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## Patriot Act II and Denationalization: An Unconstitutional Attempt to Revive Stripping Americans of Their Citizenship

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PATRIOT ACT II AND DENATIONALIZATION: AN  
UNCONSTITUTIONAL ATTEMPT TO REVIVE STRIPPING  
AMERICANS OF THEIR CITIZENSHIP

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I. INTRODUCTION

Imagine writing a check to a local non-profit organization only to discover months later that the government has used your charitable deed to revoke your United States citizenship. The group to which you made an innocent donation has been labeled a terrorist organization and your check is considered “providing material support” to a terrorist group. Imagine further that your contribution is used as *prima facie* evidence establishing your intent to renounce your United States citizenship. This evidence is then used to strip you of your citizenship and leave you stateless in your own country. This may seem extreme, but if a proposed legislation

entitled the “Domestic Security Enhancement Act of 2003” becomes law, this seemingly outlandish scenario will become a very real and frightening possibility.

On February 7, 2003, a confidential draft of this proposed legislation, the “Domestic Security Enhancement Act of 2003,” more commonly known as “Patriot Act II,” was released to the public by the Center for Public Integrity.<sup>1</sup> This proposed legislation was drafted by the staff of Attorney General John Ashcroft and sent to Speaker of the House Dennis Hastert and Vice President Richard Cheney on January 10, 2003.<sup>2</sup> Up until this draft was leaked to the Center for Public Integrity, the Justice Department denied that any such legislation was even being planned.<sup>3</sup> If passed, this proposed Patriot Act II will effect a bold, sweeping expansion of the USA Patriot Act passed in the wake of September 11, 2001.<sup>4</sup> The original USA Patriot Act was passed on October 26, 2001, just six weeks after the terrorist attacks.<sup>5</sup> The USA Patriot Act, which passed with little debate, provided for major changes to federal criminal, immigration, banking, and intelligence law in the name of anti-terrorism.<sup>6</sup> These changes have led critics to question whether the balance between liberty and security has been thrown off kilter.<sup>7</sup> Patriot Act II seeks to extend the government’s power to limit civil liberties even further.<sup>8</sup>

Section 501 of Patriot Act II, which threatens Americans’ citizenship, is among the most alarming provisions of this draft legislation.<sup>9</sup> Section 501, entitled “Expatriation of Terrorists,” provides for denationalization of citizens if the government determines that they have joined or provided material support to terrorist organizations.<sup>10</sup> Further, Section 501 takes the unprecedented action of declaring that involvement with a terrorist group would be *prima facie* evidence of intent to

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<sup>1</sup>Charles Lewis & Adam Mayle, *Special Report: Justice Dept. Drafts Sweeping Expansion of Anti-Terrorism Act: Center Publishes Secret Draft of ‘Patriot II’ Legislation* (Feb. 7, 2003) at <http://www.publicintegrity.org/dtaweb/report.asp?ReportID=502&L1=10&L2=10&L3=0&L4=0&L5=0> (last visited Feb. 19, 2004).

<sup>2</sup>See Domestic Security Enhancement Act of 2003, draft Jan. 9, 2003 at [http://www.publicintegrity.org/dtaweb/downloads/Story\\_01\\_020703\\_Doc\\_1.pdf](http://www.publicintegrity.org/dtaweb/downloads/Story_01_020703_Doc_1.pdf) (last visited Feb. 19, 2004).

<sup>3</sup>See Lewis & Mayle, *supra* note 1.

<sup>4</sup>See *id.*

<sup>5</sup>See *id.*

<sup>6</sup>See Donald A. Downs & Erik Kinnunen, *Symposium Issue: Civil Liberties in a Time of Terror: Article: A Response to Anthony Lewis: Civil Liberties in a New Kind of War*, 2003 Wis. L. Rev. 385, 387 (2003).

<sup>7</sup>See *id.* at 387.

<sup>8</sup>See *id.* at 388.

<sup>9</sup>See Joanne Mariner, *Patriot Act II’s Attack on Citizenship: Denationalization as Punishment*, CounterPunch, March 8, 2003, at <http://www.counterpunch.org/mariner03082003.html> (last visited Feb. 19, 2004).

<sup>10</sup>See Domestic Security Enhancement Act of 2003, Section 501, 78-79, draft, Jan. 9, 2003 at [http://www.publicintegrity.org/dtaweb/downloads/Story\\_01\\_020703\\_Doc\\_1.pdf](http://www.publicintegrity.org/dtaweb/downloads/Story_01_020703_Doc_1.pdf). (last visited Feb. 19, 2004) [hereinafter “Patriot Act II”].

relinquish citizenship.<sup>11</sup> Section 501 of Patriot Act II will extend the government's power and threaten not just loss of civil liberties, but loss of citizenship itself.<sup>12</sup>

Citizenship is viewed as "man's basic right for it is nothing less than the right to have rights."<sup>13</sup> The Constitution protects this most fundamental right by prohibiting the government from denationalizing citizens without their consent.<sup>14</sup> The Supreme Court has held that involuntary denationalization of citizens is prohibited by the Fourteenth Amendment.<sup>15</sup> Further, the Court has held that use of denationalization as punishment is unconstitutional under the Eighth Amendment as cruel and unusual punishment.<sup>16</sup> Section 501 of Patriot Act II, as proposed, violates both of these constitutional protections of citizenship by reinstating the government's power to denationalize citizens as a punishment for involvement with alleged terrorist organizations regardless of a person's intent to relinquish citizenship.

This Note will examine the rise and fall of denationalization in the United States and argue that Section 501 of Patriot Act II, which seeks to revive denationalization by amending the Immigration and Nationality Act, will be unconstitutional if passed by Congress in its present form. Part II of this Note will examine the history of denationalization in the United States. The development of expatriation legislation shows an early confusion of the status of citizenship and the right of a citizen to expatriate himself. Judicial response to this legislation shows an initial deference to Congress allowing for denationalization of citizens. Eventually, however, the Supreme Court recognized the constitutional limitations on the power of Congress to revoke citizenship and established the basic principle that all United States citizens have the right to remain citizens unless they voluntarily relinquish this right.

Part III explores in detail the proposed amendments to the Immigration and Nationality Act in Section 501 of Patriot Act II that provide for a revival of denationalization. This section also discusses the potential for abuses that may result if this legislation is enacted, as suggested by several critics of Patriot Act II, including the use of denationalization against citizens who are members of groups that express unpopular political views or even using denationalization as a way to detain individuals indefinitely once they have lost their rights as citizens.

Part IV discusses why Patriot Act II is an unconstitutional attempt to strip Americans of their citizenship, rather than a way to protect our country from terrorism. This section focuses on the constitutional protections provided for citizenship by the Fourteenth Amendment, and emphasizes Patriot Act II's attempt to overcome these protections through eliminating the government's burden to prove a citizen's intent to renounce citizenship by a preponderance of evidence. Part IV also analyzes Section 501 of Patriot Act II's use of denationalization as a punishment which has been held unconstitutional under the Eighth Amendment. This analysis emphasizes the value of citizenship to individuals and explores the potential for

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<sup>11</sup>*See id.*

<sup>12</sup>*See generally* Lewis & Mayle, *supra* note 1; Mariner, *supra* note 9.

<sup>13</sup>*See* Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

<sup>14</sup> *See* Afroyim v. Rusk, 387 U.S. 253 (1967).

<sup>15</sup>*Id.* at 268.

<sup>16</sup>*See* Trop v. Dulles, 356 U.S. 86 (1958).

statelessness that would result from denationalization under Patriot Act II. In conclusion, this Note recommends that if presented with Patriot Act II, Congress should reject this proposed legislation because of its unconstitutional attempt to revive denationalization.

## II. HISTORY OF DENATIONALIZATION IN THE UNITED STATES

The history of denationalization<sup>17</sup> and expatriation<sup>18</sup> in the United States shows a movement toward prohibiting the government from revoking citizenship unless the citizen himself manifests an intention to terminate citizenship.<sup>19</sup> The Supreme Court's examination of the constitutional limits on the power of Congress to enact expatriation legislation has founded the principle that "forcible destruction of citizenship" through denationalization is prohibited by the Fourteenth Amendment.<sup>20</sup> This conclusion by the Supreme Court has resolved the confusion between the protected right of all citizens to expatriate themselves and the prohibited act of denationalizing citizens regardless of their intent.<sup>21</sup> This led to the "consensus that an American citizen, natural born or naturalized, has a constitutional right to remain a citizen unless he/she voluntarily assents to relinquish citizenship."<sup>22</sup> An examination of American expatriation legislation and the Supreme Court's response to this legislation shows that Patriot Act II would violate the constitutional protection of Americans from denationalization by the government.

### A. Historical Overview of American Expatriation Legislation

For the first hundred years of United States history, Congress rarely enacted denationalization legislation.<sup>23</sup> In fact, early concerns over loss of citizenship revolved around expatriation, not denationalization.<sup>24</sup> Use of the terms "expatriation" and "denationalization" as interchangeable concepts in loss of citizenship law has been a major source of confusion.<sup>25</sup> Expatriation is a citizen's

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<sup>17</sup>Denationalization is the revocation of citizenship by the government pursuant to statute regardless of the citizen's intent. See Elwin Griffith, *Expatriation and the American Citizen*, 31 *How. L.J.* 453, 459 n.57, 462 n.70 (1988).

<sup>18</sup>True expatriation is viewed as a voluntary surrender of citizenship made by the citizen himself. See *id.* at 459 n.57, 462 n.70.

<sup>19</sup>See Alan G. James, *Expatriation in the United States: Precept and Practice Today and Yesterday*, 27 *SAN DIEGO L. REV.* 853, 854-55 (1990).

<sup>20</sup>See *Afroyim*, 387 U.S. 253; James, *supra* note 19, at 855 (recognizing the Supreme Court's decision in *Afroyim* as establishing the principle that the Fourteenth Amendment prohibits denationalization).

<sup>21</sup>See James, *supra* note 19, at 855.

<sup>22</sup>*Id.*

<sup>23</sup>See J.M. Spectar, *To Ban or Not to Ban an American Taliban? Revocation of Citizenship & Statelessness in a Statecentric System*, 39 *CAL. W. L. REV.* 263, 281 (2003).

<sup>24</sup>See T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 *MICH. L. REV.* 1471, 1475 (1986).

<sup>25</sup>See Steven S. Goodman, Note, *Protecting Citizenship: Strengthening the Intent Requirement in Expatriation Proceedings*, 56 *GEO. WASH. L. REV.* 341, 344 n.14 (1988).

voluntary relinquishment of citizenship.<sup>26</sup> In contrast, denationalization is “the forcible divestiture of an individual’s citizenship by the government.”<sup>27</sup> Frequently, the government will use the term expatriation for government actions that are actually denationalization under the premise that deprivation of citizenship is merely a formalization of an individual’s voluntary action to renounce citizenship.<sup>28</sup> Regardless of the term used, any action of the government to revoke a person’s citizenship without his assent should be viewed as denationalization.<sup>29</sup>

In 1868, Congress passed the first Expatriation Act.<sup>30</sup> This Act formally recognized the right of expatriation possessed by all citizens stating that “the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness.”<sup>31</sup> The purpose of this legislation was to protect naturalized U.S. citizens who returned to their native countries.<sup>32</sup> This initial recognition of a right of expatriation for citizens, which was meant to protect citizens, was eventually used as the basis for the government to revoke citizenship.<sup>33</sup> By establishing that Americans could renounce their allegiance, this allowed the government to argue that certain objective conduct was evidence of expatriation and led to further legislation providing for the denationalization of U.S. citizens.<sup>34</sup>

Several decades after enacting the first Expatriation Act, Congress passed the Expatriation Act of 1907, which was the first statute to identify specific acts that would lead to loss of United States citizenship.<sup>35</sup> This Act provided that expatriation occurred if a citizen was naturalized in, or swore allegiance to, a foreign state, or if a naturalized citizen resided in a foreign county for a certain length of time.<sup>36</sup> The Act also provided that expatriation occurred for any American woman who married a foreigner under the theory that a woman takes the nationality of her husband.<sup>37</sup> The

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<sup>26</sup>*See id.*

<sup>27</sup>*Id.*

<sup>28</sup>*Id.*

<sup>29</sup>*See* J.P. Jones, Comment, *Limiting Constitutional Denationalization After Afroyim*, 17 SAN DIEGO L. REV. 121, 123 n.11 (1979).

<sup>30</sup>*See* Griffith, *supra* note 17, at 457.

<sup>31</sup>*See* Aleinikoff, *supra* note 24, at 1475 (quoting Expatriation Act, Ch. 249, 15 Stat. 223 (1868)).

<sup>32</sup>*See id.*

<sup>33</sup>*See id.* at 1476.

<sup>34</sup>*Id.*

<sup>35</sup>*See* Griffith, *supra* note 17, at 457. In 1906, Congress responded to the problems caused by a major increase in immigration and naturalization in the United States by establishing a commission “to examine into the subjects of citizenship, expatriation and protection abroad.” *See* James, *supra* note 19, at 873 (quoting S. Res. 30, 59th Cong. (1st Sess. 1906)). The report from this commission was used to create the bill that became the Expatriation Act of 1907. *Id.* at 874.

<sup>36</sup>*See* Griffith, *supra* note 17, at 457-58.

<sup>37</sup>*See* Aleinikoff, *supra* note 24, at 1476.

main goal of the Act was to deal with the problems of dual nationality; however, it led to further problems of citizens expatriating themselves without realizing it because the act defined circumstances in which it would infer an individual's assent.<sup>38</sup> This caused a shift in focus from an individual's right of expatriation to "the government's right to prescribe the formula for an individual's loss of citizenship," and led to statutory denationalization.<sup>39</sup>

The Nationality Act of 1940 expanded even further grounds for denationalization.<sup>40</sup> For the first time, Congress included acts that did not involve the assumption of a new nationality as grounds for loss of American citizenship.<sup>41</sup> This legislation provided for loss of citizenship for conduct including: serving in foreign armed services, voting in a foreign election, accepting certain offices in a foreign state, being convicted of wartime desertion, and committing treason.<sup>42</sup> In 1944, loss of citizenship for leaving the United States during wartime to avoid military service was added to the list.<sup>43</sup> All of these grounds for expatriation were codified by the Immigration and Nationality Act of 1952.<sup>44</sup> This continual extension of the government's power over expatriating acts transformed what was meant initially to be a system recognizing citizens' voluntary expatriation into involuntary denationalization of citizens by the government.<sup>45</sup>

Over the course of their history, these statutes were frequently challenged on grounds of constitutionality.<sup>46</sup> Supreme Court rulings declaring denationalization as unconstitutional have slowly returned the interpretation of expatriation legislation to its original intent – a method for individuals to voluntarily renounce their citizenship, not to have it forcibly taken away by the government.<sup>47</sup> In response to the Supreme

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<sup>38</sup>See Griffith, *supra* note 17, at 458.

<sup>39</sup>*Id.*

<sup>40</sup>See Spectar, *supra* note 23, at 281.

<sup>41</sup>Leonard B. Boudin, *Involuntary Loss of American Nationality*, 73 HARV. L. REV. 1510, 1513 (1960). It is important to note that the terms "nationality" and "citizenship" are often regarded as synonymous and are both used to describe a person's membership in their country. See P. WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 4-5 (1956).

<sup>42</sup>See Spectar, *supra* note 23, at 281.

<sup>43</sup>See Aleinikoff, *supra* note 24, at 1477.

<sup>44</sup>See Griffith, *supra* note 17, at 459.

<sup>45</sup>See Boudin, *supra* note 41, at 1514. Boudin states that the process of the government transforming voluntary expatriation into denationalization is marked by three significant tendencies: (1) The continuous expansion of the number of acts deemed evidence of so-called voluntary expatriation. (2) A shift from rebuttable presumption and temporary suspension to conclusive acts with permanent effect. (3) The change of the basic standard so as to infer an intent to expatriate from conduct not involving a transfer of allegiance to another country. *Id.* at 1514-15.

<sup>46</sup>See, e.g., *Mackenzie v. Hare*, 239 U.S. 299 (1915) (challenging the expatriation of women who marry foreigners as provided in the 1907 Act); *Perez v. Brownell*, 356 U.S. 44 (1958) (challenging provision that authorized expatriation for citizen that had voted in foreign election); *Trop*, 356 U.S. 86 (challenging expatriation for wartime desertion).

<sup>47</sup>See James, *supra* note 19, at 854-55.

Court's decisions, the most current version of the Immigration and Nationality Act, amended in 1987, expressly states that a citizen can only lose his citizenship if he performs an expatriating act voluntarily with the intent to relinquish United States citizenship.<sup>48</sup> Through this amendment Congress has brought the statute into conformity with the Constitution and officially recognized that the government does not have the authority to involuntarily denationalize citizens.<sup>49</sup> Ignoring the unconstitutionality of denationalization, Patriot Act II seeks to amend this statute and reassert the government's power to strip people of their citizenship.<sup>50</sup>

### B. Judicial Response to Congress' Efforts to Denationalize Citizens

Congressional enactment of these "expatriation" statutes led the Supreme Court to examine the constitutionality of denationalization.<sup>51</sup> The initial uncertainty about the right of expatriation led to confusion between intentional expatriation by citizens and involuntary denationalization of citizens by the government.<sup>52</sup> The Supreme Court was faced with the question of whether Congress has the power to determine through legislation which voluntary acts of citizens will result in their expatriation.<sup>53</sup> Early Supreme Court decisions show that the Court was very deferential to Congress and sustained most of the early denationalization statutes.<sup>54</sup> However, the Supreme Court gradually began to restrict the power of Congress during the 1950's and 1960's, and struck down many expatriation statutes as unconstitutional.<sup>55</sup> A review of the major Supreme Court decisions on expatriation and denationalization shows a movement towards the recognition that the Constitution protects the right of citizenship and Congress is "powerless to take away a person's citizenship without [that] person's assent."<sup>56</sup>

#### 1. Initial Judicial Deference to Congress

Early judicial acceptance of denationalization of citizens by the government is demonstrated by *Mackenzie v. Hare*,<sup>57</sup> which tested the Expatriation Act of 1907.<sup>58</sup>

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<sup>48</sup>8 U.S.C. § 1481(a) (2003). The current Immigration and Nationality Act only provides for seven specific acts of expatriation. *Id.*

<sup>49</sup>See David A. Martin, Comment, *The Civic Republican Ideal for Citizenship, and for Our Common Life*, 35 VA. J. INT'L L. 301, 313 (1994).

<sup>50</sup>See Mariner, *supra* note 9.

<sup>51</sup>See Spectar, *supra* note 23, at 282.

<sup>52</sup>See Griffith, *supra* note 17, at 459. The confusion between expatriation and denationalization can be traced back to the common law doctrine of perpetual allegiance, which was rejected by the 1868 Expatriation Act. *Id.* at 459-60.

<sup>53</sup>*Id.* at 460.

<sup>54</sup>See Aleinikoff, *supra* note 24, at 1478.

<sup>55</sup>See James, *supra* note 19, at 855.

<sup>56</sup>See Griffith, *supra* note 17, at 468.

<sup>57</sup>239 U.S. 299 (1915).

<sup>58</sup>See Griffith, *supra* note 17, at 458.



Mackenzie was a native born U.S. citizen who lost her citizenship by marrying a foreigner under the act.<sup>59</sup> She challenged the act claiming that the Constitution protected her right to citizenship and that the Constitution did not provide Congress the express power of expatriation.<sup>60</sup> The Supreme Court upheld the right of Congress to denationalize citizens, concluding that this was an implied power that was necessary to the express power of protecting U.S. sovereignty.<sup>61</sup> This decision shows the Court's early disregard of the intent of a citizen to retain citizenship.<sup>62</sup> The Court focused on the voluntary act of marrying a foreigner, and concluded that taking such action with notice of the consequences could be used to establish expatriation regardless of whether there was an actual intent to relinquish citizenship.<sup>63</sup>

In 1958, the issue of denationalization was again faced by the Supreme Court in two major cases that show a shift in the Court's view of denationalization. The first case, *Perez v. Brownell*,<sup>64</sup> was a controversial decision by a divided Court that continued the trend of judicial deference to Congress. The Court held that the Nationality Act of 1940 authorized Congress to strip a person of his citizenship for voting in a foreign election or remaining outside the United States to avoid military service, regardless of whether the person intended to relinquish his citizenship.<sup>65</sup> Perez was a native-born U.S. citizen who moved with his parents to Mexico and remained there to avoid military service during World War II.<sup>66</sup> When he sought to reenter the United States as a citizen, he admitted that he had avoided military service and also that he had voted in political elections in Mexico.<sup>67</sup> Based on these admissions, Perez was deemed to have expatriated himself and he was deported.<sup>68</sup>

The majority in *Perez* reiterated the idea that Congress had the power to denationalize citizens based on the Necessary and Proper Clause of the Constitution.<sup>69</sup> The Court reasoned that Congress has the power to deal with foreign affairs and controlling the withdrawal of citizenship may be necessary to avoid embarrassment in foreign relations.<sup>70</sup> With this deferral to the power of Congress,<sup>71</sup>

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<sup>59</sup>*Mackenzie*, 239 U.S. at 306-07.

<sup>60</sup>*Id.* at 308, 310.

<sup>61</sup>*Id.* at 311-12.

<sup>62</sup>See Griffith, *supra* note 17, at 458 (discussing the Court's deference to Congress's inherent power of sovereignty and the lack of a statutory requirement for a citizen to intend to relinquish citizenship).

<sup>63</sup>*Mackenzie*, 239 U.S. at 311-12.

<sup>64</sup>356 U.S. 44 (1958), *overruled by* Afroyim v. Rusk, 387 U.S. 253 (1967).

<sup>65</sup>*Perez*, 356 U.S. at 61-62.

<sup>66</sup>*Id.* at 46.

<sup>67</sup>*Id.*

<sup>68</sup>*Id.* at 46-47.

<sup>69</sup>*Id.* at 60-62.

<sup>70</sup>*Id.* at 59-60.

the Court overtly rejected the idea that a citizen's intent should be considered, stating that "it would be a mockery of this Court's decisions to suggest that a person, in order to lose his citizenship, must intend or desire to do so."<sup>72</sup>

Chief Justice Warren wrote an important dissent in *Perez* that would lay the foundation for future Supreme Court decisions rejecting the power of Congress to denationalize citizens.<sup>73</sup> The Chief Justice condemned denationalization as "not within the letter or the spirit of the powers with which our Government was endowed" and firmly concluded that the government is without power to revoke the citizenship of any American, native-born or naturalized.<sup>74</sup> Chief Justice Warren drew this conclusion from the Fourteenth Amendment protection of citizenship for all people born or naturalized in the United States.<sup>75</sup> This amendment provides a constitutional right of citizenship and the Constitution does not provide any corresponding provision authorizing divestment of citizenship by the government.<sup>76</sup> Consequently, the Chief Justice pronounced that the Constitution prohibits Congress from revoking citizenship without assent from the individual.<sup>77</sup>

## 2. Judicial Recognition of the Unconstitutionality of Denationalization

The second major case in 1958 to address denationalization, *Trop v. Dulles*,<sup>78</sup> shows the beginning of judicial recognition that Congress is prohibited by the Constitution from revoking citizenship involuntarily. *Trop v. Dulles* was decided on same day as *Perez v. Brownell*, but the outcome was very different.<sup>79</sup> Trop was a soldier who was convicted of desertion during World War II.<sup>80</sup> Several years later when he applied for a passport, he was notified that he had lost his citizenship as a

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<sup>71</sup>This deferral to Congress was based on the "longstanding belief that Congress could both define expatriation acts and compel an individual to accept the consequences of committing any of these acts." See Goodman, *supra* note 25, at 344.

<sup>72</sup>*Perez*, 356 U.S. at 61.

<sup>73</sup>*Perez*, 356 U.S. at 62 (Warren, C.J. dissenting). See also Goodman, *supra* note 25, at 344 (recognizing the prominence of Chief Justice Warren's dissent in future cases).

<sup>74</sup>*Perez*, 356 U.S. at 77-78 (Warren, C.J. dissenting).

<sup>75</sup>*Id.* at 65-66. The Fourteenth Amendment provides that "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1.

<sup>76</sup>*Perez*, 356 U.S. at 65-66 (Warren, C.J., dissenting).

<sup>77</sup>*Id.* Chief Justice Warren emphasized that the right of voluntary expatriation remains a natural and inherent right of all people. *Id.* at 66-67.

<sup>78</sup>356 U.S. 86.

<sup>79</sup>A third case involving the Nationality Act of 1940, *Nishikawa v. Dulles*, was also decided on the same day as *Trop* and *Perez*, however, this case did not address the constitutionality of denationalization, rather it addressed the burden of proof required for expatriation. *Nishikawa v. Dulles*, 356 U.S. 129 (1958). In *Nishikawa*, the Court held that the government bears the burden to prove that an expatriating act was voluntarily performed by clear, convincing and unequivocal evidence. *Id.* at 135.

<sup>80</sup>*Trop*, 356 U.S. at 87-88.

result of his desertion under the Nationality Act of 1940.<sup>81</sup> In this case, Chief Justice Warren, who had strongly dissented in *Perez*, wrote the majority opinion.<sup>82</sup> The Court held that stripping a person of his citizenship as punishment for wartime desertion was unconstitutional under the Eighth Amendment because denationalization is a form of cruel and unusual punishment.<sup>83</sup>

In *Trop*, Chief Justice Warren expanded on his views of citizenship as a fundamental right that cannot be revoked by the government.<sup>84</sup> He stated, "It is my conviction that citizenship is not subject to the general powers of the National Government and therefore cannot be divested in the exercise of those powers."<sup>85</sup> The opinion then went on to recognize the removal of Trop's citizenship as a punishment for his desertion, because there was no other legitimate purpose for the statute other than to punish.<sup>86</sup> The Court concluded that denationalization is a cruel and unusual punishment under the Eighth Amendment and is, therefore, unconstitutional.<sup>87</sup> In reaching this conclusion, the Court emphasized the value of citizenship and the potential for rendering individuals stateless which would essentially destroy a person's political existence.<sup>88</sup>

The Court completely reversed the view of Congressional denationalization it espoused in *Perez* just nine years later in *Afroyim v. Rusk*.<sup>89</sup> In *Afroyim*, the Court held that Congress has no power under the Constitution to strip a person of citizenship unless the person voluntarily relinquishes citizenship.<sup>90</sup> The petitioner in

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<sup>81</sup>*Id.* at 88.

<sup>82</sup>*Id.* at 87. Justice Brennan proved to be the pivotal vote in this decision because he changed his position from that of the majority in *Perez*. In his concurring opinion, he found that the statute was unconstitutional because he could not see a connection between the statute and a legitimate Congressional purpose under the war power. *Id.* at 114 (Brennan, J., concurring). Brennan, however, still supported the *Perez* majority's view that Congress did have the power to denationalize citizens. *Trop*, 356 U.S. at 105-07 (Brennan, J., concurring).

<sup>83</sup>*Id.* at 103. The Eighth Amendment provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.

<sup>84</sup>Although Chief Justice Warren's view was that Congress did not have the power to revoke citizenship, the majority was still unable to agree on this issue. The majority's conclusion was only that Congress could not use denationalization as a punishment. *See Jones, supra* note 29, at 136.

<sup>85</sup>*Trop*, 356 U.S. at 92. The Chief Justice also reiterated that a citizen may still voluntarily relinquish or abandon citizenship by express language or language and conduct that exhibit a renunciation of citizenship. *Id.*

<sup>86</sup>*Id.* at 97.

<sup>87</sup>*Id.* at 103.

<sup>88</sup>*Id.* at 101.

<sup>89</sup>387 U.S. 253 (1967); *see Jones, supra* note 29, at 137.

<sup>90</sup>*Afroyim*, 387 U.S. at 268. The Court stated:

We hold that the Fourteenth Amendment was designed to and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color or race. Our holding does no more than to give to this

*Afroyim* was held by the lower court to have lost his American citizenship for voting in a foreign election under the same section of the Nationality Act of 1940 that was held to be constitutional in *Perez v. Brownell*.<sup>91</sup> In reversing the lower court's decision, the Supreme Court expressly overruled *Perez v. Brownell* and adopted Chief Justice Warren's dissenting view that the Fourteenth Amendment prevents Congress from revoking citizenship.<sup>92</sup> The Court found that Americans, born or naturalized in the United States, are granted full citizenship under the Fourteenth Amendment, and all people retain this citizenship unless they voluntarily relinquish it.<sup>93</sup> Further, the Court stated that the Constitution contains no provision, either express or implied, granting the Government the power to strip people of their citizenship.<sup>94</sup>

The impact of the *Afroyim* decision on the power of Congress to denationalize was immense.<sup>95</sup> For the first time, the Supreme Court recognized that an inherent right of citizenship exists for all Americans under the Constitution and denounced the power of Congress to revoke citizenship without assent of the citizen.<sup>96</sup> This decision has established the view of citizenship and denationalization that is followed in the United States today.<sup>97</sup> *Afroyim*, however, left one important issue unresolved regarding the government's ability to revoke citizenship. Although *Afroyim* firmly established that Congress can only strip a person of citizenship if he voluntarily relinquishes it, this decision failed to address whether such "voluntary relinquishment" requires a specific intent to relinquish citizenship along with the voluntary commission of an expatriating act.<sup>98</sup> The issue of intent was resolved by the Supreme Court in *Vance v. Terrazas*.<sup>99</sup>

*Vance v. Terrazas*,<sup>100</sup> decided in 1980, involved the expatriation of Laurence Terrazas, a dual national of the United States and Mexico. While a student in

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citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.

*Id.*

<sup>91</sup>*Afroyim*, 387 U.S. at 255.

<sup>92</sup>*Id.* at 267-68 (stating that "[b]ecause the Fourteenth Amendment prevents Congress from [revoking citizenship], we agree with THE CHIEF JUSTICE's dissent in the *Perez* case that the Government is without power to rob a citizen of his citizenship").

<sup>93</sup>*Id.* at 262.

<sup>94</sup>*Id.* at 257.

<sup>95</sup>See James, *supra* note 19, at 889. James states that *Afroyim* was "a watershed in the law of expatriation. It delineated, probably once and for all, the rights of the citizen and the powers of Congress with respect to those rights." *Id.* at 890.

<sup>96</sup>*Afroyim*, 387 U.S. at 268; see also Goodman, *supra* note 25, at 345-46.

<sup>97</sup>See Griffith, *supra* note 17, at 492.

<sup>98</sup>See Goodman, *supra* note 25, at 346. The *Afroyim* Court also used the vague term "assent" to describe voluntary relinquishment which added to the confusion over the exact nature of "assent" and what it required. See Griffith, *supra* note 17, at 477.

<sup>99</sup>See Goodman, *supra* note 25, at 347.

<sup>100</sup>444 U.S. 252 (1980).

Mexico, Terrazas applied for a certificate of Mexican nationality, swearing allegiance to Mexico while expressly renouncing his United States citizenship.<sup>101</sup> A few months later, Terrazas was issued a certificate of loss of nationality after it was concluded that he had voluntarily renounced his United States citizenship under Section 349 (a)(2) of the Immigration and Nationality Act.<sup>102</sup> Terrazas denied renouncing his citizenship, and through a series of appeals debating the requirement of specific intent and the burden of proof required to establish such intent, the case reached the Supreme Court.<sup>103</sup>

In *Terrazas*, the Court reaffirmed its holding in *Afroyim* that every citizen has a constitutional right to retain his citizenship unless he voluntarily relinquishes it.<sup>104</sup> The Court then clarified *Afroyim*'s use of the term "assent" to describe the mandatory requirement of voluntariness.<sup>105</sup> The Court concluded that "assent" to loss of citizenship means an intent to relinquish citizenship, thus establishing specific intent as a necessary element of voluntary expatriation.<sup>106</sup> Further, the Court established that expatriating acts cannot be used as conclusive evidence of specific intent and there can be no presumption that an act has been performed with the intent to relinquish citizenship.<sup>107</sup> The burden is on the government to prove specific intent to relinquish citizenship by a preponderance of the evidence.<sup>108</sup>

Beginning with *Trop v. Dulles*, the Supreme Court has recognized constitutional limits on the power of Congress to denationalize citizens.<sup>109</sup> In *Afroyim v. Rusk* and *Vance v. Terrazas*, the Court fully pronounced the principles that citizenship is protected by the Fourteenth Amendment, involuntarily revocation of citizenship through denationalization is unconstitutional, and the government must prove specific intent to relinquish citizenship in all cases involving expatriation.<sup>110</sup> These decisions have formed the modern basis for United States law on the issue of

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<sup>101</sup>*Id.* at 255.

<sup>102</sup>*Id.* at 256.

<sup>103</sup>*Id.* at 256-59. Following the issue of the certificate of loss of nationality by the Department of State, Terrazas' case was first reviewed by the Board of Appellate Review of the Department of State, which affirmed the decision. *Id.* at 256. Terrazas then brought suit in federal court, and the District Court concluded that the United States had proved by a preponderance of the evidence that he had voluntarily renounced his citizenship. *Id.* at 257. The Court of Appeals reversed and remanded holding that the evidentiary standard, as required by the Constitution, was "clear, convincing and unequivocal evidence" rather than just a preponderance of the evidence. *Id.* at 257-58. The Secretary of State appealed to the Supreme Court the issue of whether specific intent must be proved to establish voluntary expatriation. *Id.* at 258-59.

<sup>104</sup>*Id.* at 259-60.

<sup>105</sup>*Id.* at 260.

<sup>106</sup>*Id.*

<sup>107</sup>*Id.* at 261, 268.

<sup>108</sup>*Id.* at 268.

<sup>109</sup>*See* 356 U.S. 86.

<sup>110</sup>*See* 387 U.S. 253; 444 U.S. 252.

denationalization.<sup>111</sup> Congress has accepted the constitutional standards expressed in these cases by incorporating their holdings into the statutory language of the Immigration and Nationality Act.<sup>112</sup> It is in the context of these well established constitutional principles that the proposed legislation of Section 501 of Patriot Act II must be viewed.

### III. PATRIOT ACT II, SECTION 501: EXPATRIATION OF TERRORISTS – A SUMMARY OF THE PROPOSED LEGISLATION

The draft of the proposed Patriot Act II that has been leaked to the public is a voluminous and incredibly detailed extension of its predecessor, the USA Patriot Act, which expands the government's powers in many areas in the name of anti-terrorism.<sup>113</sup> Tucked deep within the text of this draft is Section 501, entitled "Expatriation of Terrorists." Among all of the other sweeping changes in Patriot Act II, this section could easily be overlooked. A cursory glance at this section may lead one to believe that it merely provides for another way for people to expatriate themselves. However, critics of Patriot Act II have called attention to the real implications of Section 501.<sup>114</sup> A thorough examination of Section 501 reveals that it is actually a veiled attempt by the government to revive denationalization as a punishment for terrorism under the premise of expatriation.<sup>115</sup>

Section 501 of Patriot Act II seeks to amend the Immigration and Nationality Act to include terrorism as an expatriating act.<sup>116</sup> Section 349 of the Immigration and

<sup>111</sup>See Griffith, *supra* note 17, at 492.

<sup>112</sup>*Id.*

<sup>113</sup>See Patriot Act II, *supra* note 10.

<sup>114</sup>See Timothy H. Edgar, *How "Patriot Act 2" Would Further Erode the Basic Checks on Government Power That Keep America Safe and Free*, ACLU 6, Mar. 20, 2003, at <http://www.cdt.org/security/patriot2/030320aclu.pdf> (last visited Feb. 19, 2004); Nat Hentoff, *Ashcroft Out of Control: Ominous Sequel to USA Patriot Act*, The Village Voice, Feb. 28, 2003 at <http://www.villagevoice.com/issues/0310/hentoff.php>. (last visited Jan. 24, 2004), see also Lewis & Mayle, *supra* note 1; Mariner, *supra* note 9.

<sup>115</sup>See generally Mariner, *supra* note 9.

<sup>116</sup>Patriot Act II, *supra* note 10. The following is the complete text of Section 501: Expatriation of Terrorists:

Section 349 of the Immigration and Nationality Act (8 U.S.C. 1481) is amended –

(1) by amending subsection (a)(3) to read as follows:

“(3)(A) entering, or serving in, the armed forces of a foreign state if—

“(i) such armed forces are engaged in hostilities against the United States; or

“(ii) such person serves as a commissioned or non-commissioned officer; or

“(B) joining or serving in, or providing material support (as defined in section 2339A of title 18, United States Code) to, a terrorist organization designated under section 212(a)(3) or 219 or designated under the International Emergency Economic Powers Act, if the organization is engaged in hostilities against the United States, its people, or its national security interests.”; and

(2) by adding at the end of subsection (b) the following: “The voluntary commission or performance of an act described in subsection (a)(3)(A)(i) or (B) shall be

Nationality Act, codified in 8 U.S.C. § 1481, provides that a person who is a national of the United States by birth or naturalization shall lose his nationality by voluntarily performing certain enumerated activities with the intention of relinquishing United States nationality.<sup>117</sup> The list of the seven expatriating acts specified by § 1481 includes: obtaining naturalization in a foreign state;<sup>118</sup> taking an oath of allegiance to a foreign state;<sup>119</sup> serving in the armed forces of a foreign state, if the armed forces are engaged in hostilities against the United States or the person serves as a commissioned or noncommissioned officer;<sup>120</sup> accepting or performing the duties of a government office of a foreign state;<sup>121</sup> making a formal renunciation of United States nationality in a foreign state;<sup>122</sup> making in the United States a formal written renunciation of nationality if our country is in a state of war;<sup>123</sup> or committing an act of treason against the United States.<sup>124</sup>

The first amendment proposed in Section 501 is directed specifically at changing the third expatriating act, serving in the armed forces of a foreign state engaged in hostilities against the United States. Under Section 501 of Patriot Act II, subsection (a)(3) of § 1481 would be amended to include as an expatriating act: “joining in, or providing material support (as defined in section 2339A of title 18, United States Code) to, a terrorist organization designated under section 213(a)(3) or 219 . . . , if the organization is engaged in hostilities against the United States, its people, or its national security interests.”<sup>125</sup> Such acts will result in loss of citizenship if performed voluntarily with intent to relinquish U.S. citizenship.<sup>126</sup> Critics of Patriot Act II fear that its reliance on the over-broad definitions of “terrorist organization” and “providing material support” as defined by the USA Patriot Act will lead to ordinary people being labeled as terrorists and facing revocation of their citizenship.<sup>127</sup>

The USA Patriot Act expanded the definition of “domestic terrorism” to include any activities that “involve acts dangerous to human life that are a violation of the criminal laws of the United States.”<sup>128</sup> This expansive definition covers virtually any group that participates in violence or destruction of property and could be used

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prima facie evidence that the act was done with the intention of relinquishing United States nationality.”

*Id.*

<sup>117</sup>8 U.S.C. § 1481(a) (2003).

<sup>118</sup>8 U.S.C. § 1481(a)(1).

<sup>119</sup>8 U.S.C. § 1481(a)(2).

<sup>120</sup>8 U.S.C. § 1481(a)(3).

<sup>121</sup>8 U.S.C. § 1481(a)(4).

<sup>122</sup>8 U.S.C. § 1481(a)(5).

<sup>123</sup>8 U.S.C. § 1481(a)(6).

<sup>124</sup>8 U.S.C. § 1481(a)(7).

<sup>125</sup>See Patriot Act II, *supra* note 10.

<sup>126</sup>*Id.*

<sup>127</sup>See Edgar, *supra* note 114; Hentoff, *supra* note 114.

<sup>128</sup>USA PATRIOT Act 802(a)(5), amending 18 U.S.C. § 2331.

against domestic political advocacy groups that engage in civil disobedience without any ties to international terrorism.<sup>129</sup> Further, the extensive list of ways to provide “material support” to a terrorist organization could potentially lead to citizens unknowingly connecting themselves to a group labeled as such without any real participation in unlawful activities.<sup>130</sup> In continuing the USA Patriot Act’s efforts to control terrorism within the United States, Patriot Act II creates the potential for denationalizing citizens who have no ties to any foreign state.

Through its second proposed amendment, Section 501 crosses the line from merely recognizing terrorism as an additional expatriating act to allowing the government to denationalize citizens against their will by eliminating the government’s burden to prove a citizen’s intent to renounce citizenship.<sup>131</sup> The second proposal in Section 501 of Patriot Act II effects a major, and controversial, change from the current version of the Immigration and Nationality Act by creating a presumption of intent to relinquish citizenship based solely on a person’s connection to a terrorist group.<sup>132</sup> Section 501 provides that “the voluntary commission or performance of an [expatriating] act . . . shall be *prima facie* evidence that the act was done with the intention of relinquishing United States nationality.”<sup>133</sup> An analysis of the section provided with the draft states that this provision would make it explicit that “the intent to relinquish nationality need not be manifested in words, but can be inferred from conduct.”<sup>134</sup> This revision contradicts judicial interpretation of the Immigration and Nationality Act which emphasizes that there can be no presumption of intent based on conduct alone.<sup>135</sup> Section 501 seeks to override the Supreme Court’s holding that the government bears the heavy burden of proving by a preponderance of the evidence that a citizen had intent to relinquish citizenship.<sup>136</sup>

If passed, this unprecedented effort by the government to reassert its power of denationalization would establish that an act of joining or providing material support to a group labeled as a “terrorist organization” is *prima facie* evidence of an intent to

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<sup>129</sup>See Downs & Kinnunen, *supra* note 6, at 388; see also Edgar, *supra* note 114 (stating that under the overbroad definition of international and domestic terrorism “diverse ‘direct-action’ organizations, including Operation Rescue, the World Trade Organization protestors, and others could conceivably be labeled ‘terrorist organizations’”).

<sup>130</sup>18 U.S.C. § 2339A (2003). According to this section, the term “material support or resources” means currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials. *Id.*

<sup>131</sup>See generally Lewis & Mayle, *supra* note 1; Mariner, *supra* note 9; Hetnoff, *supra* note 114.

<sup>132</sup>*Id.*

<sup>133</sup>See Patriot Act II, *supra* note 10 (emphasis added).

<sup>134</sup>*Id.*

<sup>135</sup>See Goodman, *supra* note 25, at 355.

<sup>136</sup>See *Terrazas*, 444 U.S. at 268 (recognizing that presumption of voluntariness does not create a presumption of intent to expatriate).



renounce citizenship.<sup>137</sup> This has caused great concern among opponents of Patriot Act II.<sup>138</sup> Critics fear the potential for abuse that may occur if this proposal to infer intent to renounce citizenship from conduct passes. For example, under this new standard, a person who makes a legitimate contribution to a non-profit organization could lose his or her citizenship if, even months later, the organization is deemed by the government to support terrorists.<sup>139</sup> All the government would have to do is prove that the person voluntarily made the donation, not that they did so with the intent to renounce citizenship.<sup>140</sup> Once a person has his citizenship revoked for joining or providing support to terrorists, the government can treat the person as an alien and subject him to potentially indefinite detention.<sup>141</sup>

While the draft of Patriot Act II may be intended to expand its predecessor, the USA Patriot Act, and increase the protection to Americans from the threat of terrorism, it would introduce a serious threat to civil liberties.<sup>142</sup> As shown by Section 501, Patriot Act II threatens not only civil liberties, but citizenship itself. A review of the history of expatriation and denationalization in the United States has shown that the revival of denationalization proposed by Patriot Act II runs contrary to the basic constitutional principle pronounced by the Supreme Court in *Afroyim* that only citizens themselves can renounce their citizenship.

#### IV. ANALYSIS: PATRIOT ACT II – UNCONSTITUTIONAL UNDER THE FOURTEENTH AND EIGHTH AMENDMENTS

Patriot Act II has revived the dispute over whether Congress has the power under the Constitution to unilaterally denationalize citizens without their consent.<sup>143</sup> This had been a major source of controversy throughout early American history up until the decisions of *Afroyim* and *Terrazas*.<sup>144</sup> In those decisions, the Supreme Court finally settled the issue by declaring that citizenship is protected by the Fourteenth Amendment and Congress has no power to revoke citizenship without citizens'

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<sup>137</sup>See Patriot Act II, *supra* note 10.

<sup>138</sup>See Hetnoff, *supra* note 114. Hetnoff poses the question that if intent can be inferred from conduct, who will do the “inferring?” *Id.*

<sup>139</sup>See Interview by Bill Moyers with Chuck Lewis, Executive Director, Center for Public Integrity (Feb. 7, 2003) at [http://www.pbs.org/now/transcript/transcript\\_lewis2.html](http://www.pbs.org/now/transcript/transcript_lewis2.html) (last visited Feb. 19, 2004).

<sup>140</sup>See generally *id.*; Lewis & Mayle, *supra* note 1; Hetnoff, *supra* note 114.

<sup>141</sup>See Edgar, *supra* note 114 (describing how people who have their citizenship stripped are placed in “the same position as stateless undocumented immigrants who face potentially indefinite detention”).

<sup>142</sup>See Downs & Kinnunen, *supra* note 6, at 388.

<sup>143</sup>See generally Lewis & Mayle, *supra* note 1; Mariner, *supra* note 9; Hetnoff, *supra* note 114.

<sup>144</sup>See James, *supra* note 19, at 904 (describing how prior to the *Afroyim* decision the expatriation controversy was an ongoing problem and that there was no “clear understanding of the nature and extent of the power to expatriate American citizens”).

voluntary assent.<sup>145</sup> Further, in *Trop*, the Court pronounced that the Eighth Amendment prohibits using denationalization as a punishment.<sup>146</sup> An analysis of Patriot Act II's proposal to revoke the citizenship for joining or providing material support to a terrorist organization, applying the constitutional principles set forth by the Supreme Court, establishes that if Section 501 of Patriot Act II is enacted it will be unconstitutional under both the Fourteenth and Eighth Amendments.

A. *Fourteenth Amendment Protection of Citizens from Attempts of Government to Revoke Citizenship*

The drafters of Patriot Act II have initiated this proposed legislation under the theory that it is justified by the power to protect Americans and increase homeland security.<sup>147</sup> The Constitution, however, prohibits Congress from granting itself the power to denationalize in the name of national security.<sup>148</sup> First, the Fourteenth Amendment, as interpreted by *Afroyim*, grants all native-born or naturalized Americans citizenship and protects this citizenship from attempts of the government to revoke it without the assent of the citizen.<sup>149</sup> Second, the Constitution does not expressly grant Congress the power to denationalize citizens or prescribe grounds for expatriation.<sup>150</sup> Further, our federal system of government is based on the theory that the government is limited to expressly enumerated powers and is prohibited from implied powers except those necessary to carry out the express powers.<sup>151</sup> This has led to the conclusion that Congress lacks the constitutional power to revoke citizenship and that expatriation can result only from the voluntary act of the citizen with the intent to renounce citizenship.<sup>152</sup> Any attempts by the government to revoke

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<sup>145</sup>See *Afroyim v. Rusk*, 387 U.S. 253 (1967); *Vance v. Terrazas*, 444 U.S. 252 (1980). Following the Court's clear prohibition against denationalization in the *Afroyim* and *Terrazas* decisions, some believed that "the expatriation chronicle is as close to being finished as it is likely to be." See James, *supra* note 19, at 904.

<sup>146</sup>*Trop v. Dulles*, 356 U.S. 86 (1958).

<sup>147</sup>In response to the leak of Patriot Act II, the Department of Justice issued a statement that "[t]he President expects all his cabinet departments that are involved in homeland security, including the Department of Justice, to make sure we are doing everything we can to protect the American people . . . . [T]he Department of Justice takes that responsibility seriously and discusses additional tools to protect the American people." Statement of Barbara Comstock, Director of Public Affairs, available at [http://www.publicintegrity.org/dtaweb/downloads/Story\\_01\\_020703\\_Doc\\_3.pdf](http://www.publicintegrity.org/dtaweb/downloads/Story_01_020703_Doc_3.pdf) (last visited Feb. 19, 2004).

<sup>148</sup>See U.S. CONST. amend. X. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

<sup>149</sup>*Afroyim*, 387 U.S. 253.

<sup>150</sup>See John P. Roche, *The Loss of American Nationality – The Development of Statutory Expatriation*, 99 U. PA. L. REV. 25, 26 (1950); Charles Gordon, *The Citizen and the State: Power of Congress to Expatriate American Citizens*, 53 GEO. L.J. 315, 333 (1964).

<sup>151</sup>See Thomas Tin Fah Huang, *Loss of United States Citizenship by Expatriation: With Particular Reference to the Constitutional Aspects* 9 (1958) (unpublished S.J.D. thesis, Harvard Law School) (on file with Cleveland-Marshall College of Law Library).

<sup>152</sup>See Gordon, *supra* note 150, at 333.

a person's citizenship against his will is unconstitutional under the Fourteenth Amendment.<sup>153</sup>

The extent of Congress' authority to control loss of citizenship has been the major source of dispute throughout the expatriation cases.<sup>154</sup> Early attempts to provide a justification for the power of Congress to denationalize were based on establishing it as an implied power through the Necessary and Proper clause.<sup>155</sup> Proponents of statutory expatriation first claimed that Congress had the power to denationalize as implied through its power over naturalization.<sup>156</sup> The Constitution provides that Congress shall have the power "to establish an Uniform Rule of Naturalization."<sup>157</sup> Therefore, it was suggested that the power to grant citizenship should also infer a power to provide for loss of citizenship.<sup>158</sup> This argument was rejected by early cases that addressed the naturalization power. Chief Justice Marshall stated in *Osborn v. Bank of United States* that "the simple power of the national legislature is to prescribe a uniform rule of naturalization and the exercise of this power exhausts it, so far as respects the individual."<sup>159</sup> In *United States v. Wong Kim Ark*, the Supreme Court denounced the idea that denationalization was implied through the naturalization power stating that "the power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away."<sup>160</sup>

After the rejection of denationalization as derived from Congress' naturalization power, Congress' asserted power to revoke citizenship was then justified through its "inherent power of sovereignty" in the area of foreign relations.<sup>161</sup> The Supreme Court initially accepted this as a legitimate basis for upholding statutory denationalization by Congress.<sup>162</sup> In *Mackenzie*, the Court stated that "[a]s a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those

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<sup>153</sup>*Afroyim*, 387 U.S. 253.

<sup>154</sup>See Gordon, *supra* note 150, at 333. Gordon's article, written prior to *Afroyim* and *Vance*, recognized two opposing views on the issue of Congress' power to denationalize. *Id.* One view rejected Congress's power while the other implied such a power through the Necessary and Proper clause. *Id.*

<sup>155</sup>See U.S. CONST. art. I, § 8, cl. 18. The Necessary and Proper clause provides that Congress shall have the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.* See also Gordon, *supra* note 150, at 333.

<sup>156</sup>See Roche, *supra* note 150, at 26.

<sup>157</sup>U.S. CONST. art. I, § 8, cl. 4.

<sup>158</sup>See Roche, *supra* note 150, at 26.

<sup>159</sup>22 U.S. 738, 827 (1824).

<sup>160</sup>169 U.S. 649, 703 (1898).

<sup>161</sup>See Roche, *supra* note 150, at 27.

<sup>162</sup>See *Mackenzie*, 239 U.S. 299; *Perez*, 356 U.S. 44.

which concern its relations and intercourse with other countries.”<sup>163</sup> The *Perez* decision elaborated on the connection between this power of sovereignty in foreign relations and the power to denationalize through the Necessary and Proper Clause.<sup>164</sup> The Court questioned whether “the means, withdrawal of citizenship, [was] reasonably calculated to effect the end that [was] within the power of Congress to achieve, the avoidance of embarrassment in the conduct of our foreign relations.”<sup>165</sup> The Court answered affirmatively, bluntly stating that “[t]he termination of citizenship terminates the problem.”<sup>166</sup>

The Court’s deference to an implied power of Congress to revoke citizenship has been replaced by its recognition of the rights of citizens founded in the Constitution.<sup>167</sup> The implied power of Congress to denationalize has now been wholly rejected by the Supreme Court in light of its interpretation of the Fourteenth Amendment.<sup>168</sup> The Fourteenth Amendment provides that “[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States.”<sup>169</sup> The Court considered the unequivocal language of this amendment and concluded that:

There is no indication in these words of a fleeting citizenship, good at the moment it is acquired but subject to destruction by the Government at any time. Rather the Amendment can most reasonably be read as defining a *citizenship which a citizen keeps unless he voluntarily relinquishes it*. Once acquired, this Fourteenth Amendment *citizenship [is] not to be shifted, canceled or diluted at the will of the Federal Government, the States, or any other governmental unit*.<sup>170</sup>

This express grant of permanent right of citizenship to all native born or naturalized Americans establishes the principle that only citizens can relinquish their citizenship and it cannot be forcibly taken away by the government.<sup>171</sup>

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<sup>163</sup>*Mackenzie*, 239 U.S. at 311. Although the Court recognized that Congress had power over citizenship, it conceded that a change of citizenship could not be arbitrarily imposed without concurrence of the citizen. *Id.* The *Perez* decision rejected any requirement of intent on the part of the citizen and gave full power to denationalize to Congress. *Perez*, 356 U.S. at 61.

<sup>164</sup>*Perez*, 356 U.S. at 61.

<sup>165</sup>*Id.* at 60.

<sup>166</sup>*Id.* The Court considered the government’s power to regulate foreign affairs to be broad and applied a “rational nexus” test that would accept Congress’ claim of an implied power if any reasonable connection to the express power could be drawn. *Id.* at 58. This interpretation of the Necessary and Proper clause has been questioned. *See* Gordon, *supra* note 150, at 337 (recognizing that this may raise fears of despotism); Boudin, *supra* note 41, at 1528 (noting the inconsistency with the view of a government of enumerated powers).

<sup>167</sup>*See Afroyim*, 387 U.S. 253; *Terrazas*, 444 U.S. 252.

<sup>168</sup>*See Afroyim*, 387 U.S. 253; *Terrazas*, 444 U.S. 252.

<sup>169</sup>U.S. CONST. amend. XIV, § 1.

<sup>170</sup>*Afroyim*, 387 U.S. at 262 (emphases added).

<sup>171</sup>*See id.* at 268.

This view of the Fourteenth Amendment protecting citizenship and prohibiting denationalization is rooted in the concept of popular sovereignty.<sup>172</sup> Chief Justice Warren first approached this idea in his pivotal dissenting opinion in *Perez*. He recognized that the people had created a government endowed with broad powers; however, he believed that “the citizens themselves are sovereign, and their citizenship is not subject to the general powers of their government.”<sup>173</sup> Regardless of the powers of Congress to regulate citizens’ conduct, “a government of the people cannot take away their citizenship simply because one branch of that government can be said to have a conceivably rational basis for wanting to do so.”<sup>174</sup> In *Afroyim*, the Supreme Court adopted Chief Justice Warren’s dissent as its majority opinion, thus establishing the principle that the Fourteenth Amendment places citizenship outside the power of Congress.<sup>175</sup>

Based on the Fourteenth Amendment’s unambiguous protection of citizenship, both Warren’s *Perez* dissent and *Afroyim* specifically reject the idea that Congress has any power, express or implied, to denationalize.<sup>176</sup> The Constitution “grants Congress no express power to strip people of their citizenship, whether in the exercise of the implied power to regulate foreign affairs or in the exercise of any specifically granted power.”<sup>177</sup> Following this principle, any attempt by the government through Patriot Act II to revive denationalization based on the power of protecting national security or the war power would be unconstitutional.<sup>178</sup>

The drafters of Patriot Act II have sought to avoid the implication of denationalization by stating in their proposal that Section 501 would merely add “joining or providing material support to a terrorist organization” to the list of expatriating acts.<sup>179</sup> If, however, Congress is officially presented with Patriot Act II it should consider the purpose behind this proposal. The Department of Justice has said that Patriot Act II will be an “additional tool to protect the American people.”<sup>180</sup> This goes beyond the formal recognition of a citizen’s voluntary renouncement of citizenship to using denationalization as a weapon in the war on terror.<sup>181</sup> Further evidence that Patriot Act II goes beyond expatriating to denationalizing in violation of the Fourteenth Amendment is shown by Section 501’s reduction of the government’s burden to prove intent.<sup>182</sup>

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<sup>172</sup>See *Perez*, 356 U.S. at 65 (Warren, C.J., dissenting); *Afroyim*, 387 U.S. at 268 (describing the foundation of the United States saying that “citizenry is the country and the country is its citizenry”).

<sup>173</sup>*Perez*, 356 U.S. at 65 (Warren, C.J., dissenting).

<sup>174</sup>*Id.* (emphasis in original).

<sup>175</sup>*Afroyim*, 387 U.S. 253.

<sup>176</sup>See *Perez*, 356 U.S. at 66 (Warren, C.J., dissenting); *Afroyim*, 387 U.S. at 257.

<sup>177</sup>*Afroyim*, 387 U.S. at 257.

<sup>178</sup>See *Perez*, 356 U.S. at 77-78 (Warren, C.J., dissenting); *Afroyim*, 387 U.S. at 257.

<sup>179</sup>See Patriot Act II, *supra* note 10.

<sup>180</sup>See Statement of Barbara Comstock, Director of Public Affairs, *supra* note 147.

<sup>181</sup>See generally Mariner, *supra* note 9.

<sup>182</sup>See Patriot Act II, *supra* note 10.

*B. Patriot Act II Improperly Reduces the Government's Burden  
to Prove "Intent to Relinquish" Citizenship*

Patriot Act II violates the Fourteenth Amendment's protection of citizens from denationalization by amending the Immigration and Nationality Act to specifically provide that committing the expatriating act of "joining or providing material support to a terrorist organization" is *prima facie* evidence that the act was done with the intent to relinquish United States citizenship. Patriot Act II should be recognized as unconstitutional because of its attempt to overcome the requirement that, for an act to be expatriating, a citizen must intend to renounce citizenship.<sup>183</sup> By establishing that an act in and of itself is *prima facie* evidence of intent, Patriot Act II alleviates the government's burden to prove by a preponderance of evidence that a citizen had the intent to relinquish citizenship.<sup>184</sup> By creating the presumption that conduct alone can be conclusive evidence of an intent to relinquish citizenship, Patriot Act II has rejected clear Supreme Court precedent and has crossed the line from recognizing expatriation to denationalization.<sup>185</sup> Without a clear intent on the part of the citizen to relinquish his citizenship, any act by the government to revoke that citizenship is denationalization, not expatriation.<sup>186</sup>

In *Afroyim*, the Supreme Court established the governing principle that Congress has no power under the Constitution to unilaterally strip people of their citizenship.<sup>187</sup> Essential to the Fourteenth Amendment's protection of citizenship is the principle that a citizen retains his citizenship unless he voluntarily relinquishes it.<sup>188</sup> In *Terrazas*, the Court expanded its view and pronounced that expatriation requires both a voluntary act and an intent to relinquish citizenship through the act.<sup>189</sup> The Court then established that the burden is on the government to prove such intent by a preponderance of the evidence.<sup>190</sup> In making this ruling, the Court firmly rejected the idea that the government could use committing an expatriating act as a presumption of an intent to renounce citizenship.<sup>191</sup> The Court stated that "we are confident that it would be inconsistent 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."<sup>192</sup>

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<sup>183</sup>See *Terrazas*, 444 U.S. at 268.

<sup>184</sup>See generally Mariner, *supra* note 9 (addressing the serious concern raised by inferring intent to relinquish citizenship from conduct).

<sup>185</sup>See *Terrazas*, 444 U.S. at 268.

<sup>186</sup>See *Afroyim v. Rusk*, 387 U.S. 253 (1967).

<sup>187</sup>See *id.*

<sup>188</sup>*Id.* at 268.

<sup>189</sup>*Terrazas*, 444 U.S. at 260. The Court stated that such intent can be "expressed in words or . . . found as a fair inference from proved conduct." *Id.*

<sup>190</sup>*Id.* at 268.

<sup>191</sup>*Id.* at 260-61.

<sup>192</sup>*Id.* at 261.

The Court denied the government the right to infer intent based solely on conduct because it is contrary to the Fourteenth Amendment:

[T]he intent of the Fourteenth Amendment, among other things, was to define citizenship; and as interpreted in *Afroyim*, that definition cannot coexist with a congressional power to specify acts that work a renunciation of citizenship even absent an intent to renounce. In the last analysis, expatriation depends on the will of the citizen rather than on the will of Congress and its assessment of his conduct.<sup>193</sup>

Although the Court stated that any of the specified expatriating acts “may be highly persuasive evidence in the particular case of a purpose to abandon citizenship,”<sup>194</sup> the Court resolved that “the trier of fact must in the end conclude that the citizen not only voluntarily committed to expatriating act prescribed by statute, but also intended to relinquish his citizenship.”<sup>195</sup> Further, the burden is on the government to prove intent by a preponderance of the evidence.<sup>196</sup>

Patriot Act II clearly contradicts this precedent by seeking to establish that joining or providing material support to a terrorist organization is *prima facie* evidence of an intent to relinquish United States citizenship.<sup>197</sup> Any attempts by the government to create a presumption of intent to relinquish citizenship shifts the burden of proof to the citizen, forcing him to prove that he did *not* have such intent to save his citizenship. This would allow the government to denationalize citizens if they are unable to overcome the presumption of intent and demonstrate that they did not intend to relinquish citizenship.<sup>198</sup> Critics of Patriot Act II have pointed to the difficulties that citizens may have in overcoming the presumption of intent due to courts’ recent deference to the government’s “factual assessments” relating to terrorism.<sup>199</sup> Patriot Act II’s proposal to alleviate the government’s burden to prove intent to relinquish citizenship is inconsistent with the standard set in *Terrazas*, and is, therefore, unconstitutional.<sup>200</sup>

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<sup>193</sup>*Id.* at 260.

<sup>194</sup>*Id.* at 261 (quoting *Nishikawa*, 356 U.S. at 139 (Black, J., concurring)).

<sup>195</sup>*Id.*

<sup>196</sup>*Id.* at 268.

<sup>197</sup>See Patriot Act II, *supra* note 10. Notably, Section 501 specifically singles out “joining or providing material support to terrorists” and serving in foreign army engaged in hostilities with the United States to be the only acts that would be considered *prima facie* evidence of intent to relinquish citizenship, while leaving the evidentiary standard for all the other established expatriating acts listed in the Immigration and Nationality Act unchanged. *Id.* This raises the question of why the act of joining or providing material support to a terrorist group would be presumptive of an intent to relinquish citizenship while all of the other long-standing expatriating acts are not.

<sup>198</sup>See generally Mariner, *supra* note 9.

<sup>199</sup>*Id.*

<sup>200</sup>See *Terrazas*, 444 U.S. at 268.

*C. Patriot Act II's Use of Denationalization as a Punishment  
is Unconstitutional Under the Eighth Amendment*

Beyond its violation of the Fourteenth Amendment by attempting to strip Americans of their citizenship without their assent, Patriot Act II is also unconstitutional because it uses denationalization as a punishment. In *Trop v. Dulles*, the Supreme Court held that statutes which provide for denationalization as a punishment are unconstitutional under the Eighth Amendment.<sup>201</sup> In reaching its decision, the Court again emphasized the value of citizenship and concluded that “the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen’s conduct, however reprehensible that conduct may be.”<sup>202</sup> An examination of Section 501 of Patriot Act II shows that the purpose of this legislation is to punish citizens that are convicted of terrorist acts.<sup>203</sup> Such legislation is prohibited by the Eighth Amendment and should not be enacted.

Because the Eighth Amendment only applies to statutes that impose penalties, the *Trop* Court first examined what makes a statute penal in nature.<sup>204</sup> The Court stated that the inquiry should be directed at the substance of the statute rather than its form, and a statute that appears to be a regulation on its face cannot avoid scrutiny simply because it is labeled as “non-penal.”<sup>205</sup> The test for determining whether or not a law is penal is based on “the purpose of the statute. If the statute imposes a disability for the purposes of punishment – that is, to reprimand the wrongdoer, to deter others, etc. – it [is] considered penal.”<sup>206</sup> The statute in question in *Trop* provided that a person would lose his citizenship for conviction of wartime desertion.<sup>207</sup> Applying this test, the Court concluded that the purpose of the statute was simply to punish the convicted deserter and, therefore, the statute was a penal law.<sup>208</sup>

Evaluating Section 501 of Patriot Act II under this test evinces that it is a punitive measure and should be treated as such. The drafters of this proposed legislation have not commented on their purpose for seeking to denationalize terrorists other than vague assertions of protecting national security.<sup>209</sup> A study of this proposal in

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<sup>201</sup>356 U.S. 86.

<sup>202</sup>*See id.* at 92-93.

<sup>203</sup>*See* Patriot Act II, *supra* note 10.

<sup>204</sup>*See Trop*, 356 U.S. at 95.

<sup>205</sup>*Id.* at 94-95.

<sup>206</sup>*Trop*, 356 U.S. at 96. In another case involving denationalization as a punishment, *Kennedy v. Mendoza-Martinez*, the Court provided a series of factors that can be considered in determining if a statute is punitive including: (1) whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as a punishment, (3) whether it comes into play only on a finding of *scienter*, (4) whether its operation will promote the traditional aims of punishment – retribution and deterrence, (5) whether the behavior to which it applies is already a crime, (6) whether an alternative purpose to which it may rationally be connected is assignable for it, and (7) whether it appears excessive in relation to the alternative purposed assigned. 372 U.S. 144, 168-69 (1963).

<sup>207</sup>*See Trop*, 356 U.S. at 88.

<sup>208</sup>*Id.* at 97.

<sup>209</sup>*See* Statement of Barbara Comstock, Director of Public Affairs, *supra* note 147.



context, however, leads to the reasonable conclusion that its purpose is to provide another method to punish those convicted of terrorist acts and not some other legitimate purpose. First, terrorism and providing material support to terrorists are already crimes that are subject to severe penalties.<sup>210</sup> By adding denationalization as another penalty, the government seeks to add further punishment to citizens that have already been convicted of a crime.<sup>211</sup> This is similar to the statute that was struck down as unconstitutional in *Trop*. Second, the majority of the expatriating acts listed in the Immigration and Nationality Act have a regulatory purpose and are used to clarify a person's citizenship status when he or she has transferred allegiance to another country.<sup>212</sup> In contrast, Patriot Act II revokes citizenship from Americans that are connected to terrorist groups rather than to any foreign country.<sup>213</sup> Thus, there is serious doubt as to any legitimate regulatory purpose behind the proposal.

Finally, Section 501 should be considered not just individually, but also in the context of Patriot Act II as a whole. It is important to note that Section 501 is inserted among a series of other sections that propose numerous increases in criminal penalties related to terrorism.<sup>214</sup> For example, Section 501 is immediately followed by Section 502: Enhanced Criminal Penalties for Violations of Immigration and Nationality Act.<sup>215</sup> In this context, it is clear that Patriot Act II is using denationalization as a punitive measure to punish citizens who are connected to terrorists organizations. Because Patriot Act II uses denationalization as a punishment it is unconstitutional under the Eighth Amendment.<sup>216</sup>

The Court in *Trop* interpreted the Eighth Amendment and concluded that "the basic concept underlying the Eighth Amendment is nothing less than the dignity of man."<sup>217</sup> The Court held that denationalization is a cruel and unusual punishment under the Eighth Amendment because it creates "the total destruction of the

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<sup>210</sup>18 U.S.C. §§ 2332, 2339A (2003).

<sup>211</sup>See generally Mariner, *supra* note 9.

<sup>212</sup>See John P. Roche, *The Expatriation Cases: "Breathes There the Man, With Soul So Dead . . . ?"*, 1963 SUP. CT. REV. 325, 337 (1963). Roche states that the government has used two categories of expatriating acts. One category provides for loss of citizenship for Americans who have shifted their allegiance to a foreign country and the other category based on punishing "Bad Americans" by depriving them of citizenship. *Id.*

<sup>213</sup>This would include both domestic and international terrorist organizations. See Patriot Act II, *supra* note 10.

<sup>214</sup>See Patriot Act II, *supra* note 10.

<sup>215</sup>*Id.* Other examples of sections proposing increased penalties include among several others: Section 411: Penalties for terrorist murders; Section 421: Increased Penalties for Terrorist Financing; Section 424: Denial of Federal Benefits to Terrorists; and Section 503: Inadmissibility and Removability of National Security Aliens or Criminally Charged Aliens. *Id.*

<sup>216</sup>*Trop*, 356 U.S. at 103.

<sup>217</sup>*Id.* at 100. The court recognized that the government does have the power to punish, even with death, but that this does not mean that any punishment less is acceptable: "[I]t is equally plain that the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination . . . any technique outside the bounds of [the] traditional penalties is constitutionally suspect. *Id.* at 99-100.

individual's status in organized society."<sup>218</sup> The Court based its decision on its contempt for the statelessness that may result from denationalization and its belief in the priceless value of citizenship.<sup>219</sup> A brief study of the concerns of the *Trop* Court relating to statelessness and the value of citizenship shows that Patriot Act II would have serious negative impacts in both of these areas. Thus, an Eighth Amendment ban on Patriot Act II's use of denationalization as punishment is well founded.

### 1. The Problem of Statelessness

By revoking citizenship from Americans who are connected to terrorist groups, Patriot Act II has the potential to create a serious problem of statelessness. Statelessness is "the legal condition of being without a nationality."<sup>220</sup> It results when a citizen loses his nationality without acquiring a new nationality.<sup>221</sup> While other expatriating acts provided in the Immigration and Nationality Act are generally used as a way to transfer a citizen's allegiance from one country to another, Patriot Act II's proposal to use denationalization as a punishment for terrorism may revoke citizenship of Americans who have no ties to any foreign country.<sup>222</sup> This will leave these citizens as stateless and treated as aliens in their own country.<sup>223</sup>

In *Trop*, the Court firmly denounced the use of denationalization as a punishment that creates stateless persons, considering such punishment to be "offensive to cardinal principles for which the Constitution stands."<sup>224</sup> The Court contemplated the perilous situation that is faced by the stateless person:

His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights.<sup>225</sup>

The Court believed that the never-ending fear and distress that is caused by statelessness makes it a cruel and unusual punishment.<sup>226</sup> Further, even if a stateless person never faces any of these consequences, the threat alone "makes the punishment obnoxious."<sup>227</sup>

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<sup>218</sup>*Id.* at 101.

<sup>219</sup>*Id.* at 101-02.

<sup>220</sup>See Jeffrey L. Blackman, *State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law*, 19 MICH. J. INT'L L. 1141, 1176 (1998).

<sup>221</sup>*Id.* at 1177.

<sup>222</sup>See Patriot Act II, *supra* note 10.

<sup>223</sup>See Gordon, *supra* note 150, at 346.

<sup>224</sup>*Trop*, 356 U.S. at 102.

<sup>225</sup>*Id.* at 101-02.

<sup>226</sup>*Id.* at 102.

<sup>227</sup>*Id.*

Not only has American law rejected the creation of statelessness, but international law also vehemently opposes such a condition.<sup>228</sup> While some have questioned the gravity of a stateless person's loss of citizenship,<sup>229</sup> statelessness has been a serious problem around the world with stateless persons facing violations of their basic human rights.<sup>230</sup> In its Declaration of Human Rights, the United Nations has announced its position against statelessness by declaring that "everyone has the right to a nationality" and that "no one shall be arbitrarily deprived of his nationality."<sup>231</sup> Patriot Act II's attempt to revive denationalization runs contrary to both the United States and the International community's condemnation of creating statelessness.

The idea that denationalization causes a citizen to become "a man without a country" is a major contributing factor in the Court's conclusion that denationalization is a cruel and unusual punishment.<sup>232</sup> Patriot Act II has the clear potential to render Americans stateless by revoking their citizenship for terrorism when they have not transferred allegiance to any foreign country.<sup>233</sup> This supports the conclusion that it is unconstitutional under the Eighth Amendment as a cruel and unusual punishment.

## 2. The Value of Citizenship

The Court's decision in *Trop* that denationalization is a cruel and unusual punishment under the Eighth Amendment is rooted in the idea that citizenship is a person's most valuable, fundamental right.<sup>234</sup> The Court considers citizenship to be the equivalent to a person's social and political identity.<sup>235</sup> Denationalization is a cruel and unusual punishment because it is the "total destruction of the individual's

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<sup>228</sup>See Spectar, *supra* note 23, at 295-96.

<sup>229</sup>See Gordon, *supra* note 150, at 346. Gordon questions the impact that a change in a person's status to stateless would really have and states that the main loss of rights would be loss of the right to vote, to hold public office, to work in certain professions and to face deportation. *Id.*

<sup>230</sup>See Spectar, *supra* note 23, at 296.

<sup>231</sup>*Id.* at 297 (quoting the United Nation's Universal Declaration of Human Rights); see also, Blackman, *supra* note 220, at 1178.

<sup>232</sup>In *Afroyim*, the Court also addressed its concern about the potential for denationalization to create statelessness. 387 U.S. at 268. The Court stated that "[i]n some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world – as a man without a country." *Id.*

<sup>233</sup>It is important to reemphasize that Patriot Act II makes no distinction between domestic and foreign terrorist organizations, and the definition for terrorism that it uses is incredibly broad. See Patriot Act II, *supra* note 10. This may lead to targeting citizens who are involved in domestic political or activist groups that are disfavored by the government being labeled as terrorists and, thus, facing denationalization even though there is no connection to a foreign country. See Edgar, *supra* note 114, at 6.

<sup>234</sup>*Trop*, 356 U.S. 86. Chief Justice Warren stated that "[w]hen the Government acts to take away the fundamental right of citizenship, the safeguards of the Constitution should be examined with special diligence." *Id.* at 103.

<sup>235</sup>*Id.* at 101.

status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community.<sup>236</sup> The use of denationalization to take away, in essence, a person's societal existence ignores the "basic concept underlying the Eight Amendment [which] is nothing less than the dignity of man" and is, thus, a cruel and unusual punishment.<sup>237</sup>

The concern over protecting citizenship because it is a most precious right has been the prevailing theme throughout the Court's decisions prohibiting denationalization.<sup>238</sup> In his dissent in *Perez*, which has been adopted as the opinion of the Court, Chief Justice Warren described citizenship as "the constitutional birthright of every person born in this country" and as "man's basic right for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen."<sup>239</sup> In *Afroyim*, the Court reiterated the fundamental basic value of citizenship stating that it "is no light trifle to be jeopardized any moment Congress decides to do so under the mane of one of its general or implied grants of power."<sup>240</sup> This concept of citizenship as man's basic right is supported by both the theoretical and historical interpretations of citizenship.<sup>241</sup>

Despite the overwhelming recognition for the fundamental value of citizenship, there has been some speculation as to the real harm that Americans would face if they have their citizenship revoked.<sup>242</sup> It has been suggested that Chief Justice Warren's characterization of citizenship "is a dramatic overstatement of the

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<sup>236</sup>*Id.*

<sup>237</sup>*Id.* at 100.

<sup>238</sup>*See id.*; *Afroyim*, 387 U.S. 253; *Terrazas*, 444 U.S. at 268. *See also* Griffith, *supra* note 17, at 453-54 (discussing how the concern in the expatriation cases centered on the extent of protection that was to be provided for the basic right of citizenship).

<sup>239</sup>*Perez*, 356 U.S. at 66 (Warren, C.J., dissenting). Chief Justice Warren's concern for the value of citizenship is connected to the plight of the stateless person, who "has no lawful claim to protection from any nation, and no nation may assert rights on his behalf." *Id.*

<sup>240</sup>*Afroyim*, 387 U.S. at 267-68.

<sup>241</sup>*See* Gordon, *supra* note 150, at 316. In considering the meaning of citizenship, Gordon states:

Citizenship is a somewhat nebulous term, with roots deep in antiquity. It is a generalization which denotes full membership in the clan, the state or the society. To most of us such membership is a proud and comforting possession . . . . Citizenship confers a status which summons rights, privileges and obligations, and in a society as powerful and beneficent as that of the United States, this may be a status of inestimable value. The manner in which such status can be lost, or in which the citizen can be deprived of it, obviously is a matter of crucial concern to all.

*Id.* *See also* Aleinikoff, *supra* note 24, at 1484-98 (analyzing several perspectives on citizenship including a citizenship under a "rights" perspective).

<sup>242</sup>*See* Gordon, *supra* note 150, at 346. Gordon questions the real gravity of denationalized citizens' loss, and suggests that the characterizations of the harm they face may be too extreme. *Id.*

importance of citizenship in the United States today.”<sup>243</sup> This argument views citizenship as just a title, the loss of which has no real impact because aliens in the United States are provided many of the same rights as citizens.<sup>244</sup>

Citizenship is still a valuable right for all Americans that needs to be protected from attempts by the government to revoke citizenship.<sup>245</sup> That a person’s status as an American citizen is still incredibly important is evident through the current situation involving the detention of enemy combatants in connection with the war on terror.<sup>246</sup> Patriot Act II’s attempt to revoke Americans’ citizenship in the name of national security has renewed the need to recognize citizenship as Americans’ most fundamental and precious right.<sup>247</sup>

Patriot Act II’s attempt to revive allowing the government to denationalize citizens for any connection to a terrorist group has raised serious concerns about the real purpose behind this proposal.<sup>248</sup> It is important to consider why the government is attempting to assert the power to strip Americans of their citizenship for involvement with a terrorist organization when such acts are already subject to severe criminal penalties.<sup>249</sup> Critics of Patriot Act II have suggested that the real purpose behind this proposal is that by giving the government the power to denationalize citizens, they will then have the power to deport or indefinitely detain these individuals who will then be treated as aliens.<sup>250</sup>

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<sup>243</sup>See Aleinikoff, *supra* note 24, at 1486.

<sup>244</sup>See Gordon, *supra* note 150, at 346; see also Aleinikoff, *supra* note 24, at 1486 (stating that aliens are entitled to the majority of benefits of citizens, but also recognizing certain benefits provided solely to citizens such as the ability to travel on a U.S. passport, the right to receive protection from the U.S. government overseas, the right to vote and the right to hold office).

<sup>245</sup>See generally Lewis & Mayle, *supra* note 1; Mariner, *supra* note 9; Hetnoff, *supra* note 114.

<sup>246</sup>As part of the war on terrorism, the government has been detaining over six hundred men who are suspected of being enemy combatants of the United States. See Bill Mears, *Supreme Court Will Hear First Appeals Involving Guantanamo Detainees*, CNN Washington Bureau (Nov. 11, 2003) available at <http://www.cnn.com/2003/LAW/11/10/scotus.detainees/> (last visited Feb. 19, 2004). There has been a great debate about the legal protection that such enemy combatants should receive. Initially, courts have denied access to the alien Guantanamo Bay detainees, holding that the United States has no jurisdiction to issue a writ of habeas corpus for aliens that are detained outside the sovereignty of the United States. See *Khaled A. F. al Ohah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003). However, the American terrorist suspects, Jose Padilla and Yaser Hamdi, as American citizens, have been granted access to the legal system. In Padilla’s case, the Court of Appeals for the Second Circuit granted a writ of habeas corpus. See *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003). This situation shows that status as a citizen is of vital importance to those who are accused by the government of involvement in terrorism. This has been suggested as a reason why the government wants the power to revoke citizenship. See Mariner, *supra* note 9.

<sup>247</sup>See generally Lewis & Mayle, *supra* note 1; Mariner, *supra* note 9; Hetnoff, *supra* note 114.

<sup>248</sup>Hetnoff, *supra* note 114.

<sup>249</sup>See Mariner, *supra* note 9.

<sup>250</sup>See Hetnoff, *supra* note 114; Edgar, *supra* note 114.

Patriot Act II is attempting to use denationalization as a weapon in the war on terror by punishing citizens who are connected to terrorist groups.<sup>251</sup> This goes against the clear statement in *Trop* that “the deprivation of citizenship is not a weapon that the Government may use” against citizens.<sup>252</sup> The value of citizenship is still recognized by the Constitution, which protects it from being taken by the government.<sup>253</sup> Thus, under the Eighth and Fourteenth Amendments, Patriot Act II’s proposal to allow the government to strip Americans of their citizenship for connection to a terrorist group should be recognized as unconstitutional.

#### V. CONCLUSION

After the leak of Patriot Act II to the public by the Center for Public Integrity, the Department of Justice released a statement claiming that its deliberations in considering new anti-terrorism measures “are always undertaken with the strongest commitment to our Constitution and civil liberties.”<sup>254</sup> Section 501, however, clearly seeks to overcome the constitutional prohibition against denationalization and revive stripping Americans of their citizenship in the name of national security and the war on terrorism.

A review of the history of denationalization in America has shown that any past deference to Congress regarding revocation of citizenship without the citizen’s assent has been replaced by a full protection of Americans from denationalization. The Supreme Court has declared that denationalization is unconstitutional under both the Fourteenth and Eighth Amendments. Section 501 of Patriot Act II violates both of these amendments because it seeks to revoke citizenship from Americans who have no intention to relinquish their citizenship and it uses this denationalization as a punishment against those persons that the government finds have a connection to terrorism.

Citizenship remains Americans’ most fundamental right, and citizens should continue to receive full protection as demanded by the Constitution. If Congress is presented with Patriot Act II in its present form, it should reject Section 501 as an unconstitutional attempt to revive denationalization.

NORA GRAHAM<sup>255</sup>

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<sup>251</sup>See Statement of Barbara Comstock, Director of Public Affairs, *supra* note 147. The Department of Justice refers to this proposal as a “tool” to protect Americans. *Id.*

<sup>252</sup>*Trop*, 356 U.S. at 92-93.

<sup>253</sup>See *id.*; *Afroyim*, 387 U.S. 253.

<sup>254</sup>See Statement of Barbara Comstock, Director of Public Affairs, *supra* note 147.

<sup>255</sup>Cleveland-Marshall College of Law, Juris Doctor Candidate 2005. The author would like to thank her family for all their support, especially her brother Michael for all his patience and advice on this Note. The author would also like to give special acknowledgment to her faculty advisor, Professor James G. Wilson, for making her aware of the constitutional concerns raised by Patriot Act II, particularly on the Eighth Amendment violation.