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## **(Un)Civil Denaturalization**

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# (UN)CIVIL DENATURALIZATION

CASSANDRA BURKE ROBERTSON<sup>†</sup> & IRINA D. MANTA<sup>‡</sup>

*Over the last fifty years, naturalized citizens in the United States were able to feel a sense of finality and security in their rights. Denaturalization, wielded frequently as a political tool in the McCarthy era, had become exceedingly rare. Indeed, denaturalization was best known as an adjunct to criminal proceedings brought against former Nazis and other war criminals who had entered the country under false pretenses.*

*Denaturalization is no longer so rare. Naturalized citizens' sense of security has been fundamentally shaken by policy developments in the last five years. The number of denaturalization cases is growing, and if current trends continue, it will continue to increase dramatically. This growth began under the Obama administration, which used improved digital tools to identify potential cases of naturalization fraud from years and decades ago. The Trump administration, however, is taking denaturalization to new levels as part of its overall immigration crackdown. It has announced plans for a denaturalization task force. And it is pursuing denaturalization as a civil-litigation remedy and not just a criminal sanction—a choice that prosecutors find advantageous because civil proceedings come with a lower burden of proof, no guarantee of counsel to the defendant, and no statute of limitations. In fact, the first successful denaturalization under this program was decided on summary judgment in favor of the government in 2018. The defendant was accused of having improperly filed an asylum claim twenty-five years ago, but he was never personally served with process and he never made an appearance in the case, either on his own or through counsel. Even today, it is not clear that he knows he has lost his citizenship.*

*The legal status of denaturalization is murky, in part because the Supreme Court has long struggled to articulate a consistent view of citizenship and its prerogatives. Nonetheless, the Court has set a number of significant limits on the government's attempts to remove citizenship at will—limits that are inconsistent with the administration's current litigation policy. This Article argues that stripping Americans of citizenship through the route of civil litigation not only violates substantive and procedural due process, but also infringes on the rights guaranteed by the Citizenship Clause of the Fourteenth Amendment. Finally, (un)civil denaturalization undermines the constitutional safeguards of democracy.*

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## INTRODUCTION

Denaturalization is making a comeback in the United States. For half a century, denaturalization largely disappeared from American policy.<sup>1</sup> Civil actions seeking to strip individuals' citizenship have been

<sup>1</sup> See *infra* Section II.D.

exceedingly rare in the last fifty years. When they occurred, they were often the product of human rights groups' efforts to identify former Nazis and war criminals who had used forged and fraudulent credentials to avoid accountability.<sup>2</sup>

Now, however, the government has ramped up the number of denaturalization cases it is filing. News reports detail how government officials are searching through old records, digitizing fingerprint records from decades ago, and looking for irregularities that might lead to new denaturalization actions.<sup>3</sup>

Immigration and Customs Enforcement (ICE) has requested funding to institute a task force aimed at bringing more civil and criminal actions against individuals who were allegedly unqualified to obtain citizenship. The program has so far identified 887 potential leads, and expects to review another 700,000 naturalized citizens' files, to see if there are grounds for potential denaturalization.<sup>4</sup>

These additional denaturalization proceedings might seem insignificant given the sheer number of naturalized citizens in the country. Every year, approximately 700,000 individuals become naturalized citizens of the United States. There are nearly 20 million naturalized citizens currently residing in the United States, representing approximately 6.5% of the nation's citizens.<sup>5</sup> Naturalized citizens enjoy the full benefits and responsibility of U.S. citizenship, including the right to vote in state and federal elections, the right to travel with a U.S. passport, the right and duty to serve on a jury, and legal protection against deportation proceedings.<sup>6</sup> In fact, the Supreme Court has

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<sup>2</sup> See *infra* Section II.C.

<sup>3</sup> See Nick Miroff, *Scanning Immigrants' Old Fingerprints, U.S. Threatens to Strip Thousands of Citizenship*, WASH. POST (June 13, 2018), [https://www.washingtonpost.com/world/national-security/scanning-immigrants-old-fingerprints-us-threatens-to-strip-thousands-of-citizenship/2018/06/13/2230d8a2-6f2e-11e8-afd5-778aca903bbe\\_story.html](https://www.washingtonpost.com/world/national-security/scanning-immigrants-old-fingerprints-us-threatens-to-strip-thousands-of-citizenship/2018/06/13/2230d8a2-6f2e-11e8-afd5-778aca903bbe_story.html).

<sup>4</sup> DEP'T OF HOMELAND SEC., U.S. IMMIGRATION & CUSTOMS ENF'T, OPERATIONS AND SUPPORT: FISCAL YEAR 2019 CONGRESSIONAL JUSTIFICATION 21 (2018), <https://www.dhs.gov/sites/default/files/publications/U.S.%20Immigration%20and%20Customs%20Enforcement.pdf>.

<sup>5</sup> Ana Gonzalez-Barrera & Jens Manuel Krogstad, *Naturalization Rate Among U.S. Immigrants Up Since 2005, with India Among the Biggest Gainers*, PEW RES. CTR. (Jan. 18, 2018), <http://www.pewresearch.org/fact-tank/2018/01/18/naturalization-rate-among-u-s-immigrants-up-since-2005-with-india-among-the-biggest-gainers> (providing the number of naturalized citizens); HENRY J. KAISER FAMILY FOUND., POPULATION DISTRIBUTION BY CITIZENSHIP STATUS, <https://www.kff.org/other/state-indicator/distribution-by-citizenship-status> (last visited Dec. 27, 2018) (noting that the number of United States citizens living in the fifty states is approximately 295 million as of 2017).

<sup>6</sup> Gonzalez-Barrera & Krogstad, *supra* note 5.

said, the only difference between the rights of naturalized citizens and those born in the United States is eligibility to serve as President.<sup>7</sup>

But even if the program results in only a few hundred additional proceedings, it still creates a culture of fear that permeates through the community of immigrants and naturalized citizens. As one reporter stated, “Fear also threads through people fast, and spreads quickly, especially online. After the immigration agency’s announcement, many naturalized citizens were left questioning the validity of an immigration status they assumed would always be safe.”<sup>8</sup> People may begin second-guessing their decision to seek naturalization; “afraid of being targeted or tripped up in a lie, [they] may now never pursue naturalization at all, even if they are eligible.”<sup>9</sup>

This fear is compounded by denaturalization procedures. First, although U.S. Attorneys often have discretion over whether to file cases in the civil or criminal justice systems, the Trump administration is increasingly relying on ordinary civil litigation to seek denaturalization. In fact, in a 2017 article in the *U.S. Attorneys’ Bulletin*, several government officials “encourage[d] Federal prosecutors to consider referring cases for civil denaturalization when a case is declined for prosecution.”<sup>10</sup> They wrote that filing civil proceedings rather than criminal actions offers several “benefits”: Civil litigation carries a lower burden of proof, there is no statute of limitations on civil denaturalization, there is no right to a jury trial, and there is no right to appointed counsel.<sup>11</sup>

While these factors may make denaturalization cases easier for the government to win, they also create substantial due process risks for the defendant. Two recent cases highlight the inequities arising when civil litigation puts citizenship at risk. In the first case, the defendant may be unaware even now that he has lost his citizenship. Because he was not personally served, we do not know whether he had actual notice of the denaturalization proceeding against him.<sup>12</sup> At any rate, he did not show up to the hearing, and no attorney entered

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<sup>7</sup> *Knauer v. United States*, 328 U.S. 654, 658 (1946) (“Citizenship obtained through naturalization is not a second-class citizenship. It has been said that citizenship carries with it all of the rights and prerogatives of citizenship obtained by birth in this country ‘save that of eligibility to the Presidency.’” (quoting *Luria v. United States*, 231 U.S. 9, 22 (1913))).

<sup>8</sup> Stephanie deGooyer, *Why Trump’s Denaturalization Task Force Matters*, NATION (July 10, 2018), <https://www.thenation.com/article/trumps-denaturalization-task-force-matters>.

<sup>9</sup> *Id.*

<sup>10</sup> Anthony D. Bianco et al., *Civil Denaturalization: Safeguarding the Integrity of U.S. Citizenship*, U.S. ATT’YS’ BULL., July 2017, at 6, <https://www.justice.gov/usao/page/file/984701/download>.

<sup>11</sup> *See id.* at 8.

<sup>12</sup> *See infra* Section I.B.1.

an appearance on his behalf. As a result, the government was able to obtain a summary judgment granting denaturalization.<sup>13</sup> In the second case, the defendant pleaded guilty to helping her boss commit financial fraud.<sup>14</sup> Although it is undisputed that the defendant played only a very minor role in her boss's underlying fraud, did not personally benefit from it, and helped the FBI build a case against her employer, the government nevertheless contends that her plea demonstrates that she lacks the good moral character necessary to qualify for citizenship.

This Article explores denaturalization's uneasy fit into civil litigation. It examines the history of denaturalization policy and how the Supreme Court's constitutional jurisprudence pushed back against statutory encroachments on citizenship rights. It argues that even though the Supreme Court has more recently applied a more limited and textualist approach to denaturalization cases, civil denaturalization contradicts the due process guarantee that the Court has developed in other contexts. The Article concludes that civil denaturalization violates both the procedural and substantive due process guarantees of the Fourteenth Amendment and that it is fundamentally inconsistent with the democratic framework established by the United States Constitution.

The Article proceeds as follows: Part I explains current denaturalization law and policy, and it explores how that law and policy play out in recent denaturalization actions. Part II looks at the historical basis of denaturalization actions. It examines how the government's denaturalization policy expanded during the early part of the twentieth century, as well as how it declined in the years after the Red Scare. Part III turns to the constitutional law of denaturalization. It analyzes the changing limits that the Supreme Court has put on denaturalization actions over time, and concludes that the Court has struggled to articulate a consistent view of citizenship rights. Finally, Part IV examines how current denaturalization law and policy fit within the constitutional structure set out in the Supreme Court's jurisprudence. It argues that civil denaturalization actions do not comport with constitutional protections: first, civil denaturalization actions violate procedural due process requirements; second, civil denaturalization actions contravene both the Citizenship Clause and the substantive due process protections offered by the Fourteenth Amendment; and finally, such actions undermine constitutional protections of citizen sovereignty.

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<sup>13</sup> See *infra* Section I.B.1.

<sup>14</sup> See *infra* Section I.B.2.

## I

## THE RENEWED THREAT OF DENATURALIZATION

Although denaturalization was a relatively common action during the first half of the twentieth century, it has been used exceedingly rarely since 1967. That year, the Supreme Court effectively limited the potential grounds for denaturalization to fraud and illegal procurement.<sup>15</sup> In the years after that, denaturalization was rarely used even when it was statutorily authorized. Instead, the Department of Justice used its prosecutorial authority primarily to seek the denaturalization of former Nazi officials and other war criminals, and did not typically go after more ordinary cases. Now, however, the number of denaturalization cases is growing and gaining significant public attention.<sup>16</sup>

There are two primary mechanisms for seeking denaturalization under current law.<sup>17</sup> The first is through a criminal naturalization-fraud proceeding.<sup>18</sup> When an individual is convicted of “[p]rocurement of citizenship or naturalization unlawfully” under 18 U.S.C. § 1425, the court is required to revoke the defendant’s naturalization.<sup>19</sup> The second mechanism, and the focus of this Article, is through a civil proceeding under 8 U.S.C. § 1451(a). This section allows a U.S. Attorney to file suit seeking to revoke citizenship on two potential grounds: first, that the naturalization was “illegally procured,” (that is, the individual did not meet the statutory requirements for citizenship, including the requirement for “good moral character”) or second, that the naturalization was “procured by concealment of a material fact or by willful misrepresentation.”<sup>20</sup> Because civil denatu-

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<sup>15</sup> See *infra* Sections III.B, III.C.

<sup>16</sup> See Patricia Mazzei, *Congratulations, You Are Now a U.S. Citizen. Unless Someone Decides Later You’re Not*, N.Y. TIMES (July 23, 2018), <https://www.nytimes.com/2018/07/23/us/denaturalize-citizen-immigration.html> (“Since President Trump took office, the number of denaturalization cases has been growing, part of a campaign of aggressive immigration enforcement that now promises to include even the most protected class of legal immigrants: naturalized citizens.”).

<sup>17</sup> See Hanna E. Borsilli, Comment, *But It’s Just a Little White Lie! An Analysis of the Materiality Requirement of 18 U.S.C. § 1425*, 122 DICKINSON L. REV. 675, 681–88 (2018) (providing a detailed explanation of the grounds for denaturalization).

<sup>18</sup> See Bianco et al., *supra* note 10, at 6.

<sup>19</sup> 8 U.S.C. § 1451(e) (2012) (“When a person shall be convicted [of] . . . knowingly procuring naturalization in violation of law, the court . . . shall thereupon revoke, set aside, and declare void the final order admitting such person to citizenship, and shall declare the certificate of naturalization of such person to be canceled.”). Conviction also carries a potential term of incarceration of ten to twenty-five years. 18 U.S.C. § 1425 (2012).

<sup>20</sup> 8 U.S.C. § 1451(a).

ralization proceedings are considered equitable in nature, they traditionally carry no right to a jury.<sup>21</sup>

When the court grants denaturalization, the individual who loses citizenship reverts back to the immigration status held immediately prior to naturalization—often the status of lawful permanent resident.<sup>22</sup> Further proceedings may change that status, however, potentially leading to a removal order requiring deportation.<sup>23</sup> Denaturalization relates back to the original grant of citizenship; the Immigration and Nationality Act provides that denaturalization “shall be effective as of the original date” of naturalization.<sup>24</sup>

This “relation back” policy can have serious consequences. When a civil denaturalization case finds that the defendant has gained citizenship “by concealment of a material fact or by willful misrepresentation,”<sup>25</sup> then the spouse and child of the defendant may lose their citizenship as well. Under the statute, the individuals who gained citizenship “by virtue of such naturalization of such parent or spouse” are deemed to lose citizenship, even if they reside in the United States.<sup>26</sup> Of course, a child who otherwise qualified for citizenship (for example, one born in the United States) would not have obtained citizenship through the parent’s naturalization, and would therefore not be at risk for loss of citizenship.<sup>27</sup> But a child born abroad would lose citizenship in such a case. One court has even held that such a child is not entitled to the appointment of a guardian ad litem in the parent’s denaturalization case, as the child’s citizenship rights “must rise or fall solely on the basis of the rights of the . . . parent from whom they

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<sup>21</sup> See Bianco et al., *supra* note 10, at 8 & n.25 (citing *United States v. Firishchak*, 468 F.3d 1015, 1026 (7th Cir. 2006) (concluding that defendants in civil denaturalization proceedings are not entitled to a jury trial)).

<sup>22</sup> See 7 CHARLES GORDON ET AL., *IMMIGRATION LAW AND PROCEDURE* § 96.13 (Matthew Bender & Co. ed., rev. ed. 2018) (“The immediate effect of denaturalization, of course, is to divest the naturalized persons of their status as U.S. citizens, to restore them to the former status of alienage, and to make them amenable to the consequences of such alien status.”).

<sup>23</sup> 5 *id.* § 64.03 (discussing removal procedure).

<sup>24</sup> INA § 340(a), 8 U.S.C. § 1451(a).

<sup>25</sup> *Id.*

<sup>26</sup> INA § 340(d), 8 U.S.C. § 1451(d).

<sup>27</sup> Even birthright citizenship, however, is currently under challenge. See Ediberto Román & Ernesto Sagás, *Birthright Citizenship Under Attack: How Dominican Nationality Laws May Be the Future of U.S. Exclusion*, 66 AM. U. L. REV. 1383, 1385 (2017) (“Trump promised that, if elected, his administration would ‘[e]nd birthright citizenship.’” (quoting DONALD J. TRUMP FOR PRESIDENT, *IMMIGRATION REFORM THAT WILL MAKE AMERICA GREAT AGAIN*, <https://assets.donaldjtrump.com/Immigration-Reform-Trump.pdf> (last visited Dec. 30, 2018))).



stem, and there are no rights to be protected independently by guardian ad litem.”<sup>28</sup>

### A. *Recent Trends Shaping Current Denaturalization Policy*

The current growth of denaturalization as a policy tool results from the intersection of several recent trends. The first is the shrinking cost of computing power: It is now much easier to digitize records and to use software tools to analyze hundreds of thousands of records at once.<sup>29</sup> And the impetus to do so took root in the Obama administration, which asserted a national security interest in examining potential cases of immigration fraud that could potentially be tied to terrorist threats. Overall, the Obama years saw a significant increase in immigration enforcement.<sup>30</sup>

After President Trump took office in January 2017, the government adopted a so-called zero-tolerance immigration policy, pledging enforcement against anyone who had broken immigration laws whom authorities encountered, without regard to mitigating factors.<sup>31</sup> Of course, there are simply too many immigrants and potential immigrants to enforce all of the immigration laws all of the time, so what the zero-tolerance policy means in practice is that sanctions will be applied in an unpredictable and arbitrary manner—a potential violation of due process.<sup>32</sup> Unlike in the past, there would be no tolerance

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<sup>28</sup> United States *ex rel.* Harrington v. Schlotfeldt, 136 F.2d 935, 939–40 (7th Cir. 1943).

<sup>29</sup> See Margaret Hu, *Big Data Blacklisting*, 67 FLA. L. REV. 1735, 1758 (2015) (“[T]ransaction costs for the collection and analysis of data have rapidly decreased. Therefore, economic restraints on investigatory and administrative capacity to impose consequences are rapidly decreasing as well . . . .” (footnote omitted)).

<sup>30</sup> See Elliott Young, *Felons and Families*, UNC PRESS BLOG (Apr. 3, 2017, 9:00 AM), <https://uncpressblog.com/2017/04/03/elliott-young-felons-and-families> (“Trump’s immigration policies . . . merely accelerate the criminalization of immigrants that was in full swing under Obama.”).

<sup>31</sup> See Bill Ong Hing, *Entering the Trump ICE Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 315–16 (2018) (“Although the likelihood of an ICE encounter may still be small, immigration enforcement since the election of President Trump is up. ICE is following the new enforcement priorities and making collateral arrests along the way.” (footnote omitted)); see also Lorelei Laird, *ABA Works to Meet Immigrants’ Increased Need for Legal Assistance and Oppose Family Separations*, A.B.A. J. MAG. (Aug. 2018), [http://www.abajournal.com/magazine/article/immigrants\\_legal\\_assistance\\_family\\_separations](http://www.abajournal.com/magazine/article/immigrants_legal_assistance_family_separations) (explaining how the adoption of the zero-tolerance policy has resulted in a greater need for legal services).

<sup>32</sup> See *infra* Sections I.A.1, I.A.2; see also Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 584 (1972) (Douglas, J., dissenting) (“[T]he protection of the individual against arbitrary action . . . [is] the very essence of due process . . . .” (alteration in original) (citation and internal quotation marks omitted)); Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL’Y 283, 292 (2012) (“An arbitrary act has either no reasons to explain it or only reasons that would with equal plausibility justify the opposite act.”).

for small infractions. Activities that might have been tolerated under a doctrine of prosecutorial discretion could now be subject to immediate sanction—but no one could predict when and on whom those sanctions would fall.

### 1. *Newly Digitized Data and Operation Janus*

Janus was the two-faced Roman god of “beginnings and transitions,” looking simultaneously into the past and the future.<sup>33</sup> The Department of Homeland Security’s “Operation Janus” similarly looks back over the files of naturalized citizens, examining the historical record to see whether evidence overlooked in the past could support filing a future denaturalization proceeding.<sup>34</sup> The effort focuses on individuals from “special interest countries,” related to national-security priorities.<sup>35</sup>

The program began under the Obama administration in 2009, when the U.S. Customs and Border Protection identified 206 individuals “who had received final deportation orders and subsequently used a different biographic identity, such as a name and date of birth, to obtain an immigration benefit (e.g., legal permanent resident status or citizenship).”<sup>36</sup> Further inquiry revealed another 1029 cases of individuals with previously overlooked deportation orders who had nonetheless been granted citizenship, 858 of whom did not have digital fingerprints on file.<sup>37</sup> As a result, the United States Citizenship and Immigration Services (USCIS), led by ICE, began a concerted effort

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<sup>33</sup> John Patrick Clayton, Note, *The Two Faces of Janus: The Jurisprudential Past and New Beginning of Rule 10b-5*, 47 U. MICH. J.L. REFORM 853, 854 (2014) (citing EDITH HAMILTON, MYTHOLOGY 51 (1998)).

<sup>34</sup> See OFFICE OF INSPECTOR GEN., DEP’T OF HOMELAND SEC., OIG-16-130, POTENTIALLY INELIGIBLE INDIVIDUALS HAVE BEEN GRANTED U.S. CITIZENSHIP BECAUSE OF INCOMPLETE FINGERPRINT RECORDS (2016) [hereinafter OIG], <https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/2016/OIG-16-130-Sep16.pdf>.

<sup>35</sup> *Id.* at 1 n.2 (“Special interest countries are generally defined as countries that are of concern to the national security of the United States, based on several U.S. Government reports.”); see also Cato, *Coming to America: The Weaponization of Immigration*, 46 WASHBURN L.J. 309, 326 (2007) (describing “thirty-five nations designated by the United States Department of Homeland Security as ‘special interest’ countries . . . so labeled because American intelligence identifies them as likely exporters of terrorism”).

<sup>36</sup> OIG, *supra* note 34, at 1.

<sup>37</sup> *Id.* These numbers represent a very small fraction of the foreign-born population in the United States. See Jie Zong et al., *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL’Y INST. (Feb. 8, 2018), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states> (reporting that 1.49 million foreign-born individuals moved to the United States in 2016 alone).

to digitize and upload decades-old fingerprint records and to match those records with immigration files.<sup>38</sup>

In 2016, the Office of the Inspector General reported that ICE had identified 315,000 individuals with deportation orders or criminal histories whose files were missing fingerprint records, and ICE had “not yet reviewed about 148,000 aliens’ files to try to retrieve and digitize the old fingerprint cards.”<sup>39</sup> That process is now ongoing, and the agency has sought funds to expand it: ICE’s 2019 budget request seeks funds to review another 700,000 files—all with the purpose of seeking potential deportation or denaturalization.<sup>40</sup>

As of August 2018, the Department of Justice had announced the filing of seven actions arising from Operation Janus.<sup>41</sup> Three of those are criminal actions for fraud in the immigration process. Two of those cases ended with a plea agreement that includes denaturalization and a prison term, and one ended in a jury conviction.<sup>42</sup> An additional four cases were filed as civil actions seeking denaturalization. Of the

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<sup>38</sup> OIG, *supra* note 34, at 4.

<sup>39</sup> *Id.* at 2–4.

<sup>40</sup> DEP’T OF HOMELAND SEC., U.S. IMMIGRATION & CUSTOMS ENF’T, OPERATIONS & SUPPORT, FISCAL YEAR 2019 CONGRESSIONAL JUSTIFICATION 21, <https://www.dhs.gov/sites/default/files/publications/U.S.%20Immigration%20and%20Customs%20Enforcement.pdf>.

<sup>41</sup> The seven cases at present are in different stages of litigation. Criminal proceedings against Enite Alindor a/k/a Odette Dureland have resulted in a jury conviction and denaturalization. *United States v. Alindor*, No. 8:17-CR-270-T-33MAP, 2018 WL 1705647 (M.D. Fla. Apr. 9, 2018). A guilty plea resulting in denaturalization has been entered by Munia Parvin a/k/a Zarrin Hoque. Press Release, U.S. Dep’t of Justice, Woman Sentenced and Denaturalized for Obtaining U.S. Citizenship by Lying to Officials (Dec. 13, 2017), <https://www.justice.gov/usao-mdfl/pr/woman-sentenced-and-denaturalized-obtaining-us-citizenship-lying-officials> [hereinafter Parvin Press Release]. A guilty plea resulting in denaturalization has also been entered by Natasha Pierre, a/k/a Elsie Petitfrere. Press Release, U.S. Dep’t of Justice, Second Woman Sentenced and Denaturalized for Obtaining U.S. Citizenship Through Lies (Dec. 21, 2017), <https://www.justice.gov/usao-mdfl/pr/second-woman-sentenced-and-denaturalized-obtaining-us-citizenship-through-lies> [hereinafter Petitfrere Press Release]. A complaint has been filed against Humayun Kabir Rahaman, f/k/a Md Humayun Kabir Talukder. Complaint, *United States v. Rahan*, No. CV-10530 (E.D. Mich. Feb. 14, 2018). The United States was unopposed by Baljinder Singh and thus was granted a summary judgment for denaturalization. *United States v. Singh*, No. CV 17-7214 (SRC), 2018 WL 305325 (D.N.J. Jan. 5, 2018). A complaint has been filed against Paravez Manzoor Khan, a/k/a Mohammad Akhtar. Complaint, *United States v. Khan*, No. 3:17-CV-96S-J-32PDB (M.D. Fla. Sept. 19, 2017). A complaint has also been filed against Rashid Mahmood a/k/a Rashid Mehmood. Complaint, *United States v. Mahmood*, No. 3:17-cv-01562 (D. Conn. Sept. 19, 2017); see also Matthew Hoppock, *Operation Janus and Operation Second Look: Denaturalization of Citizens with Removal Orders*, HOPPOCK L. FIRM (Mar. 4, 2018), <https://www.hoppocklawfirm.com/operation-janus-operation-second-look-denaturalization-citizens-removal-orders> (discussing recent denaturalization cases).

<sup>42</sup> *United States v. Alindor*, No. 8:17-CR-270-T-33MAP, 2018 WL 1705647 (M.D. Fla. Apr. 9, 2018); Parvin Press Release, *supra* note 41; Petitfrere Press Release, *supra* note 41.

civil actions filed, only the first has been concluded; it resulted in a summary judgment of denaturalization.<sup>43</sup> Immigration law experts expect a number of additional cases to be filed in the near future.<sup>44</sup>

## 2. *Zero Tolerance*

In one of his major campaign speeches in September 2016, then-candidate Donald Trump announced that if he is elected “all immigration laws will be enforced . . . [and] no one will be immune or exempt from enforcement . . . . Anyone who has entered the United States illegally is subject to deportation—that is what it means to have laws and to have a country.”<sup>45</sup> Because of the significant number of individuals who have entered the United States illegally, it is essentially impossible to pursue all deportable individuals. The result is arbitrary and unpredictable enforcement. In some cases, individuals on the path to naturalization are trapped at the very moment they believed their legal situation was to be resolved:

As the Trump administration arrests thousands of immigrants with no criminal history and reshapes the prospects of even legal immigrants . . . many who have lived without papers for years are urgently seeking legal status by way of a parent, adult child or spouse who is already a citizen or permanent resident. In a growing number of cases, however, immigrants with old deportation orders that were never enforced are getting the go-ahead after an interview by United States Citizenship and Immigration Services, the agency that handles residency and citizenship, only to be arrested by ICE.<sup>46</sup>

Internal emails uncovered by the American Civil Liberties Union have revealed coordination between USCIS and ICE to apprehend undocumented immigrant spouses of U.S. citizens when the spouses

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<sup>43</sup> Complaint, *United States v. Rahan*, No. CV-10530 (E.D. Mich. Feb. 14, 2018); *United States v. Singh*, No. CV 17-7214 (SRC), 2018 WL 305325 (D.N.J. Jan. 5, 2018); Complaint, *United States v. Khan*, No. 3:17-CV-96S-J-32PDB (M.D. Fla. Sept. 19, 2017); Complaint, *United States v. Mahmood*, No. 3:17-cv-01562 (D. Conn. Sept. 19, 2017); see *infra* Section I.B.

<sup>44</sup> See, e.g., Matthew Hoppock, *Three Operation Janus Updates in the Pending Cases in Federal Court*, HOPPOCK L. FIRM (May 15, 2018), <https://www.hoppocklawfirm.com/three-operation-janus-updates-in-the-pending-cases-in-federal-court> (“We anticipate the DOJ will be filing more of these cases shortly, especially if they can get these cases granted without having to fight very hard.”).

<sup>45</sup> Donald J. Trump, Transcript of Donald Trump’s Immigration Speech (Aug. 31, 2016), in *N.Y. TIMES* (Sept. 1, 2016), <https://www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html>.

<sup>46</sup> Vivian Yee, *A Marriage Used to Prevent Deportation. Not Anymore.*, *N.Y. TIMES* (Apr. 19, 2018), <https://www.nytimes.com/2018/04/19/us/immigration-marriage-green-card.html>.

reported to interviews in an attempt to obtain legal status.<sup>47</sup> Tactics used included spreading out or delaying interviews to give ICE the opportunity to arrest individuals.<sup>48</sup>

Poignant media reports have featured individuals deported after serving in the U.S. military, surprising many who believed such service to be a shield against such actions.<sup>49</sup> Military spouses are suffering similar fates, and families are ripped apart even when there was no criminal behavior or anything else that raised obvious problems.<sup>50</sup>

One of the most disconcerting trends involves the deportation or threatened deportation of individuals who acted legally or in reasonable reliance on previous actions by the government. For example, the Trump Administration is currently locked in a battle with the courts over the fate of the Obama-era Deferred Action for Childhood Arrivals (DACA) program, which seeks to protect from deportation young individuals who came to the United States as children.<sup>51</sup> A federal district court judge recently ruled that the Administration is obligated to restore the program.<sup>52</sup> In addition, while the law has historically permitted authorities to reject immigration applications if the applicant is considered likely to become a “public charge,” White House advisor Stephen Miller has proposed changing the govern-

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<sup>47</sup> See Sonia Moghe & David Shortell, *ACLU: Officials Set Up ‘Trap’ to Arrest Immigrants at Legal Status Interviews*, CNN (Aug. 14, 2018), <https://www.cnn.com/2018/08/14/politics/ice-immigrants-trap-lawsuit-aclu/index.html> (describing coordination between the Boston area USCIS office and local ICE officers).

<sup>48</sup> See *id.*

<sup>49</sup> See, e.g., Kristine Phillips, *The Story Behind This Powerful Photo of Deported Military Veterans Saluting the U.S. Flag*, WASH. POST (Nov. 16, 2017), <https://www.washingtonpost.com/news/checkpoint/wp/2017/11/16/the-story-behind-this-powerful-photo-of-deported-military-veterans-saluting-the-american-flag> (describing a group of about two dozen deported American military veterans who gather in Juarez, Mexico).

<sup>50</sup> See, e.g., Associated Press, *‘It’s an Absolute Disgrace’: Tears and Anger as Wife of US Marine Deported to Mexico*, GUARDIAN (Aug. 3, 2018), <https://www.theguardian.com/world/2018/aug/03/us-marine-wife-alejandra-juarez-deported-mexico>; Tara Copp, *As Many as 11,800 Military Families Face Deportation Issues, Group Says*, MILITARY TIMES (Apr. 1, 2018), <https://www.militarytimes.com/news/your-military/2018/04/01/as-many-as-11800-military-families-face-deportation-issues-group-says> (reporting that up to 11,800 people serving in the U.S. military may have spouses or family members facing deportation); Tara Copp, *More Military Families Come Forward with Deportation Fears*, MILITARY TIMES (Mar. 5, 2018), <https://www.militarytimes.com/news/your-military/2018/03/04/more-military-families-come-forward-with-deportation-fears> (noting that several people had come forward with stories of military spouses who were in deportation proceedings); see also *Fact Sheet on Denaturalization*, NAT’L IMMIGR. F. (Oct. 2, 2018), <https://immigrationforum.org/article/fact-sheet-on-denaturalization> (discussing the potential effects of denaturalization on spouses).

<sup>51</sup> MARIA PIMENTA & ANN MORSE, NAT’L CONFERENCE OF STATE LEGISLATURES, DEFERRED ACTION FOR CHILDHOOD ARRIVALS (2018), [www.ncsl.org/research/immigration/deferred-action.aspx](http://www.ncsl.org/research/immigration/deferred-action.aspx) (explaining DACA).

<sup>52</sup> See *NAACP v. Trump*, 315 F. Supp. 3d 457, 474 (D.D.C. 2018).

ment's interpretation of "public charge" to make legal immigrants' past use of many government benefits a barrier to permanent residency or citizenship.<sup>53</sup>

### B. *The Two Trends Converge in Current Litigation*

Both of these trends—looking back at old cases with the help of newly digitized data and increasing enforcement without regard to mitigating factors—have converged in denaturalization cases, creating a credible fear that even long-ago mistakes can unravel current citizenship rights. Operation Janus has led to the filing of several civil denaturalization cases, including the first case to reach judgment: that of Baljinder Singh, who sought asylum in the United States as a teenager in the early 1990s, and obtained citizenship in 2006.<sup>54</sup> Singh has no reported criminal history. Similarly, the zero-tolerance approach resulted in the government seeking to denaturalize Norma Borgoño, a sixty-three-year-old grandmother who was, in the government's words, a "minimal participant"<sup>55</sup> in her former boss's fraud but who helped the FBI build the case against him.<sup>56</sup> Without the zero-tolerance policy, the government likely would have exercised prosecutorial discretion and not sought her denaturalization. Under current policy, however, the government filed civil denaturalization actions against both Singh and Borgoño.

#### 1. *Baljinder Singh: Newly Digitized Data*

Baljinder Singh had immigrated to the United States as a fifteen- or sixteen-year-old in 1991.<sup>57</sup> In February of 1992, he filed an application for political asylum.<sup>58</sup> Nearly five years later, while his asylum application was still pending, Singh married a U.S. citizen and applied for an adjustment of status.<sup>59</sup> In 1998, he was granted lawful permanent resident status.<sup>60</sup> In 2006, Singh took the Oath of Allegiance to the United States and became a naturalized citizen.<sup>61</sup>

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<sup>53</sup> Tal Kopan, *Sources: Stephen Miller Pushing Policy to Make It Harder for Immigrants Who Received Benefits to Earn Citizenship*, CNN (Aug. 7, 2018), <https://www.cnn.com/2018/08/07/politics/stephen-miller-immigrants-penalize-benefits/index.html>.

<sup>54</sup> See *infra* Section I.B.1.

<sup>55</sup> Plea Offer at 4, *United States v. Borgoño*, No. 1:18-cv-21835 (S.D. Fla. Nov. 2, 2011), <https://www.justice.gov/opa/press-release/file/1060901/download>.

<sup>56</sup> See *infra* Section I.B.2.

<sup>57</sup> Complaint, *United States v. Singh*, No. 2:17-cv-07214 (D.N.J. Sept. 19, 2017).

<sup>58</sup> *Id.* at 4.

<sup>59</sup> *Id.*

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

<sup>61</sup> *Id.* at 6.

Twelve years later, Singh's file was reviewed as part of Operation Janus.<sup>62</sup> The government alleged that Singh had originally entered the United States under the name Davinder Singh and had filed an earlier proceeding under that name.<sup>63</sup> He had allegedly arrived in the United States on a flight from Hong Kong in September 1991 as a teenager traveling without a passport or any other identification papers.<sup>64</sup> A Punjabi interpreter wrote his name down as "Davinder Singh."<sup>65</sup> He was fingerprinted and detained for nearly two weeks, then released on bond to stay with a friend in October of that year.<sup>66</sup> Three weeks after his release, notice of an upcoming immigration hearing was mailed to his friend's house. When he failed to show up for the hearing in January of 1992, the court ordered him deported in absentia.<sup>67</sup>

At nearly the same time, however, a parallel case was going forward in another courtroom: An asylum action for "Baljinder Singh" was filed on February 6, 1992, less than a month after "Davinder" had failed to show up for the hearing in the other case.<sup>68</sup> That case was never dismissed on the merits; instead, it remained pending for more than four years until Baljinder Singh married a U.S. citizen and obtained adjustment of his immigration status to lawful permanent resident, and later obtained naturalization.<sup>69</sup>

It was not until Operation Janus was able to digitize the old fingerprint cards and use electronic resources to analyze them that the two cases were ever connected.<sup>70</sup> The Justice Department compared "a January 24, 1992 fingerprint card bearing the name Baljinder Singh to a September 25, 1991 fingerprint card bearing the name Davinder Singh."<sup>71</sup> The investigation concluded that "[b]ased on a comparative analysis of the friction ridge details of each fingerprint . . . the fingerprints match and belong to the same individual."<sup>72</sup>

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<sup>62</sup> Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, United States Files Denaturalization Complaints in Florida, Connecticut and New Jersey Against Three Individuals Who Fraudulently Naturalized After Having Been Ordered Deported Under Different Identities (Sept. 19, 2017), <https://www.justice.gov/opa/pr/united-states-files-denaturalization-complaints-florida-connecticut-and-new-jersey-against>.

<sup>63</sup> Complaint at 2, United States v. Singh, No. CV 17-7214 (SRC), 2018 WL 305325 (D.N.J. Jan. 5, 2018).

<sup>64</sup> *Id.* at 3.

<sup>65</sup> United States v. Singh, No. CV 17-7214 (SRC), 2018 WL 305325, at \*1 (D.N.J. Jan. 5, 2018).

<sup>66</sup> Complaint, *supra* note 57, at 4.

<sup>67</sup> *Singh*, 2018 WL 305325, at \*1.

<sup>68</sup> Complaint, *supra* note 57, at 2–3.

<sup>69</sup> *Id.* at 3.

<sup>70</sup> See generally OIG, *supra* note 34.

<sup>71</sup> *Singh*, 2018 WL 305325, at \*1 n.1.

<sup>72</sup> *Id.*

In September 2017, the Acting U.S. Attorney for the District of New Jersey filed a civil denaturalization complaint against Singh. In its complaint, the government alleged that Singh had procured naturalization by fraud or willful misrepresentation and it sought to revoke his citizenship.<sup>73</sup>

Singh did not file an answer or appear in the lawsuit, and there is no record of an attorney representing him in the case. As a result, when the government moved for summary judgment, it was unopposed.<sup>74</sup> The district court consequently held that “[b]y failing [to] respond to the complaint, Defendant has defaulted and thus is ‘deemed to have admitted the factual allegations of the Complaint by virtue of [his] default.’”<sup>75</sup> Taking the government’s allegations as true, and noting that there had been no evidence “to impeach the credibility of this scientific fingerprint analysis,”<sup>76</sup> the court concluded that Singh had “procured his naturalization as a result of these misrepresentations and concealments.”<sup>77</sup> The court granted summary judgment in favor of the government, ruling that Singh would be denaturalized.<sup>78</sup>

Of course, we do not know why Singh did not answer the lawsuit. The agent who served process did not serve him personally—instead, the summons and complaint were left with someone else—a person of “suitable age and discretion” who lived at his last known address.<sup>79</sup> As a result, it is possible that he did not learn of the lawsuit in time to defend it. And it is possible that even now he does not know that he has lost his citizenship and therefore might have to wait until he tries

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<sup>73</sup> *Id.* at \*4.

<sup>74</sup> *Id.* at \*2.

<sup>75</sup> *Id.* at \*1 n.2 (quoting *Doe v. Simone*, 2013 WL 3772532, at \*2 (D.N.J. July 17, 2013)).

<sup>76</sup> *Id.* at \*1 n.1.

<sup>77</sup> *Id.* at \*6.

<sup>78</sup> *Id.*

<sup>79</sup> See Process Receipt and Return, *United States v. Singh*, No 2:17-cv-07214-SRC (on file with authors) (showing that service was made upon one Pritam Singh); FED. R. CIV. P. 4(e)(2)(B) (allowing service of process on a “person of suitable age and discretion” who shares a residence with the defendant). The shared last name of “Singh,” however, does not necessarily suggest a familial relation. Baptized Sikh males take the name Singh, most commonly as their last name. See *Common Sikh Names Banned Under Canada’s Immigration Policy*, CBC (July 23, 2007), <https://www.cbc.ca/news/canada/calgary/common-sikh-names-banned-under-canada-s-immigration-policy-1.689259> (discussing the use of Singh as a last name in Sikh tradition). In addition, the city of Carteret, where Baljinder Singh was last known to live, has the largest Sikh community in the state of New Jersey. Kevin Coyne, *Turbans Make Targets, Some Sikhs Find*, N.Y. TIMES (June 15, 2008), <https://www.nytimes.com/2008/06/15/nyregion/nyregionspecial2/15colnj.html> (stating that in 2008, New Jersey had a population of 25,000 Sikhs and Carteret was “home to the largest concentration of Sikhs in the state”).



to travel on a passport or vote in a federal election to find out that he is no longer a citizen of the United States.

Assuming the government properly matched the fingerprint cards and Baljinder and Davinder Singh are indeed the same person, we do not know why he failed to show up to the first asylum hearing, or why a second case was filed under a different name. The government, of course, claims that this was intentional fraud—a person using two different names to gain an unfair advantage. But this is not a case where someone lost an asylum case on the merits before re-filing under a new name. There appears to be substantially more risk than benefit to Singh from filing two different asylum proceedings under two different names.

It is possible that the Punjabi translator simply made a mistake in originally recording his name as “Davinder” rather than “Baljinder.” Competent Punjabi translators can be difficult to find: A lawyer for Gurbinder Singh, a later asylum seeker in Texas, reported that “the only translator he had been able to find in the general area was an Albuquerque-based cab driver who ha[d] only conversational Punjabi skills and couldn’t communicate at the level . . . needed to fill out his clients’ asylum claims in detail.”<sup>80</sup> One Sikh asylum seeker, Monhinder Singh, obtained reversal of his asylum denial as a result of translation problems.<sup>81</sup> Mohinder Singh arrived in New York, and was interviewed by a translator who spoke Hindi, rather than Punjabi.<sup>82</sup> The Ninth Circuit concluded that inconsistencies in his answers could well have arisen from the difficulties in communication, stating that “Singh was twice removed from understanding the immigration officer’s questions and completely precluded from ensuring that his responses were accurately conveyed to the officer and duly recorded. The English-Hindi-Punjabi-Hindi-English round robin that occurred there begins to take on the patina of the children’s game of ‘telephone.’”<sup>83</sup>

Perhaps a poorly prepared translator misunderstood Baljinder Singh’s first name. Singh had entered the country in California, and a California lawyer filed the initial case on his behalf and moved to have the case transferred to New Jersey. Singh’s entire time in California was spent in immigration detention. Given his lack of English fluency, it is not clear that he would have understood the nature of the proceedings. When Singh was released to friends in New Jersey, the

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<sup>80</sup> Sonia Smith, *The Long Road to Asylum*, TEX. MONTHLY (Aug. 25, 2014), <https://www.texasmonthly.com/politics/the-long-road-to-asylum>.

<sup>81</sup> *Singh v. I.N.S.*, 292 F.3d 1017, 1022 (9th Cir. 2002).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

California lawyers were no longer a part of the case. Perhaps when Singh or his newly appointed lawyer contacted the court in New Jersey, they were told that there was no filing under his name. If so, this could provide an innocuous explanation for why he sought to file a second asylum proceeding less than a month after failing to show up for the first.

But without the defendant present (either in person or through an attorney), we are left to guess. Apparently nothing in the second proceeding led the government to be concerned about Singh's background or moral character, and nothing in the recent denaturalization petition suggests any later history of criminal activity. But twenty years after he was granted lawful permanent resident status, and more than ten years after becoming a U.S. citizen, Baljinder Singh was stripped of that citizenship—without the aid of an attorney and without the effective chance to contest the allegations against him.

## 2. *Norma Borgoño: Zero Tolerance and Collateral Consequences*

Norma Borgoño, a sixty-three-year-old grandmother who suffers from a rare kidney disease, is one of the individuals targeted for denaturalization based on criminal activity.<sup>84</sup> Borgoño legally immigrated to the United States in 1989 and obtained U.S. citizenship in 2007.<sup>85</sup> Between 2003 and 2009, Borgoño worked as an office manager for Texon, owned by Guillermo Oscar Mondino.<sup>86</sup> During this time, Mondino was orchestrating a fraudulent plan to obtain loan guarantees from the Export-Import Bank of the United States, the government's official export credit agency.<sup>87</sup> When the FBI investigated the fraud, Borgoño provided assistance.<sup>88</sup> Mondino pleaded guilty to

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<sup>84</sup> Mazzei, *supra* note 16; Press Release, U.S. Dep't of Justice, Justice Department Seeks to Revoke Citizenship of Convicted Felons Who Conspired to Defraud U.S. Export-Import Bank of More than \$24 Million (May 8, 2018), <https://www.justice.gov/opa/pr/justice-department-seeks-revoke-citizenship-convicted-felons-who-conspired-defraud-us-export>.

<sup>85</sup> Adiel Kaplan, *Miami Grandma Targeted as U.S. Takes Aim at Naturalized Immigrants with Prior Offenses*, MIAMI HERALD (July 9, 2018), <https://www.miamiherald.com/news/local/immigration/article214173489.html>; Affidavit of David Jansen at 2, para. 6, United States v. Borgoño, No. 1:18-cv-21835 (S.D. Fla. Nov. 2, 2011), <https://www.justice.gov/opa/press-release/file/1060901/download>.

<sup>86</sup> Complaint to Revoke Naturalization at 2–3, para. 7, United States v. Borgoño, No. 1:18-cv-21835 (S.D. Fla. May 5, 2018), <https://www.justice.gov/opa/press-release/file/1060906/download>.

<sup>87</sup> United States v. Borgoño, No. 1:18-cv-21835 (S.D. Fla. Nov. 2, 2011), <https://www.justice.gov/opa/press-release/file/1060901/download>.

<sup>88</sup> Plea Offer at 3, 5, United States v. Borgoño, No. 1:18-cv-21835 (S.D. Fla. Nov. 8, 2011), <https://www.justice.gov/opa/press-release/file/1060901/download>.

fraud and money laundering, was sentenced to nearly four years in prison, and was ordered to pay more than \$13 million in restitution.<sup>89</sup>

Borgoño, as office manager, prepared paperwork that her boss used in the fraudulent transactions.<sup>90</sup> When the FBI investigated the case, she provided assistance that helped to incriminate Mondino.<sup>91</sup> Because she allegedly knew that her boss's actions were fraudulent at the time that she helped to prepare the paperwork for the deals, she was charged with conspiracy—though the Justice Department acknowledged that she was a “minimal participant.”<sup>92</sup> Rather than stand trial, Borgoño accepted a plea deal that gave her five years of probation and required her to pay \$5000 in restitution.<sup>93</sup> Borgoño did not share in the millions of dollars fraudulently paid out.<sup>94</sup> At most, less than \$2000 was paid to Borgoño's account.<sup>95</sup> While on probation, she worked a second job and paid the ordered restitution in full.<sup>96</sup>

The government's denaturalization petition seeks to revoke Borgoño's citizenship on the grounds that Borgoño lacked the requisite good moral character to qualify for naturalization. It alleges that she lied in her citizenship application by falsely answering “no” on the naturalization application when it asked whether she had “knowingly committed any crime . . . for which she had not been arrested.”<sup>97</sup> It further alleges that Borgoño's conspiracy conviction was a “fraud related offense” that “statutorily precluded” her from establishing good moral character under 8 U.S.C. § 1101(f)(3), which provides that an applicant convicted of a crime of moral turpitude cannot establish good moral character.<sup>98</sup>

Borgoño's case is still pending, and the government may well lose on the merits. Fraud claims are categorically considered crimes of moral turpitude when evaluated in the immigration process.<sup>99</sup>

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<sup>89</sup> Judgment in a Criminal Case 2–4, *United States v. Mondino*, No. 1:18-cv-21841 (D.D.C. Nov. 1, 2011), <https://www.justice.gov/opa/press-release/file/1060916/download>.

<sup>90</sup> Information at 3, *United States v. Borgoño*, No. 1:18-cv-21835 (S.D. Fla. Nov. 2, 2011), <https://www.justice.gov/opa/press-release/file/1060901/download>.

<sup>91</sup> deGooyer, *supra* note 8 (“She immigrated legally, suffers from a rare kidney disease, and even cooperated with the FBI when they investigated the crime. Still, after living and working for decades in the United States, she is facing deportation.”).

<sup>92</sup> Plea Offer, *supra* note 88, at 4.

<sup>93</sup> *Id.* at 5.

<sup>94</sup> Kaplan, *supra* note 85.

<sup>95</sup> Information, *supra* note 90, at 4.

<sup>96</sup> Kaplan, *supra* note 85.

<sup>97</sup> Complaint, *supra* note 86, at 16, para. 81.

<sup>98</sup> *Id.* at 9–12.

<sup>99</sup> *Jordan v. De George*, 341 U.S. 223, 232 (1951) (“The phrase ‘crime involving moral turpitude’ has without exception been construed to embrace fraudulent conduct. We therefore decide that Congress sufficiently forewarned respondent that the statutory consequence of twice conspiring to defraud the United States is deportation.”); *see also*

Borgoño was a citizen at the time of conviction, and it is not clear that the categorical approach would or should be applied to retroactively question her fitness for citizenship.<sup>100</sup> But in any case, the loss of citizenship is a troublingly harsh sanction for what appears to be relatively minor misconduct. Borgoño neither orchestrated the scheme nor personally benefitted from it. She provided office support to a boss engaged in financial crime, and her only personal benefit was being allowed to keep her job—a job that may well have provided life-saving health insurance benefits that allowed her to seek treatment for her kidney disorder.<sup>101</sup> Even if her crime was legally one of moral turpitude, it was not one condemned by society at large; the facts of her case aroused significant sympathy from the public.<sup>102</sup>

The incentives inherent in modern plea bargaining also suggest another possible injustice: Borgoño may have been factually innocent of the crime she pleaded guilty to.<sup>103</sup> Because she pleaded guilty, the government did not need to prove that Borgoño understood that the paperwork she prepared for her boss was being used in a fraudulent transaction or that she had the intent to assist in his fraud. Perhaps she did have the requisite *mens rea*. But whether she did or not, her sentence of probation and minimal restitution was not onerous, and Borgoño may well have judged that it was not worth the expense and risk of going to trial.<sup>104</sup> Even if factually innocent, she may have wor-

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Shannon M. Grammel, Note, *Chevron Meets the Categorical Approach*, 70 *STAN. L. REV.* 921, 934–35 (2018) (explaining the categorical approach, a two-step process for determining whether certain offenses fit within the federal definition of a larger category of crimes).

<sup>100</sup> *Lopez Ventura v. Sessions*, 907 F.3d 306, 313 (5th Cir. 2018) (noting that “[t]hrough the categorical approach is longstanding, it is not absolute”). *But see* *United States v. Marcu*, 210 F. Supp. 3d 1234, 1241 (D. Nev. 2016) (applying the categorical approach even in a denaturalization case).

<sup>101</sup> See Kaplan, *supra* note 85 (noting that Borgoño’s close family members in Peru had died of the same kidney disease for which she is now being treated).

<sup>102</sup> See Amanda Marcotte, *Donald Trump’s Immigration Policy: Define All Latino Immigrants as “Criminals,” Then Deport Them*, SALON (July 10, 2018), <https://www.salon.com/2018/07/10/donald-trumps-immigration-policy-define-all-latino-immigrants-as-criminals-then-deport-them> (“If the administration manages to get Borgoño denaturalized over a minor offense for which she has made full amends, it will continue twisting the definition to figure out how far they [sic] can go.”).

<sup>103</sup> A new report notes that this is not an infrequent occurrence. NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT* (2018), <https://www.nacdl.org/trialpenaltyreport> (“There is ample evidence that federal criminal defendants are being coerced to plead guilty because the penalty for exercising their constitutional rights is simply too high a risk.”).

<sup>104</sup> Erica Hashimoto, *Toward Ethical Plea Bargaining*, 30 *CARDOZO L. REV.* 949, 951 (2008) (“Innocent defendants often have less information about the case against them than guilty defendants and therefore cannot accurately evaluate the strength of the case against them.”); Samuel R. Wiseman, *Waiving Innocence*, 96 *MINN. L. REV.* 952, 960–61 (2012)

ried about the possibility of a wrongful conviction. And she may also have not been sure of either her legal guilt or innocence. For example, she may have struggled to remember exactly what she knew at the time that she completed her boss's paperwork—did she know her boss was committing fraud, or did she merely suspect it? Certainly, once the FBI approached her, she assisted in the investigation. But she likely would not have been able to evaluate her own potential liability, and it is not uncommon that a defendant “later may well question her own judgment and the reasonableness of her belief.”<sup>105</sup>

Of course, that calculation only makes sense if Borgoño did not understand the potential collateral consequences of her plea—that pleading guilty could cause her citizenship to be stripped and create a risk that she could be deported to a country where she no longer has any family or personal connections. Indeed, she says now that she had no idea that denaturalization could be a potential consequence. If so, she may be able to challenge the underlying conviction and with it, the government's denaturalization petition. The Supreme Court held in *Padilla v. Kentucky* that attorneys provide ineffective assistance of counsel if they fail to inform clients that their plea “carries a risk of deportation.”<sup>106</sup> Denaturalization both encompasses the risk of deportation and strips away the defendant's membership in the national political community.<sup>107</sup> Under the logic of *Padilla*, a defendant who pleads guilty without being told of the risk of losing citizenship should be able to challenge that conviction.<sup>108</sup>

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(“Despite stubborn perceptions to the contrary, innocent defendants plead guilty. Eight percent of the wrongfully convicted defendants exonerated by DNA initially entered guilty pleas, and the strong incentives that push some innocent defendants to plead guilty remain, suggesting that this trend may continue.”).

<sup>105</sup> Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 980 (1989) (noting that such problems can arise especially “under ambiguous circumstances,” where liability depends on the reasonableness of the defendant's actions).

<sup>106</sup> 559 U.S. 356, 374 (2010).

<sup>107</sup> See *Trop v. Dulles*, 356 U.S. 86, 101–02 (1958) (Warren, C.J., plurality opinion) (noting that denaturalization removes the defendant from the “national . . . political community” and that “his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation”).

<sup>108</sup> Some courts have suggested that *Padilla's* requirement to warn of potential deportation could apply in the denaturalization context. See *Lee v. United States*, 137 S. Ct. 1958, 1966 (2017) (vacating a defendant's deportation conviction because he demonstrated prejudice due to ineffective assistance of counsel but reaffirming that finding prejudice resulting from ineffective assistance requires a case-by-case determination); *United States v. Ataya*, 884 F.3d 318 (6th Cir. 2018) (reversing a defendant's fraud conviction because he was not properly informed of his plea's potential denaturalization consequences and he demonstrated that he would not have taken the plea otherwise); *United States v. Marcu*, 210 F. Supp. 3d 1234, 1241 (D. Nev. 2016) (refusing to estop the government from pursuing denaturalization after prosecutors had represented to the court

## II

### THE RISE AND FALL OF DENATURALIZATION POLICY

How do the Singh and Borgoño cases fit within the United States' denaturalization policy? In short, they seem to reflect a throwback approach that does not fit into present-day denaturalization policy at all—and that is one of the reasons that the cases have caused such a public outcry.<sup>109</sup> Denaturalization was relatively common in the first half of the twentieth century, with over 22,000 Americans losing their citizenship between 1907 and 1967.<sup>110</sup> But it rapidly fell out of favor in the second half of the twentieth century.<sup>111</sup> Between 1968 and 2013, fewer than 150 Americans were denaturalized.<sup>112</sup> As a result, one scholar concluded in 2013 that “denaturalization has largely become a thing of the past,” primarily reserved for people who “camouflaged crimes against humanity prior to their immigration.”<sup>113</sup>

The decline in denaturalization coincided with a series of Supreme Court cases protective of citizenship rights.<sup>114</sup> Those cases made it more difficult for the government to strip individuals of their citizenship. But they alone were not the driving force in denaturalization's wane in the mid-to-late twentieth century; the decline of the Red Scare and an increasing emphasis on civil rights played an equal or greater role.

#### A. *The Origin of Denaturalization Authority*

Denaturalization is never mentioned in the Constitution. Naturalization, on the other hand, is a power explicitly constitutionally given to Congress.<sup>115</sup> Congress accordingly developed criteria for when and how immigrants to the United States could gain citizenship.<sup>116</sup> Ori-

that the defendant was a citizen and therefore not subject to deportation, and noting that “it is the Defendant’s counsel’s duty, not the government’s, to inform him of deportation consequences”).

<sup>109</sup> Mazzei, *supra* note 16 (“The renewed focus on denaturalization, and a recent uptick in the number of cases filed by the Justice Department, have deeply unsettled many immigrants who had long believed that a United States passport warded off a lifetime of anxiety over possible deportation.”).

<sup>110</sup> PATRICK WEIL, *THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC* 179 (2013).

<sup>111</sup> *Id.*

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

<sup>113</sup> *Id.* at 180.

<sup>114</sup> See *infra* Part III.

<sup>115</sup> U.S. CONST. art. I, § 8, cl. 4 (“The Congress shall have Power . . . ; To establish an uniform Rule of Naturalization.”).

<sup>116</sup> For a description of the history of congressional legislation in this area, see Aram A. Gavoort & Daniel Miktus, *Snap: How the Moral Elasticity of the Denaturalization Statute Goes Too Far*, 23 WM. & MARY BILL RTS. J. 637, 649–53 (2015).

nally, this process was very simple and geographically diffused. For more than a century, Congress allowed “any court of record”—including a district court, territorial court, or state court—to grant naturalization.<sup>117</sup> Administrative power over naturalization did not become centralized until 1990, when Congress changed the procedure to create an administrative process for naturalization, supervised by the Attorney General.<sup>118</sup> Even after the executive branch took over primary responsibility for naturalization, the judiciary remained involved; to this day, courts still administer the oath of citizenship.<sup>119</sup>

Despite naturalization procedures becoming more systematic, denaturalization got scant attention in American law or policy development. After all, in the earliest years of the United States, Americans supported open immigration and simple procedures to obtain citizenship; “[i]t was a big country; they needed folks to settle it.”<sup>120</sup>

But even in these early years, naturalization procedures were sometimes overlooked for political expedience. There was essentially a power struggle between state and federal courts. Congress authorized state courts to naturalize new citizens.<sup>121</sup> But while Congress adopted naturalization procedures and requirements (including, for example, a five-year waiting period),<sup>122</sup> state courts did not always follow them.<sup>123</sup> Courts obtained significant revenue from naturaliza-

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<sup>117</sup> *U.S. Immigration and Naturalization Service—Populating a Nation: A History of Immigration and Naturalization*, U.S. CUSTOMS & BORDER PROTECTION [hereinafter *Populating a Nation*], <http://archive.li/mRgfx> (last visited Mar. 25, 2019) (noting that courts used their own processes and procedures for naturalization from 1802 until Congress passed the 1906 Act); see also *Gorbach v. Reno*, 219 F.3d 1087, 1089 (9th Cir. 2000) (explaining that courts continued to exercise the naturalization power under Congress’s procedures until 1990).

<sup>118</sup> WEIL, *supra* note 110, at 51.

<sup>119</sup> *Id.*

<sup>120</sup> *Populating a Nation*, *supra* note 117.

<sup>121</sup> See *Bindczyck v. Finucane*, 342 U.S. 76, 85 (1951) (“By giving State courts jurisdiction in naturalization cases, Congress empowered some thousand State court judges to adjudicate citizenship.”).

<sup>122</sup> Gavoor & Miktus, *supra* note 116, at 647–48, 650 (explaining that prior to 1906, an applicant for naturalization had to demonstrate five years of residence in the United States as well as good moral character and attachment to the Constitution and that after 1906, there was an additional ninety-day waiting period after the individual had filed an application before naturalization could be granted).

<sup>123</sup> See WEIL, *supra* note 110, at 3 (“The state judiciary, however, did not always respect citizenship requirements set by federal law.”).

tion cases.<sup>124</sup> Naturalizations also sometimes occurred en masse before local elections, in an effort to create new voters.<sup>125</sup>

In 1906, Congress adopted the Naturalization Act, which attempted to provide uniform procedures for granting citizenship.<sup>126</sup> The Act also provided the first statutory mechanism for denaturalization,<sup>127</sup> and authorized U.S. district attorneys to bring suit “upon affidavit showing good cause therefor[e], to institute proceedings . . . for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud, or on the ground that such certificate of citizenship was illegally procured.”<sup>128</sup>

In addition to providing a statutory procedure for citizenship revocation, the Act also established new requirements for citizenship that reflected changing beliefs about what it meant to be American. The Act made anarchists and polygamists ineligible to become American citizens.<sup>129</sup> For the first time, citizenship eligibility depended on evaluation of personal belief—not just on the length of residence or willingness to take an oath of citizenship.<sup>130</sup>

### B. Early Growth of Denaturalization

The Naturalization Act of 1906 explicitly tied citizenship to political belief for the first time.<sup>131</sup> But the connection between naturalization policy and national identity soon grew stronger, as the United States began to grapple with what it meant to be an American—and

<sup>124</sup> See *id.* at 15 (“[N]aturalization was a means for the clerks of local courts to generate revenue.”).

<sup>125</sup> See *id.* at 15, 16 & 204 n.8 (noting that in one month, two New York judges naturalized fifty-four thousand individuals, that the political machines used naturalization as “a tool . . . to increase the number of loyal voters on the eve of local, states, and federal elections,” and that “several politicians were indicted for violating naturalization laws” after it was found that the Saint Louis Court of Appeals had issued four hundred fraudulent naturalization certificates in a single three-day span).

<sup>126</sup> Naturalization Act of 1906, Pub. L. No. 59-338, 34 Stat. 596; see also WEIL, *supra* note 110, at 19 (summarizing the procedures).

<sup>127</sup> Gavoor & Miktus, *supra* note 116, at 649. Because naturalization in this era happened through court proceedings, often in state court, some denaturalization actions took place through the ordinary process by which judgments could be re-opened or vacated. See *Bindczyck v. Finucane*, 342 U.S. 76, 81–82 (1951) (explaining that prior to the 1906 Act, there were “widely diverse naturalization procedures,” resulting in “haphazard denaturalization,” including a number of cases in which “the then circuit courts had vacated naturalization orders at the suit of the Attorney General”).

<sup>128</sup> Naturalization Act of 1906 § 15.

<sup>129</sup> *Id.* § 7.

<sup>130</sup> See Gavoor & Miktus, *supra* note 116, at 650 (noting the Act’s exclusion of anarchists and polygamists from eligibility for citizenship).

<sup>131</sup> *Id.*



with how that American identity should align with immigration, naturalization, and denaturalization policy.<sup>132</sup>

Part of that identity had to do with race and gender. Citizenship-stripping provisions, in particular, reflected both gender and racial inequities. Married women had no independent right to citizenship. A federal statute adopted in 1907 provided that a woman would automatically lose her U.S. citizenship upon marriage to a foreign man, and could regain citizenship only “[a]t the termination of the marital relationship.”<sup>133</sup> Likewise, the federal naturalization statute allowed only “free white persons” and persons of African descent to become naturalized—Asians were ineligible for naturalization (though still constitutionally entitled to citizenship as “natural born citizens” if born in the United States).<sup>134</sup>

When these requirements were brought into denaturalization proceedings, both women and racial minorities risked losing their citizenship. A number of individuals from India had gained citizenship in the United States, for example, only to find it summarily stripped under the “illegal procurement” prong when the United States Supreme Court held that they were not, in fact, white.<sup>135</sup> The Court stated that even though such individuals were “of high-caste Hindu stock . . . classified by certain scientific authorities as of the Caucasian or Aryan race,” they would not be understood as “white” to the “common man.”<sup>136</sup> As a result of these holdings, not only did Indian-born men lose their citizenship, but American-born women married to them automatically lost theirs as well, even though it rendered them stateless.<sup>137</sup> Mary Das, “a member of an old American family from the

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<sup>132</sup> See WEIL, *supra* note 110, at 56 (“A naturalized person who was Asian, spoke out against the war, or was a socialist, a communist, or a fascist risked the loss of his American citizenship.”).

<sup>133</sup> Act of March 2, 1907, Pub. L. No. 59-193, § 3, 34 Stat. 1228; see also *Mackenzie v. Hare*, 239 U.S. 299, 312 (1915) (“[C]itizenship is of tangible worth, and we sympathize with plaintiff in her desire to retain it . . . . [But] [t]he marriage of an American woman with a foreigner has consequences . . . as long as the relation lasts, it is made tantamount to expatriation.”). This requirement was partially repealed by Congress in 1922 with the passage of the Cable Act, and fully repealed in 1931. Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of Loving*, 2007 WIS. L. REV. 345, 357 (2007).

<sup>134</sup> See *United States v. Bhagat Singh Thind*, 261 U.S. 204, 213–15 (1923); *United States v. Wong Kim Ark*, 169 U.S. 649, 701–02 (1898).

<sup>135</sup> *Bhagat Singh Thind*, 261 U.S. at 213–15.

<sup>136</sup> *Id.* at 214. This standard was subject to criticism from its inception. See Note, *The Nationality Act of 1940*, 54 HARV. L. REV. 860, 865 (1941) (“This substitution of common for scientific knowledge, while in keeping with legislative intent, did not establish a very workable standard. The common man, like the Court of Appeals for the Second Circuit, is not quite sure as to a Parsee’s racial status.”).

<sup>137</sup> See Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 433–34 (2005).

South, of Revolutionary ancestry, a woman of wealth and prominence,” who had married a naturalized citizen from India, described suffering “the humiliation and the thought of not being wanted as an American citizen.”<sup>138</sup>

### C. *World Wars and the Fear of Communism*

Political denaturalization grew stronger during the first half of the twentieth century, as the United States first fought two world wars and subsequently looked inward to fight against a perceived threat of communist sympathy. In some cases, the government bureaucracy was able to tie pre-existing naturalization requirements to more explicit political goals. The discretion inherent in deciding to bring denaturalization proceedings, combined with the likelihood of administrative error somewhere in the naturalization process, made it relatively easy for the government to target specific individuals.<sup>139</sup>

Thus, for example, Emma Goldman—a radical activist, anarchist, and naturalized citizen—was targeted by the U.S. government, which sought a way to denaturalize and deport her.<sup>140</sup> Because she seemed to have a valid claim to citizenship, the government was worried that arresting her would “add to her prestige,” potentially “bringing her in considerable sums in the way of contributions.”<sup>141</sup> The government therefore found another way: It investigated the citizenship of her husband and found that he had been naturalized before the age of eighteen. Because the Naturalization Act required applicants to be legal adults, the government could cancel his naturalization even many years later. Goldman, as a woman, lost her claim to citizenship when her husband was denaturalized<sup>142</sup> and was ultimately deported from the United States in 1919.<sup>143</sup>

After World War I, the United States “entered a period of increased nativism and hostility to immigrants.”<sup>144</sup> The National Origins Act limited immigration from countries deemed less desirable,

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<sup>138</sup> *Id.* at 436 (quoting *Hearing on H.R. 4057, H.R. 6238, and H.R. 9825 Before the H. Comm. on Immigration and Naturalization*, 69th Cong. 22–28 (1926) (statement of Elizabeth Kite, Scholar, Library of Congress)).

<sup>139</sup> See WEIL, *supra* note 110, at 86 (explaining that the “power to commence a denaturalization proceeding was, in fact, quite discretionary,” and that “[i]t became, perhaps as an inevitable result, a highly political, often symbolic tool of the U.S. government”).

<sup>140</sup> *Id.* at 57.

<sup>141</sup> *Id.* at 58.

<sup>142</sup> *Id.* at 61 (“At first I took this case of the U.S. Authorities of taking away my papers as a joke but now it turns out serious; altogether too serious.”).

<sup>143</sup> *Id.* at 63.

<sup>144</sup> Jared A. Goldstein, *Unfit for the Constitution: Nativism and the Constitution, from the Founding Fathers to Donald Trump*, 20 U. PA. J. CONST. L. 489, 523 (2018).

greatly reducing the number of immigrants from Italy, Russia, and Eastern Europe and “effectively eliminat[ing]” immigration from Japan.<sup>145</sup> During this period, the Naturalization Act was also interpreted to exclude large classes of potential citizens. Pacifists and conscientious objectors, for example, were deemed unable to meet the Naturalization Act’s requirement of “attachment to the principles of the Constitution.”<sup>146</sup>

The 1940s saw significant growth in political denaturalization. Attorney General Robert Jackson first sought to identify and denaturalize members of the German American National League, called the “Bund,” a group sympathetic to Nazi aims.<sup>147</sup> The Justice Department submitted to Congress a proposed bill to allow the denaturalization “for conduct that established a foreign allegiance” arising post-naturalization, but the bill was ultimately rejected by Congress after intense lobbying from the American Civil Liberties Union and the Federation of Constitutional Liberties.<sup>148</sup>

The failure to pass the bill did not dampen the enthusiasm for denaturalization attempts, however. In 1942, Attorney General Francis Biddle created a new program “studying cases of disloyalty among naturalized citizens.”<sup>149</sup> In Biddle’s words, denaturalization could be “a most important weapon in dealing with organized subversive and disloyal activities . . . .”<sup>150</sup>

The government pursued denaturalization cases against Nazi sympathizers—even when those sympathies developed later, after the individual had been naturalized in the United States.<sup>151</sup> Furthermore, the government made a decision to publicize the program, as it made political leaders look “tough” in wartime, and also was a way of “appearing fair by demonstrating an apparent equality of treatment of

<sup>145</sup> *Id.* at 528.

<sup>146</sup> Naturalization Act of 1906 § 4, Pub. L. No. 59-338, 34 Stat. 596; *see also* United States v. Schwimmer, 279 U.S. 644, 652 (1929) (“[O]ne who refuses or is unwilling for any purpose to bear arms because of conscientious considerations . . . is not . . . held by the ties of affection to any nation or government. Such persons are liable to be incapable of the . . . devotion to the principles of our Constitution that are required of aliens seeking naturalization.”); Laura M. Weinrib, *Freedom of Conscience in War Time: World War I and the Limits of Civil Liberties*, 65 EMORY L.J. 1051, 1121–22 (2016) (describing the Court’s rejection of Schwimmer’s claim).

<sup>147</sup> *See* WEIL, *supra* note 110, at 93 (describing Attorney General Jackson’s efforts).

<sup>148</sup> *Id.* at 94–95.

<sup>149</sup> *Id.* at 100.

<sup>150</sup> *Id.*

<sup>151</sup> *See, e.g.*, Baumgartner v. United States, 322 U.S. 665, 677 (1944) (concluding that the “evidence as to Baumgartner’s attitude after [the date of naturalization] affords insufficient proof that [at the time he naturalized] he had knowing reservations in forswearing his allegiance to the Weimar Republic and embracing allegiance to this country so as to warrant [denaturalization]”).

Japanese and German Americans.”<sup>152</sup> Of course, as scholar Patrick Weil pointed out, this equality of treatment was an illusion at best—Japanese immigrants were still barred from naturalization at the time, and even native-born Americans of Japanese descent were held in internment camps.<sup>153</sup>

In addition to the executive branch ramping up the number of denaturalizations, Congress also expanded the scope of the denaturalization power during this time period. The 1940 Nationality Act provided “the first comprehensive rules governing expatriation.”<sup>154</sup> It expanded the behaviors by which citizenship could be lost for both native-born and naturalized citizens, including such grounds as voting in foreign elections, accepting employment in certain foreign government positions, and, for children, residing for six months or more in a country that counted their parents as citizens—even if the parents had been naturalized in the United States.<sup>155</sup> In 1952, additional provisions were added aimed at countering a perceived Communist threat and allowing the denaturalization of individuals engaged in “subversive activities.”<sup>156</sup>

#### D. *The Quiet Period*

Ultimately, all of these provisions were intended to unify an American identity. The government’s goal was to exclude those who might be seen as disloyal or un-American, or “regarded as prospective ‘fifth columnists.’”<sup>157</sup> The constitutionality of these grounds for denaturalization, however, was hotly contested. The Supreme Court eventually adopted greater citizenship protections in a highly divided series of cases.<sup>158</sup> As discussed more fully in the next Part, that change

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<sup>152</sup> WEIL, *supra* note 110, at 101.

<sup>153</sup> *Id.*

<sup>154</sup> Note, *supra* note 136, at 867.

<sup>155</sup> Nationality Act of 1940, Pub. L. No. 76-853, § 401, 54 Stat. 1137 (1940); *see also* Note, *supra* note 136, at 869 (noting that the provision for children “has been criticized as being but a fragmentary effort to eliminate dual nationality acquired at birth”).

<sup>156</sup> Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 340, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537); *see also* Note, *Protecting Deportable Aliens from Physical Persecution: Section 243(h) of the Immigration and Nationality Act of 1952*, 62 YALE L.J. 845, 845 & n.1 (1953) (expecting to see an increase in the number of individuals deported for “subversive activities” resulting from “the broader provisions for deportation on political grounds contained in the McCarran Act”). The Act did, however, finally eliminate laws barring the naturalization of Asian individuals.

<sup>157</sup> Note, *supra* note 136, at 869 (quoting 86 CONG. REC. 11,948 (1940)); *see also* Note, *The Attorney-General and Aliens: Unlimited Discretion and the Right to Fair Treatment*, 60 YALE L.J. 152, 157–59 (1951) (linking wide executive discretion with an increase in political targeting).

<sup>158</sup> *See infra* Part III.

reduced the number of denaturalization cases initiated by the government.<sup>159</sup>

A changing political environment, however, had an even bigger impact. When the “Red Scare” of the mid-twentieth century receded from public discourse, government officials lost their appetite for pursuing vast numbers of denaturalization cases.<sup>160</sup> A few cases still went forward, including high-profile cases involving alleged war criminals.<sup>161</sup> And in the late 1990s, when naturalization procedures were brought within the executive branch’s oversight, the Clinton administration also sought to create administrative procedures for denaturalization.<sup>162</sup> The Ninth Circuit struck down the procedures, however, concluding that although Congress had delegated authority to the Attorney General for naturalization, nothing in the statute delegated authority for *denaturalization*.<sup>163</sup> The Clinton administration decided not to appeal that ruling, instead choosing to abandon the idea of administrative denaturalization.

Since the early 2000s, no President has attempted to reinstate such a program, and Congress has not provided explicit authority for one; denaturalization continues to require judicial action.<sup>164</sup> In practice, however, denaturalization became exceedingly rare.<sup>165</sup> In the half-century between 1968 and 2018, only four denaturalization cases reached the Supreme Court.<sup>166</sup> After the events of 9/11, some politi-

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<sup>159</sup> See *infra* Part III.

<sup>160</sup> See WEIL, *supra* note 110, at 139, 178, 180 (noting that the Supreme Court became more active in pushing back against denaturalization after “the second Red Scare declined,” but that even in cases where it is still available, government officials “substantially reduced” their reliance on it after 1967, except against “those who have committed the very worst crimes against their fellow human beings”).

<sup>161</sup> See *id.* at 178–79 (summarizing government efforts to denaturalize “individuals who have committed gross violations of human rights”).

<sup>162</sup> Revocation of Naturalization, 8 C.F.R. § 340.1 (1996); see also *Gorbach v. Reno*, 219 F.3d 1087, 1089–91 (9th Cir. 2000) (noting the transfer of the naturalization power from the courts to the INS); Catherine Yonsoo Kim, Note, *Revoking Your Citizenship: Minimizing the Likelihood of Administrative Error*, 101 COLUM. L. REV. 1448, 1465–66 (2001) (describing the political impetus for the proposed program).

<sup>163</sup> *Gorbach*, 219 F.3d at 1093 (“The delegation that Congress expressly made to the Attorney General was of ‘authority to naturalize’ citizens. There is no express delegation in the statutes to the Attorney General to denaturalize citizens.” (quoting 8 U.S.C. § 1421(a) (2012))).

<sup>164</sup> See Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 340(a), 66 Stat. 163, 260 (1952) (codified as amended at 8 U.S.C. § 1451(a) (2012)) (requiring revocation proceedings to be initiated in the district courts of the United States); DANIEL LEVY, U.S. CITIZENSHIP AND NATURALIZATION HANDBOOK § 14:21 (Charles Roth ed., 2018) (“The U.S. attorneys for the district where naturalization took place institute denaturalization proceedings.”).

<sup>165</sup> See WEIL, *supra* note 110, at 179 (“[B]etween 1907 and 1967, a total of 22,000 denaturalizations were concluded. [From 1968 to 2013], there [had] been fewer than 150.”).

<sup>166</sup> See *infra* Section III.C.

cians proposed increasing the use of denaturalization as a tool to exclude individuals suspected of engaging in terrorist activity.<sup>167</sup> Leaders of both political parties spoke up against the proposal, however, arguing that such a policy would violate both the Constitution and valued political norms. By 2013, a scholar specializing in the history of expatriation concluded that denaturalization was largely a policy of the past.<sup>168</sup>

### III

#### THE SUPREME COURT'S LIMITS ON DENATURALIZATION

What happened in the courts while the political branches were increasing their reliance on expatriation and denaturalization as a tool of political control? During the middle part of the twentieth century, the Supreme Court overturned a number of denaturalization decisions. Its decisions protected citizenship rights through varying approaches, including procedural due process, substantive due process, and statutory formalism. But it can be hard to draw clear principles from these decisions that would govern in later cases, because the Court was often highly fractured. Some of the most important denaturalization decisions were decided only by a plurality of the Court, with numerous separate writings. But even if the underlying theory of citizenship was fractured, unclear, and subject to change over time, the judgments issued by the Supreme Court nevertheless place real limits on the political branches' ability to wield denaturalization and expatriation as political weapons.

##### A. *Procedural Protection*

The earliest—and perhaps most important—limits adopted by the Supreme Court focused on procedural due process. First, the Court adopted a heightened standard of proof for denaturalization cases. In later decisions, the Court reversed a denaturalization that had been decided by default, and in another denaturalization case, it required a heightened standard of appellate review. In spite of adopting positions favorable to the individuals threatened with loss of citizenship, however, the Court was unable to pull together a majority

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<sup>167</sup> See Peter J. Spiro, *Expatriating Terrorists*, 82 *FORDHAM L. REV.* 2169, 2169–70 (2014) (“The bipartisan rejection of such proposals presents a puzzle. . . . [H]igh-profile efforts to legislate the termination of citizenship in the context of terrorist activities have fallen flat in the United States. There is little chance that these proposals will be resurrected.”).

<sup>168</sup> See WEIL, *supra* note 110, at 180 (discussing the fact that “denaturalization has largely become a thing of the past”); see also *id.* at 166 (naming the last chapter of the leading book on denaturalization “American Citizenship is Secured”).

in support of a unified rationale for those decisions. It therefore remains unclear whether these procedural protections are grounded in constitutional due process, or whether they are common-law rules subject to legislative change.

### I. *Schneiderman: A Heightened Standard of Proof*

In *Schneiderman v. United States*,<sup>169</sup> the Supreme Court was faced with a case of alleged naturalization fraud and illegal procurement. William Schneiderman had been a member of the Young Workers League of America and the Workers Party of America before his naturalization.<sup>170</sup> As part of the naturalization process, he was required to show that he was “attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the [United States].”<sup>171</sup> These two organizations were affiliated with the Communist Party, however, which the district court found to be an organization that is “opposed to the principles of the Constitution and advised, taught and advocated the overthrow of the government by force and violence.”<sup>172</sup> As a result of his membership in the affiliated groups, the district court concluded—twelve years after Schneiderman became a citizen of the United States—that he had lacked the requisite good moral character at the time of his naturalization and that his naturalization was therefore obtained illegally.<sup>173</sup>

The Supreme Court reversed. In the majority opinion authored by Justice Murphy, the Court noted that the government “proceeds here not upon the charge of fraud but upon the charge of illegal procurement.”<sup>174</sup> Schneiderman had not lied about his affiliations; it was only after the fact that those affiliations were charged to be inconsistent with “good moral character” and attachment to constitutional principles.<sup>175</sup> The government’s position, however, was that he failed to meet the good character requirement at the time of his naturalization and was therefore subject to revocation of his citizenship. To Justice Rutledge, who authored a concurrence, this retrospective

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<sup>169</sup> 320 U.S. 118 (1943).

<sup>170</sup> See *United States v. Schneiderman*, 33 F. Supp. 510, 511 (N.D. Cal. 1940), *aff’d*, 119 F.2d 500 (9th Cir. 1941), *rev’d*, 320 U.S. 118 (1943).

<sup>171</sup> *Id.* at 513 (quoting *In re Saralieff*, 59 F.2d 436, 436 (E.D. Mo. 1932)).

<sup>172</sup> *Id.*

<sup>173</sup> See *id.*

<sup>174</sup> *Schneiderman*, 320 U.S. at 122.

<sup>175</sup> See *id.* at 165 (Douglas, J., concurring) (“[W]here it has not done so in plain words, we should be loathe to imply that Congress sanctioned a procedure which in absence of fraud permitted a man’s citizenship to be attacked years after the grant because of his political beliefs, social philosophy, or economic theories.”).

review of personal beliefs should have been enough to reverse the judgment; according to his opinion, that process was inconsistent with constitutional principles, especially free-speech and freedom-of-conscience protections:

No citizen with such a threat hanging over his head could be free. If he belonged to “off-color” organizations or held too radical or, perhaps, too reactionary views, for some segment of the judicial palate, when his admission took place, he could not open his mouth without fear his words would be held against him. For whatever he might say or whatever any such organization might advocate could be hauled forth at any time to show “continuity” of belief from the day of his admission, or “concealment” at that time. Such a citizen would not be admitted to liberty. His best course would be silence or hypocrisy. This is not citizenship.<sup>176</sup>

The Court, however, reversed the judgment on somewhat narrower grounds aimed at procedural due process. It held that the government had not sufficiently proved illegal procurement, because the evidence did not show that Schneiderman personally lacked attachment to the Constitution or believed in governmental overthrow.<sup>177</sup> The Court stated that denaturalization was “more serious than a taking of one’s property, or the imposition of a fine or other penalty,” and citizenship could not be taken away “without the clearest sort of justification and proof.”<sup>178</sup>

The Court specified two requirements that the evidence must meet. First, the total quantum of evidence must be sufficient to support the finding—and in this regard, the ordinary civil burden of “preponderance of the evidence” would not be sufficient.<sup>179</sup> Instead, the facts must be proven by “clear, unequivocal, and convincing” evidence.<sup>180</sup> Second, when the evidence lends itself to conflicting inferences, those inferences must be drawn to favor the defendant in danger of losing his citizenship:

We hold . . . that where two interpretations of an organization’s program are possible, the one reprehensible and a bar to naturalization and the other permissible, a court in a denaturalization proceeding, assuming that it can re-examine a finding of attachment upon a charge of illegal procurement, is not justified in canceling a certifi-

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<sup>176</sup> *Id.* at 167 (Rutledge, J., concurring).

<sup>177</sup> *See id.* at 136 (majority opinion).

<sup>178</sup> *Id.* at 122.

<sup>179</sup> *See id.* at 125 (“To set aside such a grant the evidence must be ‘clear, unequivocal, and convincing’—‘it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt.’” (quoting *United States v. Maxwell Land-Grant Co.*, 121 U.S. 325, 381 (1887))).

<sup>180</sup> *Id.* at 154.



cate of citizenship by imputing the reprehensible interpretation to a member of the organization in the absence of overt acts indicating that such was his interpretation.<sup>181</sup>

Thus, the mere fact that Schneiderman belonged to two groups affiliated with the Communist Party was insufficient to prove his lack of attachment to the Constitution. There was some evidence that the Party supported violent overthrow of the government, but there was countervailing evidence that it sought change by peaceful means consistent with constitutional procedures.<sup>182</sup> Without evidence that Schneiderman himself possessed the disqualifying belief, the district court was bound to infer from the contradictory evidence that Schneiderman did not support violent overthrow.<sup>183</sup>

## 2. Baumgartner and Knauer: A More Searching Review on Appeal

Two cases over the next few years would reaffirm the heightened standard of proof and expand the procedural protections to include a more searching review on appeal.<sup>184</sup> But even though the cases reaffirmed and expanded the procedural protections given to defendants in denaturalization cases, they made it clear that the Justices were not in agreement about the basis of those procedural protections. Just one year after *Schneiderman* was decided, internal court papers from another denaturalization case—*Baumgartner v. United States*—showed that Justice Frankfurter believed that the standard was simply the ordinary heightened standard for proving fraud in a case at equity.<sup>185</sup> Certainly, the *Schneiderman* case had left the basis for the ruling less than clear—and had indeed cited to a fraud case applying the ordinary heightened standard.<sup>186</sup> Justice Murphy, however, believed that the Court had gone further in *Schneiderman*. He took the opportunity in his concurrence in *Baumgartner* to reiterate his view, pointing out that “[w]e expressly did not pass upon the charge of fraud” in *Schneiderman*, and that “the requirement that the Government prove its case by ‘clear, unequivocal, and convincing’ evi-

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<sup>181</sup> *Id.* at 158–59.

<sup>182</sup> *See id.* at 158.

<sup>183</sup> *See id.* at 158–59.

<sup>184</sup> *See Knauer v. United States*, 328 U.S. 654 (1946); *Baumgartner v. United States*, 322 U.S. 665 (1944).

<sup>185</sup> *See WEIL, supra* note 110, at 132 (“[T]hat case [*Schneiderman*] never involved for me any question as to the measure of proof required . . . . That fraud requires convincing proof is one of the commonplaces of the law—and hardly seemed to me in question.” (alteration in original) (quoting Justice Frankfurter’s internal memo)); *Steadman v. S.E.C.*, 450 U.S. 91, 105 (1981) (“At common law, it was plain that allegations of fraud had to be proved by clear and convincing evidence.”).

<sup>186</sup> *Schneiderman*, 320 U.S. at 125 (citing *Maxwell Land-Grant Co.*, 121 U.S. at 381, a fraud case applying such a heightened standard of proof).

dence . . . was a formulation by a majority of the Court of a rule of law governing all denaturalization proceedings.”<sup>187</sup>

Although the Justices disagreed about the basis for the heightened burden of proof, they nonetheless agreed that it applied in denaturalization cases.<sup>188</sup> The Court further agreed that the heightened standard of proof also required heightened scrutiny on appeal to determine “whether that exacting standard of proof had been satisfied on the whole record.”<sup>189</sup> For the defendant in *Baumgartner*, that heightened standard made a difference. *Baumgartner* had been accused of harboring Nazi sympathies at the time of his naturalization (thus allegedly showing that he did not “support the Constitution and laws of the United States and . . . give them true faith and allegiance”), and there was evidence that he had spoken in favor of Nazi policies.<sup>190</sup> But under the heightened standard of proof required, the Court held that the record showed “insufficient proof” that he supported fascism when he took the oath of citizenship.<sup>191</sup> As a result, the Supreme Court reversed the underlying judgment and *Baumgartner* was allowed to keep his citizenship.<sup>192</sup>

Two years later, in *Knauer v. United States*, the Court returned to the *Schneiderman* standard.<sup>193</sup> Ultimately, it found that the evidentiary requirement had been “plainly met,” concluding that the defendant was a “thoroughgoing Nazi and a faithful follower of Adolph Hitler,” who had falsely sworn otherwise at the time of his naturalization.<sup>194</sup> Again, however, the Court was not unanimous. Justices Rutledge and Murphy dissented, agreeing that the evidence showed *Knauer* to be “a thorough-going Nazi, addicted to philosophies altogether hostile to the democratic framework in which we believe and live,” but asserting that denaturalization violated constitutional principles.<sup>195</sup> “[C]itizens with strings attached to their citizenship, for its revocation, can be neither free nor secure in their status.”<sup>196</sup>

In both the majority opinion and the dissent, the Justices placed great reliance on the heightened evidentiary standard. The majority suggested that the standard was required for due process in a denatu-

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<sup>187</sup> *Baumgartner*, 322 U.S. at 678 (Murphy, J., concurring).

<sup>188</sup> *See id.* at 670 (majority opinion) (“The measure of proof requisite to denaturalize a citizen . . . must be clear and unequivocal.”).

<sup>189</sup> *Id.* at 671.

<sup>190</sup> *Id.* at 666.

<sup>191</sup> *See id.* at 677.

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

<sup>193</sup> *See Knauer v. United States*, 328 U.S. 654 (1946).

<sup>194</sup> *Id.* at 660.

<sup>195</sup> *Id.* at 675, 678 (Rutledge, J., dissenting).

<sup>196</sup> *Id.* at 678.

ralization proceeding, stating that the consequence of denaturalization could be severe enough to “result in the loss ‘of all that makes life worth living,’” and therefore cannot be left to “conjecture”; otherwise, “valuable rights would rest upon a slender reed” and be vulnerable to shifting political winds.<sup>197</sup> According to the majority, this meant that not only did the trial court have to be persuaded by “‘clear, unequivocal, and convincing’ evidence, which does not leave ‘the issue in doubt,’” but also that the appellate court has a duty to “reexamine the facts” found by the lower courts.<sup>198</sup>

Justice Rutledge’s dissent agreed, stating that even “if [he] may be wrong”<sup>199</sup> in concluding that denaturalization itself is unconstitutional:

[C]ertainly so drastic a penalty as denaturalization, with resulting deportation and exile and all the attendant consequences, should not be imposed by any procedure less protective of the citizen’s most fundamental right . . . [A]t the least this should be done only by those forms of proceeding most fully surrounded with the constitutional securities for trial which are among the prized incidents of citizenship.<sup>200</sup>

He pointed out that loss of citizenship entailed a loss of liberty even greater than incarceration in a criminal action, stating that it is “altogether anomalous that those safeguards are thrown about . . . when, for some offense, his liberty even for brief periods is at stake, but are withdrawn from him when all that gives substance to that freedom is put in jeopardy.”<sup>201</sup>

### 3. *Later Cases: Continued Questions About the Basis for Heightened Procedural Protections*

In 1948, the Court again grappled with the basis of the *Schneiderman* ruling: Did it create a procedural due process right that could be extended to forbid default judgment? A majority of the Court agreed that a judgment denaturalizing August Klapprott by default needed to be reversed, though the Court was sharply divided on both reasoning and outcome and did not produce a majority opinion.<sup>202</sup> Klapprott was a member of the German American Bund, accused of sympathy to Nazi Germany and disloyalty to the United

<sup>197</sup> See *id.* at 658 (majority opinion) (quoting *Schneiderman v. United States*, 320 U.S. 118, 159 (1943)); *id.* at 659 (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)).

<sup>198</sup> *Id.* at 657 (quoting *Schneiderman*, 320 U.S. at 158).

<sup>199</sup> *Id.* at 678 (Rutledge, J., dissenting).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 678–79.

<sup>202</sup> See *Klapprott v. United States*, 335 U.S. 601, 615–16 (1949) (presenting the final disposition of the case through plurality opinion).

States. While his civil denaturalization suit was pending, however, he was arrested and confined to jail on federal criminal charges. His criminal conviction was later overturned by the Supreme Court in a case unrelated to the denaturalization proceeding.<sup>203</sup> He had been unable to afford an attorney to represent him in the civil case, and his incarceration prevented him from appearing personally at the denaturalization trial.<sup>204</sup> As a result, the district court granted a default judgment of denaturalization.<sup>205</sup>

The Supreme Court reversed the judgment. Five Justices agreed with the ultimate result, but they diverged in their rationales. Justice Black wrote the plurality opinion (joined by Justice Douglas). He cited *Schneiderman* for the proposition that “because of the grave consequences incident to denaturalization proceedings we have held that a burden rests on the Government to prove its charges in such cases by clear, unequivocal and convincing evidence which does not leave the issue in doubt.”<sup>206</sup> In his view, the burden required for denaturalization “is substantially identical with that required in criminal cases—proof beyond a reasonable doubt.”<sup>207</sup> He concluded that the government had not met this standard in the court below.

Justice Rutledge concurred in an opinion joined by Justice Murphy, and would have gone even further. They reiterated their view that denaturalization was unconstitutional in its entirety, writing that “[t]o take away a man’s citizenship deprives him of a right no less precious than life or liberty, indeed of one which today comprehends those rights and almost all others.”<sup>208</sup> They also emphasized the lack of procedural safeguards, noting that:

[B]y the device or label of a civil suit, carried forward with none of the safeguards of criminal procedure provided by the Bill of Rights, this most comprehensive and basic right of all, so it has been held, can be taken away and in its wake may follow the most cruel penalty of banishment.<sup>209</sup>

The plurality similarly noted the lack of procedural safeguards, emphasizing that a default judgment necessarily lacks the procedural protections of a true adversarial proceeding:

The undenied allegations already set out show that a citizen was stripped of his citizenship by his Government, without evidence, a

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<sup>203</sup> *See id.* at 607.

<sup>204</sup> *See id.* at 608.

<sup>205</sup> *See id.*

<sup>206</sup> *Id.* at 612 (citing *Schneiderman v. United States*, 320 U.S. 118, 158 (1943)).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 616 (Rutledge, J., concurring).

<sup>209</sup> *Id.* at 617.

hearing, or the benefit of counsel, at a time when his Government was then holding the citizen in jail with no reasonable opportunity for him effectively to defend his right to citizenship.<sup>210</sup>

Although Justices Rutledge and Murphy had not been able to get a majority of the Court to sign on for this view, they did agree that *Schneiderman* required, at the very least, substantially heightened due process. They again compared it to the constitutional standard required in criminal cases, writing that *Schneiderman* “required a burden of proof for denaturalization which in effect approximates the burden demanded for conviction in criminal cases, namely, proof beyond a reasonable doubt of the charges alleged as cause for denaturalization,” and that it did so “in view of the substantial kinship of the proceedings with criminal causes,” and with the understanding that “ordinary civil procedures, such as apply in suits upon contracts and to enforce other purely civil liabilities, do not suffice for denaturalization and all its consequences.”<sup>211</sup> Furthermore, the defendant’s failure to show up to trial did not relieve the government of the need to meet that heightened burden.<sup>212</sup>

More than thirty years later, however, there was substantial turnover in the Court—but the Court still seemed at odds over the basis for *Schneiderman*’s procedural protections. In *Vance v. Terrazas*, a Mexican-American dual national was alleged to have voluntarily given up his citizenship.<sup>213</sup> Congress had enacted a statute providing that proof of voluntary expatriation should be measured by the ordinary civil “preponderance of the evidence” standard, rather than the heightened “clear and convincing” standard that the Supreme Court had applied in denaturalization cases.<sup>214</sup> The Supreme Court divided over the question of whether the standard of proof was of common-law origin (and thus subject to being overruled by an act of Congress)

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<sup>210</sup> *Id.* at 615 (plurality opinion).

<sup>211</sup> *Id.* at 617–18 (Rutledge, J., concurring).

<sup>212</sup> *See id.* at 612–13 (plurality opinion) (“[I]t is our opinion that courts should not . . . deprive a person of his citizenship until the Government first offers proof of its charges sufficient to satisfy the burden imposed on it, even in cases where the defendant has made default in appearance.”).

<sup>213</sup> 444 U.S. 252 (1980).

<sup>214</sup> *See* 8 U.S.C. § 1481(b) (“Any person who commits or performs . . . any act of expatriation . . . shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.”); *Terrazas*, 444 U.S. at 264–65 (discussing Congressional passage of § 1481(b) in response to the heightened evidentiary standard).

or whether it was of constitutional origin.<sup>215</sup> The Court in that case held that the government had not sufficiently shown that the dual national had intended to expatriate himself, thus allowing him to keep his American citizenship.<sup>216</sup> In dicta, however, a majority of the Court sided with the common-law view of the standard of proof, listing *Schneiderman* as one of several cases that “did not purport to be [a] constitutional ruling.”<sup>217</sup> The Court further distinguished decisions adopting a heightened standard in criminal cases, stating that “expatriation proceedings are civil in nature and do not threaten a loss of liberty.”<sup>218</sup>

Again, however, the opinion drew sharp disagreement from those who believed that a heightened evidentiary standard was constitutionally mandated. Justice Marshall wrote that he “cannot understand, much less accept, the Court’s suggestion that ‘expatriation proceedings . . . do not threaten a loss of liberty.’”<sup>219</sup> He believed that a “clear and convincing” standard of proof in expatriation and denaturalization cases was required under the Constitution.<sup>220</sup> Justice Stevens wrote a separate opinion likewise stating that:

In my judgment a person’s interest in retaining his American citizenship is surely an aspect of “liberty” of which he cannot be deprived without due process of law. . . . [I] believe that due process requires that a clear and convincing standard of proof be met in this case as well before the deprivation may occur.<sup>221</sup>

Just a year later, in *Fedorenko v. United States*, the Supreme Court upheld the denaturalization of a man who had concealed his past as a concentration-camp guard.<sup>222</sup> In its decision, the Court applied *Schneiderman*’s heightened burden of proof and *Baumgartner*’s more searching appellate review.<sup>223</sup> This time, the

<sup>215</sup> See *id.* at 264 (disagreeing with the appellate court’s determination that Congress was without constitutional authority to set the standard of proof in expatriation proceedings).

<sup>216</sup> *Id.* at 263.

<sup>217</sup> See *id.* at 266–67.

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

<sup>219</sup> *Id.* at 271 (Marshall, J., concurring in part and dissenting in part).

<sup>220</sup> *Id.* at 272.

<sup>221</sup> *Id.* at 274 (Stevens, J., concurring in part and dissenting in part).

<sup>222</sup> 449 U.S. 490 (1981).

<sup>223</sup> See *id.* at 505–06 (“The evidence justifying revocation of citizenship must be ‘clear, unequivocal, and convincing’ and not leave ‘the issue in doubt.’ . . . And in reviewing denaturalization cases, we have carefully examined the record ourselves.” (quoting *Schneiderman v. United States*, 320 U.S. 118, 125 (1943))). It is worth noting, however, that Justice Stevens believed the evidence in *Fedorenko* failed to meet this exacting standard; he believed the evidence supported the conclusion that Fedorenko had been forced involuntarily into his position, and that his actions therefore did not disqualify him from citizenship. *Id.* at 533 (Stevens, J., dissenting) (“I cannot accept the view that any citizen’s

Court's majority opinion implied that such procedural protections were constitutionally required: "Any less exacting standard would be inconsistent with the importance of the right that is at stake in a denaturalization proceeding."<sup>224</sup>

The Court's back-and-forth over the source of the heightened procedural protections in denaturalization makes it difficult to determine the scope of legislative power—and difficult to predict how future cases will come out. But whether the requirement for a heightened evidentiary burden is grounded in the Constitution or in the common law likely makes little difference for modern cases, as Congress's lower standard applies only in voluntary expatriation cases and has not been expanded to apply to involuntary denaturalization. Thus, modern denaturalization cases must be guided at least by a "clear and convincing" standard of proof, and the scope of appellate review must be commensurate with the heightened burden of proof.<sup>225</sup>

### B. Substantive Constitutional Protections

While the Supreme Court's cases based on procedural due process dealt with the question of *how* citizenship could be taken away, the Court also decided several cases on substantive grounds that looked at the question of *whether* citizenship could be taken away under certain circumstances. The Due Process Clause of the U.S. Constitution is central to both of these questions, as substance and procedure are so closely intertwined as to be inseparable.<sup>226</sup>

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past involuntary conduct can provide the basis for stripping him of his American citizenship.").

<sup>224</sup> *Id.* at 505–06 (majority opinion).

<sup>225</sup> See *Kungys v. United States*, 485 U.S. 759, 772 (1988) (holding that the elements of a denaturalization claim "must be met, of course, by evidence that is clear, unequivocal, and convincing"); *United States v. Muthara*, 737 F. App'x 426, 427–28 (10th Cir. 2018) (citing *Fedorenko* for the proposition that "evidence justifying revocation of citizenship must be clear, unequivocal, and convincing and not leave the issue in doubt").

<sup>226</sup> As Professor Peter Rubin has pointed out, "What we would ordinarily call procedural rights can be characterized as substantive, and substantive rights can often be defined in terms of procedure." Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 848 (2003) (explaining that the incorporation of the Sixth Amendment right to a jury trial is commonly considered a substantive due process guarantee "incorporating the 'substantive' right to a jury trial before a criminal conviction," but pointing out that it is also "a procedural trial right that one can imagine being imposed, in the absence of the Sixth Amendment, as a requirement of procedural due process"); Timothy Sandefur, *Why Substantive Due Process Makes Sense*, CATO UNBOUND (Feb. 6, 2012), <https://www.cato-unbound.org/2012/02/06/timothy-sandefur/why-substantive-due-process-makes-sense> (arguing that "[p]rocedural due process is a subset of substantive due process," and that "[o]ne might think of a trial as a procedural right, but a trial is composed of certain substantive rights—the right to cross-examine witnesses, the right to be represented by an attorney, the right not to be compelled to testify against oneself").

Cases of expatriation—that is, taking citizenship away from individuals even if born in the United States, often as a sanction for conduct deemed inconsistent with citizenship—proved to be particularly divisive, though the Court ultimately held that individuals could not be expatriated without their voluntary consent. The holding was extended in a subsequent case to naturalized citizens. In reaching these decisions, however, the Court was even more divided than it had been on the procedural questions—and once again, the driving force behind that disagreement was an inability to reach a common theory of citizenship.

### 1. *Limiting Expatriation as Punishment*

When Congress adopted citizenship-stripping laws aimed at various forms of behavior deemed to be incompatible with citizenship—including voting in a foreign election, serving in a foreign military, leaving the country to avoid U.S. military service, and others—these laws were challenged as unconstitutional forms of punishment. *Trop v. Dulles* was one such case in which the Supreme Court was faced with the question of whether citizenship could be taken away as a punitive measure for voluntary behavior.<sup>227</sup> The petitioner, Albert Trop, was a native-born U.S. citizen who served in the U.S. military in Morocco during World War II.<sup>228</sup> During this time, he was sent to a military stockade as punishment for an infraction. He then escaped from the stockade, but returned to base and turned himself in after spending less than a day away. Nonetheless, he was court-martialed, convicted of wartime desertion, sentenced to three years' confinement, and dishonorably discharged. Five years after he completed his sentence, he applied for a passport and discovered only then that he had also been stripped of his citizenship and was therefore ineligible to obtain a passport.<sup>229</sup> He filed suit seeking a declaration of citizenship.

When Trop's case reached the Supreme Court, the Justices sharply divided over the outcome. A majority of the Court held that Trop's denationalization violated the Constitution, but less than a majority agreed on the rationale.<sup>230</sup> Chief Justice Warren wrote the opinion for a four-judge plurality, concluding that denationalization

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<sup>227</sup> 356 U.S. 86, 87 (1958).

<sup>228</sup> *Id.*

<sup>229</sup> *See id.* at 88 (“In 1952 petitioner applied for a passport. His application was denied on the ground that under the provisions of Section 401(g) of the Nationality Act of 1940, as amended, he had lost his citizenship by reason of his conviction and dishonorable discharge for wartime desertion.”).

<sup>230</sup> *Id.* at 104–05 (Black, J., concurring); *id.* at 105 (Brennan, J., concurring).



violated the Eighth Amendment's prohibition on cruel and unusual punishment and stating that the individual who is stripped of citizenship "has lost the right to have rights."<sup>231</sup> He explained that expatriation puts the individual at risk of deportation, causes "the total destruction of the individual's status in organized society," and "strips the citizen of his status in the national and international political community."<sup>232</sup> Taken together, the plurality found these consequences to be "a form of punishment more primitive than torture."<sup>233</sup>

While the plurality's language was strong, it did not garner a majority of the Court. Justice Brennan declined to join the majority opinion and concurred in the judgment, writing separately that Congress exceeded its authority under the war power because the expatriation was intended as "naked vengeance," and was not reasonably calculated "to further the ultimate congressional objective—the successful waging of war."<sup>234</sup> In less egregious circumstances, however, he suggested that expatriation could be within the war power of the legislative branch.

Justice Frankfurter dissented, joined by Justices Burton, Clark, and Harlan. The dissent argued that denationalization for wartime desertion fit easily within Congress's war power; it referred to military services as "this ultimate duty of American citizenship," and stated that "Congress might reasonably have believed the morale and fighting efficiency of our troops would be impaired if our soldiers knew that their fellows who had abandoned them in their time of greatest need were to remain in the communion of our citizens."<sup>235</sup> The dissent also disagreed that loss of citizenship was the harsh penalty that the plurality and Justice Brennan believed. Instead, the dissent said, expatriation was far less harsh than the death penalty, which was also a potential consequence of wartime desertion.<sup>236</sup>

In 1963, the Supreme Court again turned to the question of expatriation as punishment. Francisco Mendoza-Martinez, a Mexican-American dual national, left the United States in 1942 "solely, as he admits, for the purpose of evading military service in our armed forces."<sup>237</sup> When he returned to the United States, he was arrested and convicted of failing to comply with the selective service laws. After serving his time, he was released—but five years later, the gov-

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<sup>231</sup> *Id.* at 101–02 (plurality opinion).

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 101.

<sup>234</sup> *Id.* at 107, 112 (Brennan, J., concurring).

<sup>235</sup> *Id.* at 121–22 (Frankfurter, J., dissenting).

<sup>236</sup> *See id.* at 125.

<sup>237</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 147 (1963).

ernment sought to deport him, alleging that he had lost his citizenship under Section 401(j) of the Nationality Act of 1940, which provided that: “A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by . . . [d]eparting from or remaining outside of the jurisdiction of the United States in time of war . . . .”<sup>238</sup>

The Supreme Court concluded that this provision of the statute was unconstitutional. The majority opinion noted that Congress had a great deal of latitude under the foreign-relations and war powers,<sup>239</sup> and certainly there was a clearer connection to the war power in *Mendoza-Martinez* than there had been in *Trop*. *Mendoza-Martinez*, after all, had entirely evaded the draft—thus missing military service entirely. *Trop*, on the other hand, missed only one day of military service, returned to his post voluntarily when he was “cold and hungry,” and caused no actual harm to military objectives.<sup>240</sup> Nevertheless, the Court said, the sanction of expatriation was a consequence so serious that it could deprive an individual “of all that makes life worth living.”<sup>241</sup> As a result, it could not follow from a mere civil action: “If the sanction these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking.”<sup>242</sup> Therefore, the Court held, the heightened process of a criminal case would be required before such a serious punishment could be imposed. “[T]he Fifth and Sixth Amendments mandate that this punishment cannot be imposed without a prior criminal trial and all its incidents, including indictment, notice, confrontation, jury trial, assistance of counsel, and compulsory process for obtaining witnesses.”<sup>243</sup> The Court acknowledged that its holding might legitimately be criticized for “immunizing the draft evader,” but it prioritized the underlying citizenship interest and the procedures that protect that interest, writing that “the Bill of Rights which we guard so jealously and the procedures it guarantees are not to be abrogated merely because a guilty man may escape prosecution or for any other

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<sup>238</sup> *Id.* at 146–47 n.1.

<sup>239</sup> *See id.* at 164 (noting Congress’s “great power[ ]” to conduct war and regulate foreign relations).

<sup>240</sup> *Trop*, 356 U.S. at 87–88.

<sup>241</sup> *Mendoza-Martinez*, 372 U.S. at 166 (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284–85 (1922)); *see also Ng Fung Ho*, 259 U.S. at 284 (“To deport one who so claims to be a citizen obviously deprives him of liberty, as was pointed out in *Chin Yow v. United States*, 208 U.S. 8, 13 [1908]. It may result also in loss of both property and life, or of all that makes life worth living.”).

<sup>242</sup> *Mendoza-Martinez*, 372 U.S. at 167.

<sup>243</sup> *Id.*

expedient reason.”<sup>244</sup> Thus, after *Mendoza-Martinez*, expatriation as a sanction for voluntary behavior would require criminal process.<sup>245</sup>

## 2. *Curtailing Involuntary Expatriation*

During the mid-twentieth century, the Supreme Court also struggled with an even more fundamental question: Does the Constitution allow citizenship to be involuntarily taken away? The question sharply divided both the Court and the public. The Court’s first answer to that question, in *Perez v. Brownell*, was “yes.”<sup>246</sup> At issue in that case was a federal expatriation statute, which provided that: “[A] person who is a national of the United States, whether by birth or naturalization, shall lose his nationality”<sup>247</sup> if they are involved in certain kinds of conduct, including: voting in a political election in a foreign state, or leaving the country to avoid the military draft. The Court concluded that Congress had the right to pass such an expatriation statute as part of its foreign affairs authority under the Constitution. In this 5-4 opinion, the Court upheld the expatriation of a native-born U.S. citizen who had voted in a Mexican election, and was therefore held to have expatriated himself.<sup>248</sup>

Six years later, however, the Supreme Court shed some doubt on the *Perez* holding in *Schneider v. Rusk*.<sup>249</sup> Angelika Schneider was a naturalized American citizen born in Germany. She later married a German citizen and moved with her husband to live there.<sup>250</sup> By the early 1960s, women no longer lost U.S. citizenship merely by marrying a foreigner.<sup>251</sup> Nonetheless, Congress had passed a statute providing that naturalized citizens (regardless of gender) who moved back to their country of origin would lose their U.S. citizenship.<sup>252</sup> The Court

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<sup>244</sup> *Id.* at 184.

<sup>245</sup> This case presented another example of the interplay between substantive and procedural due process. See *supra* note 226 (discussing further the relationship between these two aspects of due process). The Court spoke of the “procedural safeguards” of the Fifth and Sixth Amendments, which the Court viewed as essential to avoid arbitrarily stripping the substantive protections of citizenship. See *Mendoza-Martinez*, 372 U.S. at 166 (discussing the purpose of the Fifth and Sixth Amendments as providing procedural protections).

<sup>246</sup> *Perez v. Brownell*, 356 U.S. 44, 62 (1958), *overruled in part by* *Afroyim v. Rusk*, 387 U.S. 253 (1967).

<sup>247</sup> *Id.* at 45–46 (quoting the Nationality Act of 1940, Pub. L. No. 76-853 54 Stat. 1137, 1168 (1940) as amended by the Act of September 27, 1944, Pub. L. No. 78-431, 58 Stat. 746 (1944)).

<sup>248</sup> *Id.* at 46, 62.

<sup>249</sup> 377 U.S. 163 (1964).

<sup>250</sup> *Id.* at 164.

<sup>251</sup> See Chacón, *supra* note 133, at 357 (noting Congress’s 1931 repeal of the provision that stripped women of their citizenship for marrying a foreigner).

<sup>252</sup> *Schneider*, 377 U.S. at 164.

held the statute unconstitutional because it treated native-born citizens more favorably than naturalized citizens.<sup>253</sup> The Court noted that “the Fifth Amendment contains no equal protection clause,” but that it does “forbid discrimination that is ‘so unjustifiable as to be violative of due process.’”<sup>254</sup> In the Court’s opinion, the treatment of naturalized citizens under the statute qualified as just such a violation.<sup>255</sup> Native-born citizens, after all, could live abroad with no fear of losing their citizenship.<sup>256</sup> Treating naturalized citizens differently “creates . . . a second-class citizenship” and “in no way evidences a voluntary renunciation of nationality and allegiance.”<sup>257</sup>

In 1967—less than a decade after *Perez*—the Court would return to the question of constitutional power to revoke citizenship in the absence of affirmative intent to give up citizenship. This time, the Court would extend the principle it had announced in *Schneider* and formally overrule *Perez*. The case involved Beys Afroyim, a naturalized U.S. citizen who moved to Israel and voted in an election for the Israeli Knesset.<sup>258</sup> He then sought a declaratory judgment affirming his U.S. citizenship, expressly seeking to overturn the *Perez* case.<sup>259</sup> The Court noted that *Perez* had not been well-received; it stated that the case “has been a source of controversy and confusion ever since,” and that the Court’s later cases “as well as many commentators,” had “cast great doubt upon the soundness of *Perez*.”<sup>260</sup>

In its 5-4 opinion, the Court adopted the dissenters’ view from *Perez*.<sup>261</sup> The Court first rejected the idea that “Congress has any general power, express or implied, to take away an American citizen’s citizenship without his assent.”<sup>262</sup> It then grounded its holding more firmly in the first sentence of the Fourteenth Amendment,<sup>263</sup> which provides that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

<sup>253</sup> *Id.* at 168–69.

<sup>254</sup> *Id.* at 168 (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)). The relationship between due process and equal protection at the federal level has become known by the shorthand “reverse incorporation,” a concept usually associated with *Bolling*. Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 976 (2004) (discussing the relationship between *Bolling* and reverse incorporation).

<sup>255</sup> See *Schneider*, 377 U.S. at 168–69 (noting that the statutory distinction made between native-born citizens and naturalized citizens constitutes unequal treatment).

<sup>256</sup> *Id.* at 168.

<sup>257</sup> *Id.* at 169.

<sup>258</sup> *Afroyim v. Rusk*, 387 U.S. 253, 254 (1967).

<sup>259</sup> *Id.* at 254–55.

<sup>260</sup> *Id.* at 255–56.

<sup>261</sup> See *id.* at 257 (rejecting the central premise of *Perez*).

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

<sup>263</sup> *Id.* at 262.

States.”<sup>264</sup> The purpose of this Amendment, according to the Court, was to firmly establish the right of citizenship and to take it out of the hands of the legislature<sup>265</sup>—particularly in the post-Civil-War era, when legislators might have tried to limit the political rights of individuals formerly held in slavery.<sup>266</sup> Even though the framers of the Fourteenth Amendment were focused on the end of slavery rather than the permissibility of expatriation, the Court concluded that the principles of liberty and equal justice expressed in the Fourteenth Amendment required overruling *Perez*.<sup>267</sup> Indeed, the Court said, “The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship.”<sup>268</sup>

### C. *A Retreat to Statutory Formalism*

The ruling in *Afroyim* sounded as if it might put the issue of denaturalization to rest once and for all. But even though the decision got a majority opinion, it was still seen as vulnerable by those dissatisfied with the ruling.<sup>269</sup> It was, after all, a 5-4 decision reversing a different 5-4 decision less than a decade old.

A year later, Chief Justice Warren’s resignation from the Court seemed to present an opportunity for a quick reversal of *Afroyim*.<sup>270</sup> And one case appeared to offer the perfect vehicle: Aldo Bellei, who was born and raised in Italy but possessed American citizenship through his mother, challenged a law that would strip the citizenship of individuals born abroad who failed to live in the United States for at least five years between the ages of fourteen and twenty-eight.<sup>271</sup> Indeed, President Nixon’s new appointee, Harry Blackmun, wrote in

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<sup>264</sup> U.S. CONST. amend. XIV, § 1.

<sup>265</sup> See *Afroyim*, 387 U.S. at 263 (“Though the framers of the Amendment were not particularly concerned with the problem of expatriation, it seems undeniable from the language they used that they wanted to put citizenship beyond the power of any governmental unit to destroy.”).

<sup>266</sup> See *id.* at 267–68 (“Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power.”).

<sup>267</sup> See *id.* at 268 (explaining that the Court’s outcome is necessary to be consistent with the principles expressed in the Fourteenth Amendment).

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

<sup>269</sup> See, e.g., *Rogers v. Bellei*, 401 U.S. 815 (1971) (holding that *Afroyim* protection from denaturalization only extends to those born or naturalized in the United States).

<sup>270</sup> See WEIL, *supra* note 110, at 176–77 (detailing Chief Justice Warren’s resignation, which left the Court equally divided on *Afroyim*, and the Court’s quick grant of certiorari to a potential reversal vehicle in *Bellei*).

<sup>271</sup> *Id.* at 176.

an early memo to the Court that he was inclined to overrule *Afroyim*.<sup>272</sup>

However, one of the Justices who had dissented in *Afroyim* was nevertheless unwilling to overrule it—Justice John Harlan believed strongly in following precedent even when he disagreed with a case on the merits.<sup>273</sup> As a result, the decision in *Bellei* left *Afroyim* undisturbed by walking a narrow textual ground—because the Fourteenth Amendment’s citizenship clause only applies to those “born” or “naturalized” in the United States, the Court held that it did not prohibit the involuntary expatriation of Aldo Bellei, who was a natural-born citizen born in Italy.<sup>274</sup>

With the *Afroyim* holding left undisturbed (though narrowly interpreted), fewer denaturalization cases entered the litigation pipeline; in the four decades after *Bellei* reaffirmed the central holding of *Afroyim*, only four such cases have reached the Supreme Court.<sup>275</sup> All four of those cases would continue to apply a narrow and formalist approach; none would return to *Afroyim*’s broad statements of “liberty and equal justice.”<sup>276</sup>

One of those cases was *Vance v. Terrazas*, discussed above,<sup>277</sup> which interpreted the standard for “voluntary” expatriation.<sup>278</sup> Congress had passed laws providing that certain conduct (voting in a foreign election; serving in a foreign military) was inconsistent with citizenship and would be deemed to provide conclusive evidence that an individual had voluntarily abandoned U.S. citizenship.<sup>279</sup> In *Terrazas*, however, the Supreme Court shut down this approach, concluding that an expatriation action must be supported by evidence of affirmative intent to give up citizenship—intent cannot be inferred from foreign service alone.<sup>280</sup> The decision protected individuals by

<sup>272</sup> See *id.* at 177 (discussing Justice Blackmun’s memo outlining his belief that *Afroyim* and *Schneider* were wrongly decided).

<sup>273</sup> See *id.* (explaining Justice Harlan’s jurisprudential approach).

<sup>274</sup> See *Bellei*, 401 U.S. at 830 (holding that the Fourteenth Amendment’s citizenship clause was “restricted to the combination of three factors, each and all significant: birth in the United States, naturalization in the United States, and subjection to the jurisdiction of the United States” and therefore “obviously did not apply to any acquisition of citizenship by being born abroad of an American parent”).

<sup>275</sup> *Maslenjak v. United States*, 137 S. Ct. 1918 (2017); *Kungys v. United States*, 485 U.S. 759 (1988); *Fedorenko v. United States*, 449 U.S. 490 (1981); *Vance v. Terrazas*, 444 U.S. 252 (1980).

<sup>276</sup> *Afroyim v. Rusk*, 387 U.S. 253, 267 (1967).

<sup>277</sup> See *supra* Section III.A.3.

<sup>278</sup> *Terrazas*, 444 U.S. at 266.

<sup>279</sup> See *id.* at 252 n.1 (describing provisions of the Immigration and Nationality Act that deem certain conduct as voluntary acts of expatriation).

<sup>280</sup> See *id.* at 263 (rejecting the government’s view that evidence of intent is not necessary under the statute).

interpreting “voluntariness” to require an individual intent to give up citizenship—not just an intent to engage in an action that Congress deemed inconsistent with citizenship.<sup>281</sup> Again, however, the opinion was a narrow one taking a very formal interpretation of the relevant language;<sup>282</sup> it did nothing to clarify the underlying constitutional interests at stake.

The remaining three cases dealt with individuals whose naturalization was originally procured illegally or by fraudulent means. In a footnote, the *Afroyim* majority had left open a remaining route for denaturalization: setting aside cases where naturalization had occurred fraudulently or unlawfully.<sup>283</sup> Post-1967, “fraud during the naturalization process” became the primary avenue left for denaturalization.<sup>284</sup>

The first case, *Fedorenko v. United States*, involved a defendant who had allegedly served as a concentration-camp guard in Treblinka, Poland during World War II.<sup>285</sup> The government brought a denaturalization suit against Fedorenko, alleging that he fraudulently concealed this background to obtain naturalization.<sup>286</sup> Furthermore, the statute that allowed Fedorenko to immigrate to the United States as a “displaced person,” specifically excluded individuals who “assisted the enemy in persecuting civil[ians]” or who “voluntarily assisted the enemy forces.”<sup>287</sup> Fedorenko admitted that he had been a guard at Treblinka, but claimed that his actions were involuntary, arguing “that he had been forced to serve as a guard” and denying “any personal involvement in the atrocities committed at the camp.”<sup>288</sup>

The Supreme Court acknowledged that it had created two lines of precedent “that may, at first blush, appear to point in different directions.”<sup>289</sup> The first line, the Court said, “recognized that the right to acquire American citizenship is a precious one and that once citizen-

<sup>281</sup> See *id.* at 261 (holding that, under the statute, a trier of fact must find that the citizen voluntarily committed the act and, in so doing, intended to relinquish their citizenship).

<sup>282</sup> See *id.* (using statutory interpretation to find that the statute must be read to proscribe only conduct where the citizen voluntarily relinquishes citizenship).

<sup>283</sup> See *Afroyim v. Rusk*, 387 U.S. 253, 267 n.23 (1967) (“Of course, as The Chief Justice said in his dissent . . . naturalization unlawfully procured can be set aside.”).

<sup>284</sup> WEIL, *supra* note 110, at 179 (noting that recently, “only a few dozen” individuals had lost citizenship as a result of naturalization fraud, which is a marked decline from the number of denaturalizations before 1968, when more avenues for denaturalization were available).

<sup>285</sup> 449 U.S. 490, 494 (1981).

<sup>286</sup> *Id.* at 497.

<sup>287</sup> *Id.* at 495 (quoting Constitution of the International Refugee Organization pt. II, Dec. 16, 1946, 62 Stat. 3037, T.I.A.S. No. 1846).

<sup>288</sup> *Id.* at 500.

<sup>289</sup> *Id.* at 505.

ship has been acquired, its loss can have severe and unsettling consequences.”<sup>290</sup> Thus, denaturalization was required to meet a high burden of proof.<sup>291</sup>

But the other line, the Court said, “recognized that there must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship.”<sup>292</sup> This line of precedent, in the Court’s view, required it to uphold Fedorenko’s loss of citizenship based on his misrepresentations even assuming that his work as a guard resulted from involuntary forced labor.<sup>293</sup> Under this very formalist approach, the Court deferred to Congress, “acknowledg[ing] . . . the fact that Congress alone has the constitutional authority to prescribe rules for naturalization,” and that the Court’s role is to “assure compliance” with its exercise of that role.<sup>294</sup> Because Fedorenko’s concealment allowed him to gain an immigration status he would not otherwise have qualified for, he had “illegally procured” citizenship and it must be revoked.<sup>295</sup> Because the Court held that strict compliance with the statute required denaturalization regardless of duress, the Court did not reach the larger question of legal complicity.<sup>296</sup> One commenter writing shortly after the decision was rendered described the *Fedorenko* reasoning as “unexpected” and the opinion as a “totally mechanical exercise” of statutory interpretation.<sup>297</sup>

Seven years later, the Supreme Court applied a similarly formalist analysis in the denaturalization case of *Kungys v. United States*, which involved an alleged guard at a Lithuanian concentration camp, whose purported actions came to light only when the Soviet Union released videotaped depositions implicating Kungys.<sup>298</sup> *Kungys* was authored by Justice Antonin Scalia relatively early in his tenure on the Court, and it showcased the textualist approach he would become

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<sup>290</sup> *Id.*

<sup>291</sup> See *id.* (holding that the government “carries a heavy burden of proof in a proceeding to divest a naturalized citizen of his citizenship” (quoting *Costello v. United States*, 365 U.S. 265, 269 (1961))).

<sup>292</sup> *Id.*

<sup>293</sup> See *id.* at 507 (finding that Fedorenko falls within the statutory prohibition against making a willful misrepresentation to gain admission into the United States).

<sup>294</sup> *Id.* at 506.

<sup>295</sup> *Id.* at 518.

<sup>296</sup> See Abbe L. Dienstag, Comment, *Fedorenko v. United States: War Crimes, the Defense of Duress, and American Nationality Law*, 82 COLUM. L. REV. 120, 131 (1982) (“[T]he inherent unsettledness of the duress issue and the combination of war-crime and nationality-law factors present in *Fedorenko* call for careful and considered evaluation of the availability here of the duress defense. The Court, however, did not address itself to these concerns.”).

<sup>297</sup> See *id.* at 129 n.34 (noting that neither party argued the issue of statutory interpretation).

<sup>298</sup> 485 U.S. 759 (1988).



known for.<sup>299</sup> Justice Scalia's opinion was partly a majority opinion and partly a plurality opinion, as the Court yet again fractured in deciding a denaturalization case. This time, however, the fracturing did not reveal a fundamental disagreement about the nature of citizenship; instead, the disagreement centered on relatively minor matters of textual interpretation. In the words of one scholar, "The *Kungys* court [sic], confused and fragmented, finally settled on an odd approach to the problems of the statute and achieved little . . . . Rather than furthering values and larger legislative purposes, the Court wrestled with language until it lost."<sup>300</sup>

In the opinion, the Court accepted the finding of the courts below that there was insufficient evidence that Kungys had personally been involved in executing Lithuanian citizens; the district court had found the Soviet-era depositions to be "inherently unreliable."<sup>301</sup> However, the evidence did show that Kungys had misrepresented his date and place of birth, as well as his wartime occupation and residence.<sup>302</sup> The central question before the Court, then, was whether Kungys's misrepresentations were material to his naturalization.<sup>303</sup> On this point, a majority of the Court agreed that a misrepresentation was material if it had a "natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed."<sup>304</sup> Thus, even a relatively minor lie, such as a misstatement about the town of one's birth, could be material if it influenced the naturalization decision.<sup>305</sup>

Justice Scalia went on to conclude, in a part of the opinion that garnered only four votes, that Kungys's misrepresentation of his birth information had not been shown to be material; whether other misrepresentations might have been material would have to be deter-

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<sup>299</sup> See Michael Heyman, *Language and Silence: The Supreme Court's Search for the Meaning of American Denaturalization Law*, 5 GEO. IMMIGR. L.J. 409, 421 (1991) (noting that the opinion was authored by "Antonin Scalia, a new member of the Court and a major proponent of the textual approach to statutory interpretation").

<sup>300</sup> *Id.* at 431.

<sup>301</sup> *Kungys*, 485 U.S. at 764.

<sup>302</sup> *Id.* at 764–65.

<sup>303</sup> See *id.* at 767 (noting that Kungys had conceded the other relevant considerations pertinent to a statutory violation).

<sup>304</sup> *Id.* at 770 (quoting *Weinstock v. United States*, 231 F.2d 699, 701 (D.C. Cir. 1956)).

<sup>305</sup> For example, lying about the town where one was born could be an attempt to conceal other potentially disqualifying information—such as a criminal history in that town, or participation in wartime atrocities. See *id.* at 774 ("[T]he misrepresentation of [date and place of birth] would . . . be a misrepresentation of material facts, if the true date and place of birth would predictably have disclosed other facts relevant to his qualifications.").

mined on remand.<sup>306</sup> On the second ground for denaturalization—that Kungys’s misrepresentations amounted to false testimony demonstrating that he lacked the moral character required for naturalization, and thus illegally “procured” it—the plurality agreed that no materiality requirement was necessary.<sup>307</sup> Even a lie that did not itself affect the naturalization decision could demonstrate a lack of moral character, if it was considered “testimony.”<sup>308</sup> This point, however, would also be remanded—this time for the lower court to determine whether Kungys’s misrepresentations (essentially, false statements contained on application forms) amounted to “testimony” as required by the immigration statute.<sup>309</sup>

It was not until 2017 that the Supreme Court accepted another denaturalization case. *Maslenjak v. United States* was one of the rarer criminal prosecutions for naturalization fraud.<sup>310</sup> Divna Maslenjak, an ethnic Serb who resided in Bosnia during the civil war of the 1990s, came to the United States as a refugee and gained citizenship in 2007.<sup>311</sup> As a refugee, Maslenjak had testified under oath that her husband had spent the war years secreted away, evading military service.<sup>312</sup> And when she sought naturalization, Maslenjak stated that she had never given “‘false or misleading information’ to a government official while applying for an immigration benefit.”<sup>313</sup> In fact, however, Maslenjak knew all along that her husband had actually served in the Bosnian Serb Army, in a brigade that had participated in the Srebrenica massacre.<sup>314</sup> Maslenjak was charged with immigration fraud under 18 U.S.C. § 1425(a), for knowingly procuring, contrary to law, her own naturalization.<sup>315</sup> Both the district court and the court of appeals accepted the prosecutors’ interpretation that the statute did not require any showing of materiality—the courts held that the conviction could be sustained by evidence of an intentional misrepresen-

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<sup>306</sup> See *id.* at 776 (holding that the government failed to prove materiality on Kungys’s date and place of birth and remanding for other materiality determinations).

<sup>307</sup> See *id.* (noting that Justice Stevens’s concurring opinion would impose a materiality requirement on this point).

<sup>308</sup> See *id.* at 780 (“Literally read, [the statute] denominates a person to be of bad moral character on account of having given false testimony if he has told even the most immaterial of lies . . .”).

<sup>309</sup> *Id.* at 782.

<sup>310</sup> 137 S. Ct. 1918, 1923 (2017).

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

tation in the naturalization process, regardless of whether that misrepresentation contributed to the naturalization determination.<sup>316</sup>

Once again, the Supreme Court hewed to a textualist analysis in its review of those decisions. In a unanimous opinion authored by Justice Kagan, the Court concluded that the statute's language—requiring that an individual “procure” nationalization “contrary to law”—impliedly contains a materiality element.<sup>317</sup> The Court began with the dictionary definition of “procure,” and analyzed its use in ordinary speech.<sup>318</sup> It concluded that the prosecutors' position “falters on the way language naturally works,” and held that materiality was implied by the language of the statute.<sup>319</sup> The Court then concluded that, on remand, the jury should be asked to consider what impact Maslenjak's false statement had on the ultimate naturalization decision.<sup>320</sup>

In *Maslenjak*, unlike many of the earlier cases, the Court was relatively unified. The Court unanimously agreed on the necessity of a “materiality” finding. Justice Gorsuch joined all but Section II.B of the Court's opinion. He issued a concurrence, joined by Justice Thomas, writing that he would go no further than stating the need to instruct the jury regarding materiality on remand, preferring to leave the specifics of that instruction to the lower courts.<sup>321</sup> Justice Alito filed a separate concurrence, arguing that a statement could be material even if it did not ultimately affect the final denaturalization decision, offering an example of a defendant who believes that his or her false statement would procure naturalization—even if that statement did not actually influence the final decision.<sup>322</sup>

Only after basing its ruling on the text itself did the Court raise the “disquieting consequences” of the prosecution's position—if the interpretation were otherwise, prosecutors would have “nearly limitless leverage” and new citizens would have “precious little security,” as nearly every immigrant would have a misstatement, however

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<sup>316</sup> See *id.* at 1924 (noting that the lower courts would have found a violation “irrespective” of whether those false statements had any impact on her citizenship determination).

<sup>317</sup> See *id.* at 1925 (noting that a materiality requirement would be required by the natural reading of the statute).

<sup>318</sup> *Id.* at 1924.

<sup>319</sup> *Id.* at 1925.

<sup>320</sup> See *id.* at 1930–31 (holding that the jury needed to find more than an unlawful false statement).

<sup>321</sup> See *id.* at 1931 (Gorsuch, J., concurring) (explaining that the question before the Court was simply the materiality requirement, not what the causation inquiry should require).

<sup>322</sup> See *id.* at 1931 (Alito, J., concurring) (suggesting that materiality “does not require proof that a false statement actually had some effect on the naturalization decision”).

minor, in their application.<sup>323</sup> The application, after all, asks “Have you EVER committed . . . a crime or offense for which you were NOT arrested?”<sup>324</sup> At oral argument, this question clearly troubled the Justices, as it would seem to allow the denaturalization of anyone who failed to report each and every instance in which they exceeded the speed limit without being pulled over.<sup>325</sup> Interestingly, the discussion of this issue was contained within the part of the opinion joined by all nine Justices, suggesting that the Court unanimously agreed that undermining the security of naturalized citizens would raise grave constitutional concerns.

But it is just this concern that is now reflected in the *Borgoño* case. Her denaturalization is sought on the basis of an alleged crime for which she had not been arrested at the time of her naturalization application.<sup>326</sup> That crime—looking the other way and continuing to provide ordinary administrative support while her boss was engaged in financial wrongdoing—is likely one that many people in a financially vulnerable position would commit, however, making it harder to argue that her actions demonstrate moral turpitude sufficient to disqualify her from citizenship. Especially given the tight connection between employment and health insurance, even persons of high moral character might find it difficult to risk losing their job by taking a stand against their employer’s fraud.

#### IV

#### THE PROBLEM WITH CIVIL DENATURALIZATION

It is understandable that after its sweeping constitutional holding in *Afroyim*, the Supreme Court would turn to a narrower formalism in later cases. After all, the holding in *Afroyim* stood on shaky ground after the decision, and there was valid concern that a new appointment to the Court would swing the pendulum back toward the Court’s previous holding in *Perez*. Focusing more narrowly on textual interpretation allowed the Court to maintain the broader constitutional holding over the next fifty years and come to agreement in the cases that followed.

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<sup>323</sup> *Id.* at 1927.

<sup>324</sup> *Id.*

<sup>325</sup> See Transcript of Oral Argument at 53, *Maslenjak v. United States*, 137 S. Ct. 1918 (2017) (No. 16-309) (suggesting at oral argument that a “serious constitutional question” is raised when an American citizen can “have his citizenship taken away because 40 years before, he did not deliberately put on paper what his nickname was or what . . . his speeding record was 30 years before that, which was, in fact, totally immaterial,” and asking rhetorically, “That’s not a constitutional question?” (statement of Breyer, J.)).

<sup>326</sup> Complaint, *supra* note 86, at 5, para. 20 (noting that *Borgoño* applied to become a citizen while still engaged in the alleged criminal activity).

And for the subsequent half-century, the Court's narrower approach did little or no harm to the civil and political rights of naturalized citizens. The number of attempted denaturalizations declined dramatically, as a consequence of both the heightened constitutional protection and a rapid decline in the Red Scare.<sup>327</sup> Not only was Communism seen as less of a threat to the United States' interests, but a respect for civil liberties, freedom of thought, and equal treatment was viewed as the antidote to totalitarian regimes.<sup>328</sup> American public discourse presented civil liberties—and the due process protections backing them up—as essential aspects of what it means to be American.<sup>329</sup>

The few denaturalizations of alleged Nazi concentration-camp guards and other war criminals during the fifty years between 1967 and 2017 did little to disrupt an overall sense of citizenship security. The American political identity may be complex and variegated, but the ethos of “Never Again” meant that it included no room for those who supported the atrocities perpetrated by the Nazi regime.<sup>330</sup> Excluding such individuals from the body politic comported with the original approach of President Taft's Attorney General, George W. Wickersham, who ordered U.S. Attorneys to refrain from indiscriminately filing denaturalization proceedings against every single citizen for whom naturalization was alleged “to have been fraudulently or illegally procured unless some substantial results are to be achieved thereby in the way of betterment of the citizenship of the country.”<sup>331</sup> By the same token, it sent a message that those who sought refuge

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<sup>327</sup> See WEIL, *supra* note 110, at 179 (noting that denaturalizations declined rapidly post-1968).

<sup>328</sup> See Judith Resnik, *Detention, the War on Terror, and the Federal Courts: An Essay in Honor of Henry Monaghan*, 110 COLUM. L. REV. 579, 634 (2010) (“The effects of World War II and the Cold War influenced the expansion of criminal defendants' rights between the 1940s and the 1960s, as judges sought to distinguish the treatment accorded by the United States from that of totalitarian countries.”).

<sup>329</sup> See Cassandra Burke Robertson, *Due Process in the American Identity*, 64 ALA. L. REV. 255, 262 (2012) (“In the American mind, judicial process is not merely a means by which we resolve individual disputes; instead, it is a mechanism by which we ‘announce to the world something about our beliefs and values and our sense of ourselves and our society.’” (quoting Robert N. Strassfeld, *Responses to Ten Questions*, 37 WM. MITCHELL L. REV. 5133, 5148 (2011))).

<sup>330</sup> See ALLAN A. RYAN, JR., *QUIET NEIGHBORS: PROSECUTING NAZI WAR CRIMINALS IN AMERICA* 340 (1984) (“By revoking citizenship, the polity—the American people joined together in a society and a government—takes the most solemn and drastic step available to it: the civil equivalent of excommunication.”); Francine J. Lipman, *Bearing Witness to Economic Injustices of Undocumented Immigrant Families: A New Class of “Undeserving” Poor*, 7 NEV. L.J. 736, 738 (2007) (“Survivors of the Holocaust speak loudly and uniformly of one commandment: Never again: bear witness to injustice, racism, and hate and do what is necessary to prevent them.”).

<sup>331</sup> WEIL, *supra* note 110, at 28.

from the Nazis in the United States *were* truly American, and would be protected from those who had once persecuted them. As a result, programs seeking to identify and denaturalize former war criminals enjoyed broad support from the American public. Difficult questions about the constitutionality of those programs could therefore go unresolved.

But with the return of aggressive denaturalization programs, questions of constitutional legitimacy require an answer. The two cases discussed above, involving Baljinder Singh and Norma Borgoño, exemplify some of the procedural and substantive shortcomings we discuss in this section. The courts in those cases have not yet had a chance to directly grapple with the questions we raise below. As of this writing, Borgoño's denaturalization case has not yet been heard, and Singh's was decided on summary judgment without the benefit of an adversarial proceeding. These two cases are just the tip of the iceberg in the government's plan to ramp up denaturalization actions, however; the Justice Department has "stated its intention to refer approximately an additional 1600 [cases] for prosecution."<sup>332</sup> This action would be more than a ten-fold increase over the fewer than 150 attempted over the last fifty years.<sup>333</sup> As more cases are litigated, these are questions that courts will need to confront.

### A. *The Procedural Due Process Deficiencies of Civil Denaturalization*

One of the most glaring constitutional weaknesses of civil denaturalization was identified by the Supreme Court back in 1943: the lack of procedural due process in ordinary civil litigation.<sup>334</sup> The return of denaturalization as a political priority brings the issue of due process to the forefront. In 2018, a man was stripped of citizenship without being personally served with process, without making an appearance in the case either personally or through an attorney, and without benefiting from even a contested hearing at the summary judgment stage. He may not, even today, know that he has lost his citizenship rights.

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<sup>332</sup> Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Justice Department Secures First Denaturalization as a Result of Operation Janus (Jan. 9, 2018), <https://www.justice.gov/opa/pr/justice-department-secures-first-denaturalization-result-operation-janus>.

<sup>333</sup> See WEIL, *supra* note 110, at 179–80 (noting that since 1968, fewer than 150 denaturalizations have been attempted and fewer than a half-dozen have actually been imposed).

<sup>334</sup> See *Schneiderman v. United States*, 320 U.S. 118, 122 (1943) (requiring "the clearest sort of justification and proof" to take away citizenship); *id.* at 160 (Douglas, J., concurring) ("A denaturalization suit is not a criminal proceeding. But neither is it an ordinary civil action since it involves an important adjudication of status.").

Even if nothing in the case violated the Federal Rules of Civil Procedure, the proceedings nevertheless give rise to serious questions of procedural due process.

As discussed above, the Supreme Court added some heightened procedural protections beyond what is ordinarily available in civil litigation: The Court required a heightened burden of proof and overturned a denaturalization obtained by the defendant's involuntary default.<sup>335</sup> The Court's language suggested that the risk of losing citizenship was serious enough to warrant heightened procedure; it required the government to meet a burden "substantially identical with that required in criminal cases," and asked that this level of proof be met even in cases where the defendant did not make an appearance.<sup>336</sup>

Not all of the Justices agreed that the heightened procedure was constitutionally required—but some did, including most notably Justice Rutledge.<sup>337</sup> Justice Rutledge's concurrence in *Klapprott* emphasized that ordinary civil litigation was insufficient to protect against the erroneous deprivation of citizenship.<sup>338</sup> Treating a denaturalization suit "as if it were nothing more than a suit for damages for breach of contract or one to recover overtime pay," he argued, "ignores . . . every consideration of justice and of reality concerning the substance of the suit and what is at stake."<sup>339</sup> He referred to the right of citizenship as "this most comprehensive and basic right of all," arguing that it should not be subject to "the device or label of a civil suit, carried forward with none of the safeguards of criminal procedure provided by the Bill of Rights."<sup>340</sup>

More than half a century has passed since Justice Rutledge suggested that ordinary civil litigation could not offer the constitutionally required level of procedural due process to defendants at risk of losing their citizenship. In the intervening decades, the Court has refined the doctrine of procedural due process. The Court's modern doctrinal developments do not cast doubt on Justice Rutledge's earlier concerns. Instead, they go further, supporting the notion that civil litigation is utterly inadequate to protect the defendant's liberty interest in citizenship.

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<sup>335</sup> See *Klapprott v. United States*, 335 U.S. 601, 602, 616 (1949) (setting aside a default judgment of denaturalization); *supra* Part III.

<sup>336</sup> *Klapprott*, 335 U.S. at 612–13 (stating that "additional procedural safeguards" may be required, but at a minimum, the government must adhere to the heightened standard of proof "even in cases where the defendant has made default in appearance").

<sup>337</sup> See *supra* Part III.

<sup>338</sup> *Klapprott*, 335 U.S. at 616 (Rutledge, J., concurring).

<sup>339</sup> *Id.*

<sup>340</sup> *Id.* at 616–17.

The Supreme Court's current approach to procedural due process was adopted in *Mathews v. Eldridge*.<sup>341</sup> The *Eldridge* case noted that the "essence of due process" is the requirement of notice and opportunity to be heard.<sup>342</sup> Beyond that, it applied "what is in essence a cost-benefit analysis, weighing the risk that the plaintiff will be erroneously deprived of liberty against the cost of providing additional procedures to safeguard against such error."<sup>343</sup> The court must weigh both the individual's liberty interest in the outcome of the case and the government's administrative burden in providing heightened procedure, and the court must evaluate whether adopting such a heightened procedure would offer significant protection against the "erroneous deprivation" of the defendant's rights.<sup>344</sup>

Under this standard, a court deciding a denaturalization case would therefore have to look at three factors. First, what is the individual's interest in retaining citizenship? Second, what kind of a cost or administrative burden would it create to offer the defendant additional procedural protections? And finally, how much protection would those procedures actually offer—that is, to what extent could we rely on those procedures to protect against the erroneous deprivation of the defendant's citizenship rights?

Even on a purely individual and instrumentalist level, the right to citizenship is an important one. Citizenship carries with it the right to vote in elections and the right to carry a passport that allows for international travel.<sup>345</sup> Citizenship also allows individuals to qualify for employment in some government jobs, allows individuals to run for office if they so desire, and makes it easier for people to bring relatives to the United States.<sup>346</sup>

But the most important aspects of citizenship transcend the merely instrumental. To Chief Justice Warren, citizenship was not just

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<sup>341</sup> 424 U.S. 319, 335 (1976); Irina D. Manta & Cassandra Burke Robertson, *Secret Jurisdiction*, 65 EMORY L.J. 1313, 1331 (2016) (noting that the balancing test applied today is the one articulated in *Mathews v. Eldridge*).

<sup>342</sup> *Mathews*, 424 U.S. at 348.

<sup>343</sup> Manta & Robertson, *supra* note 341, at 1331.

<sup>344</sup> *Id.*

<sup>345</sup> See Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1349 (2011) ("[I]n the turn toward the politics of universalism, something changed: voting became a fundamental right of citizens, closely tied to citizenship itself, that could only be denied or abridged by the state with compelling reason."); 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, 576 (2014) (referring to passports as "the ultimate and definitive proof of citizenship and identity under international law").

<sup>346</sup> See *Should I Consider U.S. Citizenship?*, DEP'T OF HOMELAND SEC., <https://www.uscis.gov/citizenship/learners/should-i-consider-us-citizenship> (last visited Jan. 8, 2019) (listing benefits of United States citizenship).



fundamental—it was the most fundamental right from which all the others were derived.<sup>347</sup> It is true that the Supreme Court has been inconsistent in its characterization of the citizenship right, with Justices sometimes suggesting that the deprivation of citizenship causes no real harm to the individual, who may still go about his or her life without obvious disruption,<sup>348</sup> while other times recognizing that the loss of citizenship threatens to “result in the loss ‘of all that makes life worth living.’”<sup>349</sup> But as discussed above, citizenship is about much more than civic duties exercised on an occasional basis, such as voting or serving on a jury; instead, citizenship goes to the very heart of membership in the political polity.<sup>350</sup> Citizenship encapsulates a right to belong, a right to participate in the political life of the country, and a right to feel secure in one’s national identity.<sup>351</sup> Whether citizenship is seen as the “right to have rights,” or whether it is viewed more narrowly as a right to participate in the exercise of sovereign authority,<sup>352</sup> its central place in American history cannot be ignored. The country, after all, was founded on the ideal of citizens’ exercise of sovereign authority. Can civil litigation offer adequate protection for those rights? Certainly, the Supreme Court in *Schneiderman* and *Klaprott* thought that at the very least, certain procedures would need to be modified; those cases required a heightened burden of proof and disallowed a default judgment to be granted without an evidentiary hearing. However, current cases show that even these protections are not enough. A summary judgment, entered after the government’s affidavits are simply taken as true, does not offer significantly more protection than the default judgment in *Klaprott*. The *Singh* case demonstrates the problem: The government enters into evidence an affidavit stating that Singh’s failure to show up for an asylum hearing more than twenty years ago was a result of intentional fraud. If taken as true, as it was in the one-sided hearing, then the statement meets the “clear and convincing” standard. But to observers outside the courtroom, not bound to accept the govern-

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<sup>347</sup> See *Perez v. Brownell*, 356 U.S. 44, 64–65 (1958) (Warren, C.J., dissenting) (“Citizenship is man’s basic right for it is nothing less than the right to have rights.”).

<sup>348</sup> See, e.g., *Vance v. Terrazas*, 444 U.S. 252, 266 (1980) (“[E]xpatriation proceedings are civil in nature and do not threaten a loss of liberty.”).

<sup>349</sup> *Knauer v. United States*, 328 U.S. 654, 659 (1946) (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)).

<sup>350</sup> See *supra* notes 330–34 and accompanying text.

<sup>351</sup> See Fishkin, *supra* note 345, at 1333–56 (discussing the connection of voting rights to dignity, equality, and citizenship and explaining how voting rights, through the assurance of political participation, help to preserve all other rights).

<sup>352</sup> See Jonathan David Shaub, *Expatriation Restored*, 55 HARV. J. ON LEGIS. 363, 423 (2018) (“Today, citizenship may be better conceived of as the right to participate in the state as a component of its sovereignty, than the right to have rights.”).

ment's statement as true, that conclusion does not lend itself to confidence. What motive would Singh have had to lie about his name, when he had never been denied asylum on the merits, and no factual findings had been made as to his particular case?

At an adversarial hearing, that question could have been asked. Perhaps the answer would have pointed toward immigration fraud; perhaps it might have suggested a more innocent explanation. But under the current procedures in play, we have no way of knowing. Did Singh know that he had been sued? If so, was he unable to afford an attorney to represent him? Does he know, even now, that a judgment of denaturalization has been entered against him? Could he have had a factual defense to the suit against him? Without answers to these questions, it is difficult to have confidence in the outcome of the case.

An adversarial hearing, with both parties represented by counsel, would go a long way toward protecting against the erroneous deprivation of citizenship rights. Attorneys prosecuting such cases have admitted as much. By identifying the "benefits" of pursuing a civil case rather than filing charges—including the lack of a jury trial, the availability of summary judgment, and the absence of any right to counsel—they admit that these procedural features facilitate obtaining denaturalization.<sup>353</sup> The procedural protections offered in a criminal action make denaturalization more difficult to achieve—and therefore do more to protect against the erroneous deprivation of citizenship.

Eliminating civil denaturalization admittedly comes with costs—financial, administrative, and systemic. The financial and administrative costs arise from handling denaturalization through immigration-fraud proceedings in the criminal justice system, rather than through civil litigation. Naturalization fraud is a felony, and it has been more than fifty years since the Supreme Court held that due process requires an attorney to be appointed in felony cases for individuals unable to afford counsel on their own.<sup>354</sup> Constitutionally guaranteed criminal procedure likewise ensures that defendants have actual notice of the proceedings against them, including the right to confront witnesses.<sup>355</sup> And unlike the law for civil denaturalization, the

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<sup>353</sup> Bianco et al., *supra* note 10, at 8.

<sup>354</sup> *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.").

<sup>355</sup> U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.").

immigration-fraud enactment carries a statute of limitations; cases may not be brought after more than ten years after the fact.<sup>356</sup> Applying these heightened procedures means that each denaturalization case will cost more to prosecute; the cost of counsel, and the cost of trial proceedings, will be greater than the cost of a summary judgment hearing in which only the government appears.

Even if the cost of each proceeding is higher, it is likely that the financial costs will be offset by a lower total number of prosecutions. The statute of limitations in naturalization-fraud cases means that some number of cases will not be prosecutable. And though the Supreme Court has applied a heightened burden of proof in denaturalization cases, that heightened burden has been interpreted as requiring “clear, unequivocal, and convincing” evidence,<sup>357</sup> which is still a lower burden than proof beyond a reasonable doubt. Taking these factors together, it is likely that significantly fewer cases could successfully be prosecuted—especially from Operation Janus, which looks back well beyond the ten-year statute of limitations.<sup>358</sup> If fewer cases are subject to prosecution, then a reduction in the number of viable cases could offset the increased cost of providing enhanced procedural protections in the cases that remain. Fewer prosecutions, of course, means that some people may “get away” with committing naturalization fraud. But even Attorney General Wickersham realized back in 1909 that many such cases of fraud were not worth pursuing, especially when the individuals offered no risk to the larger society.<sup>359</sup>

The elements of the due process analysis work together interdependently and therefore require balancing multiple factors. Establishing a right to counsel and a mandatory notice procedure, for example, means weighing the financial cost of providing these measures against the truth-finding benefits of the adversary process. Applying a heightened burden of proof and imposing a statute of limitations means weighing the risk of erroneous removal of citizenship against the risk of erroneous non-enforcement. Even the best justice system must operate in hindsight; no trial can ensure perfectly accurate fact-finding. In balancing these risks, American courts have generally thought that “it is far worse to convict an innocent man than to let a guilty man go free.”<sup>360</sup> If the citizenship interest is central to the

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<sup>356</sup> See 18 U.S.C. § 1425 (2012) (defining unlawful naturalization); 18 U.S.C. § 3291 (2012) (prescribing a ten-year statute of limitations).

<sup>357</sup> *Schneiderman v. United States*, 320 U.S. 118, 154 (1943).

<sup>358</sup> See *supra* Section I.A.1.

<sup>359</sup> See WEIL, *supra* note 110, at 27–28.

<sup>360</sup> *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring); see also 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 357 (1871) (“[B]etter that ten

nation's foundation and identity—and this Article argues that it is<sup>361</sup>—then both the financial costs and the risk that an occasional individual might wrongfully gain and keep citizenship are a small price to pay to avoid unjustly stripping citizenship from others.

### B. *Beyond Procedure: The Constitutional Infirmities of Civil Denaturalization*

The centrality and importance of the underlying citizenship right extends beyond procedural due process. While procedural due process “asks whether the government has followed the proper procedures when it takes away life, liberty or property,” courts look to the doctrine of substantive due process to determine “whether there is a sufficient substantive justification, a good enough reason for such a deprivation.”<sup>362</sup> Of course, these matters are closely related; just as the substantive value of the underlying liberty interest must be weighed in the procedural due process analysis, so, too, are the availability and adequacy of procedural protections considered in a substantive due process analysis.<sup>363</sup> And, of course, substantive due process also interacts with other constitutional protections<sup>364</sup>—which for denaturalization necessarily includes the Citizenship Clause.<sup>365</sup> Again, however, civil denaturalization falls far short of constitutional protections.

The Supreme Court's precedent in *Afroyim* and *Schneider* may be enough to find civil denaturalization unconstitutional. Those decisions, after all, warn against applying different standards to naturalized citizens and those born in the United States.<sup>366</sup> But denaturalization for fraud and illegal procurement is applicable only to naturalized citizens, not to those born in the United States—the

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guilty persons escape, than that one innocent suffer.”); Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173, 198–206 (1997) (collecting cases and exploring the different courts' formulations for how to weigh the wrongful acquittal of the guilty against the wrongful conviction of the innocent).

<sup>361</sup> See *infra* Section IV.C.

<sup>362</sup> Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1501 (1999).

<sup>363</sup> See Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 *COLUM. L. REV.* 1013, 1019 (2008) (describing the “elusive relationship” between the two as “one of the recurring and unresolved debates in legal theory”).

<sup>364</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602–03 (2015) (“The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles.”).

<sup>365</sup> See *supra* Section III.C.

<sup>366</sup> See *United States v. Kairys*, 782 F.2d 1374, 1383 (7th Cir. 1986) (“*Schneider* and *Afroyim* do stand for the propositions that naturalized and native citizens must be treated equally and that before any citizen can be expatriated or denaturalized there must be a voluntary and intentional act.”); *supra* notes 227–46 and accompanying text.

very dichotomy that the *Schneider* Court ruled impermissible when it held that Congress could not denaturalize citizens for living abroad in the country of their birth, because such a requirement by its nature could not apply to native-born U.S. citizens.<sup>367</sup> The *Schneider* Court warned that such distinctions risk creating “a second-class citizenship” that discriminates against naturalized citizens.<sup>368</sup>

The Fourteenth Amendment’s citizenship clause that supported the holding in *Afroyim* likewise suggests that Congress lacks the power to take away citizenship once it is granted. While it is true that the *Afroyim* Court specifically excluded cases of fraud and illegal procurement,<sup>369</sup> the opinion’s logic covers the situations we see today. The underlying concern of *Afroyim* was that denaturalization could be wielded as a political weapon—that “a group of citizens temporarily in office can deprive another group of citizens of their citizenship.”<sup>370</sup> And yet that is exactly what we see with Operation Janus and the proposed denaturalization task force: Current political expediency supports looking back through the files of individuals naturalized years or decades ago, and, in particular, prioritizing the files of individuals from countries associated with the current popular fears and anxieties.<sup>371</sup>

The Supreme Court’s post-1967 development of substantive due process and equal protection in cases outside of the denaturalization context strengthens this conclusion. Substantive due process is grounded in the Fifth and Fourteenth Amendments, which forbid depriving a person of “life, liberty, or property, without due process of law.”<sup>372</sup> The doctrine asks whether particular restrictions on liberty are constitutionally valid—that is, whether there is “a sufficient substantive justification” for that deprivation of liberty.<sup>373</sup> It protects against the arbitrary loss of fundamental rights. Scholar Timothy Sandefur has used Shirley Jackson’s short story *The Lottery* to illustrate the idea of substantive due process.<sup>374</sup> In the story, villagers must

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<sup>367</sup> *Schneider v. Rusk*, 377 U.S. 163, 168–69 (1964). *But see Kairys*, 782 F.2d at 1383 (“[T]his standard applies only to acts committed after citizenship. Because there are no analogous pre-citizenship requirements for native-born individuals, naturalized citizens are not being treated any differently than their intrinsic differences require.”).

<sup>368</sup> *Schneider*, 377 U.S. at 169.

<sup>369</sup> *Afroyim v. Rusk*, 387 U.S. 253, 267 n.23 (1967).

<sup>370</sup> *Id.* at 268.

<sup>371</sup> See *supra* note 35 (noting that Operation Janus focuses on what the U.S. government has termed “special interest countries” based on national security concerns).

<sup>372</sup> U.S. CONST. amends. V, XIV.

<sup>373</sup> Chemerinsky, *supra* note 362, at 1501.

<sup>374</sup> Sandefur, *supra* note 32, at 297–98 (citing SHIRLEY JACKSON, *THE LOTTERY* (1949), reprinted in SHIRLEY JACKSON: NOVELS AND STORIES 227–35 (Joyce Carol Oates ed., 2010)); see also Manta & Robertson, *supra* note 341, at 1341.

choose a member to undergo what the reader later learns is a death by stoning.<sup>375</sup> The villagers make their choice of individual through a procedure that is scrupulously fair, ensuring that each villager has the same chance to be chosen at random—but the horror of the story is the utter arbitrariness of the ultimate fate. In Sandefur’s words, the story illustrates a “fundamentally arbitrary, yet regular procedure.”<sup>376</sup> The essential protection of substantive due process is the protection of the underlying right. Even equitable procedures can violate due process if they arbitrarily deprive individuals of a fundamental right.

The Supreme Court’s most recently articulated the substantive due process test in *Obergefell v. Hodges*, which held that states could not restrict the right to same-sex marriage.<sup>377</sup> In *Obergefell*, the Court noted that the first question is whether the liberty at issue can be characterized as a fundamental right.<sup>378</sup> In determining whether a right is truly fundamental, the Court must consider “central reference to specific historical practices.”<sup>379</sup> Citizenship, as the foundation of voting and political participation—which are “preservative of all rights”<sup>380</sup>—has the requisite importance and historical pedigree to qualify as a fundamental right.

The deprivation of a fundamental right requires a compelling state interest.<sup>381</sup> Civil denaturalization fails that test. In contrast to the central role that citizenship has played over the nation’s history, expatriation and denaturalization have played only supporting roles, with the passage of time throwing them into significant disfavor.<sup>382</sup> For the first century of American life, citizenship revocation was a rarity in the political process.<sup>383</sup> Although its use grew in the early part of the

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<sup>375</sup> JACKSON, *supra* note 374.

<sup>376</sup> Sandefur, *supra* note 32, at 297.

<sup>377</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (“The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment’s guarantee of the equal protection of the laws.”).

<sup>378</sup> *Id.* at 2598.

<sup>379</sup> *Id.* at 2602.

<sup>380</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (“Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless [voting] is regarded as a fundamental political right, because preservative of all rights.”); see Kim, *supra* note 162, at 1466–70 (2001) (summarizing precedent that “[c]itizenship, once attained, constitutes a fundamental right”).

<sup>381</sup> See *Obergefell*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting) (“The theory is that some liberties are ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental,’ and therefore cannot be deprived without compelling justification.” (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934))).

<sup>382</sup> See *supra* Part II.

<sup>383</sup> See *supra* Section II.A.

twentieth century,<sup>384</sup> revocation had largely receded by the latter part of that century.<sup>385</sup> It is hard to imagine a compelling need for a process that is so little used—and, at the same time, so susceptible to the political winds.

That is not to say that there is *no* state interest in civil denaturalization. First, the Supreme Court has noted the importance of protecting Congress's constitutional power to set naturalization requirements; if citizens failing to meet Congress's stated requirements are naturalized nonetheless, then that action would usurp Congress's power.<sup>386</sup> Second, some have emphasized the importance of deterring immigration fraud.<sup>387</sup> If naturalization is irrevocable, then perhaps individuals will believe that they have nothing to lose by engaging in fraudulent conduct. Finally, and perhaps most controversially, some have identified an interest in protecting the nation's political fabric against those who mean it harm. During the early Cold War era, that resulted in the attempted exclusion of communists;<sup>388</sup> in the modern era, it has led to proposals to denaturalize individuals with ties to terrorism.<sup>389</sup>

None of these interests can withstand heightened scrutiny, however.<sup>390</sup> First, protection of Congress's naturalization power can be accomplished on the front end with careful review of the naturalization application through an administrative process that is likely both less expensive and more systematic in rooting out potential fraud or error. Likewise, whatever disincentives to fraud the denaturalization program might produce are likely vastly overshadowed by the incentives inherent in the system. Even without denaturalization, there are tremendous incentives to avoid immigration fraud. Getting caught

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<sup>384</sup> See *supra* Sections II.B, II.C.

<sup>385</sup> See *supra* Section II.D.

<sup>386</sup> See *Fedorenko v. United States*, 449 U.S. 490, 518 (1981) (“An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon the terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.” (quoting *United States v. Ginsberg*, 243 U.S. 472, 474–75 (1917))).

<sup>387</sup> See, e.g., Rainer Bauböck & Vesco Paskalev, *Cutting Genuine Links: A Normative Analysis of Citizenship Deprivation*, 30 GEO. IMMIGR. L.J. 47, 80 (2015) (arguing that civil citizenship law requires its own sanctions to deter cheating).

<sup>388</sup> WEIL, *supra* note 110, at 56.

<sup>389</sup> See, e.g., Spiro, *supra* note 167, at 2171 (“As those hostile to the United States retain their citizenship, citizenship will no longer demarcate the boundary between friends and enemies.”).

<sup>390</sup> See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 864 (2006) (“Substantive due process cases, which make up the majority of strict scrutiny applications in the fundamental rights area, survive at a rate (22%) consistent with strict scrutiny more generally.”).

during the immigration or naturalization process means being permanently barred from the United States and potentially spending time in prison for immigration fraud.<sup>391</sup> If someone is foolish enough—or desperate enough—to be willing to risk those consequences, they are unlikely to be deterred by the fear that they could be denaturalized years or decades later. Finally, the state interest in protecting the nation’s political fabric is likely served through more narrowly targeted procedures: pursuing criminal actions against actual and attempted terrorist acts to ensure physical safety, while safeguarding civil liberties to allow the marketplace of political ideas to serve the nation’s interests. The lesson of McCarthyism during the Red Scare was that the political fabric of the nation is strongest when political ideas are freely expressed; trying to suppress political disagreement is itself a threat to the American identity and political fabric.<sup>392</sup>

### C. *Civil Denaturalization’s Threat to Constitutional Democracy*

The Supreme Court’s failure to articulate a consistent theory of citizenship leaves the Court’s denaturalization doctrine unmoored from the constitutional foundations of democracy. Chief Justice Warren articulated the connection between constitutional democracy and citizenship in the middle of the century.<sup>393</sup> Warren’s view derived from founding principles enshrined in the Declaration of Independence: “Governments are instituted among Men, deriving their just powers from the consent of the governed.”<sup>394</sup> Under this conception, Warren argued, citizenship reflects the very “right to have rights.”<sup>395</sup> That is, it is not the state that creates the right of citizenship; instead, the citizens themselves possess sovereignty, delegating to the state the “power to function as a sovereignty” as part of the social contract.<sup>396</sup>

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<sup>391</sup> INA § 212(a)(6)(C)(i) (codified at 8 U.S.C. § 1182(a)(6)(C)(i) (2012)); *see also* Robert L. Reeves, *Visa Fraud and Waivers*, REEVES IMMIGR. L. GROUP, <https://www.rreeves.com/immigration-news/visa-fraud-waivers> (last visited Jan. 10, 2019) (“A finding of fraud under section 212(a)(6)(c) of the INA results in a lifetime bar for future immigration benefits such as a green card and the ability to petition family unless granted a waiver.”).

<sup>392</sup> *See* Masumi Izumi, *Alienable Citizenship: Race, Loyalty and the Law in the Age of ‘American Concentration Camps,’ 1941–1971*, 13 *ASIAN AM. L.J.* 1, 20 (2006) (noting that in the McCarthy era, freedom became a privilege only afforded to those the government deemed loyal).

<sup>393</sup> *Perez v. Brownell*, 356 U.S. 44, 64–65 (1958) (Warren, C.J., dissenting), *overruled in part by* *Afroyim v. Rusk*, 387 U.S. 253 (1967).

<sup>394</sup> *Id.* at 64 (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).

<sup>395</sup> *Id.*

<sup>396</sup> *Id.* at 65 (“[T]he citizens themselves are sovereign, and their citizenship is not subject to the general powers of their government.”).



Although the Supreme Court has not continued to engage in discussion of citizenship theory, scholars of democratic process have extended the conversation. Shai Lavi articulated three traditional theories of citizenship applied by countries around the world: citizenship as security (that is, a state-granted right to permanently reside in a territory, as in the United Kingdom),<sup>397</sup> citizenship as a social contract (founded on the consensual allegiance of the citizen, reflecting the view of United States citizenship expressed by Chief Justice Warren),<sup>398</sup> and citizenship as an ethnonational bond (with Israel presented as “the closest representative of this model”).<sup>399</sup> Rainer Bauböck and Vesco Paskalev expanded further on this approach, offering contrasting conceptions of the fundamental basis of citizenship.<sup>400</sup> One is a state-directed approach in which citizenship is founded on state discretion; under this view, “citizenship policies should primarily serve the goals of the State represented by a democratically legitimate government.”<sup>401</sup> Another approach, however, which historically held sway under the United States constitutional order, views citizenship “as an individual entitlement that is held *against* the State . . . a foundation of individual autonomy analogous to individual property that the State must protect and of which it cannot deprive its citizens without losing legitimacy.”<sup>402</sup>

The idea of citizenship as part of a social compact that gives rise to an individual right is woven into the fabric of American democracy, and is the only theory consistent with American constitutional structure. As one scholar has written, “Unlike Europe’s ethnic and cultural nationalism, American nationalism is basically civic; the United States is an idea-based nation.”<sup>403</sup> Individuals “willing to respect and accept” the political tenets of our constitutional system were welcomed into the American polity; it was the shared commitment to the Constitution and to the political order that it represented that defined a shared national identity.<sup>404</sup> The polity was formed first, before the state gained sovereignty; and upon the nation’s founding, “[t]he powers not delegated to the United States by the Constitution, nor

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<sup>397</sup> Shai Lavi, *Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel*, 13 *NEW CRIM. L. REV.* 404, 409–13 (2010).

<sup>398</sup> *Id.* at 413–17.

<sup>399</sup> *Id.* at 399.

<sup>400</sup> See Bauböck & Paskalev, *supra* note 387, at 60–71.

<sup>401</sup> *Id.* at 63.

<sup>402</sup> *Id.* (emphasis added).

<sup>403</sup> Liav Orgad, *Creating New Americans: The Essence of Americanism Under the Citizenship Test*, 47 *HOUS. L. REV.* 1227, 1295 (2011).

<sup>404</sup> *Id.* at 1296.

prohibited by it to the States, [were] reserved to the States respectively, or to the people.”<sup>405</sup>

Under Chief Justice Warren’s view of denaturalization, the state therefore could not involuntarily denaturalize an individual—especially not as a matter of ordinary legislative policy.<sup>406</sup> After all, if the state’s sovereign power existed only as a delegation from its citizens, then how could the state presume to take citizenship away?<sup>407</sup> Such an action would be a usurpation of power. Ultimately the view originally expressed by Chief Justice Warren would persist. As Justice Stewart stated in his dissent in *Mendoza-Martinez*, “the power to expatriate endows government with authority to define and to limit the society which it represents and to which it is responsible.”<sup>408</sup> As the Court recognized in those cases, such a view does not comport with the constitutional framework of the United States.

Current denaturalization policies threaten the cohesion of a political structure founded on a sovereign citizenry.<sup>409</sup> In the United States’ constitutional democracy, it is the status of citizenship that, in Alexander Meiklejohn’s words, establishes an individual as both “ruler” and “ruled”—and thereby provides the basis for political freedom.<sup>410</sup> The Supreme Court in *Afroyim* adopted a similar theory of citizenship, stating that “[c]itizenship in this Nation is a part of a cooperative affair. Its citizenry is the country and the country is its citizenry.”<sup>411</sup> Making the citizenship of naturalized citizens vulnerable to political winds changes the very character of that country—and that is the effect of denaturalization, even when such policies are theoretically targeted at cases of immigration fraud or illegal procurement.

It is no answer to say that not all naturalized citizens will, or even can, be so targeted. The problem is not the number of citizens subject to denaturalization proceedings, but rather the arbitrariness of who is

<sup>405</sup> U.S. CONST. amend. X.

<sup>406</sup> *Perez v. Brownell*, 356 U.S. 44, 65 (1958) (Warren, C.J., dissenting) (“Whatever . . . the scope of its powers to regulate the conduct and affairs of all persons within its jurisdiction, a government of the people cannot take away their citizenship simply because one branch of that government can be said to have a conceivably rational basis for wanting to do so.”), *overruled in part by Afroyim v. Rusk*, 387 U.S. 253 (1967).

<sup>407</sup> *Cf. id.* at 83–84 (“The Fourteenth Amendment grants citizenship to the native-born . . . . I see no constitutional method by which it can be taken from him.”).

<sup>408</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 214 (1963) (Stewart, J., dissenting).

<sup>409</sup> *See* WEIL, *supra* note 110, at 5 (“American citizens, naturalized and native-born, were redefined as possessing sovereignty themselves.”).

<sup>410</sup> ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 6 (1948) (arguing that in a self-governing society, “[t]here is only one group—the self-governing people. Rulers and ruled are the same individuals”); *id.* at 11 (“We the People . . . make and administer law.”); *id.* at 15 (“We, and we alone, are the rulers.”).

<sup>411</sup> *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967).

targeted—and the political message that is sent by that targeting.<sup>412</sup> Combining selective enforcement with race, religion, or national origin—as with Operation Janus’s focus on “special interest countries,” for example—gives rise to serious constitutional concerns.<sup>413</sup> When the government pursues cases that are neither clear-cut nor morally reprehensible, it is easy for naturalized citizens to identify with denaturalization defendants. Few people would personally identify with a Nazi concentration camp guard. But a grandmother with a rare kidney disease, nervous about keeping her job, who looked the other way when her boss committed financial crimes? Or a non-English-speaking immigrant whose translator may have filed an asylum action under the wrong name, causing him to miss a court date? It is easy for people to imagine themselves in the shoes of many of those at risk of losing their citizenship.<sup>414</sup>

Because many naturalized citizens may be able to identify with today’s denaturalization defendants, they are likely to feel excluded from the American polity. That feeling of exclusion creates a chilling effect as individuals fear for their own status. Actions “targeting the foreign-born” have been recognized by scholars as “threaten[ing] the social contract and expos[ing] the vulnerability of immigrants’ rights to political manipulation.”<sup>415</sup> It can cause the fears expressed in earlier cases to come to pass: Naturalized immigrants may feel excluded from the body politic, afraid to participate in public life lest they run afoul of individuals in power who might seek to deport them.<sup>416</sup> Of

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<sup>412</sup> As journalist Masha Gessen has pointed out in the context of anti-LGBT legislation in Russia, laws that are only selectively enforced are necessarily intended to send a political message. Lane Sainty, *8 Things We Learned About Russian American Journalist Masha Gessen*, BUZZFEED NEWS (Mar. 7, 2016), <https://www.buzzfeed.com/lanesainty/8-things-you-should-know-about-masha-gessen> (“Once you write a law that can only be enforced selectively, then the point of it is not to have legislation, the point of it is to have a message in the public.”); see also *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (“The requirements for a selective-prosecution claim draw on ‘ordinary equal protection standards.’” (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985))).

<sup>413</sup> See *Armstrong*, 517 U.S. at 464 (“[A] decision whether to prosecute may not be based on ‘an unjustifiable standard such as race, religion, or other arbitrary classification.’” (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962))).

<sup>414</sup> See deGooyer, *supra* note 8 (describing that “many naturalized citizens” might now “question[ ] the validity of an immigration status they assumed would always be safe” as a result of current denaturalization policies).

<sup>415</sup> Marta Tienda, *Demography and the Social Contract*, 39 DEMOGRAPHY 587, 607 (2002).

<sup>416</sup> See *Schneiderman v. United States*, 320 U.S. 118, 167 (1943) (Rutledge, J., concurring) (“No citizen with such a threat hanging over his head could be free.”). Along these lines, concerns have risen that the government is using social media to engage in greater surveillance of both citizens and immigrants. See Daniella Silva, *ACLU Demands Records of Social Media Surveillance Under Trump*, NBC NEWS (May 24, 2018), <https://>

course, this was the very consequence that Justice Rutledge warned about in *Schneiderman*.<sup>417</sup>

The seemingly narrow exception to the Court's prohibition on Congress's power to "take away a man's citizenship"<sup>418</sup> for fraud and illegal procurement is not as limited as it might have felt to the *Afroyim* Court when it excluded fraud actions from the case's broad holding.<sup>419</sup> History instructs us—and modern cases confirm—that bureaucratic error and ordinary human frailty give rise to very common vulnerabilities throughout the immigration process. A case filed under the wrong name can be difficult to distinguish from an individual trying to get a second bite at the apple in an asylum proceeding.<sup>420</sup> A moment of weakness from an individual in a vulnerable position can raise later questions about "moral character."<sup>421</sup> And, as the Justices on the Supreme Court pointed out in the oral argument in *Maslenjak*, minor crimes such as speeding are nearly ubiquitous, and most cases do not result in getting ticketed.<sup>422</sup> *Maslenjak*'s materiality requirement can help ensure that some minor violations do not result in criminal prosecution for illegally procuring naturalization.<sup>423</sup> But *Maslenjak*'s standard does not apply in civil cases, and even when there is an analogous materiality provision, it would not help in situations like Singh's or Borgoño's.<sup>424</sup>

In addition to avoiding the chilling effect of denaturalization, a primary force behind the Supreme Court's protection of citizenship status might also be a "fear that the state would abuse any denaturalization power it is recognized to have."<sup>425</sup> Certainly, the very concept of citizenship can be used as a weapon to attack members of an

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[www.nbcnews.com/tech/social-media/aclu-demands-records-social-media-surveillance-under-trump-n877036](http://www.nbcnews.com/tech/social-media/aclu-demands-records-social-media-surveillance-under-trump-n877036).

<sup>417</sup> See *supra* note 176 and accompanying text.

<sup>418</sup> *Afroyim v. Rusk*, 387 U.S. 253, 267 (1967).

<sup>419</sup> *Id.* at 267–68.

<sup>420</sup> See *supra* Section I.B.1.

<sup>421</sup> See *supra* Section I.B.2.

<sup>422</sup> Transcript of Oral Argument at 54, *Maslenjak v. United States*, 137 S. Ct. 1918 (2017) (No. 16-309) (Roberts, C.J.) ("If you take the position that . . . not answering about the speeding ticket or the nickname is enough to subject that person to denaturalization, the government will have the opportunity to denaturalize anyone they want, because everybody is going to have a situation where they didn't put in something like that.")

<sup>423</sup> See *Maslenjak v. United States*, 137 S. Ct. 1918, 1925, 1927 (2017) (explaining the materiality requirement).

<sup>424</sup> See *id.* at 1925 n.2 ("[W]e have interpreted a civil statute closely resembling § 1425(a)—which authorizes denaturalization when, inter alia, citizenship is 'illegally procured,' 8 U.S.C. § 1451(a)—to cover that qualifications-based species of illegality.")

<sup>425</sup> T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471, 1499 (1986) (arguing that fear of the state's abuse of denaturalization is the only logical explanation for the Court's "intent-to-relinquish test" in *Afroyim* and *Terrazas*).

opposing political party. Suggesting that certain individuals—or members of certain disfavored groups—are not legitimately part of the nation’s citizenry is a way of casting doubt on their right to participate in public life.<sup>426</sup> And to the extent that civil and political rights flow from citizenship, it suggests that those civil rights deserve lessened state protection.

For example, when thirteen Russians were criminally charged in the United States for conspiring to undermine the 2016 U.S. election, Russian president Vladimir Putin attempted to cast doubt on the legitimacy of their Russian citizenship, reportedly saying: “Maybe they are not even Russians . . . but Ukrainians, Tatars or Jews, but with Russian citizenship, which should also be checked.”<sup>427</sup>

The overtly anti-Semitic message underlying the statement was certainly disquieting, and it was rightly subjected to immediate international pushback.<sup>428</sup> But the belief that some legal citizens are not full or “real” members of a society is an idea that is gaining international traction with the rise of ethno-nationalism<sup>429</sup>—including within the United States, a nation founded on the integration of an immigrant population into the political fabric of the country.<sup>430</sup> For example, in July 2018 President Trump falsely tweeted: “Just out that the Obama Administration granted citizenship, during the terrible Iran Deal negotiation, to 2500 Iranians – including to government

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<sup>426</sup> Cf. *Schneiderman v. United States*, 320 U.S. 118, 159 (1943) (“Were the law otherwise, valuable rights would rest upon a slender reed, and the security of the status of our naturalized citizens might depend in considerable degree upon the political temper of majority thought and the stresses of the times.”).

<sup>427</sup> Nicholas Fandos & Matthew Luxmoore, *After Putin Cites Jews, Democrats Implore Trump to Extradite Russians*, N.Y. TIMES (Mar. 12, 2018), <https://www.nytimes.com/2018/03/12/us/politics/democrats-trump-election-interference-russia-jews.html>.

<sup>428</sup> *Id.* (“Many commentators considered it a clear echo of the anti-Semitism that has plagued Russia’s history since at least the 19th century.”).

<sup>429</sup> See Gideon Rachman, Opinion, *Donald Trump Leads a Global Revival of Nationalism*, FIN. TIMES (June 25, 2018), <https://www.ft.com/content/59a37a38-7857-11e8-8e67-1e1a0846c475> (“The nationalists’ dominant issue is usually immigration—and the need to defend the nation against ‘swarms’ of migrants from outside the west.”); Robert J. Shiller, *What’s Behind a Rise in Ethnic Nationalism? Maybe the Economy*, N.Y. TIMES: THE UPSHOT (Oct. 14, 2016), <https://www.nytimes.com/2016/10/16/upshot/whats-behind-a-rise-in-ethnic-nationalism-maybe-the-economy.html> (describing an increase in “political appeals” to the idea that “identity is defined by perceived genetic, religious or linguistic heritage rather than democratic ideals or principles”).

<sup>430</sup> See Kristina Bakkær Simonsen, *Does Citizenship Always Further Immigrants’ Feeling of Belonging to the Host Nation? A Study of Policies and Public Attitudes in 14 Western Democracies*, 5 COMP. MIGRATION STUD., no. 3, 2017, at 1, 1–2, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5331101> (“[R]ecent decades’ political debates about the granting of citizenship to immigrants tell another story of citizenship as a highly contested policy domain, which is not just about rules but also about identity.”).

officials. How big (and bad) is that?”<sup>431</sup> In fact, the negotiation had not included any deal for citizenship. And if President Trump’s tweet could be charitably read only to mean that such naturalizations had occurred over the same time period, it seriously undercounted the number of Iranian citizens naturalized during that period—in 2015, over ten thousand of them.<sup>432</sup> Even if the content of the tweet is demonstrably false, its “metamessage” still matters.<sup>433</sup> The underlying meaning of the tweet undermines the legitimacy of citizenship in two ways, focusing on political affiliation as well as national origin: The tweet suggests that both individuals naturalized under a previous political administration as well as citizens born in Iran should be viewed with suspicion. It echoes the message of Putin’s statement, suggesting that for some people citizenship may be merely a legal technicality and not a fundamental identity shared by all.<sup>434</sup>

The view that citizenship may be a mere legal technicality undermines a political system founded on the participation of its citizens.<sup>435</sup> When this view is combined with efforts to strip away the naturalization of long-time citizens, it becomes even more destructive to the political order and to the foundations of the United States constitutional democracy. Impugning the citizenship of individuals based on national origin raises the concern expressed by Alexander Aleinikoff, which is the “fear that the state would abuse any denationalization power it is recognized to have.”<sup>436</sup>

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<sup>431</sup> Donald J. Trump (@realDonaldTrump), TWITTER (July 3, 2018, 5:03 AM), <https://twitter.com/realdonaldtrump/status/1014117468858650624>.

<sup>432</sup> See Salvador Rizzo, *Trump Falsely Claims Obama Gave Citizenship to 2,500 Iranians During Nuclear Deal Talks*, WASH. POST (July 4, 2018), <https://www.washingtonpost.com/news/fact-checker/wp/2018/07/04/trump-claims-obama-gave-citizenship-to-2500-iranians-during-nuclear-deal-talks/> (fact-checking President Trump’s tweet and stating that “[i]n 2015 . . . 10,344 Iranian-born people were naturalized”).

<sup>433</sup> Linguist Deborah Tannen’s research separates a speaker’s message (the “[i]nformation conveyed by the meanings of words”) and metamessage (“[w]hat is communicated about relationships—attitudes toward each other, the occasion, and what we are saying”). She notes that people’s emotional reactions are more connected to the metamessage than the message. DEBORAH TANNEN, *THAT’S NOT WHAT I MEANT!: HOW CONVERSATIONAL STYLE MAKES OR BREAKS RELATIONSHIPS* 15–16 (1986); see also Cassandra Burke Robertson, *Beyond the Torture Memos: Perceptual Filters, Cultural Commitments, and Partisan Identity*, 42 CASE W. RES. J. INT’L L. 389, 397–98 (2009) (explaining how the metamessages of statements made by political leaders can shape the public’s understanding of a shared national identity).

<sup>434</sup> See Fishkin, *supra* note 345, at 1333–36 (discussing the centrality of citizenship to the American identity).

<sup>435</sup> See *supra* note 345 and accompanying text.

<sup>436</sup> See Aleinikoff, *supra* note 425, at 1499.

### CONCLUSION

The possibility of civil denaturalization, which lay mostly dormant for fifty years, is increasingly becoming a political reality. As more cases are litigated, courts will have to answer several questions. The first is whether civil denaturalization is constitutional as a matter of substantive due process and of the Citizenship Clause. If so, then what level of procedural protection is required to take away someone's citizenship? Even hardened immigration enforcement advocates should take pause at the idea that a person can lose her citizenship without ever being personally served with process, having the opportunity to obtain legal counsel, or even appearing in court. Stripping political rights without adequate procedural safeguards destabilizes the very concept of citizenship by sending the message that naturalized citizens may never be an integral part of the polity. It also upends the fundamental principle of the United States' founding: that the state has only the power delegated to it by its citizens, and has no power to take that citizenship away. If naturalized citizens cannot feel secure in their substantive and procedural rights, natural-born citizens (and especially those considered undesirable by the government for any reason) may not be far behind in losing theirs. Thus, it is time for courts to draw a clear border around citizenship.