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▶ **To cite this version:**

Patrick Weil. Citizenship, Passports, and the Legal Identity of Americans: Edward Snowden and Others Have a Case in the Courts. Yale Law Journal, 2014, 123, pp.565. hal-03961388

HAL Id: hal-03961388
https://cnrs.hal.science/hal-03961388

Submitted on 28 Jan 2023

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THE YALE LAW JOURNAL FORUM
APRIL 23, 2014

Citizenship, Passports, and the Legal Identity of Americans: Edward Snowden and Others Have a Case in the Courts

Patrick Weil

In this Essay, Professor Patrick Weil reexamines the constitutional function of the passport in relation to American citizenship. The State Department recently developed a policy of passport revocation whereby some Americans are transformed into de facto stateless persons, like Edward Snowden, or are prohibited from living abroad as citizens, like dozens of Yemeni Americans. In the Yemeni Americans' case, the State Department confuses the legality of passports and naturalization. Revoking Snowden's passport violates the right for a citizen to possess a passport confirming his or her legal identity—including citizenship—while abroad. This passport function, recognized since 1835, is one of the privileges and immunities of American citizens protected by the Fourteenth Amendment. The Supreme Court has never authorized its suspension by the executive for national security reasons, unlike the other function of a passport—the right to travel. New technologies offer a way to distinguish between these two functions and to make effective a constitutional right.

On June 22, 2013, Edward J. Snowden, a Hawaii-based computer specialist and contractor for the National Security Agency (NSA), had his passport revoked by the United States State Department.[1] While working for the NSA, Snowden had secretly downloaded classified documents detailing NSA surveillance operations. By May 20, 2013, Snowden had left Hawaii for Hong Kong, where he started releasing the top-secret material in his possession to the press.[2]

1. Peter Baker & Ellen Barry, *Snowden, in Russia, Seeks Asylum in Ecuador*, N.Y. TIMES, June 23, 2013, http://www.nytimes.com/2013/06/24/world/asia/nsa-leaker-leaves-hong-kong-local-officials-say.html.

2. *Id.* On June 6, 2013, the *Guardian* and the *Washington Post* published the first articles revealing the secret NSA operations. Roy Greenslade, *How Edward Snowden Led Journalist and Film-Maker to Reveal NSA Secrets*, GUARDIAN, Aug. 19, 2013, http://www.theguardian.com/world/2013/aug/19/edward-snowden-nsa-secrets-glenn-greenwald-laura-poitras. *See also* Barton Gellman & Laura Poitras, *U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program*, WASH. POST, June 6, 2013, http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497

On June 14, the U.S. Justice Department filed criminal charges against Snowden in federal district court.[3] The following day, the Justice Department formally requested that Hong Kong authorities issue a provisional arrest warrant for Snowden.[4] Eight days later, on the very morning—Hong Kong time—that his passport was revoked, Mr. Snowden was able to board a flight to Moscow. He remained in Moscow Sheremetyevo Airport's transit zone until August 1, 2013, when Russian authorities granted him a one-year temporary asylum along with an identity document.[5]

The State Department reaffirmed that Snowden remained an American citizen. However, according to U.S. Attorney General Eric Holder, Snowden only remained eligible for a "limited validity passport good for direct return to the United States."[6] The State Department had thus effectively voided Snowden's U.S. passport. Only if and when he decides to return to the United States will the State Department grant him an official document permitting his return to the U.S.; it will not grant him a passport of the common kind, which allows a U.S. citizen to remain abroad.[7]

_story.html (publishing Snowden's initial revelations). Three days later, Snowden revealed himself as the source of the leaks. Philip Rucker & Sari Horwitz, *In Snowden Playbook, Obama Administration Prioritized Legal Channels over Diplomacy*, WASH. POST, June 28, 2013, http://www.washingtonpost.com/politics/in-snowden-playbook-obama-administration-prioritized-legal-channels-over-diplomacy/2013/06/27/17523a0a-de7b-11e2-b797-cbd4cb13f9c6_story.html.

3. Baker & Barry, *supra* note 1. The charges contained allegations of theft of government property and two violations of the Espionage Act. Sari Horwitz et al., *Legal, Political Maneuvering Let Snowden Flee*, WASH. POST, June 24, 2013, http://www.washingtonpost.com/world/national-security/legal-political-maneuvering-let-snowden-flee/2013/06/23/5643e0b6-dc36-11e2-bd83-e99e43c336ed_story.html.

4. Horwitz, *supra* note 3.

5. Kevin Rawlinson, *Russia Grants NSA PRISM Whistleblower Edward Snowden a Year's Asylum*, INDEP. (London), Aug. 1, 2013, http://www.independent.co.uk/news/world/europe/russia-grants-nsa-prism-whistleblower-edward-snowden-a-years-asylum-8741940.html.

6. Letter from Eric H. Holder, Jr., Att'y Gen., U.S., to Alexander Vladimirovich Konovalov, Minister of Justice, Russ. Fed'n (Jul. 23, 2013), http://s3.documentcloud.org/documents/740227/attorney-genral-letter-to-russian-justice-minister.pdf; Sari Horwitz & Michael Birnbaum, *U.S. Won't Seek Death Penalty for Snowden, Holder Says in Letter to Russian Official*, WASH. POST, July 26, 2013, http://www.washingtonpost.com/world/national-security/us-will-not-seek-death-penalty-for-snowden-holder-says-in-letter-to-russians/2013/07/26/5ab3f4da-f601-11e2-aa2e-4088616498b4_story.html.

7. 22 C.F.R. § 51.60(a) (2014) states that "[t]he Department may not issue a passport, except a passport for direct return to the United States," before enumerating the cases in which the Department can act in such a way. It is this particular type of passport—available only for a short period, solely for the purpose of permitting direct return to the United States—that Attorney General Holder was referencing in his letter. *See also infra* note 69 (discussing the case of passports recently issued to Yemeni Americans following the revocation of their passports).

Snowden's is not the only passport of an American citizen that the U.S. State Department has recently revoked. According to the *Washington Post*, the State Department revoked the passports of a few dozen—if not a hundred—Yemeni Americans after arguing that because these individuals were illegally naturalized, their passports were also obtained illegally.[8]

From an analysis of historical and legal precedents, it seems clear that the State Department has acted in violation of the Constitution in each of these cases. The revocation of Snowden's passport violates a privilege and immunity of American citizenship, protected by the Privileges or Immunities Clause of the Fourteenth Amendment—namely a U.S. citizen's ability to keep a passport while abroad as a document proving her legal identity and citizenship. This is a function of the U.S. passport that the Supreme Court has recognized since 1835.[9] The revocation of the passports of the Yemeni Americans is similarly suspect. If the U.S. State Department contests the legality of their naturalization, their cases should be brought to court on the claim that there is good cause to revoke their citizenship. The cases do differ; Snowden's citizenship is uncontested while the citizenship of the Yemeni Americans in question seems contestable. But in both instances, when prevented from directly revoking or attacking the citizenship of American citizens—which is staunchly protected de jure by Supreme Court jurisprudence and relevant statutes—the State Department has developed a strategy of attack whereby Americans are transformed into de facto stateless persons (as in the case of Snowden) or individuals who are no longer able to live abroad as U.S. citizens (like the Yemeni Americans). It is time for the courts to intervene and set the rules by clarifying the link between U.S. citizenship and a U.S. passport.

I. SNOWDEN'S PASSPORT

At first glance, Supreme Court jurisprudence seems to offer support for the Obama Administration's position in Snowden's situation. In a 1981 case, *Haig v. Agee*, the Court upheld the revocation of ex-CIA agent Philip Agee's passport.[10] Agee, who was living in West Germany at the time, had traveled extensively to other countries in order to publicize the activities of undercover

8. Al Kamen, *In Yemen, U.S. Embassy Confiscating Some Passports, ACLU Warns*, WASH. POST, Jan. 9, 2014, http://www.washingtonpost.com/politics/in-yemen-us-embassy-confiscating-some-passports-aclu-warns/2014/01/09/8011d2fa-7956-11e3-8963-b4b654bcc9b2_story.html.

9. Urtetiqui v. D'Arcy, 34 U.S. 692, 699 (1835).

10. 453 U.S. 280 (1981).

CIA agents, triggering government action against him.[11] The Court affirmed the authority of the Secretary of State to revoke a passport when the holder's activities in foreign countries were causing serious damage to national security.[12]

Agee attacked the Secretary's action on statutory grounds—Congress had never authorized the Secretary of State to revoke passports, either by an express delegation or by "an administrative practice sufficiently substantial and consistent to warrant the conclusion that Congress had implicitly approved it."[13] Agee prevailed in the district court and court of appeals on the basis of that argument. He further claimed that his passport should be returned on three constitutional grounds, described by the Supreme Court as:

> [F]irst, that the revocation of his passport impermissibly burdens his freedom to travel; second, that the action was intended to penalize his exercise of free speech and deter his criticism of Government policies and practices; and third, that failure to accord him a prerevocation hearing violated his Fifth Amendment right to procedural due process.[14]

The Court backed the government's right to revoke Agee's passport for national security reasons. Denying his constitutional claims, it stated that the freedom to travel abroad was subordinate to national security and foreign policy considerations. It saw no foundation for his First Amendment claim and his request for a prerevocation hearing.[15]

Yet, in so deciding, the Court dealt with only one dimension of the American passport: the one that guarantees American citizens the freedom to travel, i.e., to leave U.S. territory and to cross foreign borders and territories.

The Court did not discuss a second dimension of the passport, which was first clearly distinguished and recognized in an 1835 Supreme Court decision, *Urtetiqui v. D'Arcy*.[16] The Court in *Urtetiqui* stated:

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11. *Id* at 283-84. On December 23, 1979, the U.S. Consul General in Hamburg notified Agee that the State Department was revoking his U.S. passport. Its authority to act was based on 22 C.F.R. § 51.70(b)(4), which allowed the Secretary of State to refuse to issue (or deny) a passport if she "determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States," and on 22 C.F.R. § 51.71(a), which permits the Secretary to revoke a passport for any reason allowing him to deny it. *Id.* at 311 (Brennan, J., dissenting).

12. *Agee*, 453 U.S. at 309-310.

13. *Id.* at 318 (Brennan, J., dissenting) (quoting Zemel v. Rusk, 381 U.S. 1, 12 (1965)).

14. *Id.* at 306.

15. *Id.*

16. 34 U.S. 692 (1835).

> [A passport] is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognised, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact.[17]

In *Agee*, the Supreme Court reaffirmed that distinction by quoting the entirety of this paragraph.[18] The executive branch itself noted this dual function of a passport; responding to a question raised by Justice Rehnquist during the oral argument, U.S. Solicitor General Wade McCree asserted that a passport "serves two purposes. First, the purpose of identifying the bearer as a citizen or a national of the issuing nation; and second, to request free passage for him from a foreign nation as well as the efforts of the foreign nation to facilitate his travel."[19]

The 1981 Court did not deal with the second function of the passport—namely, to be "recognised, in foreign countries, as an American citizen" and to "identify[] the bearer as a citizen or a national of the issuing nation."[20] Agee did not invoke it, and Chief Justice Burger—who only included answers to Agee's constitutional claims in the final stages of writing the majority opinion[21]—did not raise the issue sua sponte.[22]

The majority opinion in *Agee* was hotly debated within the Court, provoking a strong dissent by Justice Brennan. For him, the right to travel out of the United States had been recognized as "an important personal right included within the 'liberty' guaranteed by the Fifth Amendment" which could

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17. *Id.* at 699.

18. 453 U.S. at 292-93.

19. Transcript of Oral Argument, *Agee*, 453 U.S. 280 (No. 80-83), http://www.oyez.org/cases/1980-1989/1980/1980_80_83.

20. 453 U.S. at 309 (explicitly ruling on Agee's "right to travel").

21. *Agee* was decided on June 29, 1981. At the end of May 1981, Chief Justice Burger circulated a draft opinion that did not address the constitutional claims that Agee was presenting. On May 29, Justice White informed the Chief Justice that "several of us, perhaps as many as five, indicated that both statutory and constitutional issues should be dealt with." Letter of Justice Byron White to Chief Justice Warren Burger, May 29, 1981 (on file with the Library of Congress, Brennan Papers, I 543/1). On June 3, Chief Justice Burger circulated additional pages, which would become Part III of his opinion. Memorandum from Chief Justice Warren Burger to the Supreme Court (on file with Library of Congress, Brennan Papers, I 543/1).

22. *See generally Agee*, 453 U.S. at 306-10 (containing no discussion of the recognition and identification function of passports).

only be curtailed by Congress in the exercise of its lawmaking function.[23] He feared that the *Agee* decision "has handed over too much of that function to the Executive."[24] Brennan's criticism is not the point of my argument; let us concede that the revocation of a passport is a necessary executive power insofar as it provides a means to restrict freedom of travel across borders for security reasons. It is not as convincing, however, that, for security reasons, an American citizen should be deprived of her right to a legal identity as an American citizen, the second function of a passport.

While stating that "there is only a constitutional 'freedom' to travel internationally—a freedom that may be curtailed within the contours of due process of law,"[25] the Court also reaffirmed in *Haig v. Agee* a constitutional "right" to interstate travel.[26] For the Court this distinction was important: the right to travel abroad was a freedom that could be subjected to due process or legislative limitation. The right to travel within the United States was an absolute right before which both the executive and the legislative powers had to bow. I believe that if the Court had inquired further, it would have also affirmed a constitutional right for an American travelling or residing abroad—that of keeping his or her passport as a valid identity document. If asked today by Edward Snowden, for example, the Court would have to confirm that it is his absolute right not to be deprived of his legal identity as an American citizen. This absolute right can first be deduced from the absolute protection afforded to him by his status as a citizen.

This absolute protection was affirmed by the Supreme Court in 1967 in *Afroyim v. Rusk*[27] and has received additional confirmation in subsequent cases.[28] In the preceding decades, citizenship was conditional: starting in 1906, naturalized citizens who would return to reside in their country of origin would be denaturalized.[29] Starting in 1907, American women marrying foreigners would lose their citizenship.[30] Later, under the 1940 Nationality Act, Americans could and did lose their citizenship if they voted in foreign elections, escaped

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23. *Id.* at 312 (Brennan, J., dissenting) (citing Kent v. Dulles, 357 U.S. 116 (1958)).

24. *Id.* at 319.

25. Letter of Justice Potter Stewart to Chief Justice Warren Burger, June 23, 1981 (on file at Yale University Archives, Potter Stewart Papers, box 365, folder 1367). In this letter, Justice Stewart mentioned *Califano v. Aznavorian*, 439 U.S. 170, 176 (1978), where he delivered the majority opinion, and asked Burger to substitute the word "freedom" for the word "right" used in the first draft of his Part III of *Haig v. Agee*.

26. *Agee*, 453 U.S. at 306.

27. 387 U.S. 253 (1967).

28. Vance v. Terrazas, 444 U.S. 252 (1980); Rogers v. Bellei, 401 U.S 815 (1971).

29. Act of June 20, 1906, ch. 3592, § 15, 34 Stat. 596, 601.

30. Expatriation Act of 1907, ch. 2534, § 3, 34 Stat. 1228, 1228-29.

the draft, or remained six months or longer within any foreign state of which he or either of his parents was ever a national[31]—adding to a list which already included denationalization for Americans who became citizens of a foreign state.[32] Between 1945 and 1967, more than 100,000 Americans, mostly native-born, were denationalized.[33] Citizenship was less protected than liberty, life, or property, for denationalization was legally possible without due process.

In 1967, in *Afroyim*, the Supreme Court secured American citizens against deprivation of their citizenship, on the basis of a literal reading of the Fourteenth Amendment.[34] Justice Black concluded the majority opinion by affirming:

> 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 citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.[35]

Since then, the Citizenship Clause of the Fourteenth Amendment has been interpreted as a right that is granted absolute protection. Adopted in 1868, the Fourteenth Amendment states first that all persons born or naturalized in the United States are citizens of the United States. Then it continues with the following sentence: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[36] These privileges and immunities were narrowly defined in the 1873 *Slaughter-House Cases*,[37] a decision that provoked and continues to provoke great controversy. Many scholars have claimed that the Court did not fulfill the original purpose

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31. Nationality Act of 1940, ch. 876, §§ 401-402, 54 Stat. 1137, 1169.

32. *Id.* at §§ 401-410, 54 Stat. at 1168-1171. Although denaturalization had similar consequences to denationalization for the individual, the two are distinct: denationalization denotes a loss of citizenship, whereas, in theory, a denaturalized person has never been a citizen.

33. In addition 3,713 were denaturalized. *See* PATRICK WEIL, THE SOVEREIGN CITIZEN 197-99 (2013).

34. Afroyim v. Rusk, 387 U.S. 253 (1967). The struggle that led Justice Black and Chief Justice Warren to find a way to declare citizenship an absolute right while in the minority of the Court in *Peres v. Brownell*, 356 U.S. 44 (1958), and to summon the majority in *Afroyim* nine years later, after many divisive cases had been decided—often in contradiction with each other—is described in WEIL, *supra* note 33, at 145-75.

35. *Afroyim*, 387 U.S. at 268.

36. U.S. CONST. amend. XIV, § 1.

37. Slaughter-House Cases, 83 U.S. 36 (1872).

of the Fourteenth Amendment.[38] Nevertheless, the Constitution affirms some privileges and immunities of American citizens and—however narrowly defined by the Court in the *Slaughter-House Cases*—even this minimalist conception turns out to be consequential.

The privileges and immunities of citizens of the United States, Justice Miller wrote for the majority, are those which "ow[e] their existence to the Federal government, its National character, its Constitution, or its laws."[39] Miller then enumerated these privileges and immunities, and it is possible to distinguish the ones he defines as owed to the Constitution—namely, the rights guaranteed by the Thirteenth, Fourteenth, and Fifteenth Amendments, as well as rights to peaceably assemble, petition for redress of grievances, and claim the privilege of the writ of habeas corpus—from those owed to the federal government and to its national character—for example, the right to freely access the nation's seaports and to use the navigable waters of the United States.[40] All these privileges and immunities are said to protect American citizenship from any abridgment by the states.

Yet, in his majority opinion, Justice Miller also deals with the privileges and immunities of the American citizen abroad, in a foreign land, which arise not in relation to his or her state, but rather to the federal government of the United States:

> Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign

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38. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 410 (12th ed. 1991) (arguing that the *Slaughter-House Cases* "implicitly rejected . . . the position that all the Bill of Rights guarantees were made applicable to the states by the post-Civil War constitutional changes"); L.H. LaRue, *The Continuing Presence of* Dred Scott, 42 WASH. & LEE L. REV. 57, 61 (1985) (arguing that the *Slaughter-House Cases* "look like the deep mirror image of *Dred Scott*. . . . With the adoption of the Fourteenth Amendment, blacks became citizens, but Miller gutted the meaning of that by stripping citizenship of any important legal consequences"); Timothy Sandefur, *Privileges, Immunities and Substantive Due Process*, 5 N.Y.U. J. L. & LIBERTY 115, 115 (2010) (arguing that the Privileges or Immunities Clause was "famously mutilated by the . . . *Slaughter-House Cases*"); Kimberly C. Shankman & Robert Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals and the Federal Government*, 3 TEX. REV. L. & POL. 1, 20 (1998) ("Five years after the Fourteenth Amendment was ratified, the Supreme Court, in the infamous *Slaughterhouse Cases*, effectively eviscerated the Privileges or Immunities Clause, thereby fundamentally changing the course that Congress and the American people had meant the Court to follow.").

39. *Slaughter-House Cases*, 83 U.S. at 37.

40. Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the* Slaughter-House Cases, 109 YALE L.J. 643, 678-79 (2000).

> government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States.[41]

One century later, in *Afroyim*, Justice Black agreed that the main consequence of the denationalization of a citizen is to "take from him the privileges of a citizen."[42] This tied privileges and immunities to the status of being a citizen of the United States, now protected absolutely and independently of any crime or illegal act committed by the citizen. The privileges of American citizens abroad—like the privileges of an American citizen within the United States—seem to have different sources. When the Court mentions the right of a citizen "to demand the care and protection of the Federal government over his life, liberty, and property," it is as much a reference to the U.S. Constitution as a reference to the national character of the United States, given that the basic protection of one's government belongs "to those privileges and immunities which were, in their nature, fundamental; which belong of right to citizens of all free governments."[43]

The protection by the federal government of life, liberty, and property is a constitutional right subject to due process. The rights of protection and care while abroad, part of the privileges and immunities of citizens of all free governments, have evolved over time. I believe that the right to possess basic identity documents detailing one's date and place of birth, along with names and surnames, has become an absolute right, as much a fundamental human right developed throughout the twentieth century as a constitutional one stemming from *Afroyim*.

II. PORT

THE PROTECTION OF THE LEGAL IDENTITY OF AMERICANS

Among the numerous rights proclaimed by the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on December 10, 1948, the "right to a nationality" guaranteed in Article 15 has become one of the most respected and protected.

When a person lacks citizenship, the international community provides a proxy: protection of the United Nations High Commissioner for Refugees

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41. *Slaughter-House Cases*, 83 U.S. at 79.

42. Afroyim v. Rusk, 387 U.S. 253, 259 (1967) (quoting 31 ANNALS OF CONG. 1050-51 (1818) (statement of Rep. Lowndes)).

43. *Slaughter-House Cases*, 83 U.S. at 97 (quoting Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823)).

(UNHCR) and rights in the country of residence[44] fulfill the functions nationality plays in linking an individual with a nation-state. The international community does not provide an analogous proxy in situations where other rights are denied, for example, when due process is lacking or gender discrimination is obvious.

Beginning in 1922, some international agreements provided refugees with a certificate that served as both a travel and identity document—like a passport. Under Article 28 of the 1951 UNHCR Convention Relating to the Status of Refugees, contracting states are required to issue travel documents to refugees, "unless compelling reasons of national security or public order otherwise require."[45]

But the 1951 convention provides in Article 27 that "[t]he Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document."[46] This is an absolute obligation.[47] There is an exception to the required provision of travel documents: security reasons. There is no exception to the obligation to provide identity documents: all contracting states must issue identity papers to any refugee in their territory who does not possess a valid travel document. This means that the United States is obliged to deliver identity documents to foreign refugees who are in its jurisdiction and lack them.[48]

The right to be provided identity papers when abroad is expressed by the fact that when a human being does not possess a nationality or the protection of a state that can provide identity papers, the international community has agreed to enter into an absolute obligation to provide them. Should not this obligation, traditionally fulfilled by nation-states voluntarily for all their

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44. Convention Relating to the Status of Refugees art. 27, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150; Convention Relating to the Status of Stateless Persons art. 27, Sept. 28, 1954, 360 U.N.T.S. 117.

45. Convention Relating to the Status of Refugees, *supra* note 44, at art. 28; *see also Identity Documents for Refugees*, U.N. HIGH COMM'R FOR REFUGEES (July 20, 1984), http://www.unhcr.org/3ae68cce4.html.

46. Convention Relating to the Status of Refugees, *supra* note 44, at art. 28.

47. JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 237 (2005).

48. The United States has not signed the 1951 Convention Relating to the Status of Refugees, the 1954 Convention Relating to the Status of Stateless Persons, or the 1961 Convention on the Reduction of Statelessness. *See also* U.N. HIGH COMM'R FOR REFUGEES & OPEN SOC'Y JUSTICE INITIATIVE, CITIZENS OF NOWHERE: SOLUTIONS FOR THE STATELESS IN THE U.S. 3 (Dec. 2012), http://www.opensocietyfoundations.org/sites/default/files/citizens-of-nowhere-solutions-for-the-stateless-in-the-us-20121213.pdf. The United States has, however, signed the Protocol Relating to the Status of Refugees; under Article 1 of the Protocol, signatories "undertake to apply articles 2 to 34 of inclusive of the Convention [Relating to the Status of Refugees] to refugees as hereinafter defined." Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 606 U.N.T.S. 267.

citizens who happen to have lost their passport while abroad, be considered *a fortiori* imposed on the signatory states—including the United States—for their own citizens?[49]

When the United States canceled the validity of Snowden's American passport, thereby stripping him of an identity document, it set the stage for a humiliating paradox: an identity document affirming and certifying his American citizenship (by listing his place of birth and citizenship) has been delivered to Snowden by the Russian authorities.[50]

The individual right to be recognized before the law found in Article 6 of the Universal Declaration of Human Rights, as well as a child's right to be registered with a name and a nationality at birth found in Article 7 of the Convention of the Rights of the Child, offer further foundations for the duty to issue identity documents in international law.[51] By doing so, the United States would fulfill the normal obligation of all states toward their own citizens, especially those states that are democracies. The ability of an American citizen to keep a legal identity has become one of the privileges and immunities of American citizens as defined in the *Slaughter-House Cases* because it now constitutes a "right of citizens of all free countries."

This principle can also be deduced from *Afroyim*. In the early twentieth century, Edwin Borchard—drawing on eighteenth-century legal thinker Emerich de Vattel's *The Law of Nations*—addressed the question of the protection of the citizen living abroad. He believed that, at least in his pre-World-War-II era, states had the right, but not the obligation, to protect the interests of their citizens while abroad. This right seemed to be derived from the nature of national sovereignty: because the interests of a citizen were also the interests of the state, the state had the right to vindicate those interests abroad whenever it thought doing so was necessary.[52]

Yet *Afroyim* has reversed this classical conception of sovereignty. In his majority opinion, Justice Black—after having conceded that all nations possess an implied attribute of sovereignty—stated that "[o]ther nations are governed

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49. Snowden remains a citizen of the United States, and only of the United States, which distinguishes his case from those of individuals with dual nationalities.

50. A copy of Snowden's Russian-issued identity document is available at Steven Lee Myers & Andrew E. Kramer, *Defiant Russia Grants Snowden Year's Asylum*, N.Y. TIMES (Aug. 1, 2013), http://www.nytimes.com/2013/08/02/world/europe/edward-snowden-russia.html (featuring an image of the identity document).

51. Jens Vedsted-Hansen, *Article 27*, *in* THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY 1165, 1165 (Andreas Zimmerman et al. eds., 2011).

52. Edwin M. Borchard, *The Protection of Citizens Abroad and Change of Original Nationality*, 43 YALE L.J. 359, 361, 363 (1934).

by their own constitutions, if any, and we can draw no support from theirs. In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship."[53] It is on the basis of the sovereignty of the citizen—a sovereignty limited to the status of citizenship itself and to certain privileges and immunities stemming from it—that American citizenship has become absolutely secured.[54] However, since *Afroyim*, the Supreme Court has not ruled on a case that would allow the Justices to bring the privileges and immunities of the U.S. citizen up to date with this new understanding of citizenship. Is it not time for the Court to read the Privileges or Immunities Clause and the *Slaughter-House* jurisprudence in the spirit of *Afroyim*—i.e., to declare as an absolute right the possession by all Americans abroad of a document attesting to their legal identity, a right to which the executive and legislative powers must defer?[55]

Being identified as an American citizen abroad is a function of the U.S. passport, recognized as such by the Supreme Court since 1835.[56] This function is especially important when, once a passport has been issued permitting an American citizen to travel abroad, its full revocation would lead to a situation wherein its previous bearer could not be recognized as an American citizen in foreign countries. A valid passport is the only identity document requested from any citizen of the United States leaving North America, and has been since 1978.[57] It is the ultimate and definitive proof of citizenship and identity under international law; other identity documents such as driver's licenses and birth certificates are not necessarily available or recognized abroad.[58]

At the time of the *Urtetiqui* decision in 1835, the State Department could claim that it was difficult to distinguish within a handwritten passport between the freedom to travel and the right to an identity document. In 1981, at the

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53. Afroyim v. Rusk, 387 U.S. 253, 257.

54. *See* WEIL, *supra* note 33, at 183-85.

55. As Justice Stevens argued in his majority opinion in *Saenz v. Roe*, "the protection afforded to the citizen by the Citizenship Clause of that [Fourteenth] Amendment is a limitation on the powers of the National Government as well as the States." 526 U.S. 489, 507-08 (1999).

56. *See* Urtetiqui v. D'Arcy, 34 U.S. 692, 699 (1835).

57. Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. No. 95-426, sec. 707(b), § 215(b), 92 Stat. 992 (codified at 8 U.S.C. § 1185(b) (2012)). *See* Joy Beane, *Passport Revocation: A Critical Analysis of* Haig v. Agee *and the Policy Test*, 5 FORDHAM INT'L L.J. 185 (1981) (noting as an exception that in 1978, citizens did not need a passport to travel between the United States and adjacent countries, with the exception of Cuba). Since 2004, as a result of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 7209, 118 Stat. 3638, 3823, U.S. citizens need a passport or a passport card to travel to neighboring countries.

58. Adam I. Muchmore, *Passports and Nationality in International Law*, 10 U.C. DAVIS J. INT'L L. & POL'Y 301, 324, 340-41 (2004).

time of *Haig v. Agee*, it was also difficult to revoke the freedom to travel without seizing the passport. This is no longer the case. The technology of the passport has been significantly transformed and now permits one to distinguish quite easily within the passport between the freedom to travel and the right to bear a legal identity. The biometric passport emerged as a global standard following the implementation of stricter border security measures after the September 11 attacks.[59] More and more states have developed versions of this technology. It is equipped with a Radio Frequency Identification (RFID) chip that contains the biometric information of the passport holder. Biometric data are physiological and behavioral characteristics of the individual, including fingerprints, voice, and typing patterns, that serve to identify her within a certain population.[60]

Even when not issuing biometric passports, all member states of the International Civil Aviation Organization, a United Nations specialized agency, have achieved their goal of "global interoperability," understood as the capability of inspection systems (whether manual or automated) in different states throughout the world to exchange data, to process data received from systems in other states, and to utilize that data in inspection operations in their respective states on Machine Readable Travel Documents (MRTDs).[61] It is therefore easy for the executive to suspend the first function of a passport—the right to travel—and to make this information available throughout the world without revoking the passport as a document that permits its bearer to prove her identity and to be recognized as an American citizen. If a fundamental right of any American citizen is at stake in the distinction of the different functions of a passport, and if no technical issue can be raised as an obstacle for the fulfillment of this right, the time has come for the courts to consider the issue.

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59. On May 28, 2003, the International Civil Aviation Organization (ICAO), which establishes the global standards for passports, released "a global, harmonized blueprint for the integration of biometric identification information into passports and other Machine Readable Travel Documents (MRTDs)." Press Release, Int'l Civil Aviation Org., Biometric Identification to Provide Enhanced Security and Speedier Border Clearance for Travelling Public (May 28, 2003), http://legacy.icao.int/icao/en/nr/2003/pio200309_e.pdf. In the blueprint, "[f]acial recognition was selected as the globally interoperable biometric for machine-assisted identity confirmation with MRTDs." *Id.* The ICAO has since revised its blueprint to include the possibility of using fingerprint and iris recognition. *See Machine Readable Travel Documents*, INT'L CIVIL AVIATION ORG. (6th ed. 2006), http://www.icao.int/publications/pages/publication.aspx?docnum=9303.

60. *Machine Readable Travel Documents: Supplement to ICAO Doc 9303*, INT'L CIVIL AVIATION ORG. (Oct. 21, 2013), http://www.icao.int/Security/mrtd/Documents/Supplement%20to%20ICAO%20Doc%209303%20-%20Release_13.pdf.

61. *Machine Readable Travel Documents*, INT'L CIVIL AVIATION ORG. at iii, I-1 (6th ed. 2006), http://www.icao.int/publications/Documents/9303_p1_v1_cons_en.pdf.

When Chief Justice Burger wrote the majority opinion in *Haig v. Agee*, he at first did not deal with the constitutional issues raised in the case; he did so later, reluctantly, and in the opinion of Justice Powell, with a "summary" treatment.[62] The revocation of Snowden's passport could offer the Court an opportunity to finally examine the different dimensions of a passport in a new constitutional and technological context. This is especially true given that Snowden's case is one among an increasing number of cases where the State Department seems to have confused a passport policy with citizenship itself.

III. THE YEMENI AMERICANS IN YEMEN

In recent months, a significant number of U.S. citizens residing in Yemen have been summoned to the U.S. embassy in Sana'a.[63] When they leave, it is without their passport—which has been confiscated and revoked. The ACLU and other civil rights organizations have recently warned that the U.S. embassy

62. On June 3, 1981, the day Chief Justice Burger circulated the first draft of Part III of his opinion, he also wrote to his five colleagues who were forming the majority: "I continue to have serious doubts about deciding the Constitutional issues when (a) there is a statutory basis for decision; and (b) the Court of Appeals did not decide the Constitutional issues. Is 'saving of judicial time' a sufficient basis for departing from long-standing practice?" Memorandum by Chief Justice Warren Burger to Justices Stewart, White, Blackmun, Powell, Rehnquist, and Stevens (Jun. 3, 1981) (on file with Library of Congress, Blackmun Papers, 332, folder 2). After receiving these additional pages, Justice Powell replied to the Chief Justice: "As to the constitutional issue, I agree with your Part III. I am in favor of brevity (especially at this season of the year), but the treatment of the issue is somewhat more summary than I would have expected." Letter from Justice Lewis Powell to Chief Justice Warren Burger (June 5, 1981) (on file with Library of Congress, Brennan Papers, I 543/1).

63. In March 2011, the State Department sought to revoke the passport of radical Muslim cleric Anwar al Aulaqi for the reason that his activities abroad were "causing and/or likely to cause serious damage to the national security or the foreign policy of the United States." Cable from U.S. Dep't of State to U.S. Embassy in Sana'a, Yemen, Passport Revocation—Anwar Nasser Aulaqi (Mar. 24, 2011), http://www.scribd.com/doc/114624904/Anwar-al-Aulaqi-Docs-Combined#page=63. The State Department instructed the American embassy in Sana'a, Yemen to send a message to Mr. Aulaqi, who resided in the country, asking him to collect an important letter. *Id.* Embassy officials were to revoke Mr. Aulaqi's U.S. passport upon his arrival at the embassy. *Id.* It remains unclear whether Mr. Aulaqi ever collected the letter. Catherine Herridge & Kristin Brown, *Al-Awlaki Faced Loss of U.S. Passport Before Drone Strike Killed Him, Documents Show*, FOX NEWS (Nov. 27, 2012), http://www.foxnews.com/politics/2012/11/27/al-awlaki-faced-loss-passport-6-months-before-drone-strike-killed-him-documents. Mr. Aulaqi was killed in a drone strike in September 2011. *Id.*

in Yemen has pressured American citizens to surrender their passports and sign confessions without the advice of an attorney.[64]

The reproach directed at Yemeni Americans by consular officers is that they—or their parents, years earlier[65]—misinformed U.S. authorities about some factual elements regarding their identities, dates of birth, last or first names, and so forth. It seems that "[m]any Yemenis have a patronymic, tribal or geographic name that identifies their origin, which is often shortened for convenience when they immigrate to the U.S. and when they fill their application for naturalization. That's what embassy officials used to claim fraud was committed."[66]

Asked about this situation, a State Department official stated that they "provide fair process to every individual that enters U.S. Embassy Sana'a, while upholding [their] obligations under the law," adding that "[t]he Department has authority to deny and revoke a U.S. passport under certain conditions, including those involving false identity."[67]

If reports from the *Washington Post*, *Al Jazeera*, and the ACLU are accurate,[68] it seems that the State Department is confusing its power to revoke a U.S. passport with the possibility of revoking one's naturalization. Deprived of their passport, these Yemeni Americans are not without identity documents, as they are most often dual citizens and therefore also Yemeni; they are instead illegally deprived—de facto—of their American citizenship.[69]

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64. *Know Your Rights: What to Do at U.S. Embassy Interviews and If Your U.S. Passport is Revoked*, ACLU N. CAL., et al. (2013), http://wemeantwell.com/blog/wp-content/uploads/2013/12/Passports-KYR-English-12.17.2013.pdf.

65. In some cases, these people were children when they immigrated to the United States and naturalized as minors. Interview with Yaman Salahi, Staff Attorney, Nat'l Sec. & Civil Rights Program at Advancing Justice-Asian Law Caucus in S.F., CA (Mar. 21, 2014).

66. Amel Ahmed, *Yemeni Americans Cry Foul over Passport Revocations*, AL JAZEERA AM., Jan. 21, 2014, http://america.aljazeera.com/articles/2014/1/21/yemeni-americanscryfouloverpassportrevocations.html.

67. Al Kamen, *In Yemen, U.S. Embassy Confiscating Some Passports, ACLU Warns*, WASH. POST, Jan. 9, 2014, http://www.washingtonpost.com/politics/in-yemen-us-embassy-confiscating-some-passports-aclu-warns/2014/01/09/8011d2fa-7956-11e3-8963-b4b654bcc9b2_story.html.

68. *See* sources cited *supra* notes 66-67.

69. Originally, the U.S. embassy in Yemen was confiscating passports and was not informing people that they continued to have the right to travel back to the United States. However, after the ACLU and other NGOs got involved, the State Department and the embassy created a process in February 2014 by which people whose U.S. passports had been confiscated could request a document called either a "direct return" or "limited validity" passport. It is good for thirty days and only for travel to the United States, and will be confiscated upon arrival at a U.S. port of entry. Interview with Yaman Salahi, *supra* note 65.

If a passport has been delivered listing the same information contained in an individual's naturalization certificate, it is not attesting to a false identity—instead, it lists one's identity as a naturalized citizen. Therefore, the passport is valid and remains so for as long as the individual remains an American citizen. If the State Department has some doubt regarding the validity of the naturalization, the case must be brought to court.[70] When the power to naturalize was transferred by the Immigration Act of 1990 from the courts to the Attorney General, another provision of the same Act transferred to the Attorney General the power "to correct, reopen, alter, modify, or vacate an order naturalizing the person."[71] But in 2000, in *Gorbach v. Reno*, the Ninth Circuit affirmed the exclusive statutory competence of the courts to revoke citizenship.[72] Following this decision, the Department of Homeland Security has not attempted to resume the use of administrative denaturalization.[73] Since 2001, only several dozen naturalized Americans have lost their citizenship, through judicial proceedings, largely because they committed different kinds of fraud during the naturalization process.[74] This small number is in part explained by *Kungys v. United States*,[75] in which the Court refused to uphold the denaturalization of Juozas Kungys because the government had not shown that his misrepresentation concerning the date and place of his birth were facts that, if known, would have warranted denial of citizenship.[76]

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70. *See, e.g.*, *Magnuson v. Baker*, 911 F.2d 330, 333 n.6 (9th Cir. 1990) ("A certificate of naturalization or of citizenship issued by a naturalization court is simply a record of the court's determination of the question of citizenship. As a record of a final court decision, a certificate is conclusive evidence of the court's determination of the litigated issue, i.e., citizenship. Because a certificate is conclusive evidence of citizenship, if a holder of a certificate from a naturalization court presented the certificate to the Secretary in order to obtain a passport, the Secretary could not relitigate the citizenship issue. The Secretary could question only the certificate's authenticity, i.e., whether the certificate is a forgery.").

71. Pub. L. No. 101-649, § 339(b)(18)(D), 104 Stat. 4978, 5046.

72. 219 F.3d 1087 (2000).

73. *See USCIS Policy Manual: Volume 12: Citizenship and Naturalization, Part L: Revocation of Naturalization: Chapter 1: Purpose and Background*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartL-Chapter1.html (last updated Apr. 8, 2014) (confirming that "[f]or civil revocation of naturalization, the United States Attorney's Office must file the revocation of naturalization actions in Federal District Court" and citing *Gorbach v. Reno*, No. C-98-0278R, 2001 WL 34145464 (W.D. Wash. 2001) (granting order for permanent injunction)).

74. Since 2001, at least fifty-six denaturalization cases have been decided by courts. (The cases were found by searching on Westlaw for (denaturalization OR (revocation /3 citizenship)) as well as (cancel! certificate /3 citizenship) over a time period of January 2001 to March 2014. The results were then reviewed for denaturalization proceedings.)

75. 485 U.S. 759 (1988).

76. *Kungys* is the Supreme Court's most recent interpretation of what 8 U.S.C. § 1451(a) requires for judicial denaturalization. The petitioner immigrated in 1948 and was

This is not the first time in its history that the State Department has exercised discretionary power over passports as a proxy for nationality policy. The 1907 Expatriation and the Protection of Citizens Act contained a provision stating that a residence of two years in the foreign state of origin by a naturalized citizen, or of five years in any other foreign state, would allow the government to assume that he or she "has ceased to be an American citizen."[77] The provision transformed some instances of denaturalization from a judicial to an administrative procedure. Furthermore, there was no longer a time limit placed on penalizing the maintenance of a residence abroad.[78] Soon thereafter, Attorney General George Wickersham held that the new law had been enacted not to deprive naturalized Americans living abroad of their citizenship; rather, it was meant only to relieve the State Department of the burden of protecting

naturalized as a citizen in 1954. In 1982, the Justice Department commenced denaturalization proceedings on three grounds: (1) Kungys had participated in the slaughter of two thousand Jewish Lithuanian civilians in 1941 during World War II; (2) Kungys made false statements concerning his date and place of birth as well as his employment and residence during World War II (the "concealment and misrepresentation" claim); and (3) even if Kungys's false statements were not in themselves material to his original naturalization proceeding, their falsity indicates that Kungys lacked the requisite "good moral character" for naturalization (the "illegal procurement" claim). 485 U.S. at 764-65. In response, the district court found that the evidence as to (1) was unreliable, that Kungys's false statements were not material to his denaturalization, and that, because they were not material, they could not be used to show Kungys's lack of good moral character. *See* United States v. Kungys, 571 F. Supp. 1104, 1104 (D.N.J. 1983). The Third Circuit upheld the district court regarding claim (3), but reversed its decision on claim (2) and declined to decide claim (1). *See* United States v. Kungys, 793 F.2d 516, 516-17 (3d Cir. 1986). The Supreme Court then agreed to consider the standards required for the "concealment and misrepresentation" claim (but only as to the date and place of Kungys's birth) and the "illegal procurement" claim. 485 U.S. at 766. It did not reexamine the question of Kungys's participation in World War II atrocities. *Id.* Writing for the majority, Justice Scalia ruled with respect to the "concealment and misrepresentation" claim that "the test of whether Kungys' concealments or misrepresentations were material is whether they had a natural tendency to influence the decisions of the Immigration and Naturalization Service," or if their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship. *Id.* at 772. On the separate question of whether the citizenship was "illegally procured" under 8 U.S.C. § 1101(f) because the petitioner lacked the good moral character required, the Court held that that section of the Act does not contain a materiality requirement because the primary purpose is to identify lack of good moral character, not to prevent false pertinent data from being introduced into the naturalization process. Yet it applies only to oral statements made under oath and to misrepresentations made with the subjective intention of obtaining immigration benefits, which was not the case for Kungys. *Id.* at 780.

77. Expatriation Act of 1907, ch. 2534, § 2, 34 Stat. 1228, 1228.

78. In the 1906 Naturalization Act, a provision permitted the initiation of denaturalization proceedings against a naturalized citizen who had returned to his country of origin within the five years following his naturalization. ch. 3592, §15, 34 Stat. 596, 601.

them after an extended stay abroad.[79] In the years following the Wickersham opinion, under the Taft and Wilson Administrations, this remained the Justice Department's interpretation of the 1907 Expatriation Act.[80]

Starting in 1911, the State Department rebelled against the Department of Justice's interpretation, de facto denaturalizing naturalized Americans residing abroad simply by refusing to deliver them a passport.[81] In the 1924 decision *United States v. Gay*, the Supreme Court endorsed the Justice Department's approach and described the presumption of loss of citizenship based on foreign residence as "easy to preclude, and easy to overcome."[82] In 1926, the State Department subsequently reached a truce with the Justice Department.[83] "The presumption that a naturalized American living abroad had ceased to be an American citizen would no longer exist 'upon his return to the United States and his reestablishment here in good faith of a permanent residence.'"[84]

The State Department, waiting for an occasion to reestablish the scope of denaturalization of foreign-born Americans residing abroad, found it in the Nationality Act passed in October 1940, steeped in the climate of fear caused by the outbreak of World War II in Europe. Sections 404-06 of the Act applied an automatic loss of citizenship to naturalized citizens residing as few as two years in their country of origin or five years in any other foreign countries during any time after their naturalization.[85] Congress went far beyond foreign-born Americans by deciding to denationalize different categories of native-born Americans perceived to be un-American.[86] During the period from 1940 until *Afroyim v. Rusk* in 1967, when the revocation of one's passport followed as a consequence of the loss of citizenship, the State Department did not stop using its passport power as its citizenship policy. In 1959, the State Department tried to challenge the validity of a certificate of citizenship of the son of a naturalized American born in Germany. The Immigration and Naturalization Service considered the certificate valid. The Attorney General issued an opinion in which he stated that Congress, in providing for the issuance of the certificate of citizenship to the former, meant "to deprive all other administrative officers of

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79. Naturalization – Citizenship – Residence in Native Country for Two Years – Status of Wife, 28 Op. Att'y Gen. 504, 507-08 (1910).

80. *See* WEIL, *supra* note 33, at 85.

81. *Id.* at 86.

82. 264 U.S. 353, 358 (1924).

83. WEIL, *supra* note 33, at 88-91.

84. *Id.* at 90 (quoting Letter of Frank B. Kellogg, Sec'y of State, to James J. Davis, Sec'y of Labor (Mar. 26, 1926) (on file at NARA, RG 85, INS Records, Central Office, Naturalization Files, 1906-1940, entry 26, file 15 GEN)).

85. Nationality Act of 1940, ch. 876, 54 Stat. 1137.

86. *See supra* notes 31-33 and accompanying text.

the United States of the power to put in issue the citizenship status recognized by a certificate regular on its face."[87] And he added, "[t]o rule that the Department of State may deny a passport . . . on the ground of non-citizenship although he is in possession of a certificate duly issued would mean that the same treatment might be accorded the thousands of persons holding like certificates."[88]

However, in the years following *Afroyim*, during which time U.S. citizenship has become more and more protected and the incidence of denaturalization has declined, the State Department might once again be tempted to use the revocation of a citizen's passport as a proxy for revoking naturalization. Such a claim is reinforced by the argument that the same office charged with delivering passports should have the power to revoke them. When asked in 2000 to determine the constitutionality of the 1990 Immigration Act's delegation of the power to denaturalize to the Attorney General rather than the federal courts, the Ninth Circuit, sitting *en banc*, stated:

> [T]here is no practical sense in supposing that, because the Attorney General can naturalize, she needs to have the power to denaturalize. The former power is typically exercised wholesale, the latter retail. An administrative agency is useful for performing large numbers of repetitive, routine tasks (from the agency's viewpoint, not the new citizen's), such as naturalization, that do not take away important liberties from individuals. But administrative agencies, accustomed to treat a case as "one unit in a mass of related cases," are dubious instruments for performing relatively rare acts catastrophic to the interests of the individuals on whom they are performed.[89]

The same reasoning could apply to the State Department, which is in charge of delivering millions of passports every year. The significance of this logic extends well beyond the cases that have recently come to light. At least those Yemeni Americans subject to State Department action had their cases

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87. Admin. Certificates of Citizenship, 41 U.S. Op. Att'y Gen. 452, 461 (1960).

88. *Id.* at 460. This opinion concerned the case of Albert Flegenheimer, who was born in Germany on July 4, 1890 to a naturalized father. His citizenship was recognized by the Immigration and Naturalization Service in 1942; it was confirmed again in 1952. In 1959, the State Department contested his status after having earlier agreed to represent him as an American citizen in the Italian-American Commission against the Italian government while he sought to obtain the cancellation of a sale of property made in Italy in 1941 under duress. The commission concluded on September 20, 1958 that he was not an American citizen and rejected the U.S. claim. Flegenheimer Case, 14 R.I.A.A., 327, 389-90 (Ital.-U.S. Concil. Comm'n 1958).

89. Gorbach v. Reno, 219 F.3d 1087, 1095 (9th Cir. 2000) (en banc) (quoting Castillo-Villagra v. INS, 972 F.2d 1017, 1026 (9th Cir. 1992)).

taken up by some lawyers and NGOs. Other Americans abroad do not have similar access to legal counsel and may not know that they have grounds for legal appeal should they feel that their status as American citizens is unfairly contested. This further underscores the need for clarification by the courts.

CONCLUSION

The State Department seems to be abusing its power with passport revocation—unknowingly in the case of Snowden, as the Department could at first glance rely on a jurisprudence that seemed until recently to favor executive power, and willfully in the case of the Yemeni Americans. It therefore seems that it is time for courts confronted with passport revocations to reexamine the constitutional function of the passport and its status in relation to American citizens who, since *Afroyim*, have gained more protection over their citizenship in relation to the state—including in relation to the Secretary of State. Today it is commonplace to say that new technologies infringe upon civil liberties—they often do. However, in the case of passports and the essential right of Americans to maintain a legal identity, new technologies offer an avenue to protect that very right. By affirming both that a passport belongs among the privileges and immunities of an American abroad and that the Secretary of State cannot revoke a passport as a matter of administrative routine, courts could make the passport an almost inalienable auxiliary of the American citizen abroad: the symbol and substance of an irreducible citizenship which the Supreme Court has already proclaimed.

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I would like to thank especially Daniel Hemel, Yaman Salahi, and Michael Wishnie, as well as Atossa Araxia Abrahamian, Michel Dejaegher, Giorgios Dimitropoulos, Owen Fiss, Itamar Mann, Gerald Neuman, Noah Rosenblum, and Eugene Rusyn for their numerous and decisive contributions to this Essay. I am most grateful to Idriss Fofana and Nicholas Handler, my research assistants at Yale Law School, for their invaluable creativity and reactivity. At the Yale Law Journal, *Benjamin Farkas has been a fantastic editor and discussion partner, Benjamin*

Eidelson encouraged me to submit a proposal and then, together with Ryan Thoreson, has worked behind the scenes. Thanks to all.

Preferred citation: Patrick Weil, *Citizenship, Passports, and the Legal Identity of Americans: Edward Snowden and Others Have a Case in the Courts*, 123 YALE L.J. F. 565 (2014), http://yalelawjournal.org/forum/citizenship-passports-and-the-legal-identity-of-americans.html.