Legal Sidebar

Man without a Country? Expatriation of U.S. Citizen "Foreign Fighters"

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Some Members of Congress have advocated and sponsored bills for expatriation, one way of losing citizenship, as a method of dealing with U.S. citizens fighting abroad for foreign terrorist groups such as the Islamic State in Iraq and Syria (ISIS). This phenomenon has piqued concern in Congress about the possibility that such citizens may return to the United States to perpetrate terrorist acts on U.S. soil or may flout U.S. foreign policy by continuing to fight abroad for such groups. The latter is particularly a concern since President Obama recently announced a plan for U.S. involvement in combating ISIS abroad. Expatriation differs from denaturalization, where a federal court revokes naturalization upon finding that an immigrant committed fraud or misrepresentation in gaining admission to the U.S. or in obtaining citizenship. The bills introduced generally would amend the existing expatriation statute to include specified acts of allegiance or support for a designated foreign terrorist organization (DFTO) as potentially expatriating acts.

The current law enumerates seven actions that may result in the expatriation of a U.S. citizen, regardless of whether that person is a citizen by birth or naturalization. These acts demonstrate an allegiance to another nation which may be incompatible with allegiance to the U.S. The most relevant acts for the pending bills include: (1) taking an oath of allegiance to a foreign state or one of its political subdivisions; (2) serving in the armed forces of a hostile foreign state or serving as a commissioned or non-commissioned officer in the armed forces of any foreign state; and (3) serving in any office, post or employment under a foreign state's government after turning 18 years old, if one is also either a dual national of that state or is required to swear or declare allegiance to that state for the position. For these particular acts, a citizen cannot be expatriated while he is in the U.S. or its possessions. However, acts committed in the U.S. or its possessions can be grounds for expatriation once the citizen leaves the U.S. and resides outside of it and its possessions. Also, a citizen who asserts his claim to U.S. citizenship within six months of becoming 18 years old cannot be expatriated because of serving in the armed forces of a foreign state or making a formal renunciation abroad before a U.S. diplomatic or consular official before the age of 18 years.

None of the acts listed above result in expatriation unless committed voluntarily and with the intent to relinquish citizenship. These requirements are derived from U.S Supreme Court interpretation of the constitutional requirements for expatriation. In *Afroyim v. Rusk*, the Court found that the Citizenship Clause of the Fourteenth Amendment prevents Congress from legislating the automatic loss of citizenship acquired by naturalization or birth in the U.S. merely because of specified conduct, without the citizen's assent. Then, in *Vance v. Terrazas*, the Court elaborated on its earlier *Afroyim* decision by holding that the U.S. Government must prove specific intent to renounce citizenship. The current expatriation statute requires that the burden of proof is on the party claiming that expatriation occurred, *i.e.*, the U.S. Government, to establish the claim by a preponderance of the evidence. Any act of expatriation will be presumed to have been done voluntarily, but the presumption may be rebutted by a preponderance of the evidence that the act was not done voluntarily. In *Terrazas*, the Court upheld these statutory evidentiary standards as constitutional, but in light of *Afroyim* and the Fourteenth Amendment, it held that no presumption of intent arises from an expatriating act. The Court also indicated that a finding of intent does not require a written, express relinquishment of citizenship, but could be inferred from conduct that was completely inconsistent with and derogatory to allegiance to the U.S. and could be established by a preponderance of the evidence.

The case law resulting from expatriation disputes reflects the complexity of determining an individual's intent and volition from the circumstances of a particular action. For example, a court of appeals has rejected the defense of economic duress to rebut the presumption of voluntariness of an act in the absence of "some degree" of economic hardship, while another court of appeals has said that economic duress may

avoid expatriation, but the citizen's economic plight must be "dire." As another example, a district court has found that holding office in a foreign legislature is not expatriating in the absence of a specific intent to renounce U.S. citizenship. Subsequently, the plaintiff in that case lost his U.S. citizenship when the laws of the foreign country changed to prohibit dual citizenship by legislative members. The plaintiff wished to run to retain his foreign office and renounced his U.S. citizenship, but was still unable to run for office for other reasons. His subsequent attempt to retract his renunciation was deemed ineffective because he had already voluntarily and intentionally renounced U.S. citizenship; the legal requirements of holding office in a foreign country did not constitute duress.

Congress does not have unlimited authority to prescribe acts as potentially expatriating. Certain actions, formerly included in the list of expatriating acts under the current statute or its precursor, were found unconstitutional for various reasons by the U.S. Supreme Court and subsequently repealed. These include desertion from the armed forces in wartime, draft evasion during wartime or a national emergency, and voting in a foreign election. Additionally, the U.S. Supreme Court has held that the Fifth Amendment bars lawfully naturalized citizens from losing citizenship for acts that do not apply to native-born citizens. Having satisfied the statutory requirements for naturalization, naturalized citizens are also citizens under the Citizenship Clause. On the other hand, the Court has further held that Congress has the power to authorize loss of citizenship by a person who became a citizen at birth under a statute granting citizenship to persons born abroad to U.S. citizen parent(s), not under the Citizenship Clause, and who subsequently failed to satisfy a statutory condition for retaining citizenship.

The pending bills may raise potential legal issues regarding the scope of some of the acts in the bills, such as being a member of and/or providing material assistance to a designated foreign terrorist organization (FTO). The U.S. Supreme Court, however, has upheld the criminal convictions of U.S. citizens for similar acts, finding that, as applied, the criminal statute neither violated the Fifth Amendment due to vagueness nor infringed the First Amendment rights to free speech and association. An FTO may also seek judicial review of a designation. Lower federal courts, however, have rejected collateral attacks on convictions for material support of designated FTOs based on the designation's invalidity. The criminal offense is based on the fact of the organization's designation, not the validity of it. Given the constitutional protections against inadvertent loss of citizenship, the courts may analyze issues of validity of a designation and knowledge of the alleged expatriate differently than they have in the criminal context.

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