

# A Brief History of the Brief History of Citizenship Revocation in Canada

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A U D R E Y M A C K L I N \*

## ABSTRACT

Four of the men convicted as part of the Toronto 18 prosecution were subject to citizenship revocation on grounds of terrorism. One of the four was born in Canada, and the other three immigrated to Canada and acquired citizenship through naturalization. I situate the politics of the four men's citizenship revocation in legal and comparative context. Contemporary citizenship revocation policies, especially those invoked in the name of national security, serve both instrumental and symbolic goals. I argue that the citizenship revocation scheme enacted in Canada resonated primarily in the register of symbolic politics and lacked virtually any instrumental value related to national security. Its deployment against four of the Toronto 18 was always, and only, a calculated electoral tactic. I conclude by recounting the case of U.K.-Canadian Jack Letts in order to illustrate how citizenship revocation not only infringes fundamental human rights but is dysfunctional from the vantage point of international relations.

**Keywords:** Canada; U.K.; Citizenship; Denationalization; Revocation; Citizenship Stripping; Electoral Politics; Terrorism; National Security; Securitization

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## I. INTRODUCTION

In early 2014, the Conservative government of Canada introduced legislation to permit the revocation of Canadian citizenship on national security grounds. The *Strengthening Canadian Citizenship Act*<sup>1</sup> obtained royal assent on June 19, 2014. On the eve of the 2015 federal election campaign, the Conservatives test-drove the new law by issuing notices of intent to revoke citizenship to several men convicted of ‘national security’ offences.<sup>2</sup> Four were members of the Toronto 18: Zakaria Amara, Saad Gaya, Saad Khalid, and Asad Ansari.

Predictably, citizenship revocation became a prominent wedge issue in the campaign. The Conservatives promoted it as one plank in their tough-on-crime, anti-refugee, anti-Muslim platform.<sup>3</sup> The Liberals and NDP opposed it and pledged to repeal the 2014 citizenship revocation law if elected. Upon receiving their notices of intent to revoke, Gaya, Khalid, and Ansari challenged the law on constitutional grounds and were joined by civil society organizations. The litigation was adjourned shortly after the election of a Liberal government, in order to give the new government time to fulfil its campaign promise. Bill C-6 amended the *Citizenship Act* by repealing citizenship revocation and restoring the citizenship of anyone whose citizenship had already been stripped on national security grounds.<sup>4</sup> It came into force on June 19, 2017.<sup>5</sup> The life span of the citizenship revocation law was exactly three years.

In this chapter, I situate the politics of the four men’s citizenship revocation in legal and comparative context. Contemporary citizenship revocation policies, especially those invoked in the name of national

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<sup>1</sup> An Act to amend the Citizenship Act and to make consequential amendments to other Acts, S.C. 2014, c. 22.

<sup>2</sup> The identities of those served with notices of intent to revoke are unclear, and so number cannot be confirmed, but one journalist reported that ten men received notices. Stewart Bell, “Government working to revoke citizenship of nine more Canadians convicted of terrorist offences,” *National Post*, September 30, 2015, <https://nationalpost.com/news/canada/government-working-to-revoke-citizenship-of-nine-more-canadians-convicted-of-terrorist-offences>.

<sup>3</sup> The Conservatives retained right-wing Australian political strategist Lynton Crosby as an election strategist. Crosby was widely known for employing dog-whistle politics.

<sup>4</sup> Zakaria Amara was the sole person to whom this applied.

<sup>5</sup> An Act to amend the Citizenship Act and make consequential amendments to another Act, S.C. 2017, c. 4.

security, serve both instrumental and symbolic goals. I argue that the citizenship revocation scheme enacted in Canada resonated primarily in the register of symbolic politics and lacked virtually any instrumental value. Its deployment against four of the Toronto 18 was always and only a calculated electoral tactic.

## II. THE RETURN OF CITIZENSHIP REVOCATION<sup>6</sup>

### A. Denationalization Pre-9/11

Denationalization refers to involuntary deprivation of citizenship.<sup>7</sup> Denaturalization is a subcategory limited to the revocation of citizenship acquired through immigration and subsequent naturalization. From the late 19th century onwards, many states denationalized female citizens who married foreigners. The rationale drew from a mélange of ideas: dual citizenship of an individual or within a family was an aberration to be avoided; women's social, legal, and political identity was subordinate to, and subsumed by that of their husbands; and marriage to a foreign man evinced a woman's loss of allegiance to her state of nationality. Naturalized citizens who resumed residence in the country of origin were also denaturalized on the basis that they had forsaken their allegiance to the country of immigration. This ground of denaturalization persisted in Canada until 1976 when the acceptance of dual citizenship in the *Citizenship Act* made it untenable to withdraw citizenship based on non-residence.

Banishment is punishment by expulsion, and it has an ancient pedigree. Practices have evolved through the centuries and across regions. Citizens convicted of certain crimes were cast out of the political

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<sup>6</sup> I have explored the normative, legal, and policy objections to citizenship revocation elsewhere and do not reprise them here in depth. See Audrey Macklin, "Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien," *Queen's Law Journal* 40, no. 1 (2014): 1-54; Audrey Macklin and Rainer Bauböck, eds. "The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?" EUI Working Paper RSCAS 2015/14, European University Institute, Italy, February 2015, [http://cadmus.eui.eu/bitstream/handle/1814/34617/RSCAS\\_2015\\_14.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/34617/RSCAS_2015_14.pdf?sequence=1), reprinted in Rainer Bauböck, ed. *Debating Transformations of National Citizenship* (London: Springer Publishers, 2018), 163-72, 239-48.

<sup>7</sup> Matthew J. Gibney, "Denationalisation and Discrimination," *Journal of Ethnic and Migration Studies* 46, no. 12 (2019): 2551-568, <https://doi.org/10.1080/1369183X.2018.1561065>.

community, whether city-state, region, or country. Formal loss of membership sometimes (but not always) accompanied exile. In the 18th and 19th centuries, Britain transported convicts to Australian colonies. With the rise of prisons, the diminution of 'vacant' territory,<sup>8</sup> and the consolidation of an international system of the sovereign, bordered states, recourse to exile via transportation became obsolete and increasingly impossible.

Under the modern statist regime, sovereign states assumed a duty to admit their nationals, while asserting the power to expel non-nationals. The constraints of legal duty produced the phenomenon of two-step exile for naturalized citizens: first, denaturalize the citizen; second, deport the newly minted alien to the country of origin. Over the course of the 20th century, and especially around the two World Wars and the Depression, denaturalizing citizens (in Canada's case, British subjects of Canada) based on alleged ties to the enemy, dissident political beliefs (especially communist sympathies), preceded deportation. The Nazis systematically denationalized Jews, not as a prelude to deportation to another country but rather as a prelude to deportation to concentration camps and annihilation.

In the aftermath of World War II, Canada effectively denationalized thousands of Canadians of Japanese descent, including those born in Canada, and then deported them to Japan.<sup>9</sup> Between Canada's first *Citizenship Act* and the 1977 *Canadian Citizenship Act*,<sup>10</sup> various grounds for citizenship revocation were added and subtracted from Canadian law. Many European states retained their pre-World War II laws allowing denaturalization on various grounds of disloyalty, but in practice, they fell into desuetude. The U.S. law of 'expatriation,' which operated under the legal fiction of constructive renunciation of citizenship, came under increasing constitutional scrutiny from the 1950s onward.

The last Canadian to be denaturalized for 'uncitizen-like' conduct was Fred Rose, a Canadian Member of Parliament elected as a Labour-Progressive Party and later convicted of espionage on behalf of the Soviet

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<sup>8</sup> The legal fiction of *terra nullius* deemed land populated by Indigenous people to be uninhabited.

<sup>9</sup> Eric Adams, Jordan Stanger-Ross, and the Landscapes of Injustice Research Collective, "Promises of Law: The Unlawful Dispossession of Japanese Canadians," *Osgoode Hall Law Journal* 54, no. 3 (2017): 687-740.

<sup>10</sup> Canadian Citizenship Act, S.C. 1977, c. 29.

Union. Following his release from almost five years imprisonment in 1951, the RCMP harassed and hounded him. He was ostracized and unable to find work. He eventually returned to Poland, the country he had left at age 13, in the hopes of setting up an import-export business. The Canadian government revoked his citizenship in 1957 while he was in Poland. The revocation of Rose's citizenship while abroad obviated the need to deport him, a salient detail that presages contemporary U.K. practice. Revocation for treason was removed in 1958 under Conservative Prime Minister John Diefenbaker who, as opposition MP, denounced the post-World War II denationalization of Japanese Canadians as "the very antithesis of democracy."<sup>11</sup> The amended statute replaced it with revocation of citizenship for naturalized Canadian fugitives who were charged with treason but who "failed or refused to return to Canada voluntarily within the prescribed time frame" to be tried for the offence.<sup>12</sup>

Canada's 1977 *Citizenship Act* eliminated all grounds of revocation except for naturalized citizenship obtained by fraud or misrepresentation of a material fact. A naturalized citizen could face withdrawal of citizenship on these grounds, but the misconduct would necessarily have occurred prior to citizenship acquisition. For instance, if government authorities discovered after naturalization that the individual lied about meeting the residency requirement, or denied having a criminal record, or fabricated a relevant fact, citizenship could be revoked. Unlike France, Canada has no statute of limitations on citizenship revocation on grounds of fraud or misrepresentation, which accounts for the initiation of revocation proceedings in the 1980s against Canadian citizens who allegedly failed to disclose the commission of Nazi war crimes prior to immigrating to Canada.<sup>13</sup> The logic of citizenship revocation for fraud or misrepresentation is that it unwinds the effect of the misleading conduct and restores the situation that would have been obtained had the truth been disclosed.

In the years prior to the 2014 amendments to the *Citizenship Act*, revocation for fraud or misrepresentation was extremely rare, though the

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<sup>11</sup> The 1958 amendments to the *Citizenship Act* preserved citizenship revocation for naturalized citizens who were charged with treason and who "failed or refused to return to Canada voluntarily within the prescribed time frame."

<sup>12</sup> An Act to Amend the Canadian Citizenship Act, S.C. 1959, c. 24, s. 2.

<sup>13</sup> These cases are complicated by many factors, including the possible disinterest of Canadian authorities to inquire or care about the past activities of certain European immigrants at the time of migration.

Nazi war criminal cases attracted considerable media attention, controversy, and litigation.

## **B. Post-September 11, 2001**

The events of September 11, 2001 evoked the spectre of terrorism untethered from state sponsorship or nationalist aspirations. States reacted by deploying three legal regimes to meet the threat: humanitarian law, criminal law, and immigration law. None was fully amenable to the unrestrained exercise of power that governments believed necessary to address the exceptionality of terrorism. And so, each sphere of legal regulation was systematically deformed in the service of counterterrorism. The laws of war putatively authorized military action in Afghanistan and later Iraq, but the United States swiftly scraped away the discipline that humanitarian law concomitantly imposes on detention, interrogation, torture, fair process, combatant immunity, and substantive liability for war crimes. The residue was a system of black-hole detention sites, extraterritorial incarceration at Guantanamo Bay, and military commissions' processes that deviated from U.S. military law as well as international humanitarian law.

Along with many states, Canada adopted a suite of amendments to the *Criminal Code* that departed from established principles of criminal procedure, evidence, and liability to authorize, *inter alia*, detention without charge and non-disclosure of evidence. New terrorism offences criminalized activity whose proximity to conventional conceptions of harm was highly attenuated.

Immigration law offered the state the opportunity to apprehend, indefinitely detain, and ultimately deport people suspected of links to terrorist groups or activities under broad and vague notions of 'membership in a terrorist group.' The 'security certificate' system featured few procedural obstacles, an undemanding burden of proof, virtually unlimited admissibility of evidence, and the ability to rely on secret evidence consisting of unverified intelligence reports, including evidence obtained from foreign governments that practiced torture.

Unlike humanitarian law or criminal law, using immigration law against alleged security threats required only incremental departure from existing law in order to attain the objective of exercising maximum discretionary power with minimum accountability. While the Canadian government scrambled to introduce new, harsher criminal provisions in the

wake of September 11, it did not renovate immigration law: it already had all the power it needed. It is thus unsurprising that in the early years following 9/11, immigration law was the preferred tool for Canadian state actors to deal with individuals that intelligence services labelled as risky. Within months of September 11, five male, Muslim, non-citizens were detained under security certificates. The major limitation on the utility of immigration law was (and is) its narrow compass: it only applies to non-citizens. The historic willingness of the law to treat non-citizens in ways that would not be countenanced toward citizens made immigration law an attractive vehicle for securitization tactics. Over time, it also furnished policy instruments that could, under cover of terrorism exceptionality, creep into other fields of law.

Over the course of the next decade, *Charter* litigation dented immigration law as the ideal vehicle for counterterrorism. The *Suresh*<sup>14</sup> decision, rendered by the Supreme Court of Canada only months after 9/11, preserved the state's power to deport to torture in 'exceptional circumstances,' but the practical effect of the decision was to mire pending deportations of security certificate detainees in years of protracted litigation.

The U.K. decision in *Belmarsh*<sup>15</sup> ruled indefinite detention of security detainees unlawful. Rather than wait for Canadian courts to issue a similar ruling, Canadian authorities grudgingly mimicked the U.K. response of releasing detainees from detention under draconian variants of house arrest, known in the U.K. as control orders. The *Charkaoui*<sup>16</sup> judgment of 2007 struck down the security certificate secret hearing process, which in turn led to the introduction of the security-cleared special advocate model.

The allure of immigration law began to fade when the prospect of swift disposal via deportation became increasingly fraught and uncertain. Eventually, and inevitably, the security apparatus turned up a suspect who happened to be a citizen and for whom criminal prosecution was the only option. In 2004, Momin Khawaja became the first Canadian charged with terrorism-related crimes under the *Criminal Code*. The summer of 2006 witnessed the arrest of the Toronto 18. All members of the group (except possibly those whose identities were protected under the *Young Offenders*

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<sup>14</sup> *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1.

<sup>15</sup> *A v. Secretary of State for the Home Department*, [2004] UKHL 56, [2005] 2 A.C. 68.

<sup>16</sup> *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9.

Act) were Canadian citizens by naturalization or, in the case of Saad Gaya, by *jus soli* (birth on Canadian territory).

### C. Emulating Britain

The Canadian revival of denationalization for citizen misconduct followed the precedent set by the United Kingdom, which led the post-September 11 revival of denationalization. The citizenship revocation provisions in the *British Nationality Act 1981 (BNA)* were amended in 2002, 2006, and again in 2014. The 2002 amendment permitted the Secretary of State (Home Secretary) to deprive citizenship by birth or naturalization if “satisfied that the person has done anything seriously prejudicial to the vital interests of the United Kingdom or a British Overseas territory.”<sup>17</sup> The U.K. government expanded its revocation power under the *Immigration, Asylum and Nationality Act 2006* to permit the Home Secretary to revoke citizenship if “the Secretary of State is satisfied that such deprivation is conducive to the public good.”<sup>18</sup> The 2006 amendments came in the wake of several high-profile incidents. These included the controversy surrounding Abu Hamza, a naturalized U.K. citizen who preached incendiary sermons vilifying Jews, LGBT people, and non-Muslims from the Finsbury Mosque. The 7/7 2005 suicide bombings in the London subway were committed by U.K. citizens who were configured by politicians, pundits, and media as ‘homegrown’ terrorists of foreign descent. Also, in 2005, it was revealed that David Hicks, an Australian citizen detained at Guantanamo Bay, was eligible for British citizenship by maternal descent. Hicks succeeded in obtaining British citizenship, despite the strenuous litigation campaign by the U.K. government to oppose him.

The major brake on citizenship stripping imposed by international law is that it cannot render the person stateless. For practical purposes, this means that citizenship revocation is restricted to dual citizens.<sup>19</sup> Almost immediately, multiple citizenship was transformed from an asset to a

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<sup>17</sup> British Nationality Act 1981 (U.K.), c. 61.

<sup>18</sup> British Nationality Act.

<sup>19</sup> For an account of the international law applicable to citizenship revocation and, in particular, the preclusion on arbitrariness and avoidance of statelessness, see Eric Fripp, “Deprivation of Nationality and Public International Law: An Outline,” *Journal of Immigration, Asylum and Nationality Law* 28, no. 4 (2014): 368–84; Council of Europe, PA, 1st Sess, *Withdrawing nationality as a measure to combat terrorism: a human rights-compatible approach?*, Reports, Doc. 14790 (2019), <http://semantic-pace.net/tools/pdf>.



liability. Dual or multiple nationals were vulnerable to citizenship deprivation where mono-nationals were not.

The most notorious target of citizenship deprivation post-2006 was Hilal Abdul-Razzaq Ali al Jedda. He arrived in the U.K. in 1992 as an Iraqi asylum seeker, became a U.K. citizen, returned to Iraq sometime in 2004, and was captured and detained by U.K. forces as a suspected terrorist recruiter that same year. The Home Secretary revoked al Jedda's U.K. citizenship in late 2007, insisting that he was also an Iraqi national. Al Jedda denied this, arguing that Iraq did not recognize dual citizenship when he became a U.K. citizen, and so he automatically lost his Iraqi citizenship upon naturalization. Although Iraqi law was subsequently amended to permit dual nationality, he had not applied for restoration of his Iraqi citizenship. Therefore, deprivation of his U.K. citizenship would render him stateless. The case reached the U.K. Supreme Court,<sup>20</sup> which held that the fact that al Jedda could obtain Iraqi citizenship did not alter the fact that he did not actually possess it when the Home Secretary deprived him of his U.K. citizenship. Therefore, the Home Secretary's act of depriving al Jedda of his U.K. citizenship rendered him stateless.

The U.K. *Immigration Act 2014*<sup>21</sup> amendments, widely viewed as a reaction to the *al Jedda* decision, re-instated the distinction between birthright and naturalized citizens. Subsection 40(4A) of the amended *British National Act, 1981* now permits denaturalization where the Home Secretary considers it conducive to the public good because the person has conducted himself in a manner "seriously prejudicial to the vital interests of the U.K. or any British overseas territory." In these cases, the creation of statelessness is no longer an impediment to revoking a naturalized citizen of status if the Home Secretary "has reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory."<sup>22</sup> Notably, the Home Secretary's belief need not be correct, only reasonable.

The U.K. was not the only state to introduce, amend, or revive pre-World War II citizenship-stripping laws post-9/11, though it quickly established itself as the prime mover in the Global North. France, Austria,

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<sup>20</sup> Secretary of State for the Home Department v. Al-Jedda, [2013] UKSC 62, [2014] A.C. 253.

<sup>21</sup> An Act to amend the Citizenship Act and to make consequential amendments to other Acts, S.C. 2014, c. 22.

<sup>22</sup> British Nationality Act, s 40(4A).

Germany, Norway, Netherlands, Australia, as well as Egypt and the Gulf States also proposed, adopted or revived terrorism-related citizenship revocation. Variations exist across states: some only apply revocation to naturalized citizens, others to both citizens by birth or naturalization; some require a conviction for a criminal offence, some stipulate prohibited conduct (especially serving in a foreign armed force), and some offer vague grounds, such as disloyalty or (in the language of international instruments) conduct “seriously prejudicial to the vital interests of the state.”<sup>23</sup> Some frame revocation as a constructive renunciation by the citizen, others as an administrative penalty meted out by the state for disloyalty. The administrative process varies from one national context to another.<sup>24</sup> Authoritarian regimes seized on the example of liberal democratic states to deploy or expand their own citizenship revocation policies in the service of political repression.<sup>25</sup>

The imprint of the U.K. precedent was visible on the Canadian version of citizenship revocation, but significant differences existed. To understand it in its domestic context, Canada’s citizenship revocation law must be situated in a landscape of measures designed to make Canadian citizenship harder to get and easier to lose. In 2009, the government confined the transmission of citizenship by descent (*jus sanguinis*) to the first generation born abroad, making Canada’s citizenship by descent law one of the most restrictive in the world. In the same year, it launched a revised, more jingoistic version of the citizenship guide, made the citizenship test more difficult, and raised the minimum passing grade. In a departure from past practice, applicants had to prove language ability through third-party testing as a precondition to applying for citizenship, which would require

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<sup>23</sup> The UN Refugee Agency, Convention on the Reduction of Statelessness, C.6, Convention 1961 (June 2014), at art. 8, [https://www.unhcr.org/ibelong/wp-content/uploads/1961-Convention-on-the-reduction-of-Statelessness\\_ENG.pdf](https://www.unhcr.org/ibelong/wp-content/uploads/1961-Convention-on-the-reduction-of-Statelessness_ENG.pdf); European Convention on Nationality, Strasbourg, November 6, 1997, E.T.S. 166, at art. 4, <https://rm.coe.int/168007f2c8>.

<sup>24</sup> See, generally, European Commission, *Ad-Hoc Query on Revoking Citizenship on Account of Involvement in Acts of Terrorism or Other Serious Crimes* (European Migration Network, September 25, 2014), [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european\\_migration\\_network/reports/docs\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs_en.pdf). See also “Global Database on Modes of Loss of Citizenship: Version 1.0,” Robert Schuman Centre for Advanced Studies, European University Institute, *GLOBALCIT*, 2017, <http://globalcit.eu/loss-of-citizenship>.

<sup>25</sup> For a recent example, see “Egypt: Activist Stripped of Citizenship,” Human Rights Watch (February 11, 2021), <https://www.hrw.org>.

expensive certification from private language testing services.<sup>26</sup> Administrative hurdles imposed additional financial and temporal burdens on citizenship applicants by combining onerous documentary requirements with very short deadlines.

In 2011, the government declared that it was cracking down on 'citizenship fraud.' Immigrants who participated in elaborate schemes to create the illusion that they resided in Canada were the government's main target. The following year, the Minister of Citizenship and Immigration announced that his department was poised to strip citizenship from over 3,000 people and was investigating another 11,000 files, mainly on grounds of misrepresentation of residence.<sup>27</sup> Next, in 2011, the Minister of Citizenship and Immigration introduced a policy prohibiting people who cover their face from swearing the citizenship oath, a prerequisite to obtaining proof of citizenship. The policy was intended to deny access to Canadian citizenship by the tiny number of Muslim women who wore niqabs.

In 2014, the Conservative government introduced Bill C-24, entitled the *Strengthening Canadian Citizenship Act*.<sup>28</sup> It represented the culmination of the project of increasing the value of citizenship by making it costlier and

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<sup>26</sup> Permanent residents previously admitted as economic class immigrants were effectively exempt, however, because they could rely on the language test results that they previously submitted in order to qualify in the economic class. Before these changes, language ability was demonstrated through interactions with citizenship officers and the reading comprehension demonstrated by writing the citizenship test. Citizenship Judges also possessed discretion to evaluate or even waive language fluency requirements. In 2010, a study commissioned by Citizenship and Immigration Canada suggested that the new system for testing language ability and the elimination of discretion would have a disproportionately negative impact on access to citizenship for refugees and Southeast Asian women. See Immigration, Refugees and Citizenship Canada, *An Examination of the Canadian Language Benchmark Data from the Citizenship Language Survey* (Research Report) (Ottawa: Government of Canada, 5 October 2010), <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/reports-statistics/research/examination-canadian-language-benchmark-data-citizenship-language-survey/section-3.html>.

<sup>27</sup> A 2016 Auditor-General's report on the anti-fraud enforcement campaign critiqued the implementation and results yielded by this initiative. See Auditor General of Canada, *Report 2 - Detecting and Preventing Fraud in the Citizenship Program* (Ottawa: Office of the Auditor General of Canada, 2016), s 2.43, [http://www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_201602\\_02\\_e\\_41246.html#hd4b](http://www.oag-bvg.gc.ca/internet/English/parl_oag_201602_02_e_41246.html#hd4b).

<sup>28</sup> An Act to amend the Citizenship Act and to make consequential amendments to other Acts, S.C. 2014, c. 22.

scarcer. It linked citizenship more explicitly to militarism and sought to elevate patriotic sentiment into the ultimate expression of citizenship. Amendments to naturalization rules imposed stricter requirements on applicant eligibility, extended the age range for language and knowledge testing from 18–55 to 14–64, and reduced the scope of positive discretion by Citizenship Judges. The residency requirement was raised from three years out of the previous four, to four years out of the previous six, except for permanent residents who served in the Canadian Armed Forces.<sup>29</sup> Those who entered as refugees, international students, or temporary foreign workers would no longer earn half-time credit toward fulfilling the residency requirement for citizenship.<sup>30</sup>

The most dramatic provisions of the *Strengthening Canadian Citizenship Act* concerned revocation for conduct committed while a citizen. In so doing, it revived elements of a Conservative private member's bill (Bill C-425) that died on the order paper the previous year.<sup>31</sup> The proposed law granted the Minister of Citizenship and Immigration broad discretion to revoke the citizenship of a Canadian convicted in Canada of any of a series of designated 'national security' offences, including treason, spying, and

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<sup>29</sup> This category was more or less a null set, since the Canadian Armed Forces website clearly instructs that you must be a Canadian citizen to apply. See Government of Canada, *Joining the Canadian Armed Forces* (Ottawa: GOC, last visited 18 January 2021), <https://forces.ca/en/how-to-join/>.

An obscure regulation entitled the *Queens Regulations and Orders for the Armed Forces* does grant exceptional discretion to "the Chief of the Defence Staff or such officer as he may designate [to] authorize the enrolment of a citizen of another country if he is satisfied that a special need exists and that the national interest would not be prejudiced thereby." See Canada, National Defence, *Queen's Regulations and Orders for the Canadian Forces*, vol. 1 – Administration (Ottawa: GOC, last modified 30 November 2017) art 6.01, [https://www.canada.ca/content/dam/dnd-mdn/migration/assets/FO RCES\\_Internet/docs/en/about-policies-standards-queens-regulations-orders-vol-02/V olume%20I%20Amalgam%C3%A9%20Final.pdf](https://www.canada.ca/content/dam/dnd-mdn/migration/assets/FO RCES_Internet/docs/en/about-policies-standards-queens-regulations-orders-vol-02/V olume%20I%20Amalgam%C3%A9%20Final.pdf). This exception is not mentioned in any Canadian Armed Forces recruiting material and, in principle, does not require the individual to hold any immigration status in Canada.

<sup>30</sup> With the shift in Canadian immigration policy from one-step (admission as permanent resident) to two-step migration (admission as temporary foreign worker, followed by transition to permanent resident status), the loss of a half-credit for residence prior to permanent resident status would affect many more newcomers than in the past.

<sup>31</sup> Bill C-425, An Act to amend the Citizenship Act (honouring the Canadian Armed Forces), 1st Sess, 41st Parl, 2013. At least three other bills proposing to amend the *Citizenship Act's* revocation provisions were introduced between 2000–2002. See Canada, Library of Parliament, *Legislative Summary of Bill C-18: The Citizenship of Canada Act*, by Benjamin Dolin and Margaret Young (Ottawa: Library of Parliament, 2002).

any crime defined as a terrorism offence under section 2 of the *Criminal Code*. The individual must have received a minimum sentence of five years or life imprisonment, depending on the offence. In the case of terrorism offences, the conviction could be for an offence committed and prosecuted outside Canada, if it would also constitute a terrorism offence under Canadian law. This meant that if a Canadian was convicted of terrorism in Egypt (as was Canadian-Egyptian journalist Mohammed Fahmy), the law permitted the Minister of Citizenship and Immigration to revoke his Canadian citizenship. Another provision of the *Strengthening Canadian Citizenship Act* authorized revocation of citizenship if the Minister had reasonable grounds to believe that a person, while a Canadian citizen, “served as a member of an armed force of a country or as a member of an organized armed group and that country or group was engaged in an armed conflict with Canada.”<sup>32</sup>

The existing treason offence in the *Criminal Code* criminalizes assistance to “armed forces against whom Canadian Forces are engaged,” but does not encompass armed groups not linked to a state. Rather than amend the treason provision in the *Criminal Code*, the government added the foreign fighter provision to the *Citizenship Act*, which permitted citizenship revocation for ‘foreign fighters’ assisting non-state armed groups, without requiring a treason conviction. The process for revocation on this ground required a finding of fact by a Federal Court judge that the named person met the statutory requirements of assisting armed forces against whom Canada was engaged.

The national security and the foreign fighter revocation provisions were retrospective, meaning that the Minister could revoke citizenship based on convictions or conduct that preceded the legislation. Revocation for serving in an enemy force or on national security grounds were both constrained by Canada’s international legal obligation to avoid the creation of statelessness. However, the new law placed the burden on the citizen to prove, on a balance of probabilities, that they are not a citizen of “any country of which the Minister has reasonable grounds to believe the person is a citizen.”<sup>33</sup> This is a reverse onus provision that required the citizen to prove a negative, namely, that they were not a citizen of another country.

The process for citizenship revocation required the Minister to send a notice in writing setting out the grounds for revocation. The citizen was

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<sup>32</sup> Citizenship Act, R.S.C. 1985, c. C-29, s. 10.1(2).

<sup>33</sup> Citizenship Act, s. 10.4(2).

permitted to make submissions in writing prior to a deadline set by the Minister but was not entitled to an oral hearing unless the Minister chose to order one. Following submissions, the Minister issued a decision in writing.

This process was, in various respects, inferior to the process for revoking Canadian permanent residence, a status subordinate to, and less secure than, Canadian citizenship.<sup>34</sup> The citizenship revocation decision was judicially reviewable by leave of the Federal Court. A judgment by the Federal Court was only appealable to the Federal Court of Appeal if the Federal Court judge who rendered the initial decision certified a question of general importance. These thin procedural protections and limited recourse to judicial review were borrowed from immigration law and signaled the demotion of citizenship to something like a more secure (but still provisional) form of permanent resident status.

Once denationalized, the former citizen would be pushed down a greased slide that bypassed permanent residence and landed hard at foreign national status.<sup>35</sup> In light of the criminal convictions (or service in an enemy force), the foreign national would be inadmissible to Canada and, therefore, deportable.

### III. REVOCATION AS SYMBOLIC POLITICS VS. POLICY INSTRUMENT

The political campaign to promote citizenship revocation in Canada, the U.K., various European states, and Australia traded in similar rhetorical tropes: citizenship is a privilege, not a right; those whose actions demonstrate disloyalty forfeit citizenship through those actions; terrorists do not deserve citizenship; citizenship is devalued when undeserving people hold citizenship, and its value is enhanced by stripping it from undeserving citizens. Securitization permeates this discourse, and racism and Islamophobia colour it.

Discourses of nationhood and national security are underwritten by the fantasy that the most grave and existential threats are external to the

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<sup>34</sup> By way of comparison, where a permanent resident of Canada faces loss of permanent resident status for misrepresentation, subsection 63(3) of the *Immigration and Refugee Protection Act* guarantees an oral hearing before the Immigration Appeal Division, an independent quasi-judicial body.

<sup>35</sup> Citizenship Act, s. 10.3.

nation. The health of the body politic is perpetually endangered by vectors of alien infiltration, contamination, and infection. The threat may take terrorist, military, cultural, medical, or political forms, but the common denominator is that the risk is foreign and must be defeated by whatever means necessary. The central figure of the alien in immigration law makes it an ideal repository for these febrile fears and provides a license for rights violations that would not otherwise be countenanced. And, as Bonnie Honig points out, the compulsion to characterize threats as emanating from an external other precedes, rather than follows, the designation of foreignness:

[A]lthough we may ... sometimes persecute people because they are foreign, the deeper truth is that we almost always make foreign those whom we persecute. Foreignness is a symbolic marker that the nation attaches to the people we want to disavow, deport, or detain because we experience them as a threat.<sup>36</sup>

Citizenship revocation can thus be understood as an exercise in producing the alien from within. It does so by turning citizens into foreigners in law. Citizens who are racialized as non-white and Muslim, are easy and obvious objects of this tactic since their claim to membership is regarded as provisional and precarious.<sup>37</sup> Revocation reconciles the illusion that threats to security are necessarily external to the nation with the reality of citizen perpetrators. Citizenship revocation thus operates as a truth-producing falsehood for managing the so-called 'homegrown terrorist'. Among the Toronto 18, Amara, Khalid, and Ansari immigrated to Canada as children. Khalid was not even born in the country of his citizenship (Pakistan). Gaya was born in Canada. In all meaningful ways, they were products of Canada and belong to Canada, both in absolute terms and relative to their other putative countries of nationality. Yet citizenship revocation offered a way to inscribe them with a foreign identity that, however implausible on the facts, provided moral satisfaction to a segment of the public invested in policing the borders of membership and nation.

Citizenship stripping holds out the promise of extending the functionality of immigration law. More specifically, it extends the reach of

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<sup>36</sup> Bonnie Honig, "A Legacy of Xenophobia," *Boston Review* 27, no. 6 (December 2002/January 2003), <http://bostonreview.net/archives/BR27.6/honig.html>.

<sup>37</sup> See Elke Winter and Ivana Previsic, "The Politics of Un-Belonging: Lessons from Canada's Experiment with Citizenship Revocation," *Citizenship Studies* 23, no. 4 (2019): 338-55; Tufyal Choudhury, "The Radicalisation of Citizenship Deprivation," *Critical Social Policy* 37, no. 2 (2017): 225-44, <https://doi.org.10.1177/0261018316684507>.

deportation of foreign nationals to grasp the banishment of ex-citizens. Here, the differences between the Canadian and U.K. models are stark: as noted above, deportation grew more attractive and more complicated post 9/11. As the U.K. government discovered, branding people as terrorists to justify deporting them could be self-defeating because it heightened the risk that people so labelled would be subjected to torture or cruel, inhuman, or degrading treatment by the destination country. This, in turn, brought the U.K. into collision with the European Convention on Human Rights' prohibition on deportation to torture which, unlike the Canadian Supreme Court, permits no exceptions.<sup>38</sup>

The U.K. contrived to circumvent this conundrum by doing what Canada did to Fred Rose in 1957: denationalize citizens who were already abroad. In the decade from 2006–2015, at least 81 U.K. citizens were denationalized, 36 on the basis that deprivation was 'conducive to the public good', and the remainder on account of fraud or misrepresentation.<sup>39</sup> Most in the former category were deprived of citizenship for reasons related to national security and were already outside the U.K.<sup>40</sup> For example, a 2013 spike in U.K. revocations was linked to an increased movement of U.K. nationals to Syria. In 2016, 14 British nationals were deprived of citizenship on grounds that it was 'conducive to the public good'. In 2017, the number rose to 104.<sup>41</sup> The U.K. government refuses to disclose the number who were overseas when denationalized.

During Parliamentary Debates in early 2014, the Minister of State for Immigration did not so much deny the practice of targeting citizens abroad as offer a rationale for it:

I understand that Members are concerned about instances where deprivation action takes places when a person is outside the UK.... I restate that the Home Secretary takes deprivation action only when she considers it is appropriate and that may mean doing

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<sup>38</sup> Saadi v. Italy, [2008] E.C.H.R. 179.

<sup>39</sup> House of Commons, "Deprivation of British Citizenship and Withdrawal of Passport Facilities" by Terry McGuinness and Melanie Gower, *Sessional Papers*, No. 06820 (2017), 10–12.

<sup>40</sup> Victoria Parsons, "Theresa May Deprived 33 Individuals of British Citizenship in 2015," *The Bureau of Investigative Journalism*, June 21, 2016, <https://www.thebureauinvestigates.com/stories/2016-06-21/citizenship-stripping-new-figures-reveal-theresa-may-has-deprived-33-individuals-of-british-citizenship>.

<sup>41</sup> U.K., Secretary of State for the Home Department, *HM Government Transparency Report 2018: Disruptive and Investigatory Powers* (Cm 9609, 2018), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/727961/CC\\_S207\\_CCS0418538240-1\\_Transparency\\_Report\\_2018\\_Web\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727961/CC_S207_CCS0418538240-1_Transparency_Report_2018_Web_Accessible.pdf).



so when an individual is abroad, which prevents their return and reduces the risk to the UK. That individual would still have a full right of appeal and the ability to resolve their nationality issues accordingly. It is often the travel abroad to terrorist training camps or to countries with internal fighting that is the tipping point—the crucial piece of the jigsaw—that instigates the need to act.<sup>42</sup>

The U.K. policy and practice confers several advantages from the U.K. government's perspective. First, it physically and permanently rids the state of persons considered to constitute security threats. Secondly, the broad and vague standard of 'conducive to the public good' enables revocation where the state lacks the substantive or evidentiary basis to prosecute the individual for committing any crime. Indeed, the Home Secretary need not prove that the person attempted or committed any unlawful act to justify revocation. Third, the weak procedural protections, especially the absence of an oral hearing, facilitate revocation in absentia. A notice of revocation will be sent to the last known U.K. address of the target, which the person may never receive. Indeed, individuals may not even discover they are at risk of denationalization until after they have been deprived of citizenship. Fourth, a denationalized citizen no longer has a right to enter the U.K., thereby precluding effective access to appeal mechanisms. Only in the exceptional case will the individual outside British territory be in a position to learn of the revocation and then find and instruct counsel to launch an appeal. The overall effect is to minimize state accountability for the exercise of the revocation of power, even where the individual is *de jure* rendered stateless. Indeed, once denationalized, the individual can not only be detained and tortured, but may even be executed by a drone strike,<sup>43</sup> or extradited<sup>44</sup> without drawing the solicitude that the U.K. government formally pays to citizens abroad.

In sum, the U.K. model of citizenship deprivation goes beyond the truism that it is easier to deport than to convict by capitalizing on the fact that it is even easier to exclude than it is to expel. It offers a relatively cheap,

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<sup>42</sup> McGuinness and Gower, "Deprivation of British Citizenship," 11.

<sup>43</sup> Chris Woods and Alice Ross, "Former British Citizens Killed by Drone Strikes After Passports Revoked," The Bureau of Investigative Journalism, February 27, 2013, <https://www.thebureauinvestigates.com/stories/2013-02-27/former-british-citizens-killed-by-drone-strikes-after-passports-revoked>.

<sup>44</sup> Victoria Parsons, "Man Stripped of British Citizenship Pleads Not Guilty to Al Qaeda Terror Charges in New York," The Bureau of Investigative Journalism, March 4, 2015, <https://www.thebureauinvestigates.com/stories/2015-03-04/man-stripped-of-british-citizenship-pleads-not-guilty-to-al-qaeda-terror-charges-in-new-york>.

swift, and efficient alternative to lengthy, arduous, rights-compliant criminal prosecution, or even the less demanding process of deportation. It minimizes the likelihood of accountability and permanently disposes of an undesirable [former] citizen on the territory of another country that lacks the capacity or will to object. Indeed, the individual may not even be a national of the country on whose territory they are located.

The Canadian model of citizenship revocation offered almost none of these instrumental advantages in respect of citizens suspected of terrorist affiliation or actions. The reason is that revocation on national security grounds required conviction for a criminal offence carrying a minimum custodial sentence. With the exception of the 'foreign fighter' provision, revocation could only supplement a criminal prosecution, not replace it. The animating idea seemed to be that the wrong embodied in national security offences exceeded that which could be contained or by ordinary criminal punishment. These various 'crimes against citizenship' warranted an additional punishment – the political death penalty of denationalization. Initiating the revocation process on a person in Canada would almost certainly embroil the government in protracted litigation, and even if the government prevailed, deportation would be complicated by the inevitable constitutional challenge arising from the risk of persecution (including torture or death) in the destination country.

Civil society and academics fiercely opposed the *Strengthening Canadian Citizenship Act*. They advanced arguments that the law was unconstitutional and the policy unsound. The constitutional objections ranged from the weak procedural protections in the scheme to the substantive injustice of depriving a person of citizenship, to the risk of torture or death facing a person branded as a terrorist and deported to a state with a poor human rights record.

On the understanding that the terminus of citizenship deprivation was deportation, opponents disputed the utility of banishment in promoting the policy goal of enhanced security. At best, it exported the problem to another jurisdiction. As such, it was a curiously parochial response to the challenge posed by terrorism, that Canada itself characterized as global in scope. Indeed, as noted above, a foreign conviction for terrorism under the laws of a foreign country qualified a Canadian for revocation of Canadian citizenship, suggesting that terrorism anywhere was a threat to Canadian national security.

Opponents of citizenship stripping argued that the appropriate response to conduct criminalized as terrorism was domestic prosecution, coupled with rehabilitation mechanisms tailored to the specificity of radicalism. Canada already criminalized and prosecuted terrorism offences. Citizenship revocation, fastened to a mirage of swift expulsion, undermined global cooperation in combatting terrorism and distracted from the urgency of investment in de-radicalization. If the endgame of citizenship revocation was banishment, the Canadian model seemed poorly designed to produce the desired result, and the result itself was undesirable.

The opposition parties voted against Bill C-24. The Conservatives held a clear majority, and the Bill passed easily and without amendment. Yet, the government declined to exercise its power to revoke citizenship for over a year.

#### IV. REVOCATION AS ELECTORAL OPPORTUNISM

When Bill C-24 was moving through the legislative process, some wondered whether the foreign fighter provision was drafted with Omar Khadr in mind. Mr. Khadr had been captured by U.S. Forces in Afghanistan in 2002 at age 15, spent a decade in Guantanamo Bay, and had returned to Canada in a prisoner transfer agreement in 2013. One might have wondered the same question about the national security revocation provisions in respect of the Toronto 18. According to Michael Nesbitt, from 2001–2018, 54 people were charged with terrorism offences and 26 were convicted.<sup>45</sup> Eleven of those convicted came from the Toronto 18. The remaining seven (including four youths) were acquitted or had charges stayed or withdrawn.

In July 2015, about a year after the new law came into force, up to ten people were served with notices of intent to revoke citizenship and given 60 days to respond. On August 2, 2015, the Conservative government dissolved Parliament and announced October 19, 2015, as election day. The timing ensured that the 60-day reply period would lapse during the campaign.

The institutions of Westminster parliamentary democracies are laced with various informal norms that are legally unenforceable but customarily

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<sup>45</sup> Michael Nesbitt, “An Empirical Study of Terrorism Charges and Terrorism Trials in Canada Between September 2001 and September 2018,” *Criminal Law Quarterly* 67, no. 1/2 (2019).

followed. They are rarely noticed until a government deviates from them. Shortly before the 2015 federal election, the government took the unusual step of posting online guidelines that defined and enumerated the informal norms nestled under the label ‘caretaker convention.’<sup>46</sup> The general principle is that once Parliament is dissolved and an election is called, the incumbent government should act with restraint in undertaking new initiatives. The rationale is that “there is no elected chamber to confer confidence on the Government [and] the government cannot assume that it will command the confidence of the House after the election.” The guidelines summarized the operational implications as follows:

- a. To the extent possible, however, government activity following the dissolution of Parliament – in matters of policy, expenditure and appointments – should be restricted to matters that are routine, or
- b. non-controversial, or
- c. urgent and in the public interest, or
- d. reversible by a new government without undue cost or disruption, or
- e. agreed to by opposition parties (in those cases where consultation is appropriate).<sup>47</sup>

None of these factors precludes the conduct of ongoing government business. Nevertheless, one might think that stripping Canadians of citizenship for ‘disloyalty’ for the first time in almost 60 years is not business as usual. It was undeniably controversial. No urgent public interest animated it. But the actual notices of intent to revoke were issued prior to the election call by a few weeks and, in the case of Saad Gaya, two days before the writ was dropped. The expiry of the 60-day reply period, and the ensuing consequences, could be described as routine in the sense that they unspooled without further instigating action by the Minister. Zakaria Amara was in a Quebec prison when he was served with the notice of revocation in July 2015. Saad Khalid also received his notice of revocation in prison. Asad Ansari was released in 2010 (for time served in pre-trial detention) and was attending university in 2015. Saad Gaya was serving his

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<sup>46</sup> Canada, Privy Council Office, *Guidelines on the Conduct of Ministers, Ministers of State, Exempt Staff and Public Servants During an Election* (Ottawa: GOC, last modified 11 September 2019), <https://www.canada.ca/en/privy-council/services/publications/guidelines-conduct-ministers-state-exempt-public-servants-election>. The September 2019 modifications to the Caretaker Convention *Guidelines* did not alter the substance of the relevant passages.

<sup>47</sup> Privy Council Office, *During an Election*.

sentence at a medium-security institution but attending university on day parole.

It is not clear whether Amara responded to the notice within the 60-day period, but in any event, Conservative candidate (and former Minister of Citizenship and Immigration) Jason Kenney publicly announced Amara's citizenship revocation at a campaign stop on September 26, 2015.<sup>48</sup> From that moment, citizenship revocation moved to the foreground of the election campaign. The parties organized their positions around talking points that candidates recycled, and the media recirculated.

The Conservatives favoured the constructive expatriation line. Jason Kenney's remarks about Amara set the tone:

I hope that this case makes people realize what we're really trying to do here.... If you basically take up arms against your country or plan to do so, and you're convicted in a Canadian court, or an equivalent foreign court, through your violent disloyalty you are forfeiting your own citizenship and we'll just read it as it is.<sup>49</sup>

Justin Trudeau, on the other hand, drew on the vulnerability of dual nationals, and emphasized the equality of citizenship:

A Canadian is a Canadian is a Canadian... And you devalue the citizenship of every Canadian in this place and in this country when you break down and make it conditional for anybody.<sup>50</sup>

Trudeau further remarked:

We have a rule of law in this country and you can't take away citizenship of an individual because you don't like what someone does.<sup>51</sup>

With the exception of Amara, each man contested the legality of citizenship revocation under the *Charter* and was supported by the British Columbia Civil Liberties Association (BCCLA) and the Canadian

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<sup>48</sup> Stewart Bell, "Canada revokes citizenship of Toronto 18 ringleader using new anti-terror law," *National Post*, September 26, 2015, <https://nationalpost.com/news/canada/canada-revokes-citizenship-of-toronto-18-ringleader>.

<sup>49</sup> Bell, "Canada revokes citizenship."

<sup>50</sup> "Munk Leaders' Debate: Harper, Trudeau Battle Over Bill to Revoke Citizenship," *Huffington Post*, September 28, 2015, [https://www.huffingtonpost.ca/2015/09/28/munk-leaders-debate-harper-trudeau-battle-over-bill-to-revoke-citizenship\\_n\\_8211410.html?utm\\_hp\\_ref=ca-justin-trudeau-debate\\_](https://www.huffingtonpost.ca/2015/09/28/munk-leaders-debate-harper-trudeau-battle-over-bill-to-revoke-citizenship_n_8211410.html?utm_hp_ref=ca-justin-trudeau-debate_)

<sup>51</sup> Steven Chase and Gloria Galloway, "Federal leaders clash over Canadian values, security in lively debate," *Globe and Mail*, September 28, 2015, <https://www.theglobeandmail.com/news/politics/harper-trudeau-mulcair-step-it-up-a-notch-in-foreign-policy-debate/article26580458/>.

Association of Refugee Lawyers (CARL) as public interest litigants. The individual applications were eventually consolidated. A constitutional challenge to the revocation provisions was inevitable: when the *Strengthening Canadian Citizenship Act* was introduced, lawyers and legal academics catalogued a list of potential *Charter* violations in relation to many aspects of the statute, all with predictable futility.<sup>52</sup> The legal challenges brought by Gaya, Ansari, Khalid, and others addressed, *inter alia*, citizenship revocation for misconduct as cruel and unusual treatment or punishment (section 12); a violation of liberty and security of the person that was both substantively unjust and procedurally unfair (section 7); a form of double punishment (paragraph 11(h)); retrospective punishment (paragraph 11(i)); discrimination against dual citizens (section 15).<sup>53</sup>

As noted earlier, the U.K. experience revealed that the complexity of determining dual nationality belied any fantasy of frictionless citizenship stripping. Not all naturalized citizens retained their first citizenship and some automatically lost their first citizenship by acquiring a second. The possession of dual citizenship was often not obvious in all cases, as Saad Gaya's case revealed.

Unlike the other subjects of revocation, all of whom immigrated to Canada and acquired citizenship through naturalization, Saad Gaya was born in Montreal in 1987 and was a citizen by virtue of birth on Canadian soil.<sup>54</sup> His parents had immigrated to Canada from Pakistan but lost their Pakistani citizenship when they naturalized as Canadians in the 1980s because Pakistan did not permit dual citizenship. Therefore, they could not and did not transmit Pakistani citizenship by descent to Gaya at birth. In 2004, an agreement between Canada and Pakistan permitted citizens of Pakistan to naturalize in Canada without relinquishing Pakistani citizenship.

Borrowing from the failed gambit of the U.K. government in the *al Jeddah* litigation, the Minister contended in his notice of intent to revoke that Saad Gaya became a citizen of Pakistan unwittingly in 2004: when

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<sup>52</sup> For two academic analyses, see Craig Forcese, "A Tale of Two Citizenships: Citizenship Revocation for 'Traitors and Terrorists,'" *Queen's Law Journal* 39, no. 2 (2014): 551-86; Macklin, "Citizenship Revocation."

<sup>53</sup> BCCLA, CARL, and Asad Ansari (20 August 2015) (Notice of Application for Leave and for Judicial Review) (on file with author); BCCLA, CARL and Asad Ansari, (20 August 2015) (Statement of Claim) (on file with author).

<sup>54</sup> Amara was born in Jordan, Khaled was born in Saudi Arabia to Pakistani parents, and Ansari was born in Pakistan.

Canada and Pakistan entered into the citizenship agreement, the Pakistani citizenships of his parents were (allegedly) automatically and retroactively reinstated to them, and so Saad Gaya automatically and retroactively became a birthright citizen by descent of Pakistan. The U.K. Court of Appeal and Supreme Court in *al Jedda* dismissed automatic, retroactive citizenship as an absurd and impracticable fiction. This did not deter the Canadian government from stretching the concept beyond the first generation (a naturalized citizen, like *al Jedda*) to the second generation born in Canada (Gaya). This unprecedented ‘retroactive citizenship by descent’ was the basis of the Minister’s allegedly reasonable belief that Gaya held Pakistani citizenship by descent. According to the new Canadian law, Gaya bore the burden of proving on a balance of probabilities that he was not a citizen of Pakistan.

Citizenship revocation and the niqab ban played well to the Conservative base. According to the polls, they also resonated with the broader electorate. Convicted terrorists elicited little sympathy, and niqabs offended people from across the political spectrum. Stripping citizenship from bad citizens and stripping niqabs from Muslim women as the price of citizenship advanced no practical policy objective. They played entirely in the register of symbolic politics where ideas of patriotism, codes of belonging, rituals of allegiance, and spectacles of retribution find a receptive audience. And, of course, symbolic politics often broadcast at their loudest and shrillest pitch during elections. Ironically, Zunera Ishaq (who challenged the niqab policy) grasped this in her remarks to a journalist during the election campaign:

I don’t understand how this issue has taken so much attention... They have so many other things to take care of... We have a crisis of jobs right now. There is the big global issue of refugees. We are not paying attention to these issues and just focusing on a single person. It’s ironic to me. How can a government have so much time to pay so much attention to a single person’s choice?<sup>55</sup>

The Conservatives chose the timing of the citizenship revocations with precision, but not so with the niqab controversy. Prior to the election call of August 2, 2015, the Federal Court of Appeal scheduled its hearing in the niqab ban case. It set down the case for September 15, 2015, which happened to fall in the middle of the election campaign. The FCA heard

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<sup>55</sup> Richard Warnica, “Woman at the heart of niqab debate set to take citizenship oath in next few days,” *National Post*, October 8, 2015, <https://nationalpost.com/news/canada/woman-at-the-heart-of-niqab-debate-set-to-take-citizenship-oath-in-next-few-days>.

the appeal and took the unusual step of ruling from the bench in Ishaq's favour, with the explicit direction that the government enable Ishaq to swear the oath of citizenship (while wearing her niqab) before election day.

In response to the judicial rebuke from the FCA, the Conservatives decided to double down on both the niqab ban and citizenship revocation. Prime Minister Harper drew the niqab policy into the ambit of securitization by insinuating that women wearing niqabs deliberately sought to conceal their identity from the state. He then upped the ante by hinting that the Conservative government would consider introducing legislation barring niqab wearers from employment as civil servants and from receipt of public services, a move calculated to appeal especially to Quebec voters.<sup>56</sup> Next, the Minister of Citizenship and Immigration announced a 'barbaric cultural practices' tip line that incited Canadians to report Muslims and other minorities whose [alleged] practices they found objectionable or suspicious.<sup>57</sup>

But in the end, the Conservatives seemed to overplayed their hand. Despite the lack of sympathy for Muslims convicted of terrorism offences, or for Muslim women wearing niqabs, the relentless vilification by Conservatives seemed to alienate some margin of voters. The barbaric cultural practices snitch line was widely mocked and devolved into parody almost instantly. Prime Minister Harper's wooden response to the photo of Alan Kurdi was seen as callous, especially when it was revealed that the Prime Minister's Office had secretly blocked the arrival of Syrian refugees (including Kurdi's relatives), despite public commitments to resettle Syrian and Iraqi refugees. The Liberals won a comfortable majority.

Analysts and commentators differ on the ultimate impact of the Conservative's citizenship strategy on the election outcome. But more interesting for present purposes is the nature of the Conservatives' miscalculation. From the time they held a majority in Parliament, the Conservatives pursued policies and enacted laws with apparent

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<sup>56</sup> Warnica, "Woman at the heart of niqab debate."

<sup>57</sup> "Tories promise RCMP tip line for people to report neighbours for 'barbaric cultural practices,'" *National Post*, October 2, 2015, <http://news.nationalpost.com/news/tories-promise-rcmp-tip-line-for-people-to-report-neighbors-for-barbaric-cultural-practices>.

Earlier in 2015, the Conservative government passed the *Zero Tolerance for Barbaric Cultural Practices Act*, S.C. 2015, c. 29. The Act consisted mostly of gratuitous amendments to existing criminal and immigration law to prohibit the immigration of persons practicing polygamy, forced marriage, the defence of provocation in so-called "honour killings". It also legislated 16 as the minimum age for marriage across Canada.



indifference, if not disdain, toward the rule of law and the *Charter*. This was certainly true of the citizenship revocation law. The operative principle seemed to be that if the policies were popular with voters, their legality mattered little. If the government prevailed in court, so much the better. If the government was defeated in court (as it was in several instances), the Conservatives could blame an unelected, unaccountable judiciary for thwarting the democratic will of the people, as embodied by the Conservative government. According to this calculus, even when the Conservatives lost legally, they won politically. The Conservative government had pursued this strategy with apparent success over several years and many laws. But with the niqab ban and possibly with citizenship revocation, the strategy failed them at the moment when it counted most.

## V. CONCLUSION

On November 2, 2015, Federal Court Justice Zinn adjourned *sine die* the constitutional challenge to the 2014 *Strengthening Canadian Citizenship Act*. The Liberal government eventually fulfilled its campaign promise to reverse the harshest aspects of the 2014 legislation enacted by their Conservative predecessors, including citizenship revocation.<sup>58</sup> The transitional provisions restored citizenship to anyone whose citizenship was revoked under the national security or foreign fighter provisions. Zakaria Amara's citizenship was reinstated.<sup>59</sup>

By the time the Liberal government amended the *Citizenship Act* in 2017 to repeal security-related citizenship revocation, the focus in Canada and elsewhere had already pivoted from 'homegrown terrorists' to their mobile cousins, the 'foreign fighters.' An estimated 5000–6000 young men – and a few teenage girls and women – from the U.K., Australia, Canada, the United States, and EU member states, had travelled to Syria or nearby regions to fight with or alongside ISIS.<sup>60</sup> An estimated 185 were

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<sup>58</sup> An Act to amend the Citizenship Act and make consequential amendments to another Act, S.C. 2017, c. 14. The amendments also restored the residency period back to 3 years (from 4) and the partial credit toward residency for international students and others holding temporary status. The new Bill also introduced a new process governing revocation for fraud or misrepresentation.

<sup>59</sup> "Would-be Canadian terrorists are often made in Canada," *Hill Times*, September 3, 2018, <https://www.hilltimes.com>.

<sup>60</sup> Richard Barrett, *Beyond the Caliphate: Foreign Fighters and the Threat of Returnees* (New York, NY: The Soufan Center, October 2017), <https://thesoufancenter.org/wp>

Canadian.<sup>61</sup> One was Ali Mohammad Dirie, a convicted member of the Toronto 18. About a year after his 2011 release from prison, he flew to Syria (reportedly on a passport that was not his) to join an extremist group. He reportedly died in Syria in 2013.<sup>62</sup> Today, men like Ali Mohammad Dirie preoccupy policymakers more than Zakaria Amara and the other members of the Toronto 18.

In 2014, the United Nations Security Council passed Resolution 2178, calling on member States to, *inter alia*, dedicate resources and adopt laws designed to constrain the international mobility of actual or potential foreign fighters.<sup>63</sup> For several years, lawmakers have concentrated their efforts on expanding the catalogue of terrorist-related crimes and on criminalizing each step in a sequence that begins with domestic radicalization and culminates in participation in ISIS (or comparable groups) abroad.<sup>64</sup> Intelligence and law enforcement agencies formulated or adapted ancillary measures to monitor and restrain the mobility of suspects. If they were still on the territory, the state sought to surveil and interdict them before departing. If they had already left the country, the goal shifted to preventing their return. As the military defeat of ISIS grew imminent and increasing numbers of foreign fighters were captured and detained by actors or states that refused to assume responsibility for them indefinitely, the prospect of their return raised alarm in countries of origin. Within this frame, politicians are no longer coy about using citizenship revocation

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content/uploads/2017/11/Beyond-the-Caliphate-Foreign-Fighters-and-the-Threat-of-Returnees-TSC-Report-October-2017-v3.pdf.

<sup>61</sup> Barrett, *Beyond the Caliphate*, 12.

<sup>62</sup> “Toronto 18’ member Ali Mohamed Dirie reportedly died in Syria,” CBC, September 25, 2013, <https://www.cbc.ca/news/world/toronto-18-member-ali-mohamed-dirie-reportedly-died-in-syria-1.1868119>.

<sup>63</sup> UN Security Council, Resolution 2178, S/RES/2178 (September 24, 2014), <https://documents-ddsny.un.org/doc/UNDOC/GEN/N14/547/98/PDF/N1454798.pdf?OpenElement>. For an evaluation of national foreign fighter regulatory mechanisms as of 2014, see The Law Library of Congress, Global Legal Research Center, *Treatment of Foreign Fighters in Selected Jurisdictions* (Washington, DC, December 2014), <https://www.loc.gov/law/help/foreign-fighters/treatment-of-foreign-fighters.pdf>.

<sup>64</sup> For a description and critique of the Canadian regime for restraining mobility, see Craig Forcese and Kent Roach, *False Security: The Radicalization of Canadian Anti-Terrorism* (Toronto: Irwin Law, 2015), 175–201. For a description of the U.K. regime, see Clive Walker, “6 Foreign Terrorist Fighters and UK Counter Terrorism Laws,” in *The Asian Yearbook of Human Rights and Humanitarian Law*, eds. Javaid Rehman and Ayesha Shahid, vol. 2 (Leiden, Netherlands: Brill Academic Publishers, 2018), 177–204.

opportunistically to prevent re-entry.<sup>65</sup> But the viability of citizenship revocation as a means of excluding returning foreign fighters is diminishing now that many are in the custody of states or forces opposed to ISIS. Blocking citizens seeking re-entry on their own initiative was politically feasible, if legally unscrupulous. Refusing to admit citizens deported by another state would be politically untenable as a matter of international relations. All Western states are under political pressure to re-admit their foreign fighters, and their ability to evade that pressure through denationalization is limited, though that may not deter them in the short term.

Importantly, citizenship revocation is not the only mechanism for controlling the mobility of people who are considered risky. States can also interdict exit or re-entry through passport cancellation and seizure, as well as through the application of no-fly lists.<sup>66</sup> These administrative measures are notionally temporary (unlike citizenship revocation) but also more pliable and less visible. They may or may not be accompanied by criminal prosecution for offences related to terrorism domestically or extraterritorially, including travel abroad to participate in foreign conflicts.<sup>67</sup> So even without citizenship revocation, Canada and other states possess the legal means to disrupt exit, delay entry, and criminally prosecute an expansive range of actions in Canada and abroad. These options are instrumental techniques explicitly organized around the objective of

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<sup>65</sup> In 2019, the government stripped Neil Prakash of Australian citizenship after he was captured and held in a Turkish prison. In the same year, the U.K. Home Secretary deprived Shamima Begum of her citizenship while she was in a Syrian refugee camp. Begum ran away from her home in London to join ISIS in 2015. Her parents emigrated from Bangladesh, raising the possibility that she was a dual U.K.-Bangladeshi national. While the U.S. Constitution effectively precludes citizenship stripping, the U.S. disavowed U.S. born Hoda Muthana, another teenage “ISIS bride” detained in a Syrian refugee camp, by claiming she never actually possessed U.S. citizenship. The U.S. position is that she was born while her father was a Yemeni diplomat, which excludes her from jus soli citizenship. See *Muthana v. Pompeo*, Columbia, Dist Ct DC, 19-445 (RBW) (December 17, 2019). This argument is similar to the position of the Canadian government against Deepan Budlakoti. See Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2264/2013*, GE 18-14175 (E), UN Doc CCRP/C/122/D/2264/2013 (2018).

<sup>66</sup> See Audrey Macklin, “Still Stuck at the Border,” in Craig Forcese and François Crépeau, eds. *Terrorism, Law and Democracy: 10 Years After 9/11* (Montreal: Canadian Institute for the Administration of Justice, 2012), 261–306.

<sup>67</sup> Beth Van Schaack, “National Courts Step Up: Syrian Cases Proceeding in Domestic Courts,” *SSRN* (February 2019): 1–39.

constraining or exploiting mobility. They neither invoke nor require the distended rhetoric that accompanies citizenship revocation as an (putative) end in itself.

The global context framing citizenship revocation has changed since 2014. Today, an opportunistic, politically conservative government with little regard for the rule of law may yet hesitate to revoke the citizenship of a man convicted in the Toronto 18 prosecution. If that government took guidance from its policing and security services, it might expend less effort in trying to denationalize and deport him and invest instead in preventing his exit. Of course, a sensible government would also devote resources to prevention and de-radicalization.

States like Canada, the U.K., Australia, and the EU Member States that find citizenship revocation attractive invariably presume that they will be the ones using it to dispose of undesirable citizens. They do not imagine themselves as the disposal site. One way of testing the wisdom of a national policy of citizenship revocation is to suppose a world in which states contemplate themselves on the receiving end of the transaction.

The 2019 controversy around ‘Jihadi Jack’ provides an interesting case study.<sup>68</sup> British-born Jack Letts converted to Islam as a teenager and travelled to Syria in 2014 at age 18. He was captured by Kurdish forces in 2018. Like Shamima Begum, a British teenager who left to join ISIS in Syria in 2015, Britain refuses to re-admit him. The Home Secretary deprived Begum of her U.K. citizenship, claiming that she would not be left stateless because she is also a Bangladeshi citizen, and the Special Immigration Appeal Commission (SIAC) upheld the decision. In mid-2020, the English Court of Appeal set aside the SIAC decision on the basis that the government’s refusal to permit her to enter the U.K. to appeal the revocation order violated principles of procedural fairness, but the U.K. Supreme Court reversed the Court of Appeal and restored the original SIAC decision.<sup>69</sup>

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<sup>68</sup> My discussion of Jack Letts draws substantially from Audrey Macklin, “Jihadi Jack and the Folly of Revoking Citizenship,” *The Conversation*, August 20, 2019, <https://theconversation.com/jihadi-jack-and-the-folly-of-revoking-citizenship-122155>.

<sup>69</sup> R (on the application of Begum) (Respondent) v Secretary of State for the Home Department (Appellant) [2021] UKSC 7 On appeal from: [2020] EWCA Civ 918. In early 2021, the Special Immigration Appeals Commission set aside the citizenship deprivation of three other UK citizens who were similarly situated to Begum, but over 21 when stripped of UK citizenship (and therefore ineligible for Bangladeshi citizenship). C3, C4, C7 v Secretary of State for the Home Department, 18 March 2021,

Sometime in July 2019, the U.K. government under Prime Minister Theresa May deprived Jack Letts of his U.K. citizenship. A British newspaper broke the story on August 17, 2019.<sup>70</sup> Letts is a dual British-Canadian citizen because his father is Canadian. In an interview, he stated that “I feel British, I am British. If the U.K. accepted me, I would go back to the U.K., but I don’t think that’s going to happen.”<sup>71</sup>

Until Letts, post-9/11 citizenship deprivation in Britain traded on a tacit understanding that British Muslims with brown skin inherently “belong” less to the U.K. than to some other country where the majority of people are Muslims with brown skin – even if they were born in Great Britain and have never even visited the other country of nationality. On this view, stripping citizenship merely sends the targets back to where they “really” come from. Citizenship deprivation thus delivers an exclusionary message to all non-white, non-Christian British citizens that their claim to U.K. membership is permanently precarious, however small the literal risk of citizenship deprivation. Indeed, legal scholar John Finnis invoked the essential foreignness of Muslims to Britain when he proposed the “humane” expulsion of all Muslim non-citizens from Britain.<sup>72</sup>

But Letts is white, his parents are middle class, and Christian in upbringing (though secular in practice). His other country of citizenship, Canada, is also predominantly white, Christian in origin and a former colony of Britain. Canada is a staunch British ally, an important diplomatic and trading partner and a G7 member. Queen Elizabeth remains the formal head of state in Canada. Denationalizing Letts cannot trade on implicit appeals to racism, Islamophobia and colonial arrogance. Letts is no more or less a risk to national security in Canada than the U.K. In no sense does Letts “belong” more to Canada than to the U.K., the country where he was

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<http://siac.decisions.tribunals.gov.uk/Documents/outcomes/documents/C3,C4%20&%20C7%20-%20Open%20Judgment%20-%202018.03.2021%20-%20JA.pdf>.

<sup>70</sup> Harry Cole, “ISIS fighter Jihadi Jack is stripped of his UK passport sparking furious diplomatic row with Canada where he has joint citizenship,” *Sunday Daily Mail*, August 17, 2019, <https://www.dailymail.co.uk/news/article-7367565/ISIS-fighter-Jihadi-Jack-stripped-UK-passport-sparking-furious-diplomatic-row-Canada>. May resigned as Prime Minister on July 24, 2019.

<sup>71</sup> Kevin Rawlinson, “Second Briton says he wants to be allowed back to UK from Syria,” *The Guardian*, February 22, 2019, <https://www.theguardian.com/uk-news/2019/feb/22/jihadi-jack-pleads-to-be-allowed-back-to-uk-from-syria>.

<sup>72</sup> John Finnis, “Endorsing Discrimination between Faiths: A Case of Extreme Speech?,” in Ivan Hare and James Weinstein, eds., *Extreme Speech and Democracy*, (Oxford: OUP 2009), 440.

born, raised, and which formed him. And, of course, global security is not advanced when the U.K. disposes of their unwanted citizens in Canada, Bangladesh or anywhere else. The very phenomenon of foreign fighters testifies to that.<sup>73</sup>

The Canadian government greeted the news of Letts' denationalization with displeasure. Minister of Public Safety and Emergency Preparedness, Ralph Goodale, stated that "Canada is disappointed that the United Kingdom has taken this unilateral action to offload their responsibilities."<sup>74</sup> In almost the same breath, the government also disavowed any obligation to assist Letts or any of the dozens of Canadian men, women, and children held in makeshift prison camps in Syria.<sup>75</sup>

As a thought experiment, consider a scenario where Canada retained the citizenship revocation law enacted by the Conservative government: both the U.K. and Canada would have the option of stripping Jack Letts of citizenship as a dual citizen. The only question would be who would do it first because once denationalized, the individual is a mono-citizen who cannot be deprived of the remaining citizenship without rendering him stateless. And so, denationalization would devolve into a race to revocation, where the loser gets the citizen.

Citizenship deprivation inflicts grave human rights violations on those deprived of citizenship, and the very phenomenon of foreign fighters evinces that global security is not advanced by 'dumping' risky people on other states. But beyond that, universal adoption of the U.K. model of citizenship revocation would be an international relations fiasco. Citizenship revocation for 'crimes against citizenship' is a state practice that flunks the Kantian imperative: its putative viability as a counter-terrorism tool depends on other states *not* emulating the practice. The absurdity of a race to denationalize buttresses the legal, normative and pragmatic reasons for rejecting denationalization, which I have explored elsewhere.<sup>76</sup>

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<sup>73</sup> His parents were convicted of funding terrorism in 2019 for sending their son money while he was in Syria. See "Jack Letts, Islamic State recruit: 'I was enemy of UK,'" *BBC News*, June 21, 2019, <https://www.bbc.com/news/uk-48624104>.

<sup>74</sup> "Canada 'disappointed' after UK reportedly strips Jihadi Jack of citizenship," *CBC News Online*, August 18, 2019, <https://www.cbc.ca/news/world/jihadi-jack-citizenship-uk-canada-1.5251437>.

<sup>75</sup> Justin Giovanetti, "Canada criticizes UK move to strip Jihadi Jack of British citizenship," *Globe and Mail*, August 18, 2019, <https://www.theglobeandmail.com/canada/article-canada-criticizes-uk-move-to-strip-jihadi-jack-of-british/>.

<sup>76</sup> See Macklin, "Citizenship Revocation."

Compared to other states on the receiving end of U.K. citizenship deprivation, Canada is uniquely well placed on the global stage to confront and challenge the practice as inimical to inter-state cooperation in countering terrorism. In so doing, Canada could bolster and champion efforts already underway among human rights organizations to discredit the practice as contrary to international human rights norms.<sup>77</sup> Unfortunately, Canada has not seized this opportunity. Meanwhile, citizenship stripping persists, even as its pretensions to principle and to utility have been stripped away.

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<sup>77</sup> See e.g., *Principles of Deprivation of Nationality as a National Security Measure*, Institute on Statelessness and Inclusion, March 18, 2020, <https://files.institutesi.org.pdf>.