any action that has harmed U.S. citizens. *Schiffer* seems to leave room for an approach that assumes forfeiture where the citizen has knowingly engaged in actions that lead to the direct harm of U.S. citizens. While today's geopolitical context differs from that of *Schiffer*, the transnational nature of terrorism and terrorist plots allows for comparison between the two. The nexus requirement should be seen as closely linked to the overt action requirement. The decision-making body should examine the totality of the circumstances, looking to both the strength of the U.S. nexus and the actions taken by the individual because this would be relevant in revealing the intent of the actor. The totality of al-Aulaqi's actions manifested his intent, both to commit attacks, and also to do so on U.S. soil. The best reading of the jurisprudence in this area is that an individual can manifest intent through his or her actions, and both the overt action requirement and the nexus help set out a baseline for this manifestation of specific intent.

CONCLUSION

The Obama administration's drone policy created a fierce debate about the legal justification for killing U.S. citizens. This Note responds to the issues created by the given legal justifications by pointing to citizenship forfeiture as an avenue for addressing a small class of persons, like Anwar al-Aulaqi, who spoke and acted so fervently against U.S. security interests, that his intent to forfeit his citizenship should be presumed. This Note demonstrates that the

a sliding scale approach: if a suspect announced that her group is in an armed conflict with the United States, that suspect would receive less notice than one who is acting alone.

268. *United States v. Schiffer*, 831 F. Supp. 1166, 1193 (E.D. Pa. 1993), *aff'd*, 31 F.3d 1175 (3d Cir. 1994).

269. *See supra* notes 263–63 and accompanying text.

Office of Legal Counsel missed a more natural analysis when it concluded that al-Aulaqi was a U.S. citizen with the same due process rights as all other citizens. Perhaps OLC did not believe that the doctrine set forth by the Supreme Court left room for an interpretation that would allow for citizenship revocation. However, *Schiffer* and the emerging doctrine from U.S. allies suggests a willingness to revisit an issue that was left essentially untouched after World War II.

Although citizenship-stripping measures have received criticism in the States that have adopted them, it is possible to identify a set of individuals who can be seen as presumptively forfeiting their citizenship. Anwar al-Aulaqi is one of those individuals, and using the facts of his case can inform U.S. policymakers and legal scholars when establishing a framework for citizenship forfeiture that protects due process and balances the needs of national security. In fact, the proposal not only meets constitutional standards, but it also leads to a more honest and restrained national security policy, with less potential for overreach than the status quo, which contains little to no transparency or possibility for review. This approach would protect civil liberties insofar as it would limit the negative externalities on due process doctrine associated with OLC's *Mathews* analysis.²⁷⁰

By allowing for citizenship forfeiture, the government can address the concerns created by the OLC memorandum. By requiring dual citizenship, nexus, and setting out particular activities that embody specific intent to relinquish, this proposal would narrow the scope of citizenship doctrine, allowing the government to address the concerns created by the OLC memorandum. Citizenship stripping would also strengthen the importance of citizenship rights in a world where the prevalence of non-state actors continues to grow. As the unit of measurement by which policymakers understand diplomacy becomes smaller, legal actors must react to safeguard the legal protections afforded to U.S. citizens by virtue of their citizenship.

Citizenship has become an incredibly malleable concept, differentiating today's legal landscape from that of the Supreme Court's key decisions in this area. While no approach to citizenship stripping will be flawless, adopting these safeguards would put the

270. For example, in the post OLC-memorandum world, an adjudicator could conceivably rule that an absence of any procedural due process is acceptable if the government interest is great enough. If that adjudicator were required to assess a set of factors, as suggested in this Note, it would ensure at least some reviewability and transparency that does not exist under the current approach.

United States in line with allied nations, create much-needed transparency in an opaque area of governance, and constrain the government's ability for post-hoc justification of drone strikes or citizenship stripping. This proposed framework would also contain significant expressive value in that it would tie U.S. citizenship to allegiance, which retains philosophical support in other states and among legal scholars. Finally, this tightened framework would alleviate concerns associated with a broader citizenship stripping measure. These concerns include abiding with international law, wrongful identification, and exporting suspected terrorists to other States. OLC has conducted legal gymnastics to justify the targeted killing of U.S. citizens abroad, and there is a simpler and more just solution to the problem of domestic terrorists. That solution is to identify the group of citizens that can be seen as forfeiting their citizenship rights, and identifying these individuals starts with the case of Anwar al-Aulaqi. By using this test case to inform future decisions, the executive branch can protect law-abiding U.S. citizens from watered down due process protections and from the growing threat of terrorism.

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