



January 19, 2016

Re: Opposition to S.247

Dear Senator:

We write to urge you to oppose S. 247, the Expatriate Terrorists Act [ETA], introduced by Senator Ted Cruz (R-TX), which is on the markup calendar for the Senate Judiciary Committee for Thursday. The bill could also come to the Senate floor as an amendment as soon as this week, if cloture is invoked on H.R. 4038.¹ The ACLU and the Constitution Project have previously written to discuss the constitutional problems with S.247.² We write again to emphasize the practical dangers that the Cruz bill poses. Because Congress has never held a hearing on S. 247, the Senate has not considered the full potential impact of the legislation, including harms that may not be obvious from a quick reading of the bill's text.

In the current climate of fear, with political leaders openly calling to deny Muslims entry to the United States, Congress cannot ignore the risk that a future administration would use the ETA to strip U.S. citizenship from innocent Americans without fair process, and those Americans might never make it into court to challenge the government's findings.

The ETA would make “providing training or material assistance to” a foreign terrorist organization grounds for loss of citizenship. The bill does not define “training” or “material assistance,” and does not require a criminal conviction or any other judicial process.³ In practice, denaturalization would only require a written finding by a government official that an American had provided “material assistance” to a terrorist group with the intent of relinquishing his or her citizenship.⁴

¹ The ACLU has separately written in strong opposition to H.R. 4038. See https://www.aclu.org/sites/default/files/field_document/15_11_19_aclu_vote_recommendation_opposing_hr4038_anamerican_safe_act_of_2015_0.pdf.

² The ACLU’s previous letter is available at https://www.aclu.org/sites/default/files/field_document/2015_11_18_oppose_s_247_expatriate_terrorists_act.pdf. The Constitution Project’s previous letter is available at <http://www.constitutionproject.org/wp-content/uploads/2015/11/11-18-15-Letter-Terrorist-Expatriation-Act-SJC.pdf>

³ Similar language in 18 U.S.C. § 2339B, the criminal material support statute, was ruled unconstitutionally vague until Congress added specific definitions. See *Humanitarian Law Project et al. v. U.S. Department of Justice et al.*, 352 F.3d 382, 403-404 (9th Cir. 2003) (vacated on other grounds). In the immigration context, asylum-seekers have at times had their claims denied for providing “material support” to terrorist groups under duress, or for providing medical treatment to the wounded. See *Annachamy v. Holder*, 686 F.3d 729, 734–36 (9th Cir. 2012); Human Rights First, *Abandoning the Persecuted: Victims of Terrorism and Oppression Barred From Asylum* (2009).

⁴ See 22 C.F.R. § 50.40: (“ . . . A person who affirmatively asserts to a consular officer, after he or she has committed a potentially expatriating act, that it was his or her intent to relinquish U.S. citizenship will lose his or her U.S. citizenship. In other loss of nationality cases, the consular officer will ascertain whether or not there is evidence of intent to relinquish U.S. nationality.”) (emphasis added).

For example, an American who travels outside the country to provide humanitarian assistance or medical care, or to conduct peace building in a troubled region, could be mistakenly accused by a consular officer of training or materially assisting terrorists. If the State Department approved this finding, it would issue a certificate of loss of nationality, and attempt to mail a copy to the individual being denaturalized.⁵ The State Department would also likely revoke the individual's passport.⁶ All of this could occur without the citizen having any opportunity to confront the evidence against him or have an independent court review the executive branch's decision.

In a war-torn or remote region, it is not clear how denaturalized persons would even receive notice of the State Department's decision, let alone successfully challenge it in court. They might only learn at a foreign border crossing or airport that State Department officials had stripped them of their U.S. citizenship and passport. Beyond the practical difficulties of getting to safety and finding an attorney, it is unclear whether there is a statutory basis for judicial review of the State Department's decision.⁷

Applicable federal regulations would not prohibit this scenario. Current State Department policies would, but those policies could be changed by a future administration with the stroke of a pen. Even under current law, there have been credible reports of citizens having passports mistakenly confiscated by the U.S. embassy in Sanaa, Yemen, and effectively denied their government's protection in a war zone.⁸ If the ETA is signed into law, the risk of similar incidents will dramatically increase. American citizens working overseas in unstable regions could lose both the protection of the United States government and the ability to exit a dangerous country, based solely on the decision of an unnamed State Department official.

Of course, the ETA cannot change the 5th and 6th Amendments, which forbid denaturalization as punishment for any act "without a prior criminal trial and all its incidents."⁹ It also cannot change the 14th Amendment, which the Supreme Court has held gives every American "a right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship."¹⁰ But the

⁵ The State Department would also forward a copy of the certificate to the United States Citizenship and Immigration Services. See 8 U.S.C. § 1501; 22 C.F.R. § 50.40 (e).

⁶ See 22 C.F.R. § 51.62 (b) (State Department "may revoke a passport when the Department has determined that the bearer of the passport is not a U.S. national, or the Department is on notice that the bearer's certificate of citizenship or certificate of naturalization has been canceled"); 22 C.F.R. §§ 51.60(C)(4), 51.62 (State Department has the authority to deny or revoke a passport to anyone whose "activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States.") The ETA would also mandate passport denial or revocation for anyone the Secretary of State determined "is a member, or is attempting to become a member" of a foreign terrorist organization.

⁷ See 18 U.S.C. § 1503(a) ("any person who is within the United States" and is denied the rights and privileges of citizenship may sue under the Declaratory Judgment Act); 18 U.S.C. § 1503(b) (individuals outside the United States must apply to consular officials "for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission"). *But see Kahane v. Secretary of State*, 700 F.Supp. 1162, 1165 n.3 (D.D.C. 1988); *Icaza v. Schultz*, 656 F.Supp. 819, 822 n.5 (D.D.C. 1987) (district court decisions allowing individuals outside the United States to sue under 18 U.S.C. § 1503(a)).

⁸ E.g. http://www.nytimes.com/2015/05/28/nyregion/yemeni-americans-thrust-into-limbo-say-us-embassy-unfairly-revokes-passports.html?_r=1; <http://www.theguardian.com/world/2014/jul/22/yemeni-americans-us-embassy-sanaa-passports>.

⁹ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-68 (1963).

¹⁰ *Afroyim v. Rusk*, 287 U.S. 253, 268 (1967). See also *Vance v. Terrazas*, 444 U.S. 252, 260 (1980).

bill is ripe for abuse, and could be implemented in a manner that jeopardizes innocent American citizens' constitutional rights.

For these reasons, we respectfully urge you to stand up for the Constitution, and oppose the Expatriate Terrorists Act. Please contact Chris Anders at canders@aclu.org or (202) 675-2308, and Katherine Hawkins at khawkins@constitutionproject.org or (202) 580-6928 if you have any questions regarding this letter

Sincerely,

American Civil Liberties Union
The Constitution Project