



# **UNMAKING AMERICANS**

## **INSECURE CITIZENSHIP IN THE UNITED STATES**

**OPEN SOCIETY**  
**JUSTICE INITIATIVE**

## ACKNOWLEDGMENTS

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## EXECUTIVE SUMMARY

Citizenship is essential to the realization of basic human rights. While rights are understood to be universal, as a practical matter they often require citizenship and the state protection that comes with it to be enjoyed. Although international law and the U.S. Constitution grant non-citizens substantial legal protection, without citizenship, rights such as freedom of movement can be restricted; without citizenship, it can be very difficult for people to access healthcare, education, and housing.

Given the critical importance of citizenship, it is surprising that U.S. citizenship law and practice are riddled with gaps, weaknesses, and opportunities for arbitrary decision-making. Under the administration of President Donald Trump, those gaps and weaknesses have been freshly exposed and exploited to deny or deprive citizenship from certain people in a context of overt racial and religious animus, as part of a broader effort to fundamentally redefine the meaning of U.S. citizenship. If left unchecked, the insecurity of citizenship will continue to increase.

The power to take away or deny citizenship creates a gaping and unresolved loophole in the protection of human rights. It also creates dilemmas for those who seek to enforce human rights. On one hand, the sanctity and security of citizenship on an equal and non-discriminatory basis should be protected. But on the other, the desirability of secure citizenship must not be exploited as a way to deprive non-citizens of the full complement of human rights. Citizenship is inherently political in any society and acutely so in democratic societies in which citizens have a share in the establishment of government. Throughout history, citizenship, including the denial and revocation of citizenship, has been manipulated for political ends. At its most extreme, the effort to take away citizenship results in statelessness, a condition that renders people literally without a place to go, without the state protection that ensures rights in practice, and often without any means to challenge their condition.

Sadly, there is a long history of governments using the revocation of citizenship as a weapon. From the Nazis revoking the citizenship of Jews to the Dominican Republic's more recent assaults on the citizenship of Dominicans of Haitian descent, governments have used this tactic against racial, ethnic, and religious minorities; political opponents; and other disfavored groups, often as a prelude to mass arrests, expulsions, and executions. Today, the Trump administration appears willing to follow in these footsteps, and the American public appears increasingly content to acquiesce.

In the United States, citizenship is welded to the Constitution, and elaborated in nationality and immigration law and regulations.<sup>1</sup> Citizenship is also constructed through a deeply rooted founding narrative—alive today—that the citizenry is united by ideals such as freedom, equality, and inalienable rights, rather than through heredity or ethnicity.

Much can be learned from the study of how Americans become non-citizens in the eyes of the law, as the law itself serves as a deeply coded reflection of the national consciousness of any era. American ideals concerning citizenship have not always been reflected in practice. The country's history shows that, when nativist movements have surged, citizenship law has been amended to the detriment of vulnerable groups. Examples abound, including the Naturalization Act of 1906 and the National Origin Act of 1924, of the U.S. government manipulating citizenship in discriminatory ways.

These dynamics form the backdrop for the current U.S. administration's xenophobic and nativist platform. This report focuses on one component of that larger enterprise, examining the systematic deployment of state powers over citizenship—including deprivation of nationality, deportation, exclusion, and exile—to attack racial and ethnic minorities, immigrants, and other members of marginalized groups, and to normalize their inhuman treatment.

### **Three Intersecting Modes of Citizenship Deprivation**

This report is divided into four main chapters. The first reviews the history of citizenship and its deprivation in the U.S., and examines how U.S. citizenship laws and practices compare to those of selected other countries. The second, third, and fourth chapters cover several policy areas that govern access to citizenship in the United States, and show how weaknesses in the regime can be exploited. These chapters examine:

- Denaturalization, which is the revocation of U.S. citizenship acquired by foreign nationals or formerly stateless people through naturalization. The key actors in this process are lawyers within the United States Department of Justice (DOJ) including assistant U.S. attorneys who initiate judicial denaturalization actions in federal courts.
- Denial and revocation of U.S. passports, an area of practice that involves decision-making initially by the United States Department of State as to whether or not the affected individual is in fact a U.S. citizen. Those whose citizenship is contested or denied must bring affirmative litigation, which the DOJ defends on behalf of the U.S. government.
- Political attacks on citizenship by birth in the United States. This includes policy proposals and surrounding rhetoric regarding the status of children born in the United States to non-citizens.

In each area, public statements, official documents, and media reports over the past two years have cited worrying actual or proposed shifts in policy that merit the in-depth study provided here.

## **Denaturalization**

Since 2008, the U.S. government has undertaken initiatives that rely on the digitization of old immigration-related fingerprint data collected on paper cards in the 1980s and 1990s but never included in newer, digital government records. These old files are being scanned, digitized, and matched against existing digital records to identify duplicate entries in immigration files that might indicate fraudulent acquisition of U.S. citizenship. Between 2008 and 2016, these efforts came to be associated with a program within the Department of Homeland Security (DHS) known as Operation Janus, which was officially disbanded in 2016. This digitization, when combined with increasing official animosity toward immigration, non-citizens, and naturalized citizens, has the potential to increase substantially the use of denaturalization as a political weapon. In January 2018, the United States Citizenship and Immigration Service announced the formation of a dedicated team to continue this work, with the intention to refer approximately 1,600 people for prosecution based on a review of an estimated 700,000 immigration files.<sup>2</sup> This effort, known as Operation Second Look, is a successor to Operation Janus in terms of its approach of scrutinizing, indiscriminately and in bulk, old records for evidence of fraud.

President Trump has consistently issued derogatory public statements singling out immigrants based on their country of origin. He has also stated, “We should have more people from Norway.”<sup>3</sup> That statement has familiar echoes in history: “Nordic” people topped the list of sought-after ethnic categories in the race-based quota system introduced in the United States under the National Origin Act of 1924, a piece of legislation so bold in its white nationalist framework that it served as inspiration for the Nazis’ Nuremberg Race Laws.

In preparing this report, the Open Society Justice Initiative reviewed 168 denaturalization cases initiated between January 1, 2017 and December 31, 2018. The report also presents detailed historical information on the use and misuse of the two U.S. denaturalization statutes—criminal and civil—that have been in place since the turn of the 20th century. From the 1960s until the early 2000s, denaturalization cases were extremely rare. These cases “did little to disrupt an overall sense of citizenship security” because their principal targets were alleged Nazis and, since 2004, other war criminals.<sup>4</sup> However, because of this normative restraint within the Department of Justice across successive administrations, constitutional protections for those threatened with denaturalization languished unaddressed. Currently, there is no right to counsel in civil proceedings, and while incomplete information on prioritization and targeting prevents a comprehensive review of possible disparate impacts, individuals are subject to removal while cases are still pending—thus frustrating access to appeal rights—and denaturalizations have and will continue to create statelessness in the United States.



Today, the United States is home to over 21 million naturalized citizens.<sup>5</sup> Although we cannot know the number of people who will be made stateless through the denaturalization investigations currently underway or yet to come, we know that these individuals are likely to face pernicious hardships. Indefinite vulnerability to the most punitive measures at the state's disposal—raids, arrests, detention—is the plight of stateless persons in the U.S. and elsewhere.

### **Denial and Revocation of Documentation of U.S. Citizenship**

In the United States, as in many other countries today, the rapid introduction of computer record keeping and increasingly automated and interoperable systems for identity management have drastically changed the evidentiary building blocks of citizenship.

Research conducted for this report reveals that a combination of institutional design and exceedingly limited legal protection against harm permits state-sanctioned profiling by immigration and law enforcement officials based on race, gender, and class, with disastrous consequences for affected communities. Just as more systematic, politically motivated animus has combined with new technology to heighten the vulnerability of naturalized citizens to denaturalization, so are these same trends exposing all citizens to the heightened risk of passport denial and/or revocation. Individuals who have lived as U.S. citizens for decades can suddenly find themselves stripped of their passports, with complex and expensive legal proceedings, detention, family separation, and humiliation standing between them and confirmation that they are, in fact, Americans.

The current and ongoing attack on American citizens and, indeed, on the very definition of American citizenship, must cease. Instead, the government's expansive citizenship powers must be exercised with restraint and accountability.

### **Political Attacks on Citizenship by Birth in the United States**

Acquiring U.S. citizenship through being born on U.S. territory is well established as a matter of law and practice. Yet proposals to restrict access to citizenship by birth on the territory of the United States are not new—although they have gained new prominence under the current administration. This mode of acquiring nationality is sometimes referred to by the Latin legal term *jus soli* and commonly called “birthright citizenship” in the United States context. The U.S. Constitution and longstanding Supreme Court precedent make it very difficult to institute restrictions on access to citizenship by birth on the territory. Rather than dwell on the legal debates, which are covered in depth elsewhere, this report reveals the Trump administration's systematic efforts to undermine the security of citizenship for certain groups by using other, more readily available, tools like denaturalization and deprivation or denial of proof of U.S. citizenship. These efforts are suspect given the racist and xenophobic platform they advance, and must be resisted through urgently needed legal reforms, rather than wishful thinking that established norms will hold.

## Key Findings

This report provides a comprehensive review of citizenship and its documentation in the United States from a human rights perspective. It demonstrates the relationships between policies and practices that have not been analysed systematically in relation to one another. Deprivation of nationality through denaturalization, denial and revocation of passports on the basis of non-nationality, and threats to the sanctity of *jus soli* citizenship in the United States must be examined together for a complete understanding of the operation and politics of citizenship law in the country.

The report also provides an international and comparative analysis to show how the same intersection of laws, policies, and practices has resulted in human rights abuses in other countries. The report also shows that U.S. citizenship law has not and does not currently reflect the vision of equality and freedom espoused in the Constitution. In fact, there are significant gaps in the protections afforded to Americans, some of whom, more than others, are at risk of losing citizenship or are unable to acquire proof of their citizenship, often because of innate characteristics like race, national origin, and religion, or a combination thereof.

Finally and perhaps most importantly, the report highlights the relationship between destabilizing and divisive political rhetoric, such as the themes espoused by President Trump and his administration, and systemic vulnerabilities in the security of citizenship.

### Denaturalization

The Trump administration's practices illuminate a combination of known weaknesses in the law and emerging areas of concern. To better understand how the denaturalization statutes are operating in practice, the Justice Initiative reviewed all denaturalization cases filed in 2017 and 2018, performing a mixed quantitative and qualitative analysis (see the Description of Research section, below). The results of this analysis revealed several key findings.

In comparison to previous administrations, denaturalizations increased significantly during the Trump administration's first two years, with nearly three times as many civil denaturalizations filed (29.5 per year) than the average (12 per year) over the previous eight administrations.<sup>6</sup> In March 2019, the Department of Justice's Civil Division, which files civil denaturalization cases, issued a FY2020 budget plan that cites a "staggering" increase in referrals in 2019 and projects an "ever-increasing" denaturalization caseload.<sup>7</sup> The report cites 54 referrals "in the first two months of FY 2019 alone," projecting 324 cases in FY 2019 based on this rate, "a 125% increase over FY 2018 . . . on top of a 148% increase in FY 2018."<sup>8</sup> Based on interviews and available information, it also appears there was an increase in criminal denaturalization cases filed during 2017 and 2018.

There is strong reason to believe that a significant proportion of denaturalizations have or will result in statelessness. This is based on an analysis of the citizenship laws of defendants' designated countries of origin.

Over one-third of the cases filed can be classified as reflecting the Operation Janus and Operation Second Look approach of using digital records to identify potential cases for denaturalization, and using denaturalization as a means of enforcing immigration law.<sup>9</sup> This approach is new in its scope and in its overall lack of restraint in deploying such a radical remedy, with disastrous personal consequences for the affected individuals.

There is a significant correlation between the countries of origin most commonly represented in denaturalization cases (including Mexico, Haiti, and Nigeria) and countries that President Trump has publicly demeaned. This suggests selective targeting based on national origin, as a proxy for race, ethnicity, and religion, and contributes to the overall charge that the administration is seeking to exclude immigrants and citizens because of its nativist ideology.

Forty-nine percent of all civil denaturalization cases filed target citizens whose country of origin is a “special interest country,” an evolving list compiled by the U.S. government that includes India, Nigeria, Bangladesh, and Pakistan, among others. The decision to prioritize Janus and Second Look cases based on national origin in a “special interest country” naturally leads to a disproportionate number of cases filed against visible minorities, and imposes collective suspicion on U.S. citizens with ties to these countries—including ties that may have been severed for decades. The practice is arbitrary, over-inclusive, and applies unequal treatment based on national origin; it is in plain conflict with the equal protection component of the Fifth Amendment's Due Process Clause.

An in-depth analysis of denaturalization cases underscores the missing procedural safeguards that have never been adequately addressed. These procedural shortcomings include the lack of a right to counsel in civil cases (in more than 25% of civil proceedings, those threatened with denaturalization had no representation), the absence of protection against deportation pending appeal, and the lack of an appropriate statute of limitations, with cases filed as many as 24 years following a citizen's naturalization.

Finally, the elaborate operations detailed here, including scouring hundreds of thousands of files in pursuit of potential naturalization fraud—which began with the identification of 206 possible cases in 2008—represent a remarkably mismatched investment. The means employed, including using some of the most advanced and all-encompassing population databases in the world, require significant reconsideration and enhanced oversight. The denaturalization statutes, already heavily flawed, are far too elastic to safeguard the rights of naturalized Americans in the face of this unprecedented and highly problematic new form of targeting.

## **Denial and revocation of documentation of U.S. citizenship**

It is not possible to state conclusively that the number of passport denials and revocations has increased in recent years. However, a quantitative analysis of judicial actions in the Southern District of Texas revealed an increase of approximately 64.5% in the number of cases seeking to confirm citizenship in relation to passport revocations or denials filed since the beginning of 2017, over the same period immediately prior to this date. Both qualitative and quantitative information gathered for this report suggest that the government has also shifted its approach to defending cases that are reaching courts in South Texas. The principal difference is that the Department of Justice (which represents the government in defending passport cases) is currently defending all cases—regardless of the merits—rather than settling some. This approach requires time and resources, yet consistently results in a finding that the individual is in fact a citizen. The government’s approach is more centralized today than under previous administrations, with attorneys defending passport cases who have never been to the Rio Grande Valley and do not understand the local culture, including how common trans-border lives and families are and how important passports are to the local economy. The outcome is an unbending, uninformed approach that results in undue hardships for those targeted. By limiting Americans’ free movement in this way, arbitrarily and without sufficient understanding of the context or evidence in individual cases, the U.S. government violates constitutional rights and sends a stigmatizing message about who is a “real” American.

This report tackles government policies and practices, many of which are purportedly intended to combat fraud. Fraud prevention may be a noble aim, but it is not a blank check to torment and seek to banish unwanted citizens. Based primarily on research in communities that face the brunt of suspected non-citizenship, in Texas’s Rio Grande Valley, and empirical analysis of cases filed in the Southern District of Texas (detailed in the Description of Research section, below), the report records several significant findings.

The odds are massively stacked against anyone whose citizenship comes under question by the Department of State, the agency responsible for issuing U.S. passports. This is especially evident when the affected individual is abroad, attempting to return to the United States. Citizens in such circumstances must seek permission to enter the U.S. as noncitizens, subjecting themselves to the full force of the immigration system, including detention and possible criminal immigration penalties. Even citizens who are in the U.S. when their passports are denied or revoked face unjustified hurdles, including the lack of a right to counsel, in challenging the agency’s decision.

The Department of State (DOS) retains undue discretion in determining when to revoke or deny passports. That discretion has led to a woeful lack of coordination and documentation of how policies are developed and deployed, at home and abroad, as a 2016 investigation of passport denials in Yemen underscored. The recommendations made by the DOS Office of the Inspector General (OIG) in that investigation are incorporated below.

There is a need to codify a consistent, stringent burden of proof, placing the onus on the government to prove non-citizenship *prior to* revocation or denial of passports, and in related cases that raise the predicate question of whether an individual is a U.S. citizen. As matters stand, the Department of State, on a discretionary basis, is empowered to require unlimited additional proof, including requiring unsuspecting citizens to obtain obscure records, sometimes more than 50 years old.

There is no cut-off point limiting the power of the U.S. government in raising retroactive suspicion that an individual is not, and never was, a citizen. Individuals thrust into this situation have lived their entire lives as Americans.

U.S. officials, both in Yemen and at the southern border of the U.S., have sought to deny or take away passports from U.S. citizens. Their tactics—including harsh interrogations, detention, and threats to family members—have resulted in false testimony concerning citizenship, as documented through cases examined in this report.

Nevertheless, it appears that the vast majority of individuals who take the government to court to prove they are U.S. citizens prevail and receive a passport. Government efforts to deny or revoke passports from U.S. citizens, like the denaturalization programs described above, are wasteful and disruptive—an elaborate search for needles in a haystack.

### **Political attacks on citizenship by birth**

The chief recommendation of this report is to rein in practices that threaten the security of citizenship. Contemporary attacks on citizenship disproportionately affect certain Americans on the basis of their national origin, religion, and race. These attacks, like the efforts to redefine *jus soli* citizenship, are being deployed in service of a nativist agenda.

As legal scholars Cassandre Burke Robertson and Irina D. Manta have observed in the context of denaturalization, even if relatively few people are affected, the implications can still be massive. The small number of people affected to date by the above policies obscures broader and deeply problematic implications for immigrant communities and individuals subjected to heightened scrutiny, regardless of the administration at the helm. As Robertson and Manta argue:

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 targeted – and the political message that is sent by that targeting. . . . 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>10</sup>

This report examines the laws, regulations, practices, institutions, and attitudes currently being mobilized to induce “that feeling of exclusion.” The ongoing attempts to exploit weaknesses in U.S. citizenship law pose an existential threat to open democracy, free thought, and an equal share for all in the political community. These attacks on citizenship can be expected to increase, unless urgent steps are taken.

## Recommendations

### To the U.S. Congress

#### Discrimination

Respond to evidence of discriminatory targeting in the administration of denaturalization and passport issuance, revocation, and confiscation by:

- Commissioning a disparate impact study to examine the unequal and discriminatory effects of the current administration’s citizenship policies and practices.
- Undertaking ongoing oversight to ensure that federal agencies investigating fraud in relation to U.S. citizenship are doing so uniformly and not on the basis of collective suspicion against particular racial, religious, ethnic, cultural, or other groups.

#### Denaturalization

*Moratorium.* Impose a moratorium on both civil and criminal denaturalization (8 U.S.C. § 1451 and 18 U.S.C. § 1425) until the adequate independent oversight and statutory safeguards recommended below are in effect.

*Defunding.* Refuse funds to the Departments of State, Homeland Security, and Justice for denaturalization until these agencies can demonstrate compliance with the oversight and safeguards below.

*Oversight.* Use all available oversight mechanisms to publicly expose the investigation, prosecution, and impact of denaturalization cases, including the following information:

- The policies, procedures, and priorities under which the Departments of Homeland Security and Justice investigate and prosecute U.S. citizens for denaturalization.
- Staff and funding deployed for denaturalization from each relevant operational component.
- The number of denaturalization cases reviewed or investigated, referred for prosecution, filed in federal court, placed in removal proceedings, leading to removal, and leading to statelessness. Case data should be disaggregated by country of origin, gender, manner of entry (including port of entry and immigration status upon entry), referring agency, and alleged denaturalization grounds.

- The number of Americans with derivative citizenship denaturalized due to their sponsor’s denaturalization.

*Legislative reforms.* Enact reforms to address the harms identified in this report, including:

Adopt legislation prohibiting denaturalization where it would result in statelessness.

Amend the civil denaturalization statute (8 U.S.C. § 1451) as follows:

- Add a statute of limitations.
- Provide for a Sixth Amendment right to counsel in all civil denaturalization proceedings.
- Codify the heightened evidentiary standard of “clear, unequivocal and convincing,” and require the government to prove intentional fraud in all civil cases.
- Institute measures (including a heightened personal notice requirement) to ensure no denaturalization takes place in absentia.
- Eliminate civil denaturalization based on membership in particular groups, because of its obvious clash with First Amendment rights and equal protection of the law.
- Eliminate “refusal to testify” as a ground for civil denaturalization.

Prohibit removal following trial court proceedings until all appeals are exhausted.

Invalidate immigration waivers, including judicial removal orders and waivers that relinquish asylum and other protection claims, in negotiated settlements.

Eliminate derivative denaturalization (8 U.S.C. § 1451(d)), so that the extreme negative consequences of denaturalization are restricted to the individual case.

Eliminate “good moral character” and “attachment to the U.S. Constitution” as grounds for denaturalization.

Amend the Immigration and Nationality Act to prohibit administrative denaturalization.

### **Documentation of Citizenship**

*Legislative reforms.* Enact reforms to address inequality and discrimination in access to U.S. passports, including:

Establish a right to counsel in challenges to executive decisions that deny rights or benefits on the ground that the claimant is not a U.S. citizen.

Amend legislation to require a heightened burden of proof on the government to prove non-citizenship where it seeks to deny or revoke a U.S. passport.

Amend 8 U.S.C. § 1503 to clarify that it provides optional remedies that do not preempt judicial review under the Administrative Procedures Act (APA).

*Oversight.* Use Congressional oversight powers over the U.S. Department of State:

- To ensure that the Department is providing notice of the intention to revoke or refuse to renew a passport and a meaningful opportunity to refute evidence provided to support denial or revocation.
- To prevent the Department from delaying passport renewals when an unexpired passport is presented.

### **To the U.S. Department of Homeland Security**

In cooperation with the Department of Justice, establish a public prioritization policy for investigations potentially leading to denaturalization.

In cooperation with the Department of Justice, conduct individual impact assessments and develop individual post-denaturalization plans, identifying factors that would preclude prosecution, such as the creation of statelessness.

### **To the U.S. Department of Justice**

Provide clear and limiting guidance to U.S. Attorney's Offices on appropriate cases for denaturalization.

In passport denial or revocation cases affecting U.S. border communities, require that assigned counsel defending the government be familiar with local cultures, history, and context.

### **To the U.S. Department of State**

Ensure that denial, revocation, or confiscation of passports does not amount to extrajudicial denaturalization, leaving U.S. citizens stranded abroad.

Implement the recommendations of the Office of the Inspector General in its October 2018 report on denial and revocation of passports, in particular:

- Issue guidance on the procedures required to revoke and confiscate passports.
- Electronically track and manage passport revocations, retentions, and confiscations.
- Require appropriate legal oversight and review of passport-related determinations within the Department.



## **To civil society organizations addressing immigrants' rights, racial justice, civil rights, privacy and data protection, and other relevant issues**

Through litigation and advocacy, challenge efforts to diminish equal access to citizenship in the United States, and ensure that any initiative to address fraud in the acquisition of U.S. citizenship is based on compelling evidence and employs the least restrictive means.

Hold relevant authorities accountable for the responsible design and use of digital records databases to protect privacy and prevent discriminatory targeting and surveillance.

## **Description of Research**

The Open Society Justice Initiative conducted over 35 interviews with journalists, prosecutors, federal defenders, judges, immigration attorneys, immigration practice experts, members of civil society groups, stateless persons, individuals impacted by the policies described in the report, and experts on citizenship and international law and practice. Photographs and in-depth stories of some of the individuals affected by the policies described in this report are also included within this text.

Extensive desk research was also undertaken, including a comprehensive review of thousands of pages of primary denaturalization case documents, as well as consideration of official government reports, press releases, budget requests, legislation and draft bills, case law, treatises, academic materials and scholarly articles, investigative reports, and news articles.

To obtain comprehensive data on current denaturalization practice, the Justice Initiative submitted Freedom of Information Act (FOIA) requests and gathered and analyzed primary case materials from across the country.

FOIA requests were sent to three divisions within the Department of Justice (DOJ)—Civil, Criminal, and the Executive Office for United States Attorneys—as well as to the U.S. Citizenship and Immigration Services (USCIS), a component of the Department of Homeland Security (DHS). Only the DOJ Civil Division provided a partial response at the time of writing.<sup>11</sup>

Relying on in-person case retrieval and Public Access to Court Electronic Records (PACER), a fee-based, electronic public access service that provides case and docket information online from all federal courts, case searches were conducted across all U.S. districts to obtain all civil and criminal denaturalization cases filed between January 1, 2017 and December 31, 2018. These searches returned a total of 168 cases, which represents the minimum number of cases filed during this period.<sup>12</sup>

Case findings and conclusions are based on case status as of May 2019. Some case files are partially or wholly under seal and thus inaccessible. In many cases reviewed, the defendant was accused of using aliases or conflicting biographical data. All information was catalogued in such cases; however, for practical statistical analysis, data stipulated in answers filed through the assistance of counsel or, in lieu of this, the information that served as the basis for naturalization was used.

Based on interviews conducted in Texas's Rio Grande Valley in January 2019, the Justice Initiative commissioned empirical research on citizenship cases in the Southern District of Texas. Qualitative information furnished by practitioners in this region suggests the U.S. government has changed its strategy and behavior in such cases. It appears the government is now refusing or otherwise failing to resolve cases at the administrative level within the Department of State and adopting a more aggressive approach to litigation when challenges to denial of citizenship are brought by claimants in federal court. In total, 111 cases filed between August 3, 2014 and May 31, 2019 were analyzed. These cases provide insight into immigration law enforcement trends regarding passport revocation and denials during this period, which are incorporated in relevant sections of this report.<sup>13</sup>



# I. HISTORY AND CONTEXT

## Introduction

Equally secure citizenship for all in the United States is not a given and must be defended. That thesis is central to this report, and can be best understood by first examining the history of U.S. citizenship and how it compares to that of other countries.

This section draws on U.S. history and comparative international information to underline the vulnerability of citizenship law to being distorted for nationalistic purposes. International legal standards constraining state discretion over nationality matters are included to provide a context for assessing the appropriateness of U.S. policies and practices, and to reflect the standards to which the United States should be held, but historically has avoided.

The report looks at three comparative contexts—the Dominican Republic, the United Kingdom, and Canada—which were chosen for the lessons they offer to U.S. actors.<sup>14</sup>

The Dominican Republic received extensive international criticism in 2013 after a Constitutional Tribunal decision stripped nationality from thousands of Dominicans of

Haitian descent. Yet it was less widely reported that the transformation did not happen overnight, and that rather, as may be observed in the United States today, assaults on the stability of citizenship for the population of Haitian descent began many years earlier, with low-level denials of the authenticity of birth records. This case study mirrors in unsettling ways the denial and deprivation of proof of citizenship faced by communities like Mexican-Americans living along the U.S.-Mexico border and Yemeni-Americans living in Yemen.

The United Kingdom began implementing an aggressive nationality deprivation program as a national security measure during Theresa May's tenure as home secretary in the early 2000s, following the attacks of September 11, 2001. These practices are linked with other exceptional measures instituted to supposedly safeguard national security in the context of countering terrorist threats, such as exclusion of nationals from returning to the United Kingdom and an elaborate regime of secret evidence in national security cases. In the United Kingdom, deprivation of nationality is disproportionately exercised against citizens with dual nationality. This has resulted in gross disparities in the vulnerability of ethnic and religious minorities, in particular British Muslims, to insecure citizenship, and in a growing sentiment that they hold second-class status in society.

In Canada, changes to the nationality law that would allow deprivation of nationality resulting in statelessness were recently overridden, and efforts to institute a "fast-track" administrative process to speed up citizenship revocation in cases of suspected fraud were struck down in the courts. These changes occurred in the context of concerted national civil society resistance to measures that threatened to diminish the status of citizenship as a *right*, not a privilege, and that conflicted with Canada's international legal obligations to avoid the creation of statelessness.

Following this contextual overview, the specific policies and practices at play in the United States will be presented and analyzed, informed by insights drawn from this chapter.

## **Citizenship and Its Deprivation in the United States: A Brief History**

### **Foundations: The Constitution, Citizenship, and Equality**

The United States Constitution articulates principles of individual freedom, including rejecting the concept of "fealty to blood."<sup>15</sup> These political ideals are deeply embedded in the founding myths and historical record of the United States.<sup>16</sup> Those with aspirations to serve as Members of Congress, for example, need only hold American citizenship for seven years to be eligible for the office. As one scholar has noted, "[T]he framers of the Constitution understood [age, alienage, property and religious restrictions] as forms of political oppression. The door to the United States was meant to be open."<sup>17</sup> As U.S. Supreme Court Chief Justice John Marshall plainly stated in 1824, a naturalized American is "distinguishable in nothing from a native citizen, except so far as the Constitution makes the distinction."<sup>18</sup>

The framers did not include a definition of American citizenship in the Constitution.<sup>19</sup> The meaning of citizenship in the United States received serious attention for the first time following the emancipation of millions of people from slavery, in the mid-1860s. The Supreme Court had by that time already issued its odious opinion in the *Dred Scott* case (1857), determining that those whose ancestors were brought as slaves to the United States could not “become a member of the political community.”<sup>20</sup> That decision lent constitutional authority to a strand of American nativism that has surged at other moments in U.S. history, and is still reflected in laws and jurisprudence concerning American citizenship.<sup>21</sup> To reckon with *Dred Scott*, “radical” Republicans in the Reconstruction Congress had to override the decision through legislation. They would do so, at nearly every turn, by likewise overriding the vehement racism and vetoes of President Andrew Jackson.<sup>22</sup>

As one historian noted:

On the eve of the Civil War, nearly half a million people, the majority of them born in the United States, lived with their rights always subject to political whim and their belonging always subject to the threat of removal. We might say that they were not unlike today’s unauthorized immigrants and their children, at least to the degree that free people of color then were also a community that lived through episodes of punitive legislation and efforts to force their exile.<sup>23</sup>

The legal definition of citizenship would continue to be forged through an ignominious parade of political and popular confrontations with American racism, gender and religious hierarchies, and other forms of discrimination.<sup>24</sup> For example, the Reconstruction Congress seethed with racist prejudice against Chinese immigrants, which infused some of the earliest sustained deliberations on the basic mechanics of American citizenship.<sup>25</sup> Decades later, in *Wong Kim Ark* (1898), the Supreme Court affirmed that children born to Chinese immigrant parents in the United States are U.S. citizens by birth, just as any other child born in the United States.<sup>26</sup> Native Americans, already confined to U.S. government reservations, fell subject to the Dawes Act of 1887, trading new land allotments, covering ever-shrinking territory, for a statutory pathway to citizenship and coerced renunciation of tribal membership.<sup>27</sup> In reality, as Rogers M. Smith observes, “Only the citizenship of white men and the quasi-citizenship of corporations remained intact as Reconstruction closed.”<sup>28</sup>

In the decades after Reconstruction, Southern states instituted a “new caste system,” through a matrix of racial segregation laws that came to be known as Jim Crow.<sup>29</sup> The 1873 Supreme Court decision in the *Slaughter-House Cases* laid the groundwork for Jim Crow, by determining that the Privileges or Immunities Clause of the Fourteenth Amendment referred only to those rights explicitly spelled out in the Constitution, and that the clause was unenforceable with respect to the vast majority of individual rights guaranteed by state governments. The *Slaughter-House Cases* also undermined women’s suffrage efforts, and were cited in Susan B.

Anthony's trial for illegal voting the same year. The post-Civil War amendments were understood to guarantee federal citizenship and nothing more, and women's suffrage was deemed "a privilege of state citizenship."<sup>30</sup> A century and a half later, Isabel Wilkerson would write a comprehensive account of the 1915-1970 mass internal migration of black Americans from the South to Northern cities, in part to flee Jim Crow. "The people did not cross the turnstiles of customs at Ellis Island. They were already citizens. But where they came from, they were not treated as such. Their every step was controlled by the meticulous laws of Jim Crow, a nineteenth-century minstrel figure that would become shorthand for the violently enforced codes of the Southern caste system."<sup>31</sup>

Wilkerson and other historians have shown how Jim Crow laws and race-based nationality and immigration legislation in the United States during this period mirrored (and compelled) a turn in other Western countries toward legislating the ideology of white supremacy. "Nursing the wounds of defeat and seeking a scapegoat, much like Germany in the years leading up to Nazism, [whites in the South] began to undo the opportunities accorded to freed slaves during Reconstruction and to refine the language of white supremacy."<sup>32</sup> The U.S. Supreme Court in *Plessy v. Ferguson* (1896) upheld the Jim Crow "separate but equal" strategy, providing constitutional approval of a form of black citizenship effectively stripped of all civil rights that left black Southerners acutely vulnerable to widespread violence and extrajudicial killings. The *Plessy* ruling came just two years before *Wong Kim Ark* confirmed that the Fourteenth Amendment applied to all children born on U.S. soil. Acquisition of U.S. citizenship may have "open[ed] up across racial lines" under *Wong Kim Ark*, and it remains open today, but that opening happened just as lawmakers all over the country and in the capital experimented with race-based segregation and border control measures.<sup>33</sup>

### **Nativism in U.S. Colonialism, Naturalization, and Immigration Laws**

From 1790 until 1952, notwithstanding the Constitution's professed ideals, the United States maintained an overtly race-based naturalization regime.<sup>34</sup> As one scholar summarized, "A contradictory series of fifty-two court cases from 1878 to 1952 gradually defined who was *not* white, even though the cases never positively defined who *was* white."<sup>35</sup>

The Immigration Act of 1882 excluded for the first time particular racial groups from immigrating to the United States: "In making a distinction based on race and nationality, the act augured a significant new era in federal legislation and American attitudes toward immigrants."<sup>36</sup> Among others, the law banned members of the Chinese "race" from entry into the United States. The 1882 Act also barred Chinese immigrants to the U.S. from naturalizing, although under *Wong Kim Ark* their native-born children were recognized as citizens. With the hardening of restrictions, widespread racist sentiment in the American West, and a new law barring an entire racially defined group from lawful presence in the country, for the first time the U.S. government confronted the now familiar task of the modern administrative state: distinguishing between citizens, lawful residents, and "illegal aliens."<sup>37</sup>

The 1924 National Origins Act (also known as the Johnson-Reed Act) instituted a much broader race-based quota system, which “sought to freeze the nation’s racial and ethnic mix as of 1920.”<sup>38</sup> A presidential commission established under the act studied the racial composition of the American population and allocated annual quotas based on their findings.<sup>39</sup> Under the act’s implementing framework, only residents who could trace their origins to European nations were counted as “authentic” Americans. There was no quota allotment, for example, to any African country under the National Origins Act.<sup>40</sup> The act remained in place until its repeal in 1965, in the context of the civil rights movement, a moment when legalized white nationalism was widely perceived as “un-American.”<sup>41</sup> America’s racialized immigration and nationality laws of this period attracted the attention of Adolf Hitler as he was composing *Mein Kampf* and its unpublished sequel, his “Second Book.” In that later work, Hitler wrote:

American immigration policies provide confirmation that the previous “melting pot” approach presupposes humans of certain similar racial basis and immediately fails as soon as fundamentally different types of humans are involved.<sup>42</sup>

Another generally unexamined area of U.S. citizenship law that is still in effect today emanates from the United States’ colonial legacy and present-day colonialist attitudes to its “unincorporated territories.” These territories include lands acquired by the United States as a result of the Spanish-American War of 1898, among them Puerto Rico.<sup>43</sup> In a series of cases decided just after the war, known as the *Insular Cases*, the U.S. Supreme Court authorized a colonial governance regime enacted by Congress that effectively limits the application of the Constitution in U.S.-held territories not “incorporated” into the United States. The decisions deployed expressly chauvinistic and racist logic in upholding Congress’s prerogative to bar full citizenship for the people living in these territories.<sup>44</sup> Justice Brown captured the spirit of the *Insular Cases* in his *Downes v. Bidwell* (1901) opinion’s concluding remark:

A false step at this time might be fatal to the development of ... the American empire ... [C]onditions [may be brought about] which would render the annexation of distant possessions desirable. If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible.<sup>45</sup>

As some scholars have observed, and is readily clear from the other areas of U.S. law explored here, such attitudes reflect the prevailing attitudes of their time.<sup>46</sup> The framework of these cases is still in place, however, generating a steady—if virtually unnoticed—stream of campaigns to alter the U.S. position on the rights of inhabitants of so-called “insular areas” (territories).<sup>47</sup> The Constitution does not mention the word “colony” which, as Judge Juan R. Toruella of the U.S. Circuit Court of Appeals for the First Circuit (which includes the territory of Puerto Rico) opined, “is not surprising given that the War for Independence was fought to

escape such a condition.” The legacy of the diminished condition of U.S. “nationals” and citizens with limited Constitutional rights under the *Insular Cases* framework lives on today, in the sense that their plight is virtually invisible in national politics. President Trump, for example, has contributed multiple public statements suggesting that he is unaware of the fact that Puerto Ricans are U.S. citizens (albeit with diminished rights, including limited representation and franchise).<sup>48</sup> This is not an auspicious starting point for resolving the vexed situation of second-class status and exploitation affecting more than four million people living in U.S. territories today.<sup>49</sup>

U.S. laws developed in the late 19th and early 20th centuries were an “experimentation in diminished citizenship rights” that significantly influenced race-based nationality and immigration laws beyond U.S. borders, including the development of the Nazis’ Nuremberg Race Laws.<sup>50</sup> Champions of a nativist vision have returned to the White House in the Trump era.<sup>51</sup> It would be too simplistic to draw broad conclusions from this historical insight and its seeming resonance in America today.<sup>52</sup> Yet the impetus for this report is to question whether current safeguards go far enough in countering threats to equality in access to and enjoyment of U.S. citizenship, given that nativist turn in public mood and prevailing political agendas. A major conclusion drawn here is that the answer to this question is no.

### **Ideology and Citizenship**

Alongside the National Origins Act of 1924, the Naturalization Act of 1906 also barred certain categories of would-be citizens from naturalization, based on their political opinions or beliefs, including conscientious objectors and pacifists.<sup>53</sup>

The 1940 Nationality Act expanded the government’s powers to denaturalize American citizens, covering a range of “subversive” behaviors that could trigger denaturalization. During the 1940s, the Justice Department sought increased powers to investigate the supposed “foreign allegiance” of naturalized Americans even after naturalization, and launched an operation to “study...cases of disloyalty among naturalized citizens.”<sup>54</sup> Japanese Americans incarcerated at a “relocation center” were given the “option” to renounce their American nationality through another amendment to the Nationality Act.<sup>55</sup> Ultimately, the renunciation requests were challenged on the ground that they were issued in a context of intense coercion. In his opinion in *Abo v. Clark*, Judge Louis E. Goodman observed:

[It was] shocking to the conscience that an American citizen be confined without authority and then, while so under duress and restraint, for his Government to accept from him a surrender of his constitutional heritage.<sup>56</sup>

Attorney General Francis Biddle instituted a denaturalization program “as a way of looking tough and winning Roosevelt’s confidence,” that targeted German Americans and Japanese



Americans whose behavior showed “true allegiance and fidelity to a foreign country rather than the United States.”<sup>57</sup> In a 1943 public statement, Biddle disclosed that internment was the intended result of denaturalization, saying, “Deprived of their citizenship, they automatically become alien enemies. As such I shall order them interned for the duration of the war.”<sup>58</sup>

Immediately after World War II, the United States denationalized thousands of U.S.-born Japanese-Americans, following the mass internment program implemented during the war.<sup>59</sup> Yet in the time since, the American drive for denaturalization has waned. As the threat of communism subsided in the last decades of the 20th century, “government officials lost their appetite for pursuing vast numbers of denaturalization cases.”<sup>60</sup>

But more recently, following the attacks of September 11, 2001, lawmakers have repeatedly proposed expanding expatriation (denationalizing native-born Americans) powers as a counterterrorism tool.<sup>61</sup> At the time of writing, these efforts have “fallen flat.”<sup>62</sup> Denaturalization prosecutions are currently brought against suspected terrorists using existing statutes, and a specialized National Security Unit within the Department of Justice’s Office of Immigration Litigation was established to handle such cases.

### Securing Citizenship

A series of Supreme Court cases in the 1950s and 1960s significantly curtailed the practices of expatriation and denaturalization based on voluntary behavior.<sup>63</sup> The *Schneiderman* case (1943) had already imposed a higher burden of proof on the government—clear and convincing evidence—in cases charging a lack of attachment to the principles of the Constitution as a ground for denaturalization (explored further in Chapter II, Denaturalizations). In *Trop v. Dulles* (1958), in a split opinion, the Supreme Court invalidated the use of expatriation as a punishment. Albert Trop was denationalized under a provision of the 1940 Nationality Act after receiving a conviction and dishonorable discharge for desertion while serving in Morocco during World War II. Chief Justice Earl Warren’s plurality opinion is often cited for its lofty language regarding the cruelty of expatriation, a violation of the Eighth Amendment, he wrote, as “a form of punishment more primitive than torture.”<sup>64</sup> Trop, a native-born American, was stateless as a result of his expatriation, a fact that solicited an impassioned passage in Warren’s opinion:

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

Decided the same day as *Trop*, the case of *Perez v. Brownell* upheld another provision of the 1940 Nationality Act, requiring expatriation for voting in a foreign election, which, according to the court, fell within Congress's power to regulate foreign affairs. In another wartime case, *Mendoza-Martinez* (decided in 1963), the court struck down a provision that expatriated native-born or naturalized citizens who left or remained outside the country in time of war.<sup>65</sup> There, the court invalidated what it deemed to be a penal sanction (denationalization) imposed without criminal process. Just a few years later, the court would revisit the question of Congress's power to involuntarily denationalize American citizens for any reason, reversing its *Perez* decision. In *Afroyim v. Rusk* (1967), a naturalized American who voted in an election in Israel challenged the constitutionality of his subsequent expatriation under § 401(e). *Afroyim* drew on legislative history of the post-Civil War amendments and Civil Rights Act of 1866 to conclude that Congress had no power to involuntarily denationalize Americans:

Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country, and the country is its citizenry. 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. We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.<sup>66</sup>

The Supreme Court decided *Trop*, *Mendoza-Martinez*, and *Afroyim* during the civil rights era. For the civil rights movement, “the fight for black freedom and equality [was] a fight to carry out America’s unfulfilled national ideals, which were embodied in the Constitution.”<sup>67</sup> During this period, white nationalism receded from wide embrace by the American public and political class, and cases of denaturalization also became exceedingly rare. More recent developments related to the availability, exercise, and loss of American citizenship are explored in more depth later in this report.

### **Vestiges of the Past: On the Security of Dual Nationality**

Although there are millions of dual or multi-nationals with United States citizenship, the United States does not officially recognize dual citizenship as an immigration status.<sup>68</sup> According to the U.S. State Department, “U.S. law does not mention dual nationality...”<sup>69</sup> At the same time, the State Department advises that, “U.S. law does not . . . require a person to choose one citizenship or another.”<sup>70</sup> Yet the Oath of Allegiance that an individual takes in order to naturalize declares that the person “will renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen.”<sup>71</sup>

As described by U.S. Citizenship and Immigration Services, “The applicant must understand that he or she is sincerely and absolutely renouncing all foreign allegiance.”<sup>72</sup> The Certificate of Naturalization lists the person’s country of nationality as a “former” nationality. Today, as traditional normative constraints on executive discretion are shrinking, the government’s equivocal position on a concept so foundational to citizenship as allegiance gives rise to potential abuse.

### United States Certificate of Naturalization



## The United States in Comparative Perspective: Nationality and Human Rights

The United States has played a pivotal role in the development of modern human rights law, including in shaping important protections for the right to a nationality. The country has undertaken human rights obligations, codified in treaty law, and related to the implementation of immigration and nationality law, both within and beyond its borders.<sup>73</sup> International law is surveyed briefly here as a framework for understanding the global and comparative context in which the policies and practices described in this report operate.

In brief, nationality is the most durable status available under international law.<sup>74</sup> Citizenship is not understood, legally, as a privilege that may be taken away at will. Rather, deprivation or denial of nationality may occur only in extremely rare cases, and is further restricted where its

sole purpose is to expel (former) nationals,<sup>75</sup> where it is discriminatory or results in the creation of statelessness, or where other indicators of arbitrariness are present, in particular a denial of due process.<sup>76</sup>

### **Denationalization and Expulsion – A Central Concern**

As described above, free black Americans' struggle for citizenship, in the antebellum period and through the post-war amendments, was linked to freedom from expulsion.<sup>77</sup> In the aftermath of the Holocaust and the dissolution and reconfiguration of states following World War II, with millions left stateless, an analogous alarm arose regarding the vulnerability of stateless people to banishment and extermination.<sup>78</sup> This led the drafters of the 1948 Universal Declaration of Human Rights to include the "right to a nationality" (Article 15) as a fundamental right inherent in all people.<sup>79</sup> That right has been incorporated into most major human rights treaties drafted in the past 70 years.<sup>80</sup>

The International Covenant on Civil and Political Rights (ICCPR),<sup>81</sup> to which the United States is a party,<sup>82</sup> prohibits arbitrary deprivation of an individual's right to enter one's "own country," in Article 12(4).<sup>83</sup> In its General Comment No. 27 on Freedom of Movement, the Human Rights Committee (HRC), the treaty body established to oversee implementation of the ICCPR, explained that Article 12(4) severely restricts denationalization leading to expulsion:

The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.<sup>84</sup>

A chief concern underlying Article 12 is the threat that states could, simply by declaring an individual a non-national, expel him or her and deny international responsibility, thus circumventing of the entire framework of human rights protection. The committee addressed this loophole by emphasizing that the right of return to one's "own country" extends:

[A]t the very least, [to] an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law . . . .<sup>85</sup>

It is widely recognized that deprivation of nationality complicates international relations by potentially forcing responsibility on a state for an individual who is not recognized by that state as its own, especially where deprivation is a prelude to expulsion and renders the person unreturnable.<sup>86</sup> Diplomats negotiating treaties on statelessness following World War II voiced concerns regarding the implications of denationalization in international relations, noting: "A

country should not have the right to rid itself of undesirable persons by denationalizing and subsequently expelling them.”<sup>87</sup> To address this, many states simply have no domestic law that would permit deprivation of nationality.<sup>88</sup>

The ICCPR, in Article 24(3), also safeguards children’s right to acquire a nationality. The Human Rights Committee, which oversees the interpretation and state compliance with the instrument, has clarified that Article 24(3)’s requirement that children have a right to “acquire a nationality” means that:

States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born. In this connection, no discrimination with regard to the acquisition of nationality should be admissible under internal law as between legitimate children and children born out of wedlock or of stateless parents or based on the nationality status of one or both of the parents.<sup>89</sup>

Article 24(1) requires that states afford additional measures of protection as may be needed in order to realize the rights of the child guaranteed under the covenant. Article 2(2) likewise entails general positive obligations “to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” These provisions would surely be triggered should the United States restrict access to citizenship by birth on the territory, and are equally relevant to derivative denaturalizations and deprivation and denial of passports due to the particular impact these measures have upon children.

### **The Prohibition of Arbitrary Deprivation of Nationality**

A host of international instruments, commentary, and jurisprudence has helped to elaborate the meaning of Article 15’s prohibition on the arbitrary deprivation of nationality. In the sections that follow, elements of that prohibition are explored in three general categories: scrutiny of the *purpose or aim* of deprivation, scrutiny of the *impact* of deprivation, and considerations of *procedural protections* that should apply in cases of deprivation.

“Deprivation of nationality” covers situations where individuals who have previously been recognized as citizens of a state are stripped of recognition of that nationality, whether by invocation of formal procedures provided under the law, or in violation of that law.<sup>90</sup> It also covers cases in which individuals are arbitrarily deprived of nationality through actions taken by administrative authorities.<sup>91</sup> Significantly, “arbitrariness” in this sense is broader than “against the law” and instead covers a wider range of “elements of inappropriateness, injustice, lack of predictability and due process of law.”<sup>92</sup>

## Scrutiny of Purpose

The United Nations Human Rights Council, in a 2013 report on arbitrary deprivation of nationality, stressed that deprivation of nationality must meet certain “conditions” in order to avoid arbitrariness: “These conditions include serving a legitimate purpose, being the least intrusive instrument to achieve the desired result and being proportional to the interest to be protected.”<sup>93</sup> Some purposes are always illegitimate. As noted above, “[a] State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her.”<sup>94</sup>

The Inter-American Commission on Human Rights, in its *Third Report on the situation of human rights in Chile*, articulated a higher standard of protection than that afforded under the 1961 Convention on the Reduction of Statelessness, Article 8, framework, particularly in the context of denationalization as a penal sanction:

... this right [to nationality] is properly considered to be one of the most important rights of man, after the right to life itself, because all the prerogatives, guarantees and benefits man derives from his membership in a political and social community – the State – stem from or are supported by this right. Because of its unique nature, there is almost no country in the world where the law uses or applies loss of nationality as a penalty or sanction for any kind of crime, much less for activities of a political nature.

It is generally considered that since nationality of origin is an inherent attribute of man, his natural right, and is not a gift or favour bestowed through the generosity or benevolence of the State, the State may neither impose it on anyone by force, nor withdraw it as punishment or reprisal. The deprivation of nationality ... always has the effect of leaving a citizen without a land or home of his own, forcing him to take refuge in an alien country. That is, it inevitably impinges on another jurisdiction, and no state may take upon itself the power to adopt measures of this sort. ... [T]he Commission believes that this penalty – anachronistic, outlandish and legally unjustifiable in any part of the world – is a thousand times more odious and reprehensible when applied in our own Americas, and should forever be banned from being applied by governments everywhere.”<sup>95</sup>

Despite the powerful limitations on the deprivation of nationality, there are conditions under which deprivation is countenanced. For example, fraud is accepted as a legitimate purpose for deprivation of nationality under international law. The Human Rights Council’s 2013 report on arbitrary deprivation of nationality, however, emphasized that “loss or deprivation of nationality can only be justified where the fraud or misrepresentation was perpetrated for the purpose of acquiring nationality and was material to its acquisition.” A proportionality test applies in such cases, including weighing whether the deprivation would result in statelessness<sup>96</sup> and

“considerations such as the person’s links with the State, including the length of time that has elapsed between acquisition of nationality and discovery of fraud also need to be taken into account.” The Human Rights Council report points to a good practice adopted by “many states” to “limit ... the period following acquisition of nationality within which it may be withdrawn if fraud or misrepresentation is established.”<sup>97</sup>

Thus, the fact that U.S. law allows for denaturalization in cases of fraud is not *per se* contrary to international law. However, the lack of a mechanism for assessing the proportionality of the measure in a particular case, and the lack of a statute of limitations in civil cases (and the existence of a lengthy statute of limitations in criminal cases), conflict with international standards as expressed by the Human Rights Council. Further factors relevant to the assessment of the impacts of loss of nationality are explored in the next section.

### **Scrutiny of Impacts**

While scrutiny of the *purpose* of deprivation of nationality provides one major restraint, another can be found in scrutiny of the *impacts* of such deprivation. In examining the impacts, particular attention must be given to the threats posed by discrimination and statelessness.

*Prohibition on discrimination.* An important indication of arbitrariness in the conception or application of nationality legislation is the presence of discrimination.<sup>98</sup> Both the International Covenant on the Elimination of All Forms of Racial Discrimination (CERD), in Article 5(d) (iii),<sup>99</sup> and the 1961 Convention on the Reduction of Statelessness (discussed below), Article 9, prohibit discrimination in the construction and application of nationality law. Article 2(1) of the ICCPR requires that states “protect and ensure” rights protected under the covenant (including Article 24(3), covering children’s nationality, examined below) “without distinction of any kind.”<sup>100</sup>

Scholars have noted that deprivation of nationality is applied unequally, being used more frequently against naturalized citizens.<sup>101</sup> The law of the United States, in effect since the availability of expatriation was restricted following *Trop* and *Afroyim*, reflects this pattern. The tension regarding the seemingly equal citizenship between naturalized citizens and U.S.-born citizens under the Fourteenth Amendment on one hand, and the availability of criminal and civil denaturalization on the other is considered in more depth in Chapter II.

In 2018, the United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Tendayi Achiume, presented a report to the U.N. General Assembly raising acute concerns regarding the appropriation of nationality and immigration law in furtherance of increasingly racist, patriarchal, and xenophobic ideologies. Achiume identified instances where such ideologies are finding expression in the government, policies, and practices of Member States.<sup>102</sup> The Special Rapporteur also called

attention to the problem of “facially race-neutral policies or rhetoric that nonetheless result in racialized exclusion.”<sup>103</sup>

Article 1(2) of the CERD acknowledges that states can and do make distinctions between citizens and non-citizens with respect to the enjoyment of human rights. However, such distinctions “must be interpreted narrowly and in accordance with international human rights law and standards relating to the prohibition of racial discrimination and equality before the law.”<sup>104</sup> The qualified legitimacy of such distinctions, however, does not absolve states from scrutiny regarding the underlying purpose or effect of discrimination between “citizens” and “aliens”:

Foreignness should not be reduced to nationality or national origin alone. In much of the world, non-white migrants are far more vulnerable to discrimination and intolerance than white migrants, irrespective of nationality. Refugees and migrants are targeted for discrimination on the basis of their nationality and national origin combined with other social categories, the most important of which include race, ethnicity, religion and class.<sup>105</sup>

The intersection of foreignness, race, religion, class, and other social categories, on the one hand, and nationality, on the other, lies at the heart of the human rights risks and abuses detailed in this report. It is argued that the current structure and functioning of the executive branch offices responsible for administering access to proof of nationality permit the rapid institutionalization of a form of *ad hoc* collective suspicion that links perceived “foreignness” with fraudulent conduct. This feature of the U.S. administrative state tilts the legal and social burdens of *proving* equal entitlement to citizenship disproportionately against certain communities, without sufficient oversight and safeguards. A parallel can also be drawn between this facet of citizenship in the U.S. and the case study of the Dominican Republic, considered below, where, through a combination of administrative practice and political rhetoric, the Haitian minority population gradually became synonymous with fraudulent status in public perception and, eventually, under the law.

*Avoidance of statelessness.* A second element of scrutinizing the impacts of deprivation is considering whether it could lead to statelessness. Numerous international courts and tribunals, in accordance with the consistent view of the U.S. Supreme Court, have recognized the pernicious impact that statelessness has on an individual. The experience of statelessness is repeatedly described as an offense against human dignity.<sup>106</sup>

The ICCPR, Article 24(3), and the Convention on the Rights of the Child (CRC), Article 7, both address children’s right to acquire a nationality. The HRC has examined cases in which states deny documentation to children born on the territory, finding that such practices may violate Article 24(3) by denying children protection and, in many cases, the ability to prove



entitlement to nationality by birth.<sup>107</sup> Article 24(3) has also been interpreted to require a state party to the treaty to confer its nationality on stateless children born or found within its territory; this rule is considered the chief protection against inherited statelessness under international law.<sup>108</sup>

The 1961 Convention on the Reduction of Statelessness and the 1954 Convention relating to the Status of Stateless Persons together provide a “framework that grants a minimum of rights and protection to stateless persons and fights against the spread of statelessness worldwide.”<sup>109</sup> The 1961 Convention “aimed to respond to the far too extensive discretion of states that enabled them to denationalize citizens during World War II.”<sup>110</sup> Deprivation of nationality is covered in Article 8. That provision, a compromise measure reflecting the variation in national law at the time of the convention’s negotiation and adoption, allows states to exercise deprivation powers only in certain strictly limited circumstances, including in cases in which nationality was obtained by fraud, with additional safeguards required as outlined in the previous section.

In order to prevent statelessness, states must understand what it is and be able to identify when an individual is at risk of becoming—or is in fact already—stateless. Statelessness is a mixed question of law and fact and must be determined not only on the basis of legal provisions but also the practice of competent state authorities.<sup>111</sup> Making a determination that has implications of such magnitude for the affected individual requires specialized skills and training and should not be delegated to low-level state actors who may lack adequate resources.

### **Procedural Protections**

Where a state claims that an individual is a non-national, or seeks to deprive nationality allegedly acquired through of fraud, minimum standards of due process must be followed,<sup>112</sup> “including the right to challenge the allegation that a person is in fact a foreigner.”<sup>113</sup>

In practice, citizenship and denationalization processes are often complicated by low-quality documents and inadequate official record keeping. This can make it especially hard to guarantee due process. Guidance by the United Nations Office of the High Commissioner of Refugees (UNHCR) issued in 2013 (known as the Tunis Conclusions), addresses this concern. The Tunis Conclusions note that fraud may be made impossible to prove (or to refute) to an acceptable standard given possible administrative shortcomings on the part of the state in registering and documenting identity:

Another area of concern is the often poor quality of “feeder” or supporting documents from civil registration systems and other administrative registries in many countries which serve as proof for issuance of identity documents and passports. These documents often contain minor errors or discrepancies relating to the identity of individuals. These realities need to be taken into account in assessing cases of alleged misrepresentation or fraud.<sup>114</sup>

As this guidance suggests, where the state accuses an individual of fraudulent acquisition of citizenship or asserts that citizenship has previously been recognized in error, the “realities” at play demand more careful review in order to mitigate the heightened risk of arbitrary deprivation of nationality.

The Tunis Conclusions also set out basic principles that should be considered in assessing the adequacy of procedural safeguards in the context of denationalization:

[L]oss and deprivation of nationality may only take place in accordance with law and accompanied by full procedural guarantees, including the right to a fair hearing by a court or other independent body. It is essential that the decisions of the body concerned be binding on the executive power. The person affected by deprivation of nationality has the right to have the decision issued in writing, including the reasons for the deprivation. Deprivation decisions are only to enter into effect at the moment all judicial remedies have been exhausted.<sup>115</sup>

These principles follow the guidance from the Human Rights Council in its 2013 report on arbitrary deprivation of nationality:

Where a person is subject to loss or deprivation of nationality and a review process is available, lodging an appeal should suspend the effects of the decision, such that the individual continues to enjoy nationality — and related rights — until such time as the appeal has been settled. Access to the appeals process may become problematic and related due process guarantees nullified if the loss or deprivation of nationality is not suspended and the former national, now alien, is expelled. Similarly, if withdrawal of nationality results in the loss of property rights, the individual may have to forfeit his home or business, as well as other acquired rights — an interference which may be difficult to repair if it is subsequently established that the loss or deprivation of nationality was unlawful or arbitrary and must be reversed.<sup>116</sup>

A formidable framework of international agreements and national laws limits states’ power to deprive people of nationality. Any such effort must survive scrutiny of purpose and scrutiny of impact—including the prohibition of discrimination and avoidance of statelessness—and must also follow due process. Yet as the next section explores, these safeguards have not always prevented malicious efforts to use denationalization as a weapon.

## Comparative Case Studies

The following three case studies present an overview of other national contexts in which nationality law has been amended recently to achieve new policy goals, in an atmosphere of exceptionalism. In the Dominican Republic, it is estimated that thousands of people—perhaps hundreds of thousands—have been made stateless through of a series of shifts in nationality law and policy affecting the native-born population of Haitian descent. In the United Kingdom and Canada, changes allowing more liberal use of nationality deprivation in cases of fraud or threats to national security have triggered criticism for disproportionate impacts on marginalized communities, particularly Muslim, Arab, Middle Eastern, and South Asian communities. These changes have also been criticized for creating a new class of contingent citizens whose status is a privilege that can be taken away by the state for an expanding list of reasons.

The following brief descriptions do not attempt to capture every detail, but rather aim to highlight that what is happening in the United States reflects a global trend whose manifestations are visible elsewhere. These examples provide insight into the mechanics of expanding nationality deprivation (in the case of the Dominican Republic and the United Kingdom), as well as arguments that have successfully set limits on the practice (Canada). The examples provided from the Dominican Republic and the United Kingdom are also included to illustrate the potential for further expansion of attacks on the security of citizenship in the United States.

### Dominican Republic

The Americas is a region of strong legal protections in the field of nationality and statelessness. The right to nationality is codified in Article 20 of the American Convention on Human Rights,<sup>117</sup> and under that framework deprivation of nationality leading to statelessness is prohibited.<sup>118</sup>

The Inter-American Court of Human Rights has also considered the application of Article 20 of the American Convention in cases brought on behalf of individuals of Haitian descent in the Dominican Republic challenging that country's nationality law and practice, chiefly on grounds of racial discrimination. That discrimination is fueled by anti-Haitian sentiment, which has been a virtually permanent fixture in the country's political, socio-cultural, and economic power structures for decades.<sup>119</sup> In the recent judgment in the case of *Expelled Dominicans and Haitians v. Dominican Republic*, the Inter-American Court stated that:

[I]n accordance with the current trend of international human rights law, when regulating the granting of nationality, States must take into account: (a) their obligation to prevent, to avoid and to reduce statelessness, and (b) their obligation to provide each individual with the equal and effective protection of the law without discrimination.<sup>120</sup>

In the *Expelled* decision and in a related case, *Yean and Bosico v. Dominican Republic*, the Inter-American Court underlined the overriding importance of ensuring equal treatment and prohibiting discrimination in the content and application of nationality law, particularly in respect of denial or deprivation of nationality leading to statelessness.<sup>121</sup> These decisions addressed a longstanding struggle of the Haitian minority in the Dominican Republic for equal access to nationality under the law.

From the 1920s until 2010, the Dominican constitution established a relatively straightforward regime of nationality acquisition by birth on the territory (*jus soli*). Beginning in the 1990s, nationalist groups promoted an interpretation of the country's *jus soli* law to exclude children of undocumented migrants. Since then, thousands of people of Haitian descent in the Dominican Republic have been refused birth registration and national identity cards, which are necessary to work, register children, get married, open bank accounts, attend public universities, and participate in many other civil activities.<sup>122</sup>

A 2004 migration law took the de facto citizenship denial regime one step closer to formalization, codifying a new interpretation of an exception to *jus soli* for children deemed by the state to be born to parents “in transit.”<sup>123</sup> The law affirmatively stated that seasonal and undocumented workers were “in transit,” a term that since the 1920s had been interpreted narrowly, to signify a person in the country for less than 10 days. The government applied the new law retroactively, introducing a nationwide policy in 2007, enacted through internal administrative decisions, systematically halting the issuance of new or renewal documentation to people of Haitian descent, including birth registration for Dominican-born children. In 2005, the Dominican secretary of labor unveiled a plan to “dehaitianize” the country.<sup>124</sup>

In January 2010, a new Constitution further formalized the restrictive interpretation of *jus soli*, foreclosing access to citizenship for children born to undocumented migrants in the Dominican Republic. Current Senior ICE Advisor Jon Feere has “praised the ‘clarity’ of the Dominican Republic’s new immigration-limiting constitution.”<sup>125</sup>

A September 2013 Dominican Constitutional Tribunal decision—now referred to ominously as *La Sentencia* (the ruling)—stripped thousands of Dominicans of their nationality, through a dramatic, retroactive re-interpretation of the country’s nationality laws.<sup>126</sup> The case was brought by Juliana Deguis Pierre, who was born in the Dominican Republic to Haitian migrant parents in 1984, and was denied access to proof of her Dominican nationality due to policies in place following the 2004 migration law. The court held that Deguis Pierre had been registered as a Dominican national erroneously because her parents could not prove their regular migration status and were accordingly “in transit” at the time of her birth. The court, extraordinarily, treated the case, brought by one woman, as a collective action, and used that posture

to direct authorities to review *all* civil records since 1929 to ensure that they contained no improper entries of other “foreigners” mistakenly registered as Dominicans.

In 2016, UNHCR estimated that the decision made 133,770 people stateless. The number of affected people remains contested today and its elusiveness is exacerbated by past practices of selectively denying documentary proof of nationality to certain groups. The *Sentencia* largely targeted Dominicans of Haitian origin, many of whose parents came to the Dominican Republic for work and settled there. The decision “legalized actions the state ha[d] been carrying out for many years.” As one observer noted:

It was obvious to human-rights groups, the United Nations, and pretty much anyone watching that the Dominican government was doing an end run around some of the most important principles of the rule of law—namely, that you can’t change the rules and then go around punishing people for having violated them in the past.<sup>127</sup>

In May 2014, months after the *Sentencia* came down, the Dominican Republic passed Law 169-14, which divided the huge population of affected persons into different groups based, with bitter irony, on whether their names appeared in the civil registry. This would lead to a grant of diminished nationality as a concession, but maintained the fiction that these individuals were never Dominican. For unregistered individuals, the law provides for a separate process to apply for a right to remain in the country for a period of two years and the possibility to naturalize. To date, five years on, no unregistered former nationals have naturalized and only an estimated one-third of previously registered nationals—like Juliana Deguis Pierre—have received confirmation and proof of nationality under the 2014 law.<sup>128</sup> Thousands of people have been forced to leave on their own or were forcibly deported. Many more remain, in a condition of total exclusion. The legal situation of hundreds of thousands is still uncertain, with no prospect of relief in sight.

### **United Kingdom**

Between 1973 and 2002, the British government did not once use its deprivation powers afforded under the British Nationality Acts of 1948 and 1981.<sup>129</sup>

In the wake of the September 11, 2001 attacks, the United Kingdom enacted a provision in its nationality law giving the Home Secretary the power to deprive nationality where he or she is “satisfied” that the person has done anything seriously prejudicial to the vital interests of the country. This power could also be used if the individual obtained citizenship by naturalization and the Home Secretary is satisfied that it was obtained by fraud or false representation.<sup>130</sup> Under these provisions, only dual nationals could be deprived of nationality, in order to ensure against the creation of statelessness.<sup>131</sup>

In 2006, a further amendment allowed for deprivation of nationality that would be, to the satisfaction of the Home Secretary, “conducive to the public good.”<sup>132</sup> Deprivations resulting in statelessness were still not permitted. Between 2006 and 2014, the United Kingdom made increasing use of its deprivation powers, revoking citizenship of at least 373 British citizens.<sup>133</sup> As of 2014, the Bureau of Investigative Journalism identified 15 cases of individuals deprived of nationality on national security grounds while abroad.<sup>134</sup> According to media reports, “[t]his power has almost exclusively been used against Muslims and such decisions will confirm to many that British Muslims are second class citizens in the eyes of the government.”<sup>135</sup>

In 2014, the United Kingdom expanded its deprivation power once again, to cover denationalization leading to statelessness in the case of naturalized British citizens, if reasonable ground exists to believe the person could obtain another nationality.<sup>136</sup> The 2014 changes do not appear to comply with the United Kingdom’s obligations under the 1961 Convention on the Reduction of Statelessness, as the Justice Initiative has argued in a legal opinion on the question.<sup>137</sup>

Prior to the 2014 amendments to the British Nationality Act (BNA), the Supreme Court decided in *Secretary of State for the Home Department v. Al-Jedda* that the British Nationality Act provisions prohibiting creation of statelessness precluded the Home Secretary from issuing deprivation orders in cases where the individual concerned did not possess another nationality at the time of the order.<sup>138</sup> The legislative history of the 2014 amendments makes clear that the Home Secretary’s loss in the *Al-Jedda* case was the reason for the newly expanded powers. Just weeks after the amendment was enacted, the Home Secretary issued a fresh order for Mr. Al-Jedda’s denationalization.

The *Al-Jedda* decision and subsequent contentious amendments to the BNA, according to one scholar, “speak volumes for the fact that state power is not unrestricted and that state sovereignty is limited by international obligations (the statelessness issue) and their application by (national) courts.”<sup>139</sup> This is an optimistic, if technically correct, take on the ability of international obligations to provide meaningful redress in citizenship deprivation cases.

One year after the BNA amendments, the case of Pham Minh Quang would reach the UK Supreme Court. Pham was born in Vietnam and came to the United Kingdom seeking asylum at the age of six.<sup>140</sup> He travelled to Yemen in 2010, taking on a role as an assistant for an al-Qaeda publication and swearing allegiance to al-Qaeda in the Arab Peninsula.<sup>141</sup> Upon his return to the United Kingdom, Pham received an order depriving him of British nationality. Deportation proceedings ensued, triggering Vietnam to deny that Pham was a Vietnamese citizen.<sup>142</sup> His case thus presented a quandary: how did Pham become stateless and when? The Supreme Court focused on the latter question, deciding that because the deprivation order preceded Vietnam’s pronouncement that Pham was not a citizen, British authorities were not responsible for his statelessness.<sup>143</sup> In February 2015, while his challenge to denationalization

in Britain was still pending, Pham was extradited to the United States to face terrorism charges.<sup>144</sup> As researcher Nisha Kapoor points out in her 2018 book on the erosion of civil liberties under the “war on terror,” Pham’s case reflects the “ideological and legal-technical progression” of denationalization in the UK.<sup>145</sup> In Pham’s case, ultimately, his statelessness was “legitimated” through a series of steps,<sup>146</sup> beginning with the expansion of citizenship deprivation in practice from 2001, continuing with the narrative reformulation of citizenship as a privilege rather than a right, and finally bolstered by the 2014 BNA amendments, which countenance the creation of statelessness in the name of national security.

As the *Pham* and *Al-Jedda* cases suggest, appeal from a deprivation order is available, however the right may be eviscerated if the Home Secretary certifies the decision was based on information that should not be made public. In such cases, appeal is available to the Special Immigration Appeals Commission, a regime of special courts affording limited review of national security cases in which secret evidence is withheld from litigants and their counsel.

An individual can appeal on the grounds of both the legality of the action and the merits of the Home Secretary’s decision. Although an appeal is technically possible while the individual is abroad, there are significant challenges preventing appeals from being lodged, including lack of access to consular services and a 28-day deadline for lodging appeals.<sup>147</sup>

The Home Secretary also has the power to issue temporary exclusion orders while British citizens are abroad, in instances where such an order may be “reasonably necessary” to protect the public from terrorism. This determination can be made by the Home Secretary without any advance notice to the citizen concerned.<sup>148</sup>

In May 2013, then Home Secretary Theresa May issued a Written Ministerial Statement invigorating her Royal Prerogative power to remove passports from British citizens by affirming that there is “no entitlement to a passport and no statutory right to have access to a passport.”<sup>149</sup> The statement also asserted that the discretionary criteria for making passport revocation decisions included “proposed” activities, in other words, the Home Secretary reserved the right to revoke passports from British citizens preemptively.<sup>150</sup>

## Canada

In Canada in 2015, the Conservative government of Prime Minister Stephen Harper passed Bill C-24 to expand citizenship-stripping powers under the Strengthening Canadian Citizenship Act (SCCA). The law, which came into force in June 2015, permitted denationalization of Canadian dual citizens “born abroad” for acts against “the national interests of Canada.”<sup>151</sup> The law was challenged in the courts, and Justin Trudeau made the security of citizenship as a right (not a privilege) a central component in his 2015 election campaign. In 2016, Canada reconsidered and repealed Bill C-24. Trudeau’s government introduced Bill C-6, which

removed differentiated penalties for mono- and dual citizens. Parliamentary debates leading to the repeal of Bill C-24 emphasized its ideological nature and practical ineffectiveness, as well as its fundamentally discriminatory character:

From a political point of view, the bill was ill conceived. It was conducted in haste, and in many ways proposed changes to the law where there had been no demonstrated problem. It was a repeated attribute of the previous Conservative government to make decisions not based on evidence but based on ideology. Bill C-24 was a classic example of that. The bill turned out to be very unfair, divisive, was ideologically driven, and most important it was unfair.<sup>152</sup>

The SCCA also included provisions permitting citizenship revocation on grounds of fraud through an expedited administrative process affording limited procedural protections. The number of revocation cases skyrocketed after the introduction of an administrative procedure, on the initiative of Jason Kenney, immigration and citizenship minister under the Harper government. Kenney announced in 2012 that using this procedure “his department would cancel the citizenship of more than 3,000 people, in a crackdown against those who had faked the amount of time they [had] spent in Canada.”<sup>153</sup> In 2014, the Harper government then amended the citizenship law again to institute a fast-tracking process for revocations in “non-complex” cases.<sup>154</sup>

These provisions came under judicial review in 2017 and were quashed as a violation of the Canadian Bill of Rights on the ground that deprivation of citizenship requires an oral hearing before the court or an independent administrative tribunal, a fair opportunity to be heard, the right to an impartial decision maker, and an opportunity to have special circumstances considered.<sup>155</sup> A month later, in June 2017, a federal court voided the citizenship revocation of 312 individuals targeted in an operation based on the expedited administrative deprivation procedure, designed to target fraudulent acquisition of Canadian nationality.<sup>156</sup>

## Conclusion

The history and case studies examined in this chapter are intended to help place the chapters that follow in historical and comparative relief. The past trends identified in the U.S. context provide essential insight into the weaknesses of U.S. citizenship and immigration laws, and how they have been shaped by periodic bouts of nativism in the country. International legal norms suggest the minimum-level safeguards and guideposts that should apply in cases of deprivation of nationality, drawing on treaty provisions the United States has signed and is



committed to uphold. Finally, the comparative case studies illustrate the strategies employed in other countries to expand deprivation powers or, in the case of the Dominican Republic, gradually to erode and ultimately discredit claims to nationality of the Dominican-born Haitian population. Regrettably, these strategies and their implementation resonate with the current U.S. context, as explored throughout the remainder of the report.



## II. DENATURALIZATION: A RADICAL MEASURE IN THE HANDS OF ZEALOTS

*“To 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.”*

Justice Wiley B. Rutledge, *Klapprott v. United States* (concurring opinion, 1949)

### Introduction

President Trump has repeatedly disparaged unauthorized immigrants using derogatory and dehumanizing language.<sup>157</sup> As a candidate, he promised to “begin moving them out, Day 1...[in my] first hour in office, those people are gone.”<sup>158</sup> Despite the president’s expressions of support for “legal immigration,” his administration’s policies and practices signal otherwise. His administration has granted fewer visas, aggressively pursued a Muslim ban, drastically reduced refugee admissions, terminated the status of hundreds of thousands of temporary protected status (TPS) residents, proposed a regulation that would reject petitions for green cards from those who use public benefits, turned asylum seekers away at ports of entry, and

terminated the Deferred Action for Childhood Arrivals (DACA) program. But above and beyond that, the administration is now targeting naturalized citizens with the aim of revoking their U.S. citizenship.

The administration openly acknowledges its “ever-increasing” denaturalization practice.<sup>159</sup> In its FY 2020 budget plan, issued in March 2019, the Department of Justice’s Civil Division, which handles civil denaturalization cases, cites a “staggering” increase in denaturalization referrals:

In FY 2017, [the District Court Section of the Civil Division’s Office of Immigration Litigation, or OIL-DCS] received 58 referrals and filed 18 cases. In FY 2018, the Unit received 144 referrals and filed 48 cases. In the first two months of FY 2019 alone, the Unit received 54 referrals – nearly as many as they received in all of FY 2017. If the referral rate remains constant, the Unit will receive 324 cases for FY 2019, a 125% increase over FY 2018. This is on top of a 148% increase in FY 2018. Having reached maximum capacity, the Unit cannot file cases for the majority of their referrals now, and the projected increase over FY 2019 and FY 2020 is staggering.

Furthermore, a DHS initiative, Operation Janus, identified approximately 315,000 cases where some fingerprint data was missing from the centralized digital fingerprint repository. Among those cases, some individuals may have sought to circumvent criminal record and other background checks in the naturalization process. These cases are the result of an ongoing collaboration between DHS and DOJ to investigate and pursue denaturalization proceedings against those who fraudulently obtained citizenship. In response to Operation Janus, U.S. Citizenship and Immigration Services (USCIS) is increasing their dedicated staff from 13 FTEs [full-time employees] to 70, and increasing the number of referrals to 360 annually, with an ultimate goal of referring at least 1,600 cases to OIL-DCS for prosecution as part of the operation.<sup>160</sup>

Naturalization is a crucial tool for the integration of immigrant communities and a fundamental facet of the U.S. immigration system. Few legal and administrative procedures are more important. However, a lack of clearly understood and properly functioning procedures is a source of abuse and prolonged political disenfranchisement in many countries, both currently and throughout modern history.

The history of denaturalization in the United States since the 1990s shows increasingly racialized and criminalized narratives about who can become an American. In the U.S. today, views of immigration and citizenship are bound up with political strategies built around nativism and racial division found in the rhetoric of the current administration. Some Americans seem to have abandoned the idea that immigrants are a legitimate and vital part of our country, to be treated with respect and dignity, and that this country’s approach to them reflects the quality and character of our democracy.

Denaturalization statutes provide ample loopholes for those with an anti-immigrant agenda to undermine naturalized citizenship, rendering it widely contingent and insecure. Echoing a trend in many affluent Western countries, since the early 2000s, the United States has quietly expanded its use of denaturalization proceedings. In the United States, the rise in denaturalization is driven by other prominent socio-legal trends explored in depth throughout this chapter, including:

- the expanding use of insufficiently understood or regulated new technologies designed to verify and track identities across government bureaucracies;
- the systemic convergence of criminal and immigration law in the country; and
- in particular under the current administration, the erosion of certain normative principles that have previously safeguarded the basic blueprint of the American political community.

The government programs and policies under review in this chapter span different presidential administrations. Denaturalization, biometric data collection and analysis, and critiques of the U.S. criminal and immigration systems are not new. This report seeks to present comprehensive and accurate information on a field of law that is obscure to most Americans and widely acknowledged by experts to be challenging in practice. Under the Trump administration, the number of denaturalization cases rose significantly in 2017 and 2018, with attendant problems of selected targeting of certain groups, the potential creation of second-class citizens, and the prospect of statelessness. More concerning still is the likelihood that attempted denaturalizations will continue to increase while Trump remains in office. As the case studies of the Dominican Republic and the United Kingdom (and many other historical and contemporary comparative examples) show, once citizenship deprivation is considered as a tool for enforcement of immigration and criminal law, the vulnerability of targeted communities generally expands as practices become more normalized and entrenched in law and state institutions.

The increase in the number of denaturalization cases under the period of review is not surprising, as this is the explicit aim of Operation Second Look, and was a foreseeable outcome of Operation Janus. The findings, elaborated in more detail below, also show other patterns that confirm concerns regarding specific groups affected by denaturalization under the Trump administration and the wider impact this is likely to have on immigrant communities. In other words, some of the same communities that President Trump has singled out for exclusion from the American political landscape are disproportionately represented among the targets of denaturalization cases in 2017 and 2018. There is, moreover, no stated end point for this operation, although it has been suggested by the former director of USCIS that Operation Second Look might result in “a few thousand” denaturalizations. Such a statement would likely have seemed unthinkable under another administration and runs markedly against the lofty language of Supreme Court cases strictly constraining Congress’s power to deprive nationality under the Fourteenth Amendment’s Citizenship Clause, which covers naturalized Americans.

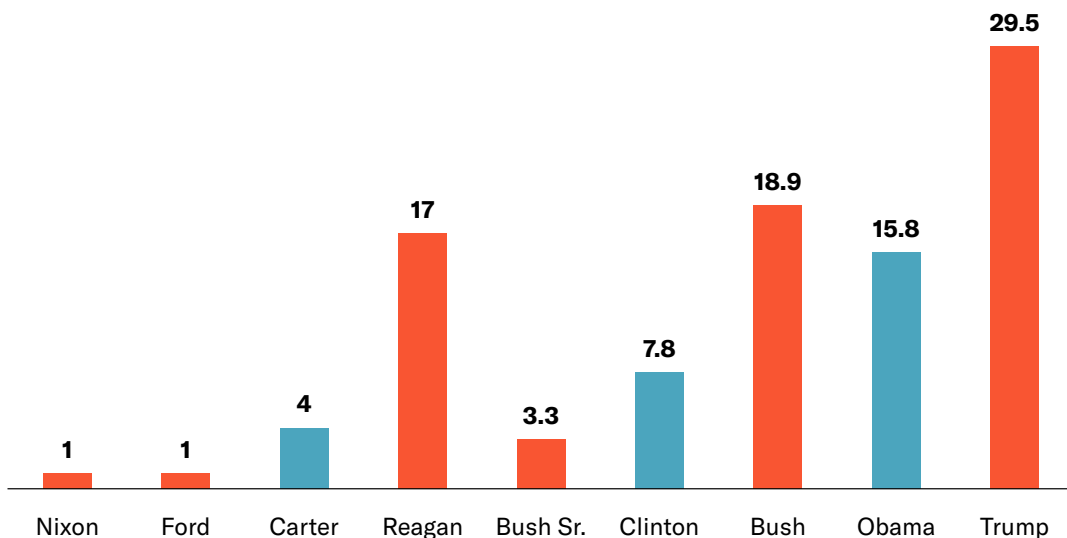
The potential to scrutinize bulk, digitized information about the activities of immigrants and citizens alike is likewise on the rise. It would therefore be naïve to assume that there may not be other, similar operations pursuing new aims using the increasingly available digital tracking systems currently under development. These systems will link data across different government agencies, including biometric data, data on entry and exit from the United States, criminal history, and relationship patterns.

There is a pressing need to address the incoherence and protection gaps in the present denaturalization regime, especially its lack of resonance with the constitutional principles it so obviously intersects with. These principles include the equality of all citizens born or naturalized in the U.S., the prohibition on deprivation of citizenship as a form of punishment, the avoidance of statelessness, and the imperative of unambiguous procedural protections when the personal and social stakes are so high.

## Denaturalization Data at a Glance

*Civil denaturalization cases.* Through a FOIA request, the Justice Initiative obtained data from the Department of Justice, Civil Division, on the number of civil denaturalization cases filed between 1972 and 2018. Based on the information received, it appears that 565 civil denaturalization cases were filed between 1972 and 2018. Over this time, on average, 12 civil denaturalization cases were filed per year. In only four previous years during this entire period (1987, 2000, 2001, and 2002) did the annual figure outstrip the number of civil cases filed in either 2017 or 2018.<sup>161</sup> Our own comprehensive review of cases filed between January 1, 2017 and December 31, 2018 returned seven additional 2018 cases compared to the number provided by DOJ.

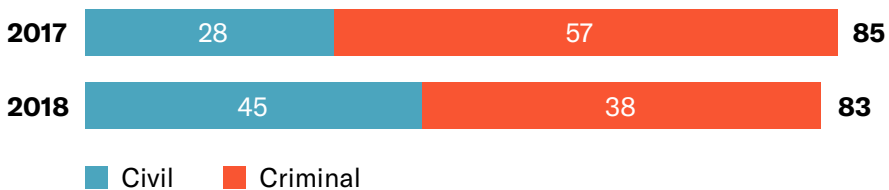
*Average Number of Civil Denaturalizations per Year, by Administration<sup>162</sup>*



*Criminal denaturalization.* A review of 2017-18 cases on PACER identified 102 criminal denaturalization cases, which account for 60.71% of all cases filed under either statute. Based on information received from practitioners and historical records reviewed in researching this report, the number of criminal cases filed appears to be rising, as most cases brought for the past 50 years have been civil denaturalizations developed under the auspices of specific sections of the Department of Justice with relatively narrow institutional mandates.<sup>163</sup>

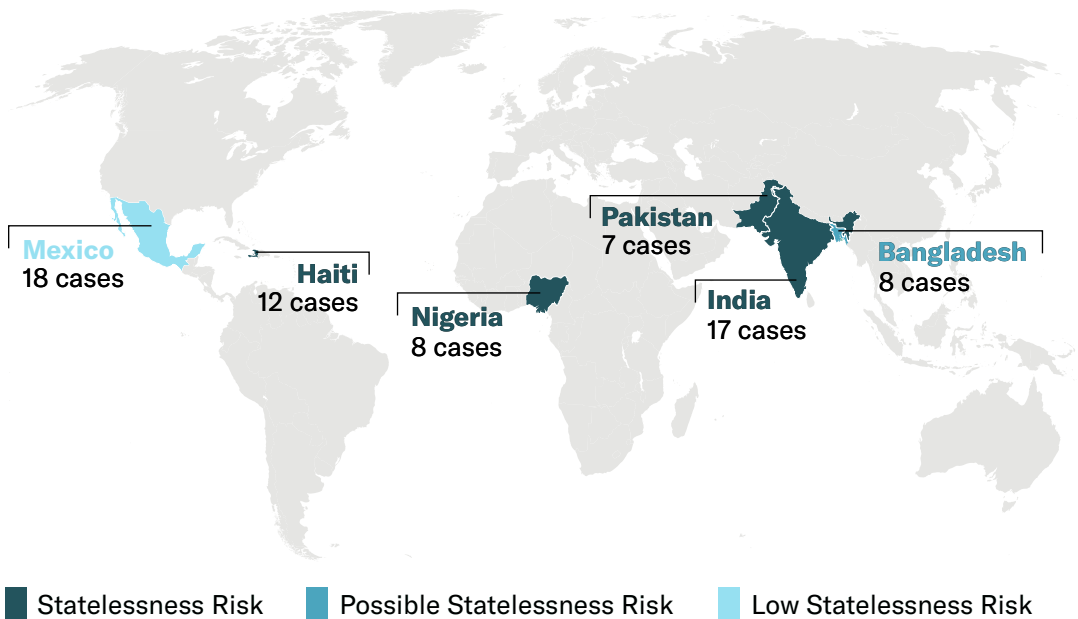
*Access to information.* Of the 168 cases reviewed through PACER, over 77%, including all civil cases, were either completely blocked online or contained documents that were inaccessible online. To obtain relevant records for analysis, the Justice Initiative retrieved files in-person.

*Denaturalization Cases Identified by the Justice Initiative, 2017-18:*



**Country of origin information**

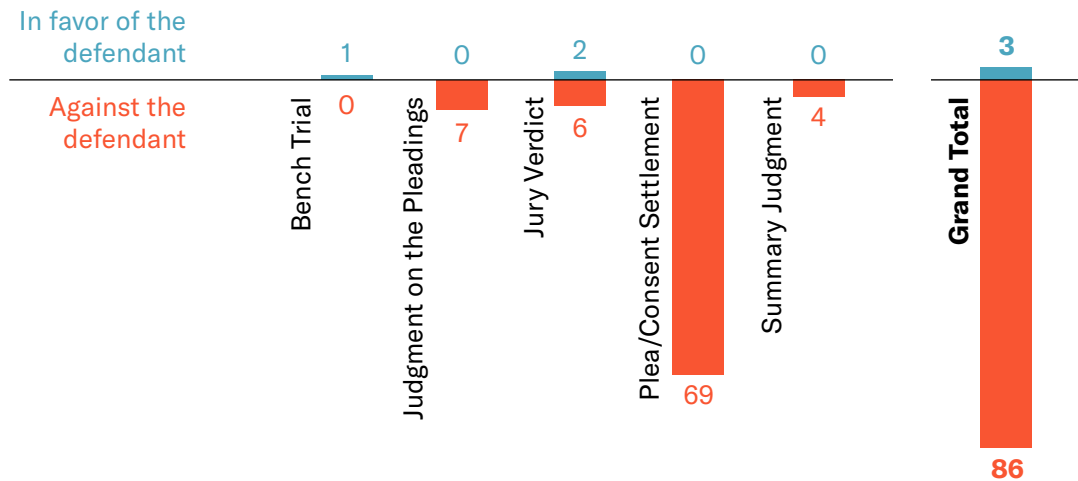
Data on country of origin listed for defendants in court documents is presented below, with the Justice Initiative’s analysis of each country’s nationality and immigration laws to assess the risk that, through denaturalization, the defendant would be rendered stateless. Of the six countries most represented, four posed a significant risk of statelessness.



In addition to the high probability that denaturalization results in statelessness, there is also a close correlation between the country of origin data from 2017-18 and President Trump’s specific public attacks against these countries and their populations. The president has overtly disparaged Mexicans,<sup>164</sup> Haitians,<sup>165</sup> Haiti,<sup>166</sup> and Nigerians,<sup>167</sup> all in connection with his administration’s immigration policies.

**Case disposition<sup>168</sup>**

Of all 89 closed cases (36 civil and 53 criminal), the following outcomes obtained (as of June 1, 2019):



Of the cases reviewed, 142 defendants faced denaturalization (rather than attempt or procurement on behalf of another). Of these, 75 cases were concluded,<sup>169</sup> and 72 individuals, or 96%, were ordered denaturalized.<sup>170</sup>

**Basic information on the profile of defendants**

Defendants in denaturalization cases in 2017 and 2018 were 81% male, their average age was between 50 and 51 years old, and they had an average date of naturalization of 2009 (10 years ago, which is the statutory limit for bringing criminal denaturalization cases).<sup>171</sup> Dates of naturalization ranged between two and 24 years ago.

**Procedural issues**

*Right to counsel.* In civil cases during 2017-18, more than a quarter (25.76%) of defendants were unrepresented. These include cases in which defendants had counsel for only a portion of the proceedings, often at later stages such as the consideration of the government’s motion for summary judgment or judgment on the pleadings. Unrepresented defendants lost in all closed cases reviewed for this report.

*Detention during criminal proceedings.* In all criminal cases reviewed, every defendant was under some form of restriction of movement. This ranged from travel restrictions, to home confinement and ankle monitoring, to full remand in custody. In most cases, bond was required, ranging from \$5,000 to \$250,000 and averaging \$67,083.<sup>172</sup> The only known national data available on bond amounts for all types of felony defendants is from 2009, which found that \$10,000 was the median money bail.<sup>173</sup>

*Judicial removal orders,* which bypass the immigration system to expedite the removal of denaturalized individuals, were issued in 13 closed cases, with several requests pending in open cases.

### **Case types<sup>174</sup>**

As a conservative estimate, we conclude that over one-third of the cases, the highest percentage of any category identified, reflect the Operation Janus and Operation Second Look investigations. These operations are discussed in more detail in below.

## **The Denaturalization Statutes**

This section provides an overview of the language and authoritative interpretation of two federal statutes authorizing denaturalization, accompanied by relevant findings from the Justice Initiative's review of recent cases, to illustrate the basic mechanics of the law. Later sections will look in greater depth at the operation of these laws in practice, both historically and today. The chapter is structured this way due to the complexity of the denaturalization statutes and the lack of consistency in how they have been interpreted and applied, which has led to ambiguities and infirmities in the protections afforded against arbitrary denaturalization. The chapter then goes on to present newer, emerging concerns about how the Trump administration is approaching enforcement of immigration law through the denaturalization statutes. These concerns can be fully appreciated only with the benefit of a basic understanding of the mechanics and shortcomings of the statutes themselves.

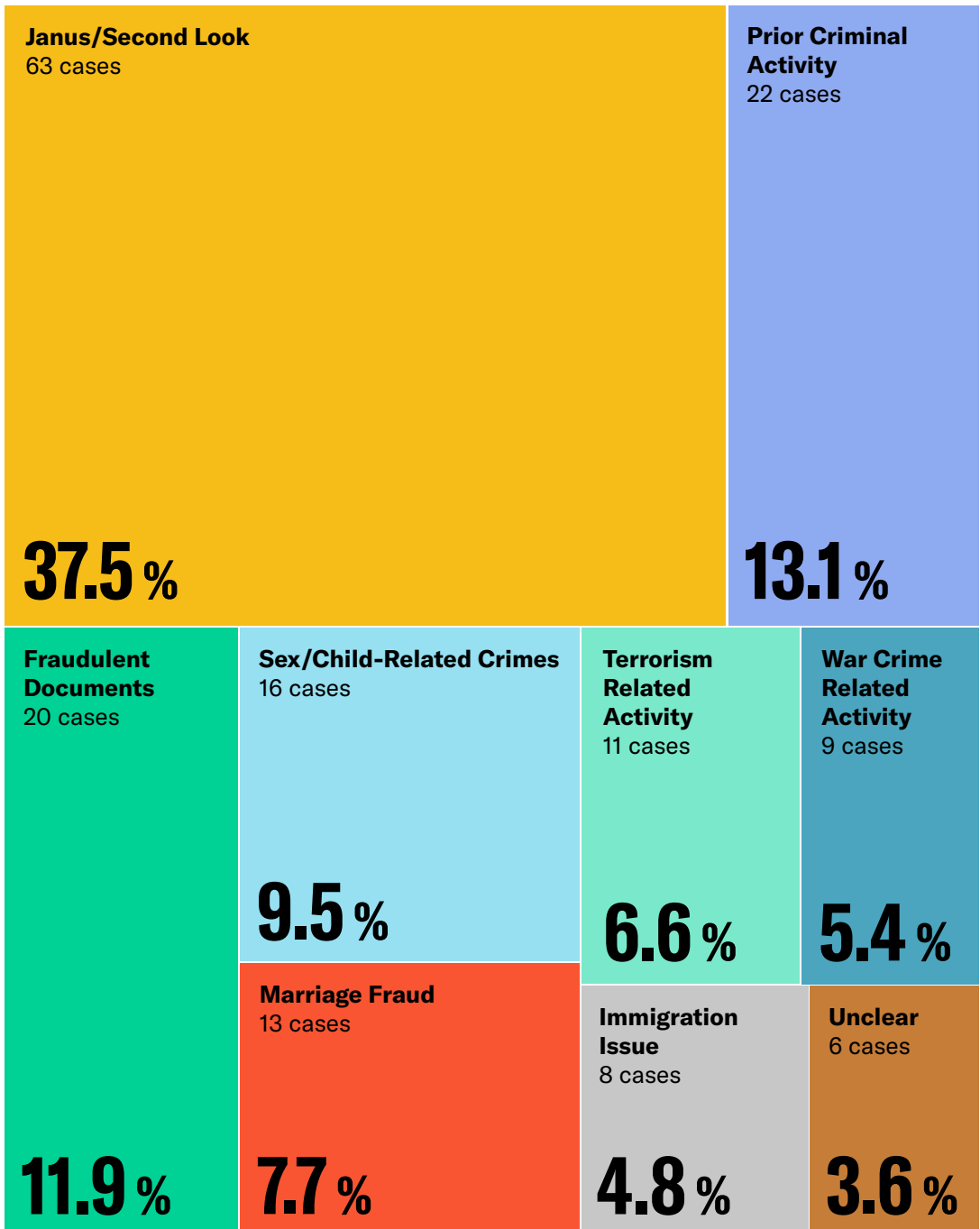
### **Naturalization and the Constitution**

U.S. citizenship is acquired either at birth or through naturalization.<sup>175</sup> Naturalization is a discretionary immigration benefit obtained by application. Applicants for naturalization must meet strict requirements, including lawful admission, residency, presence in the United States, and good moral character.<sup>176</sup>



# Case Types

Grand Total 168 cases



The Fourteenth Amendment’s Citizenship Clause does not distinguish between citizens on the basis of citizenship acquisition. U.S. citizens “born or naturalized in the United States” appear to hold the same rights and the same quality of citizenship. The clause states:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The process of denaturalization only applies to U.S. citizens who acquired citizenship through naturalization.<sup>177</sup> A person who acquired citizenship by birth cannot be stripped of citizenship. The federal courts have rationalized this disparity by conceptualizing denaturalization as a corrective administrative action, rather than a punishment.<sup>178</sup> Only Article III federal courts have authority to denaturalize American citizens via either civil or criminal denaturalization procedures.<sup>179</sup>

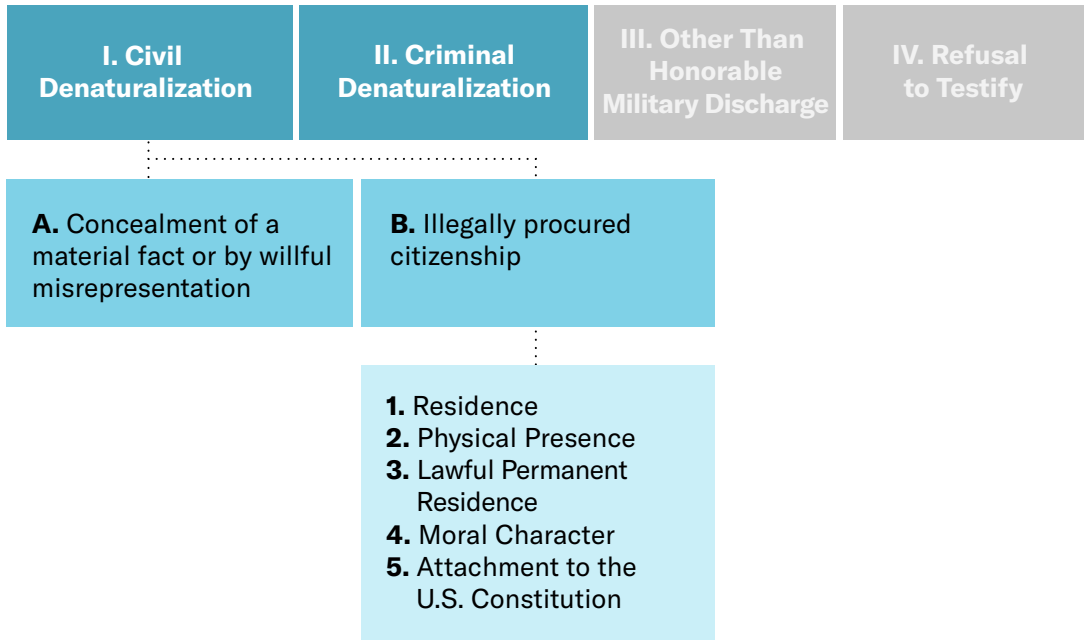
If denaturalized, a citizen’s legal status automatically reverts to legal permanent residency, but this does not preclude USCIS from further investigations and actions to revoke benefits and pursue removal.<sup>180</sup> It is unclear how many individuals were deported as a result of being denaturalized in the cases reviewed by the Justice Initiative, as this information is neither contained in court documents, nor publicly available.<sup>181</sup>

## GROUNDS FOR DENATURALIZATION

Naturalized citizens can be denaturalized through either civil or criminal processes, with different grounds for denaturalization in the relevant statutory language:

- *Civil denaturalization* may be sought where citizenship was (A) “procured by concealment of a material fact or by willful misrepresentation,” or (B) “illegally procured” (meaning the individual did not meet the statutory requirements for naturalization).<sup>182</sup>
- *Criminal denaturalization* may be sought if citizenship was knowingly procured “unlawfully” for one’s self or for another. This statute also sanctions attempted procurement.<sup>183</sup>

## Grounds for Denaturalization



Civil and criminal denaturalization cases are explored in more detail below. All denaturalization cases identified and analyzed for this report fell into these two categories. However, there are two additional forms of denaturalization that are relatively rare and not addressed in this report:

*Other Than Honorable (OTH) Military Discharge.* Naturalization can be acquired through active-duty service in the U.S. Armed Forces during periods of military hostilities. Citizenship acquired this way may be revoked if the individual “is separated from the Armed Forces under other than honorable conditions before the person has served honorably for a period or periods aggregating five years.”<sup>184</sup>

*Refusal to Testify.* The “refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities” is grounds for denaturalization.<sup>185</sup> This is considered a “remnant of the Cold War” but continues to be valid law.<sup>186</sup>

## Civil Denaturalization

There are several reasons why a naturalized U.S. citizen could be denaturalized, as explained below. However, it is important to note that prior to the Trump administration, denaturalization was largely considered a last resort to be applied only against the worst of the worst, such as war criminals. These shifts in practice are explored in more depth in subsequent sections of this chapter, but it is important to recognize that regardless of the priorities and normative principles adopted within the executive branch, the law currently permits denaturalization on a wide variety of grounds and does not prioritize among those grounds.

### Concealment of a Material Fact or by Willful Misrepresentation

USCIS has issued guidance on the meaning of this prong of the civil denaturalization statute.

A person is subject to revocation of naturalization if there is *deliberate deceit* on the part of the person in misrepresenting or failing to disclose a *material* fact or facts on his or her naturalization application and subsequent examination. In general, a person is subject to revocation of naturalization on this basis if:

- the naturalized U.S. citizen misrepresented or concealed some fact;
- the misrepresentation or concealment was willful;
- the misrepresented or concealed fact or facts were material; and
- the naturalized U.S. citizen procured citizenship as a result of the misrepresentation or concealment.<sup>187</sup>

In practice, this provision requires a prediction as to what *would have happened* if information had been disclosed during the application process. If the information would have had no bearing on naturalization, then denaturalization is inappropriate. The Supreme Court has interpreted the civil denaturalization statute's meaning and application. According to the court, the term "*material*" requires that concealment or misrepresentation must be shown by "clear, unequivocal, and convincing evidence to have been predictably capable of affecting, i.e., to have had a natural tendency to affect, [the immigration agency's] decisions."<sup>188</sup> "Materiality" means that the concealment or misrepresentation was "relevant to his qualifications for citizenship or that true information, if supplied, would predictably have disclosed other facts relevant to his qualifications."<sup>189</sup> However, the Supreme Court's position is contradicted by current policy guidance from USCIS, which directs the agency to apply a broader concept of materiality. According to USCIS, "[I]t is not necessary that the information, if disclosed, would have precluded naturalization."<sup>190</sup>

The government did not appear to adhere to the Supreme Court's standards in a number of cases reviewed for this report.

In practice, naturalized citizens are vulnerable even if the standards as envisioned by the Supreme Court apply, for two chief reasons. First, the application form for naturalization covers a voluminous amount of information, including whether the applicant has “**EVER** committed...a crime or offense for which you were **NOT** arrested.”<sup>191</sup>

A United States District Court, in its ruling in *United States v. Oribello Eguilos*, examined this complexity, and the uncertainty it presents for naturalization applicants:

[The question] sets a trap for the unwary applicant. Given the thousands of possible offenses an individual can commit each day, no applicant can answer this question truthfully without jeopardizing their entire application and risking self-incrimination. Nevertheless, a false answer gives the government nearly limitless leverage over the naturalized individual's citizenship. As the aforementioned question is often repeated during an individual's citizenship interview, the government can argue that such false testimony means that the individual never possessed the requisite good moral character for citizenship. Or the government can simply claim that an untruthful answer caused the individual's naturalization to be illegally procured by concealment or willful misrepresentation.”<sup>192</sup>

Second, and related, the requirements for naturalization cover discretionary determinations like “good moral character.” It is one thing to predict how newly discovered information might impact the answer to a purely objective fact, like whether a person was continuously present in the country; on the other hand, to predict the outcome of a discretionary determination that has no uniform application invites arbitrariness.

### **Illegally Procured Citizenship**

Citizenship may also be revoked through a civil action if naturalization was procured “illegally.” *Illegally* in this case means that the individual was not eligible to be naturalized. The provision was inserted into § 1451 in 1961, without a debate.<sup>193</sup> There are five requirements that must be met in order to procure citizenship legally (in other words, to naturalize): (1) residence, (2) physical presence, (3) lawful admission for permanent residence, (4) good moral character, and (5) attachment to the U.S. Constitution.<sup>194</sup> According to USCIS, there is no intent requirement: “This applies even if the person is innocent of any willful deception or misrepresentation.”<sup>195</sup> These five requirements are explored more fully below.

1. *Lawful permanent residence.* To be eligible for naturalization, an individual must have been lawfully admitted for permanent residence.<sup>196</sup> No person can naturalize if there is a final order of deportability or pending removal proceedings against the individual.<sup>197</sup> If lawful permanent residence was obtained in error, the subsequent naturalization may be challenged under this statute, even if the error is entirely innocent.<sup>198</sup> For example, an

individual may unwittingly have been issued a visa to enter the United States in error, which eventually led to permanent residency and, later, to naturalization. The civil statute’s “illegal procurement” prong could be used to strip nationality in such a case.

2. *Continuous residence.* After admission to the United States as a permanent resident, individuals must reside continuously within the U.S. for a specific amount of time—usually five years; three years if married to a U.S. citizen—immediately preceding the date of filing for naturalization. Extended absences from the country can disrupt continuous residence. Absence over six months “is presumed to break the continuity of such residence.”<sup>199</sup>
3. *Physical presence.* To naturalize, individuals must show they were physically present in the U.S. either for 30 months within the five-year period before applying, or for 18 months within the three-year period before applying in the case of spouses of U.S. citizens.<sup>200</sup> Applicants must also demonstrate they have resided in the U.S. for at least three months immediately preceding filing for naturalization. If a person omitted a trip outside the United States that would have made them ineligible to meet the physical presence requirement, they could be denaturalized.<sup>201</sup>
4. *Good moral character.* An individual attempting to naturalize must demonstrate that he or she has been a person of “good moral character” (GMC), including during the three- or five-year period immediately preceding an application for naturalization and until the time of taking the Oath of Allegiance. GMC “means character which measures up to the standards of average citizens of the community in which the applicant resides.”<sup>202</sup> A person may be unable to establish GMC if she admits she committed (including conspiracy or attempt) offenses involving “moral turpitude” or relating to a controlled substance, even if she has never been charged or convicted. Conduct prior to the three- or five-year period may also affect whether the applicant meets the GMC requirement. Congress has determined that certain acts permanently foreclose naturalization (including participation in acts of genocide, torture, extrajudicial killing, severe religious persecution, or murder). GMC is an extremely pliable standard that the government can use as a “catch-all” when attempting to denaturalize someone. This provision was cited in nearly all of the civil denaturalization cases reviewed for this report.

The statutory list of conduct that impugns moral character ranges from participation in genocide to being “a habitual drunkard.”<sup>203</sup> Thus, even if an applicant’s conduct is not expressly cited as a bar to demonstrating GMC under INA § 101(f), the adjudicator may look at other factors, and determine GMC based on the “totality of the circumstances.”<sup>204</sup> Further complications related to GMC include:

- *An expanding list of permanent bars to good moral character.* The list of acts or alleged acts that serve as permanent bars to GMC grew during immigration reforms in the 1990s. In 1991, Congress added a permanent bar for those convicted of an “aggravated felony” on or after November 29, 1990.<sup>205</sup> In 1996, with the passage of the controversial Illegal Immigration Reform and Immigrant Responsibility Act, Congress expanded the type of offense considered an “aggravated felony” in the immigration context<sup>206</sup> to include such offenses as those relating to passport and document fraud<sup>207</sup> and failure to appear to court.<sup>208</sup>
  - *Discretionary decision-making: Conditional bars to good moral character.* Federal law also includes bars to GMC that are not permanent (or automatic) in nature, known as “conditional bars.” The category is called “conditional” because a person *may* still qualify for citizenship if the conduct is considered an exception, for example if it was the only crime the person has ever committed, or it was committed prior to the three- or five-years leading up to the submission of one’s naturalization application. Conditional bars are discretionary in nature—that is, they are subjective and depend on the view of the adjudicator. For example, a person who has committed a “crime involving moral turpitude (CIMT)” will be conditionally barred from naturalizing. But according to USCIS, CIMT “used in the immigration context has no statutory definition.”<sup>209</sup> Instead, case law is used as guidance when determining whether an offense rises to the level of a CIMT.<sup>210</sup> Determining whether an offense rises to the level of CIMT is based on the judgment of the USCIS officer processing the application. The applicant’s admission alone, without any conviction, is sufficient to disqualify them. Conduct considered to be CIMTs listed by USCIS ranges from using marijuana or working in the cannabis industry (even in states where it is legal)<sup>211</sup> to statutory rape, theft, forgery, and offering a bribe.<sup>212</sup>
5. *Attachment to the U.S. Constitution.* Prior to and after naturalization, a person must demonstrate that she is “attached to the principles of the Constitution of the United States and well-disposed to the good order and happiness of the United States during the statutorily prescribed period.”<sup>213</sup> According to USCIS, an “applicant must understand that he or she is giving true faith and allegiance to the United States, its Constitution and laws” and “[a]n applicant who is hostile to the basic form of government of the United States, or who does not believe in the principles of the Constitution, is not eligible for naturalization.”<sup>214</sup>
- *Membership in certain organizations.* If an applicant was or is a member of, or associated (either directly or indirectly) with, certain organizations, this may be construed as indicating a lack of attachment to the Constitution.<sup>215</sup> Such organizations include “the Nazi government of Germany, [t]he Communist Party; [a]ny other totalitarian party; or

[a] terrorist organization.”<sup>216</sup> For the first 50 years of the denaturalization statute’s existence, proceedings were instituted against Communist Party members for failure to comply with the attachment requirement.<sup>217</sup>

Significantly, there is no statute of limitations for civil denaturalization.

### **Criminal Denaturalization**

The elements for prosecution under 18 U.S.C. § 1425 are:

That the defendant

(1) for himself or another person

(2) not entitled thereto or contrary to law

(3) knowingly issues, procures or obtains or applies for or otherwise attempts to procure or obtain naturalization, or citizenship, or a declaration of intention to become a citizen, or a certificate of arrival or any certificate or evidence of nationalization or citizenship, documentary or otherwise, or duplicates or copies of any of the foregoing.

Unlike the civil statute, the criminal statute allows for prosecution of *attempted* procurement of citizenship, as well as procurement or attempted procurement for another person.

The terminology used in describing the role of intent in the civil and criminal statutes is opaque because the two statutes use the terms “illegal” and “unlawful”—seemingly synonymous in plain English—in two different senses, and because one prong of the civil statute contains a willfulness requirement, while the other (“illegal procurement”) does not. For the purposes of the civil statute, “illegal procurement” carries no intent requirement (someone can, in theory, innocently not meet the criteria for naturalization and, upon discovery, face denaturalization).<sup>218</sup> For the purposes of the criminal statute, “unlawful procurement” requires criminal intent, in this case that the defendant acted *knowingly*.

Conviction under the criminal statute results in automatic revocation of citizenship. There is no discretion regarding this consequence if the offender is a naturalized citizen.<sup>219</sup> While the deprivation of nationality has permanent, severe consequences, it is not legally considered a punishment. Courts have consistently construed denaturalization—in both the civil and the criminal context—as a purely administrative, non-punitive affair.<sup>220</sup> In addition to denaturalization, the criminal statute provides for a sentence of up to 25 years imprisonment and carries a 10-year statute of limitations.<sup>221</sup>



Although the statute’s text does not reference a “materiality” requirement, the government is required to prove (beyond a reasonable doubt) that the underlying illegal act “played a role” in procurement of naturalization.<sup>222</sup>

## MATERIALITY REQUIREMENT IN CRIMINAL DENATURALIZATION

The criminal statute does not specify whether *materiality* is required for conviction, and federal courts were divided on this point until 2017.<sup>223</sup> The Supreme Court attempted to resolve the divide in *Maslenjak v. United States* (2017), which involved an ethnic Serb who lived in Bosnia during the civil war of the 1990s. In 1998, Divna Maslenjak and her family sought refugee status in the United States. Under oath, she misrepresented her husband’s involvement in the war, not disclosing that he had served as an officer in the brigade of the Bosnian Serb Army that participated in the Srebrenica massacre—a slaughter of 8,000 Bosnian Muslim civilians. Swearing that she had never given false information to a government official while applying for an immigration benefit, Maslenjak naturalized before this was discovered by the U.S. government. Upon discovery, she was charged under 18 U.S.C. § 1425 (a) for procuring citizenship “illegally.” According to the government, in the course of procuring naturalization, she broke another law, 18 U.S.C. § 1015(a), which prohibits making a false statement under oath in a naturalization proceeding. The Supreme Court ultimately determined that her false statements must have *influenced* the decision to approve her naturalization application in order to result in a conviction for unlawful procurement of naturalization. The alleged illegal actions “must have somehow contributed to the obtaining of citizenship”<sup>224</sup>—that is, it must have been material in the granting of citizenship.

Delivering the opinion for the court, Justice Elena Kagan wrote:

If whatever illegal conduct occurring within the naturalization process was a causal dead-end—if, so to speak, the ripples from that act could not have reached the decision to award citizenship—then the act cannot support a charge that the applicant obtained naturalization illegally. The conduct, though itself illegal, would not also make the obtaining of citizenship so. To get citizenship unlawfully, we understand, is to get it through an unlawful means—and that is just to say that an illegality played some role in its acquisition.<sup>225</sup>

*Materiality requirement in criminal denaturalization.* While adhering to a narrow, textual interpretation of the statute, the Supreme Court’s unanimous opinion in *Maslenjak* also registered the “disquieting consequences” of a looser materiality standard.<sup>226</sup> “[I]f the interpretation were otherwise, prosecutors would have ‘near limitless leverage’ and [naturalized] citizens have ‘precious little security,’ as every immigrant would have a misstatement, however minor, in their application.”<sup>227</sup>

### **Removal from the United States**

Both civil and criminal denaturalization can result in deportation—and today that sanction is being applied with increasing frequency.<sup>228</sup> Under federal law, a broad range of crimes constitutes removable offenses for non-citizens, including procuring U.S. citizenship unlawfully.<sup>229</sup> The 1996 Illegal Immigration Reform and Immigrant Responsibility Act and the Antiterrorism and Effective Death Penalty Act radically transformed immigration law by mandating the deportation of noncitizens convicted of an “aggravated felony,” while expanding the list of felonies which qualify as aggravated for immigration purposes (for example, failure to appear in court).<sup>230</sup> As noted by ICE in its 2008 Denaturalization Handbook, “Prosecution under 8 U.S.C. § 1425...is an important consideration for subsequent removal proceedings because an attorney could argue that a conviction for this offense is a crime involving moral turpitude or an aggravated felony.”<sup>231</sup>

Court documents reviewed for this report routinely cite removal from the U.S. as the next step following denaturalization. Most often, the language appears in the defendant’s plea agreement or settlement (in civil cases) with the government. For example:

[B]ecause the Defendant is pleading guilty to this offense, removal is **presumptively mandatory**...the Defendant understands that no one, including his attorney or this district court, can predict to a certainty the effect of his conviction on his immigration status. The Defendant nevertheless affirms that he wants to plead guilty regardless of any immigration consequences that his plea may entail, **even if the consequence is his automatic removal** from the United States.<sup>232</sup>

Judges can order the removal of a defendant by issuing a Judicial Removal Order (JRO). A JRO orders the defendant’s immediate and automatic removal from the United States, bypassing the immigration system, and any possible defenses to removal or other forms of protection. In all 53 closed criminal cases reviewed for this report, 13 (24.5%) resulted in a JRO. Judicial Removal Orders are examined in greater detail at the end of this chapter.

## How Did We Get Here? History and Bureaucracy of Denaturalization

To fully comprehend the threat posed by the expansion of the scope and policy aims of denaturalization, it is necessary to first examine how this measure has been deployed throughout American history. This section will briefly trace the use of denaturalization in the 20th century, before looking in greater detail at more recent denaturalization efforts embodied by Operation Janus and Operation Second Look.

The statutory authority to denaturalize citizens was first codified in the Naturalization Act of 1906, giving U.S. Attorneys the authority to initiate proceeding to cancel a “certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured.”<sup>233</sup> The 1906 Act was amended by the Nationality Act of 1940,<sup>234</sup> though statutory language permitting naturalization cancellation was left largely intact, and remained so when the current statutes (8 USC § 1451; 18 USC § 1425) were enacted in 1952.

When the 1906 Act was adopted, women could not vote.<sup>235</sup> Naturalization law in effect at the time only allowed “free white persons” and people of African descent to naturalize, which led to litigation in illegal procurement cases based on racial classifications, ultimately barring Indian-born men from naturalizing because they would not be understood as “white” to the “common man.”<sup>236</sup> In 1907, another newly enacted law provided for automatic loss of U.S. citizenship when a woman married a foreigner.<sup>237</sup> As legal scholars Cassandra Burke Robertson and Irina D. Manta note, “[w]hen these requirements were brought into denaturalization proceedings, both women and racial minorities risked losing their citizenship.”<sup>238</sup>

### Early 20th Century: Centralizing Denaturalization Power

The 1906 Naturalization Act passed amidst fears that there was “widespread [voter] fraud and abuse,” perpetuated by individuals who had procured citizenship through fraud.<sup>239</sup> To combat this supposed fraud, § 15 of the 1906 Act authorized U.S. district attorneys to institute proceedings “in any court having jurisdiction to naturalize aliens 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>240</sup> Though not statutorily required, the practice was for district attorneys to institute denaturalization proceedings prior to revocation.

This legislative history was crucial to early courts’ assessment of the constitutionality of the Naturalization Act. In the decades that followed, courts interpreted § 15 narrowly, avoiding its application to situations where it had no relation to voter fraud or abuse.<sup>241</sup>

The act did not provide a mechanism for deportation following revocation of naturalization. Indeed, § 15 of the 1906 Act only permitted the “setting aside and cancel[ation]” of an individual’s certificate of citizenship.<sup>242</sup> Following the passage of the 1906 Naturalization Act,

# Denaturalization: Federal Government Roles and Responsibilities



**DOS**

Investigates and refers cases for denaturalization

**DOJ**



Department of State

Diplomatic Security Service (DSS)

Department of Justice

Executive Office of Immigration Review (EOIR)

Board of Immigration Appeals (BIA)

Civil Division

Office of Immigration Litigation (OIL)

District Court Section (DCS)

National Security & Affirmative Litigation Unit (NS/A Unit)

Criminal Division

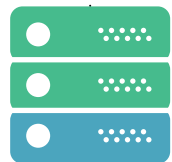
Human Rights Special Prosecutions (HRSP) *previously OSI*

PROSECUTING AUTHORITY  
Executive Office for U.S. Attorneys (EOUSA)

Federal Bureau of Investigation (FBI)

Seeks authorization from the U.S. Attorney to institute denaturalization proceedings and prosecutes together

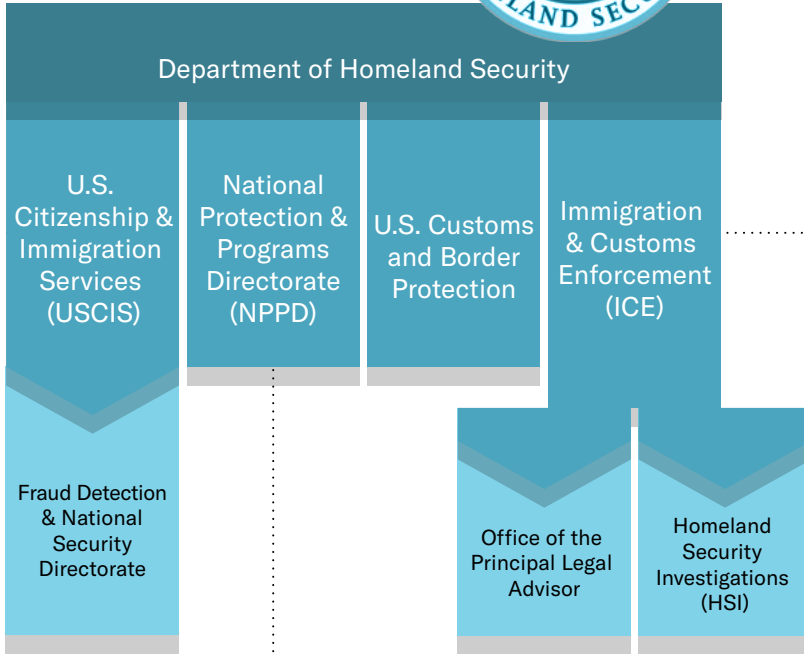
**Next Generation Identification (NGI) database**



# DHS

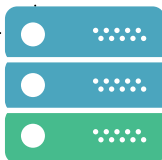


Investigates and refers cases for denaturalization



## Denaturalization Taskforce

Interoperable under Secure Communities (2008-2014). In Operation Janus and Operation Second Look, historical paper fingerprint records are digitized and uploaded to IDENT database



## IDENT database

Federal district court judges can issue judicial removal orders (JRO) that **bypass immigration court** following denaturalization, preventing defendants in these cases from raising protection claims or any other potentially available defenses to removal



Defendants who are denaturalized in district court proceedings can be removed immediately, frustrating access to appellate review.

the Department of Justice issued Circular Letter Number 107 (1909) regarding prosecutorial discretion in immigration-related matters. The letter states:

In the opinion of the department, as a general rule, good cause is not shown for the institution of proceedings to cancel certifications of naturalization 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.

The DOJ's 1909 guidance was reaffirmed 1976<sup>243</sup> and supplemented in an Immigration and Naturalization Service (INS) Special Agent's Field Manual.<sup>244</sup> The manual stated that prior to initiating a denaturalization case, the case "must be reviewed" to determine if "mitigating humanitarian factors are present" and whether "the citizenry as a whole will benefit from such a revocation to a degree that exceeds any possible mitigation."<sup>245</sup> The guidance also emphasized that, "when the holders of illegally obtained papers were themselves victims of deception, and not guilty of any design to break the law," no action would be taken.<sup>246</sup>

### **Political Denaturalization**

For the first 50 years after the 1906 Act, denaturalization policy and practice focused increasingly on naturalized citizens' political allegiance in the form of membership in suspect groups, especially those considered to espouse communism.<sup>247</sup> Procedurally, these cases alleged illegal procurement of naturalization, for failure to meet the "attachment" requirement regarding allegiance to the Constitution.<sup>248</sup> As a matter of policy, denaturalization "became a means of cleansing the body politic."<sup>249</sup> Between 1907 and 1948, an average of approximately 462 denaturalization cases were brought each year.<sup>250</sup>

The most significant legislative change made during this period was the enactment of the 1940 Nationality Act, which added the "good moral character" and "attachment" requirements for naturalization, paving the way for denaturalization based on the applicant's political beliefs.<sup>251</sup> In 1942, Attorney General Francis Biddle established a denaturalization program to systematically "study cases of disloyalty among naturalized citizens," calling denaturalization "an important weapon" to root out citizens with suspect political beliefs.<sup>252</sup> During World War II, the popular joining of political belief and ethnic identity resulted in the internment of Japanese Americans (including the native-born), rampant expatriation of native-born citizens,<sup>253</sup> and denaturalization on grounds of disloyalty or "subversive activities."<sup>254</sup>

Later amendments to the legal framework responded directly to concerns about the scale of denaturalizations and political motivations for them during this time.<sup>255</sup> The 1952 Immigration and Nationality Act, which contains the current formulation of the denaturalization statutes, was drafted during the era of the "Red Scare," a time when the U.S. government was intensely focused on communist activities. In 1950, "the Department of Justice embarked on a full-scale

denaturalization program directed principally against naturalized Germans who were affiliated with the German-American Bund (a pro-Nazi organization).<sup>256</sup> The experiences of these cases inspired Congress to change the language of the denaturalization statute to introduce a burden on the government to prove willful and material fraud.<sup>257</sup> The Senate Judiciary Committee believed “concealment of material fact or willful misrepresentation is more easily proved” and the insertion of this language would eliminate conflicting interpretations of fraud in denaturalization cases.<sup>258</sup> The passage of this provision was the most significant action Congress had taken on denaturalization since the 1940s. It is important to note this moment in the history of the denaturalization statutes as one instance in which Congress was inspired to rein in overzealous application of denaturalization for political reasons.

The 1952 Act maintained the racial quota system of the 1924 National Origins Act. Most political and public debate around the 1952 Act centered on its use of racial quotas. However, the act’s retention of denaturalization was also controversial, with much of the American public and President Harry Truman opposed this provision. Congress passed the 1952 Act only after overriding his veto. Among his objections to the act was his strong opposition to the concept of denaturalization.<sup>259</sup>

The concerns of opponents of denaturalization would later be somewhat assuaged by a series of important Supreme Court cases in the 1950s and 60s, which introduced strict limits on involuntary expatriation and denaturalization (as explored in Chapter I, History and Context).

### **War Crime Denaturalization – The Department of Justice Office of Special Investigations**

For a period of roughly 50 years following the end of World War II, very few denaturalization prosecutions occurred. However, a small unit within the U.S. Department of Justice was active during this period, prosecuting denaturalization cases against Nazi war criminals. These prosecutions were carried out under the civil statute, as the criminal statute’s time limitations had expired. The Office of Special Investigations (OSI) was established in 1979 within the Department of Justice’s Criminal Division, specifically to conduct this work.<sup>260</sup>

The purpose of OSI, as described by its champion and chief architect, Congresswoman Elizabeth Holtzman, was to be “an effective Nazi-fighting unit.”<sup>261</sup> According to one account, “It could not bring Nazis to trial for the crimes they had committed elsewhere or seek prison sentences for them. But it could expose the lies they had told about their past when they had entered the country, leading to their loss of citizenship and deportation—in the best scenario, to countries that could then put them on trial.”<sup>262</sup>

Historical records of OSI’s prosecutions bear no resemblance to the average denaturalization case reviewed for this report. A 600-page report painstakingly examining OSI’s record, dated

December 2006 and leaked to the *New York Times* in 2010,<sup>263</sup> describes the two-week *Fedorenko* trial in South Florida, quoting the district judge:

From the beginning it was like a Hollywood spectacular and polarized the residents of South Florida.

As an example of some of the emotional intensity surrounding the trial, the Jewish Defense League ran ads in newspapers offering chartered buses from Miami Beach to Fort Lauderdale on opening day. A demonstration outside the courtroom ensued with a chant: “Who do we want? Fedorenko. How do we want him? Dead.” After the court was interrupted twice and the first three warnings were ignored by the demonstrators, a leader who as using an amplified bullhorn was arrested.<sup>264</sup>

The report also recounts representation of OSI defendants, sometimes by Jewish lawyers, who “have generally defended their decision to represent alleged Nazi persecutors on the ground that refusing to represent a class of persons *per se* is reminiscent of the treatment Jews received in Nazi Germany.”<sup>265</sup> While a proportion of cases settled, the *purpose* of OSI was to hold trials like *Fedorenko*’s. The goals were to expose a narrow set of actors who had knowingly concealed horrific deeds to secure safe haven living amidst their victims, to make a public record of all that the United States government could, belatedly, learn about surviving Nazi persecutors, and to engage survivor communities in an accountability process, however imperfect.

Between its establishment in 1979 and 2015, OSI successfully prosecuted 108 cases and 68 people were stripped of nationality, leading to 67 individuals being “deported, extradited, or otherwise expelled.”<sup>266</sup> In 2004, Congress passed the Intelligence Reform and Terrorism Prevention Act, establishing statutory recognition of OSI’s purpose and expanding its mandate to cover modern war criminals.<sup>267</sup>

*Fedorenko v. United States* (1981) was the first OSI case to come before the Supreme Court.<sup>268</sup> Commentators analyzing the outcome of that litigation expressed concern about the procedural implications of using Nazi war crime “trials” to set the parameters for citizenship-stripping statutes that could, one day, target a much broader swath of the citizenry:

The cry for retribution against war criminals, who are guilty of inhuman brutality, must be tempered by the American ideal of justice, particularly because this ideal was conspicuously absent from the Nazi regime. In the final analysis, the paramount concern is that the concepts of due process and citizenship rights are continuously honed and forever maintained.<sup>269</sup>



In February 2019, the FBI announced that it will shutter its International Human Rights Unit, which played a role in denaturalizations brought against war criminals.<sup>270</sup> The move casts doubt that the administration views the statutes as a tool to seek accountability for grave crimes. Overall, the history of OSI prosecutions sheds light on the possibilities and limits of denaturalization as a tool to enforce criminal accountability for heinous crimes.

Because there are no more Nazis to prosecute, OSI's mission is no longer contingent on the absence of a statute of limitations in the civil denaturalization statute. Instead, the lack of a statute of limitations is currently being exploited to denaturalize individuals who committed no such crimes and naturalized decades ago. Decades of practice under the denaturalization statutes focused on war criminals and other high profile defendants lowered the procedural protections afforded to today's defendants. The fact that war criminal proceedings may still be possible under the statutes augurs for their retention, according to certain advocacy groups. But the costs of maintaining such an imperfect tool just in case it may be needed have never been seriously examined.

### **A New Bureaucracy of Denaturalization: The Department of Homeland Security and Department of Justice Office of Immigration Litigation – District Court Section**

This section surveys a number of developments in the 1990s and 2000s that have led to an expanded bureaucracy for the investigation and litigation of denaturalization cases. OSI's mandate expanded to cover modern war crimes cases under the Intelligence Reform and Terrorism Prevention Act of 2004, but OSI did not retain exclusive jurisdiction over denaturalization cases.<sup>271</sup> A separate, more fluid, and steadily expanding agency structure emerged during this period, without as focused a mandate as OSI's.

*Citizenship USA sparks a new denaturalization operation.* The first relevant development began with the inauguration of the "Citizenship USA" or CUSA program. On August 31, 1995, the U.S. Immigration and Naturalization Service (INS) announced this effort, which was designed to address the mounting backlog of naturalization applications pending adjudication.<sup>272</sup> The surge in applications at the time was not unexpected: 2.7 million beneficiaries of the 1986 Immigration Reform and Control Act amnesty would become eligible to apply for naturalization during this time.<sup>273</sup>

CUSA was an ambitious program unfolding as the U.S. government was modernizing many aspects of its bureaucracy to make use of emerging new technology. In 1996, under the CUSA program, 1.1 million new Americans were naturalized. The program received criticism, including allegations that it was a partisan effort to shift electoral demographics. Ultimately, government oversight mechanisms, including congressional hearings and a lengthy OIG investigation, noted weaknesses of the program, in particular with respect to criminal background check procedures used to vet potential candidates for naturalization.<sup>274</sup>

While the specific recommendations of the OIG report did not make reference to potential denaturalization for any of those who naturalized under CUSA, information gathered by the Open Society Justice Initiative in the preparation of this report suggests that attorneys working for the Department of Justice and INS began scrutinizing CUSA cases for potential denaturalization actions in the years following its implementation.

As of July 1998, “INS General Counsel had reviewed 4,269 cases for possible revocation. Of those, 2,686 had been deemed appropriate for revocation. . . . A working group comprised of staff from the General Counsel’s Office, from the Office of Immigration Litigation (OIL) of the Department’s Civil Division, and from U.S. Attorneys’ offices identified which cases should be brought first.” From the original pool of 2,686 cases, 110 cases were referred to OIL for possible litigation. OIL in turn referred 68 of those cases to U.S. Attorneys’ offices, and those offices authorized 27 cases for denaturalization litigation. According to the OIG report, four people had been denaturalized at the time.<sup>275</sup> While the Justice Initiative did not investigate the public resources devoted to the CUSA investigation, clearly the effort would have involved considerable expenditures.

*A short-lived effort to create an administrative denaturalization procedure.* Under the Immigration Act of 1990, power over naturalization was shifted from the courts to the attorney general, including the power “to correct, reopen, later modify, or vacate an order naturalizing the person.”<sup>276</sup> In *Gorbach v. Reno* (2000), a class action case brought in Washington state in 1998 during the height of the CUSA denaturalization operation, the Ninth Circuit Court of Appeals ultimately enjoined administrative denaturalization. The fact that the nationwide injunction has held demonstrates, perhaps, a wide recognition that the 1990 Act did not aim to establish administration jurisdiction to denaturalize Americans when it transferred naturalization power from the courts to the Attorney General. However, the issue has never come before the Supreme Court and the act itself has never been amended specifically to preclude administrative denaturalization. In contrast, Canada recently ended fast-tracked administrative denaturalizations and reversed hundreds of decisions rendered under its previous scheme.

*The Office of Immigration Litigation.* The CUSA cases may have been some of the first cases litigated by what would become the OIL District Court Section (OIL-DCS), a new unit specializing in civil denaturalization within the Department of Justice’s Civil Division. OIL-DCS was established in 2008. In 2017, a new unit under OIL-DCS called the National Security and Affirmative Litigation Unit was established to handle “high-profile denaturalization cases involving known or suspected terrorist aliens in immigration detention.”<sup>277</sup>

On January 22, 2000, U.S. Attorney’s Offices, INS (now ICE), and OIL entered into a Memorandum of Understanding (MOU)<sup>278</sup> that covered the “parties’ mutual responsibilities in denaturalization actions.”<sup>279</sup> Under the MOU, the U.S. Attorney’s Office has primary

responsibility for exercise of prosecutorial discretion, but “must notify ICE whether it intends to prosecute the action. If the U.S. Attorney’s Office declines to prosecute or intends to proceed with a civil denaturalization action, or if the U.S. Attorney’s Office wishes to negotiate a plea to a different offense, it must notify ICE and OIL.”<sup>280</sup>

It is OIL attorneys (and ICE attorneys detailed to OIL) who litigate civil denaturalization cases, but the U.S. Attorney’s Office “may choose to assume primary or exclusive responsibility for litigating any civil denaturalization case.” While OSI continues to handle all actions targeting Nazi persecutors, “ICE and OSI share joint investigative authority regarding non-Nazi era human rights violator denaturalization cases.”<sup>281</sup>

In civil cases, the MOU provides that the INS is responsible for preparing a referral packet, including an Affidavit of Good Cause and an indication of the INS point of contact for litigation assistance, and referring to OIL all actions seeking revocation of naturalization under INA § 340. INS must also detail to OIL no fewer than 15 attorneys to assist in litigating revocation actions in the most heavily affected judicial districts. These include the Central and Northern Districts of California, the Southern District of Florida, the Eastern and Southern Districts of New York, the Northern District of Illinois, the District of New Jersey, the Eastern District of Virginia, and the Southern and Western Districts of Texas.<sup>282</sup>

In criminal cases, the MOU directs INS to promptly notify OIL of its intention to refer a case for prosecution under 18 USC § 1425. The case will then be referred to the appropriate INS official for preparation and referral to a U.S. Attorney.<sup>283</sup>

Clearly, the sheer U.S. bureaucratic power trained on denaturalizations has increased greatly since 2000. That expanded reach would be soon be put to use in two recent, large-scale denaturalization efforts: Operation Janus and Operation Second Look.

### **Operation Janus**

Operation Targeting Groups of Inadmissible Subjects (OTGIS), begun in 2008 and framed as a counterterrorism enforcement tool, eventually became known as Operation Janus. OTGIS began when a U.S. Customs and Border Patrol (CBP) employee identified 206 individuals who had received final deportation orders but whose naturalization or permanent residency records contain a different name or birthday. These individuals were specifically targeted because they came from “special interest countries,” also defined as, “countries that are of concern to the national security of the United States,” and countries bordering them.<sup>284</sup> Operation Janus seems to have broken with previous executive branch practice in its scrutiny of digitized bulk data for the purposes of investigating cases for possible denaturalization. No other operation employing these tactics, whether for counterterrorism enforcement, immigration enforcement, or some other reason, is known to exist. The investigation following CUSA

naturalizations in the late 1990s and early 2000s is the closest predecessor to Operation Janus in terms of its scale and methods. Yet in the CUSA investigation, no known targeting based on national origin occurred.

Between 2008 and June 2014, little is known about the efforts of OTGIS, except that an inter-agency working group was formed. While it is not known how or when, during this time ICE identified a pool of approximately 315,000 records in its database (IDENT) of aliens with a final deportation order or record of a criminal conviction or fugitive status, for which there was no digital fingerprint data. In July 2014, a list of 1,029 names derived from that pool of roughly 315,000 was given to the Department of Homeland Security's (DHS) Office of the Inspector General (OIG). The list named individuals "identified as coming from special interest countries or neighboring countries with high rates of immigration fraud, had final deportation orders under another identity, and had become naturalized U.S. citizens." Of those, 858 did not have digital fingerprint records when USCIS was reviewing their citizenship applications.<sup>285</sup>

By March 2015, of the 1,029 individuals whose names were given to DHS, ICE had closed 90 investigations and had 32 open investigations. The Offices of the United States Attorneys (USAO) had accepted two cases for criminal prosecution, which could lead to denaturalization.<sup>286</sup> Also in 2015, DOJ and DHS agreed to widen the scope of denaturalization cases to include naturalized citizens who had gained "security clearances or positions of public trust or who had a criminal history," which led to a sharp increase in referrals in 2016 beyond the special interest or neighboring countries.<sup>287</sup>

According to a September 2016 OIG report, Operation Janus ran out of funds and was formally eliminated in 2016, although it was subsequently rebranded as Operation Second Look, accompanied by a hiring increase.<sup>288</sup> At the time Operation Janus was disbanded, 148,000 records from the original pool of 315,000 had not been reviewed. The OIG report recommended that in addition to digitizing the remaining 148,000 fingerprints of immigrants "with final deportation orders or criminal histories or who are fugitives," DHS should "establish a plan for evaluating the eligibility of each naturalized citizen whose fingerprint records reveal deportation orders under a different identity. The plan should include a review of the facts of each case and, if the individual is determined to be ineligible, a recommendation whether to seek denaturalization through criminal or civil proceedings."<sup>289</sup>

Thus, the groundwork for the rise in denaturalizations under the Trump administration evolved under the Obama administration, although it is important to note a key limiting factor in the Operation Janus approach: there were prioritization criteria in effect that limited targeting in an arguably objective manner, to focus energy and resources on potential threats to national security. The operation was not, in other words, a generalized immigration enforcement effort designed to root out all naturalized citizens whose records threw up

inconsistencies of any nature. There may be non-public criteria in effect under Operation Second Look as well, but the public communication from the administration has done nothing to allay concerns that even the slightest error could result in a federal denaturalization case.

### **Operation Second Look**

In January 2018, USCIS stated that it had “dedicated a team to review these Operation Janus cases, and the agency has stated its intention to refer approximately an additional 1,600 for prosecution.”<sup>290</sup> This successor DHS operation, overseen by ICE’s Homeland Security Investigations, is named Operation Second Look (OSL). The aim of OSL is “to address leads received from Operation Janus” and to review “an estimated 700,000 remaining alien files,”<sup>291</sup> a figure much higher than the 315,000 generated under Janus.

There are no details on deadlines or procedures for these reviews or prosecutions. In June 2018, then USCIS Director L. Francis Cissna stated that a new office in Los Angeles will be running by 2019, but that investigating and referring cases will take longer.<sup>292</sup> Cissna stated that, “We finally have a process in place to get to the bottom of all these bad cases and start denaturalizing people who should not have been naturalized in the first place.” He went on: “What we’re looking at, when you boil it all down, is potentially a few thousand cases.”<sup>293</sup>

In remarks made in October 2018, Cissna, stated that since January 2017, USCIS had identified approximately 2,500 cases requiring review, and that as of August 31, 2018, it had referred more than a 110 of those cases to DOJ for civil denaturalization, noting that six individuals “received a final denaturalization court order based on that work.”<sup>294</sup> In response to widespread public reporting, he erroneously and misleadingly assured the audience that “[t]here is no denaturalization task force. I don’t know how many times I repeat that—there’s press in the room—for the ten thousandth time, there’s no denaturalization task force. This is a group of adjudicators, rather officers and lawyers, who are looking at the cases that were identified by ICE of people who illegally entered the country, got deported, and then illegally entered again under a fake identity and then years later lied to get citizenship. It is appropriate and correct that those people be denaturalized.”<sup>295</sup>

It is not publicly known how many of the 2,500 cases Cissna referred to have been reviewed, aside from the 110 referred for civil proceedings. The DOJ’s Civil Division, in March 2019, cited 54 further referrals in the first two months of 2019 alone.<sup>296</sup> Even 110 civil proceedings would represent a nearly ten-fold increase over the average number of civil denaturalizations filed since 1972, according to data analyzed by the Justice Initiative. Given the intensive resources required to investigate and initiate proceedings, significant mobilization within the Department of Justice and Department of Homeland Security would be required in order to realize these goals. It is unclear how many of those referred were declined by DOJ and not pursued. According to the Justice Initiative’s research, 66 civil cases were filed between 2017

and 2018, 36 which have been closed on the merits. Cissna did not mention the number of cases slated for criminal prosecution, or any corresponding results. The Justice Initiative identified 102 criminal cases, in which 53 have been closed on the merits.

No information on prioritization of cases for review is publicly available and Freedom of Information Act requests have not succeeded in obtaining such information. Based on the review of cases conducted for this report, many of the “Affidavits of Good Cause” that must be submitted in civil denaturalization proceedings were submitted by officers of Immigration Services based in Los Angeles, usually far from the district in which the defendant was charged.

### **Where We Are Now**

Operations Janus and Second Look mark a significant departure from past practice in two key respects. First, the denaturalizations stemming from these initiatives—at least one third of all cases filed in 2017 and 2018—are now officially couched as general immigration enforcement actions within a broader crackdown laced with nationalistic invective. This leaves a much wider subset of the U.S. naturalized population suddenly vulnerable to what were once measures reserved only for war criminals.<sup>297</sup> Second, the tactics employed by the government in identifying targets for potential denaturalization and proving fraud or illegal procurement illustrate the ever-increasing state capacity to use digital records in its enforcement operations.

## **Denaturalization under the Trump Administration: Derailing Lives, Wasting Resources**

*“We are concerned with only one man, William Schneiderman. Actually, though indirectly, the decision affects millions. If, seventeen years after a federal court adjudged him entitled to be a citizen, that judgment can be nullified and he can be stripped of his most precious right, by nothing more than re-examination upon the merits of the very facts the judgment established, no naturalized person’s citizenship is or can be secure.”*

-Justice Wiley Rutledge, *Schneiderman v. United States* (concurring opinion, 1943)<sup>298</sup>

Donald Trump opened his presidential campaign with racist invective against Mexican immigrants.<sup>299</sup> From that day onward, his campaign was marked by frequent attacks on immigrants and promises to reduce or eliminate immigration, and to prosecute “illegal” immigrants, presumably including naturalized U.S. citizens. Since taking office, he has acted on those nativist promises. The Trump administration’s pursuit of denaturalization has wasted

and misdirected valuable resources. It has never been explained why the government needs to digitize and review hundreds of thousands of additional records under Operation Second Look. Moreover, the Trump administration has proposed to fund the operation through the account set up to administer naturalization fees, at a time when waiting times for the processing of naturalization applications exceed two years. Additionally, these policies instill a sense of fear, harming political and economic engagement by and with immigrants. Denaturalizations are particularly harmful, even in the abstract, for immigrant families, because of the possibility and unpredictable application of derivative citizenship-stripping.

In July 2017, the Department of Justice published a bulletin to federal prosecutors encouraging increased immigration enforcement, with a significant portion of the publication focused on using denaturalization as a tool to target naturalized citizens. In it, then Attorney General Jeff Sessions described denaturalization of U.S. citizens as “a crucial link in the Department’s strategic enforcement framework.”<sup>300</sup>

Based on the Justice Initiative’s research, the Trump administration is systematically implementing this strategic framework as envisioned. This section details some of the observable wider impacts of the denaturalization program under the Trump administration—resource waste, chilling effects, and derivative denaturalization—prior to examining research focused on individual denaturalization cases.

### **Resource Waste**

Denaturalization prosecutions are expensive and time-consuming to investigate. A former ICE prosecutor who litigated denaturalization cases interviewed for this report estimated that investigations can take several years just to develop.<sup>301</sup> OSI’s efforts resulted in 108 successful prosecutions between 1978 and 2015, with many cases going on for years after they were filed.<sup>302</sup> A recent examination of one of the early Operation Janus trials—of Parvez Manzoor Khan, who has been a citizen since 2006, but entered the U.S. on an altered passport in 1991—arrived at the same fundamental question: why sink so much into undoing the naturalization of one man, tearing his family apart, almost 30 years after he came here?<sup>303</sup>

DHS has proposed a budget reallocation that would shift money away from naturalization processing to immigration enforcement, including denaturalization and deportation. The money that is to be shifted derives from naturalization application fees, which are deposited into the Immigration Examinations Fee Account (IEFA) budget. This budget “is the primary funding source for USCIS” and is used to “fund the cost of processing immigration benefit applications and associated support benefits, as well as to cover the cost of processing similar benefit requests for applicants without charge, such as refugee and asylum applicants.”<sup>304</sup> In its FY 2019 budget, DHS proposed to transfer \$207.6 million from USCIS’s IEFA budget to ICE for denaturalizations and other immigration enforcement measures. Operation Janus’s budget

was \$5 million. As noted above, the Department of Justice released a March 2019 FY 2020 budget plan that cites a “staggering” increase in civil denaturalization referral, in a plea for additional resources to handle this “ever-increasing” load.<sup>305</sup>

The use of IEFA to fund denaturalizations is a further reflection of the existential shift taking place within USCIS from a service-oriented benefits agency to a well-resourced surrogate enforcement agency.

Under the Trump administration, it takes an average of 10 months for USCIS to process the N-400 naturalization application form.<sup>306</sup> This number has doubled in the last two years<sup>307</sup> and does not include those waiting for other steps in the naturalization process, such as the citizenship interview and exam. In some cities, the application processing time alone takes over two years.<sup>308</sup> It appears the increased delay is due to the administration’s stricter scrutiny of naturalization applications, as well as new measures making it more difficult to qualify and complete the process.<sup>309</sup>

## THE PRICE OF AN INACCURATE BIRTH CERTIFICATE

Ahmed Bafagih, a 31-year-old permanent resident since 2010, was denied U.S. citizenship. Acting in good faith, Bafagih told a USCIS officer that he was born in Kenya, not Yemen as appeared in his file. In fact, he was born in Kenya and moved to Yemen when he was 30 days old. This error likely would have gone unpunished under previous naturalization regimes. According to USCIS, he was denied naturalization on the grounds that there “was fraud in procurement of your Legal Permanent Resident status,” referring to an inaccurate birth certificate. Bafagih has three sisters who are U.S. citizens and his father has won several awards over his 25 years of service with the U.S. government, including with the Pentagon.<sup>310</sup>



Approximately 750,000 naturalization applications were pending as of June 2018. The growing processing backlog makes it more difficult for citizens-in-waiting to become civically engaged, preventing a large pool of potential voters from participating in local and national elections. Despite the backlog, many USCIS officers who conduct citizenship interviews have been relocated to the U.S.-Mexico border to conduct asylum interviews as the government seeks to expedite those cases.<sup>311</sup>

In February 2019, 86 members of Congress sent a letter to USCIS regarding the “alarming growth in processing delays” for naturalization. The letter also expressed alarm over the request to transfer IEFA funds to ICE for denaturalization purposes, stating that “[t]his appears to represent part of USCIS’s larger shift toward prioritizing immigration enforcement over the service-oriented adjudications at the core of the agency’s mandate.”<sup>312</sup>

The funding that USCIS receives from IEFA is not subject to annual congressional approval, meaning USCIS is not wholly dependent on Congress for funding. Since Congress does not have oversight over IEFA, it does not have a say over:

[W]hether some fees are at levels that inhibit some potential applicants from applying for benefits or inhibit lawful permanent residents from becoming citizens; whether the pace and progress of information technology modernization is sufficient to meet the agency’s multiple functions and efficiently serve petitioners; and whether USCIS’s management of its personnel and resources adequately addresses sudden demands for processing and adjudication of petitions while maintaining processing times and adequate levels of service for all other petitions.<sup>313</sup>

In addition to slowing the naturalization process and thus limiting the number of new citizens, the Trump administration has also proposed plans to increase eligibility requirements for naturalization. For instance, one proposal would demand additional documentation—such as children’s birth certificates or supplementary information to ascertain one’s “good moral character”—which are not currently required, and which some individuals (particularly refugees and asylees) may not have or be able to get.<sup>314</sup>

Furthermore, USCIS has proposed changing the fee waiver rule for the filing fee required for naturalization, making it more difficult for low-income individuals to prove eligibility for a waiver. According to the non-profit group Asian Americans Advancing Justice (AAAJ), this would affect almost 245,000 applicants who apply for the fee waiver each year and will discourage those without means from applying for citizenship.<sup>315</sup>

Appropriations and discretionary spending decisions by the Trump administration to support denaturalizations reflect the systematic prioritization of citizenship-stripping, at the expense

of welcoming new Americans. To understand the current administration's approach to citizenship, one can follow the money, or follow the president's rhetoric. Both point to an administration seeking to narrow access to citizenship, raise the financial and temporal costs, and remake denaturalization from an obscure and rarely used mechanism reserved for heinous criminals into a pliable enforcement tool wielded against marginalized groups. In reality, the statutes themselves were not well designed to constrain the executive from expanding the scope of a denaturalization program, and subsequent Supreme Court precedents, valuable though they may be for articulating the principles of a secure U.S. citizenship for all, likewise fail to rein in the prerogatives of a zealous anti-immigrant platform.

### **Chilling Effects**

Today's denaturalization efforts may have a tenuous connection to the integrity of the immigration system, but they are having a chilling effect on specific groups that reaches well beyond those eligible to apply for naturalization. Across the country, the prospect of denaturalization is causing immigrant communities to reduce the free exercise of their rights as citizens or residents, including seeking out immigration benefits or engaging in the social and political life of the country.<sup>316</sup> In several of the cases investigated by the Justice Initiative, it appeared that denaturalization procedures resulted after the target applied for a passport or government service, subjecting that person to scrutiny. By linking loss of citizenship to applications for a public or immigration-related benefit, the Trump administration may be seeking to dissuade naturalized citizens (or even all immigrants) from engaging with the state, and linking citizenship troubles with rhetoric stigmatizing social assistance.

A *New York Times* opinion piece noted that:

The number of potential denaturalization cases that are being considered is reportedly in the thousands, so the Trump administration can't hope to permanently alter the demographics of the country with this unwieldy device. Maybe it doesn't have to. It's possible that the true intent — and the probable consequence — of the Trump policy is that naturalized citizens will not actively participate in political activity for fear that some old mistake on their forms could put their status in jeopardy.<sup>317</sup>



Interviews conducted for this report confirmed the chilling social impact that the Trump administration's denaturalizations are having. Naturalized Americans and wider immigrant communities suffer a sense of subordination, social paralysis, and surveillance. Whether unintentionally or by design, denaturalizations are reducing the political participation—and hence political power—of immigrants, including naturalized citizens.

### Derivative Citizenship: Total Discretion, No Recourse

According to federal law, an individual can acquire what is known as derivative citizenship through the naturalization of a parent or spouse. Denaturalization jeopardizes derivative citizenship because it invalidates naturalization retroactively, as if it had never occurred in the first place.<sup>318</sup> In such circumstances, the government does not treat derivative citizens uniformly, and no public policy or guidance exists on the subject. It is entirely possible that a naturalized U.S. citizen could lose their citizenship due to the actions of a relative—a clear example of guilt by association.

The “relation back” doctrine holds that when a person is denaturalized and loses U.S. citizenship, that person reverts to the immigration status held prior to naturalization. As such, this principle may have implications for any person who benefitted from that naturalization, including those who derived their citizenship from this person.<sup>319</sup> The reason why citizenship was revoked, and the physical location of where the derivative citizen resides at the time of their relative’s denaturalization, determines whether the derivative will also lose citizenship.<sup>320</sup>

If a relative’s citizenship was “illegally procured,” the derivative citizen can retain U.S. citizenship. USCIS has confirmed that “the citizenship of a spouse or child who became a U.S. citizen through the naturalization of his or her parent or spouse is not lost if the revocation was based on illegal procurement.”<sup>321</sup> However, if the relative’s citizenship was procured by “willful misrepresentation,” the derivative’s citizenship is automatically lost.

Reason for Revocation	Location of Residency	
	 Inside the U.S.	 Outside the U.S.
Concealment of a material fact or willful misrepresentation	Citizenship Lost	Citizenship Lost
Membership in certain organizations or discharged from military	Citizenship Kept	Citizenship Lost
Other reason for denaturalization (i.e. “illegal procurement”)	Citizenship Kept	Citizenship Kept

Though the statute’s language speaks of children and spouses, “only children of citizens can acquire or derive their citizenship through citizen parents today, spouses were also eligible for derived citizenship up until 1922, making it likely that the language is a remnant of a bygone era.”<sup>322</sup>

A child with derivative citizenship has no recourse in preventing his or her own denaturalization by proxy. As noted by one court, “the derivative citizenship of a child...may be effectively cancelled without a chance to contest it, if a prior denaturalization decree has conclusive effect.”<sup>323</sup> The policy of retroactive citizenship stripping can have serious, negative consequences on a child. To illustrate, the Seventh Circuit held that a three-year-old child, who had acquired citizenship through his father, was not entitled to the appointment of a guardian *ad litem* to protect the child’s interests, since the child’s “rights, if any, were derived solely from the status of his father.”<sup>324</sup>

Data and information on individuals who have lost, or may lose, derivative U.S. citizenship due to a denaturalization is not publicly available and there is very limited case law on the issue. This is not surprising, given that the law does not provide a remedy for derivatives who have lost their citizenship, since it is considered *void ab initio* based on the principal’s denaturalization.

A leaked 2008 DHS document called the “Denaturalization Investigations Handbook,” sets out steps for how to investigate a denaturalization case. The first step requires agents to “[i]dentify family member(s) whose status is dependent on the naturalized subject,” and “[l]ocate and review all files relating to the naturalized person, such as the naturalized person’s immediate family members.”<sup>325</sup> Such instructions make clear that DHS is investigating not just single individuals, but whole family groups, targeting innocent people for an error made by a relative.

President Trump has repeatedly voiced opposition to so-called “chain migration.” Since a naturalized citizen has the right to petition for family members to join them in the United States, there may be a risk to those who came to the United States via petition by the naturalized citizen. This may mean an exponentially higher pool of individuals at-risk of denaturalization and removal should the administration determine their citizenship is void on account of the original naturalized citizen’s citizenship being revoked, unless they have some separate basis upon which to claim a right to remain in the United States.

The Trump administration’s commitment to increasing denaturalizations can be seen to have multiple deleterious effects on individuals, families, communities, and even the body politic. But even that litany of ill effects does not include one of the harshest possible results of denaturalizations, statelessness, which is considered in the next section.

## Statelessness

For an individual, one of the worst possible results of denaturalization is to become stateless. A stateless person literally has no place to be in the world, and lives, in the words of one stateless person, “a kind of half-life,” completely stripped of the state protection necessary to make rights real in practice.<sup>326</sup> Taking away a person’s citizenship is one of the most severe sanctions

available, which is why the use of this radical step is meant to be carefully circumscribed by law. However, such limitations have not completely prevented the creation of statelessness, including by the United States. Based on data reviewed by the Justice Initiative, the use of this extreme measure continues to give rise to new stateless people trapped in legal limbo in the United States. This section first looks at statelessness in the U.S., then at the causal link between denaturalization and statelessness, before examining the hazards of statelessness and the people most at risk of becoming stateless as a result of the current operation of the denaturalization statutes.

### **Statelessness in the United States**

Statelessness is both a reflection and a product of an international political system based on sovereign states. Millions of people living today—and many millions more throughout modern history—have no nationality. Nationality in this sense means the *legal* bond between an individual and a state. Around the world, nationality is acquired or granted in three ways:

- at birth, by descent/parentage (*jus sanguinis*, Latin for “blood”);
- at birth, by birth on a country’s territory (*jus soli*, Latin for “soil”);
- after birth, by way of naturalization (outside the U.S., the terms “registration” or nationality “by option” may be used).<sup>327</sup>

Statelessness is defined in international law. A stateless person is someone who is not considered to be a national by any state under the operation of its law.<sup>328</sup> Some people are born stateless; others become stateless. Whether someone is stateless or not is a mixed question of fact and law, meaning that simply reading another country’s nationality laws is insufficient to determine how they apply in a particular case. The true number of stateless people living today is unknown, though estimates range between 12 to 15 million.<sup>329</sup> An undetermined number of these individuals live in the United States, without access to a lawful status or to essential rights and protections.<sup>330</sup>

*Citizens of Nowhere: Solutions for the Stateless in the U.S.* (2012), a report by the United Nations High Commissioner for Refugees (UNHCR) and the Open Society Justice Initiative, scrutinized 70 U.S. court decisions where the issue of statelessness arose and identified the most common causes of statelessness in the U.S. The most common situations were:

- Citizens of former Soviet satellite states who did not obtain citizenship in a newly independent state following the break-up of the Soviet Union.
- Ethnic Eritreans who were denationalized by Ethiopia during the Eritrea-Ethiopia war and were unable to acquire another nationality.
- Palestinians unable to obtain nationality in their state of birth (including Lebanon, Kuwait, Egypt, or Saudi Arabia) or any other state.<sup>331</sup>

Estimating how many stateless individuals currently live in the United States is difficult for a number of reasons, including the government’s failure to keep an official count. Although the number of stateless persons currently in the U.S. is not clear, it is abundantly clear that the government should not be trying to increase this number.

### **Denaturalization Creates Statelessness**

Denaturalization prosecuted by the United States government creates a risk of statelessness for those who have no other citizenship. This section will look at precisely how denaturalization can lead to statelessness, before the next section considers the many disastrous effects of becoming stateless, and why the U.S. should seek to minimize the number of people condemned to such a fate.

There are several ways a U.S. citizen could become stateless if denaturalized. These include:

*Dual-citizenship prohibited.* Some countries do not permit their nationals to hold any other citizenship. Acquiring U.S. citizenship could result in loss of this original citizenship, potentially automatically. Subsequent loss of naturalized American citizenship would result in statelessness (assuming the concerned individual holds no other nationality).

*Prohibited acts under another country’s laws.* Some countries’ laws allow for citizenship revocation if a national does something contrary to the country’s national interests. For example, some countries permit citizenship revocation if the national serves in another country’s armed forces or even resides in a foreign country for an extended period. In the United States, until 1978, Americans who obtained citizenship by birth abroad to a U.S. citizen parent could lose their nationality if they failed to meet certain “retention requirements” including residence in the United States.<sup>332</sup> Serving in the U.S. armed forces, which many residents do, or residing in the United States for a specified period of time, which many of those denaturalized by the U.S. have done, could result in loss of a foreign nationality and lead to statelessness upon denaturalization by the United States.

*Lack of identity documentation in country of origin.* In most cases, undocumented individuals do have a nationality, but their inability to prove vital aspects of their identity—such as their name, date and place of birth, and parents’ nationality—can lead to statelessness if their country of nationality does not consider them to be nationals.<sup>333</sup> Many countries lack universal foundational registration systems,<sup>334</sup> leaving more than 1 billion people globally potentially unable to prove their entitlement to a nationality. Revoking U.S. citizenship through denaturalization proceedings, particularly where the person concerned has links only to countries with weak identity infrastructure, could result in statelessness.

*Voluntary renunciation.* Some individuals formally renounce their citizenship, a voluntary act to relinquish ties with their country of nationality. Individuals who renounce any other nationality become mono-citizens in the United States. For naturalized U.S. citizens in this situation, denaturalization would make them stateless.

*Discrimination.* Discrimination in nationality laws is one of the largest causes of statelessness.<sup>335</sup> For example, members of minority ethnic or religious groups stripped of their nationality, or women who lose their nationality upon marriage to a foreign spouse, are vulnerable to statelessness if they have naturalized as Americans and are subsequently denaturalized.

## **DENATIONALIZATION AND PROTECTION FROM STATELESSNESS**

Temesgen Haile, an Ethiopian of Eritrean ethnicity, fled to the United States when the Ethiopian government began arbitrarily expelling 75,000 persons of Eritrean ethnicity in 1998. He sought asylum based on his fear that he too would be stripped of his citizenship by the Ethiopian authorities. His claim was denied by the immigration judge and the Board of Immigration Appeals based on the conclusion that forced denationalization without additional harm is not persecution. On appeal, the circuit court ruled that in some circumstances forced denationalization could constitute persecution. “If Ethiopia denationalized [him] because of his Eritrean ethnicity, it did so because of hostility to Eritreans....To be deported to the country that made you stateless and continues to consider you stateless is to be subjected to persecution.” (*Haile v. Holder*, 591 F.3d 572 (7th Cir. 2010)).

Over 50 countries deny women equal rights to acquire, change, or retain their nationality.<sup>336</sup> Many of these countries are represented in the denaturalization cases reviewed for this report, in which denaturalization proceedings were brought against women from Bangladesh, Iran, Morocco, Nigeria, Sierra Leone, and Somalia. Additionally, individuals hailing from countries with a history of arbitrarily denying citizenship on a racially or ethnically discriminatory basis are also represented, including the Dominican Republic and Myanmar.

*State succession.* Redrawing national borders always creates a risk of statelessness. According to the UNHCR, “the emergence of new states and changes in borders...[may leave one] without a nationality as a result of these changes.”<sup>337</sup> Naturalized Americans affected by shifts in national boundaries or the dissolution or emergence of states will most likely be living abroad and could miss crucial registration periods for acquiring or retaining another nationality. If loss of nationality results in these situations and the individual has no other nationality, denaturalization will leave them stateless. Some of the cases reviewed for this report include individuals who were born in or arrived from a state that does not exist (such as, Yugoslavia).

*Disputed, unincorporated, or non-state territory.* A person may be stateless if they were born in a disputed territory, an area ruled by an entity whose independence is not internationally recognized, or on territory that may be controlled by a country but not considered part of that country, so that the inhabitants are not considered citizens under the country’s law. For example, case files examined for this report included at least one person from Palestine, and other individuals referred to as “Palestinian.”

### **U.S. Complicity in the Moral and Individual Hazards of Statelessness**

The Supreme Court has recognized statelessness as a “condition deplored in the international community of democracies,” which has “disastrous consequences.”<sup>338</sup> The U.S. Department of State has noted the extreme vulnerability of the stateless person: “Without citizenship, stateless people have no legal protection and no right to vote, and they often lack access to education, employment, health care, registration of birth, marriage or death, and property rights. Stateless people may also encounter travel restrictions, social exclusion, and heightened vulnerability to sexual and physical violence, exploitation, trafficking in persons, forcible displacement, and other abuses.”<sup>339</sup>

Despite this strong moral opposition to statelessness, the United States has not acceded to either the 1954 or 1961 Conventions on Statelessness and U.S. law does not define statelessness, accord any protections to stateless individuals in the country, or provide an avenue for the stateless to acquire lawful status or citizenship on the basis of their statelessness alone. Should a stateless person go through the U.S. immigration system and receive a final order of removal, there would be nowhere for them to be removed to, resulting in indefinite supervision and the risk of perpetual detention.<sup>340</sup>



## STATELESSNESS AND DETENTION IN THE UNITED STATES (FROM *CITIZENS OF NOWHERE*):

Viktorya N., a woman with a thriving small business in California, came to the United States in 1990 from the Ukrainian Soviet Socialist Republic of the former Soviet Union. Following a final order of removal against her, she was detained, but her removal order could not be executed because the Soviet Union had ceased to exist and neither Russia nor Ukraine would recognize her as a national. She remained in detention for three months and experienced significant trauma—not only by her detention but also by the great uncertainty of what would happen to her and where she might be sent. ...She was eventually released but continues to face restrictions in her daily life and entrepreneurial endeavours based on the requirements of the order of supervision that her release is contingent on.<sup>341</sup>

As Viktorya N.'s story illustrates, the United States is willing to seek the deportation of individuals who are stateless, including to countries to which the person has no ties.<sup>342</sup> In denaturalization case documents reviewed for this report, the U.S. government states that when a person is denaturalized, the U.S. will order that person be removed “to [named country] *or any other country that will accept the defendant.*”<sup>343</sup> In practice, “it is rare that any country other than the country of citizenship will accept an individual who has been ordered removed from the United States.”<sup>344</sup>

The United States government does not consider whether the individual targeted for denaturalization is stateless or is at-risk of stateless as a result. Based on the denaturalization court records reviewed for this report, the government does not make any effort to establish whether the defendant holds the nationality of his or her country of origin, or any other country to which the individual has relevant links.

Outside the courtroom, the United States government openly acknowledges that denaturalization can lead to statelessness. The State Department notes that denaturalization can “result in statelessness if the person does not possess or acquire another nationality,” and “[r]evocation procedures may take place...even if the individual in question is thereby rendered stateless.”<sup>345</sup>

As a country that strips citizenship and makes people stateless, the United States is betraying the moral principles expressed in *Trop v. Dulles* that it is “a punishment more primitive than torture.”<sup>346</sup> In allowing denaturalization to lead to statelessness, the U.S. is ignoring the link

between deprivation of nationality, creation of stateless populations, and the commission of genocide and other unimaginable atrocities. Stripping people of their citizenship and rendering them stateless has, in the past, been a precursor to genocide. Although a repeat of that may seem unlikely today, the current administration is clearly willing to target and expel people without the faintest consideration of the results.

### **Prevalent Countries of Origin and Risks of Statelessness**

This section sets out, as illustrative examples, a brief overview of the nationality laws of three prominent countries of origin represented in the denaturalization cases reviewed for this study, demonstrating a risk of statelessness posed as a result of denaturalization. In each case, provisions of the country of origin's nationality law may result in the loss of that nationality, if originally held, upon naturalization in the United States or as a result of prolonged residence abroad. The information provided here is not comprehensive. As a practical matter, to fully explore the risk of statelessness posed by any deprivation or loss of nationality, the specific facts and circumstances of each case must be assessed individually and in much greater detail, which is beyond the scope of the present study.

#### **Haiti**

Haitians have been particularly targeted by the Trump administration. In January 2018, President Trump publicly insulted Haiti in derogatory terms<sup>347</sup> and the government stated that Haitians would no longer be eligible for U.S. visas for work in agriculture and other industries.<sup>348</sup> This came only months after Trump publicly disparaged Haitian immigrants<sup>349</sup> and DHS officials announced that Haitians would no longer retain Temporary Protected Status (TPS) in the United States.<sup>350</sup> DHS pronounced that Haitians must self-deport within 18 months following that decision, upending the lives of nearly 60,000 Haitians who have put down roots in the U.S., built careers, and raised children—many of whom are American citizens.<sup>351</sup> On October 3, 2018, the District Court for the Northern District of California enjoined DHS from enforcing the decision to terminate TPS for Haitians, pending further resolution of the case.<sup>352</sup>

A high proportion of individuals targeted for denaturalization in the U.S. are from Haiti. Under Haiti's 1987 Constitution, Haitian nationality was obtained by descent or naturalization, the latter requiring five-year residency.<sup>353</sup> According to Article 13, Haitian citizenship was lost if the citizen acquired citizenship of a foreign country through naturalization, held a political post in the service of a foreign country, or, if not a native Haitian but naturalized, resided abroad for three years without authorization from a competent official. Article 15 plainly stated that "dual Haitian and foreign nationality is in no case permitted."

The 1987 Constitution was amended in 2012 to include a new Article 12, which implicitly recognizes the concept of dual nationality, stating, "No Haitian can make their foreign nationality prevail on the territory of the Republic."<sup>354</sup> Article 13 and 15 were abrogated.<sup>355</sup>

According to an official in the consular section of the Haitian embassy in Ottawa, Canada:

An individual who has previously lost their Haitian citizenship and wishes to reclaim it must be able to prove their Haitian origin, typically with a Haitian birth certificate or an official copy of the birth register...If the requestor does not have their birth certificate, they can ask a proxy in Haiti, such as a family member or a friend, to request an official copy of the birth register at the National Archives of Haiti. If the birth was never registered or the records are unavailable, the embassy advises the individual to hire a lawyer to make a formal request for a legal decision confirming their identity at a court of first instance in Haiti. The lawyer would look for evidence that can be used to prove the individual's Haitian origins, such as witnesses to their birth or a baptism certificate, to take before the court.<sup>356</sup>

As noted by the U.S. State Department, Haiti's "dysfunctional civil registry system and weak consular capacity throughout the Caribbean made obtaining documentation extremely difficult for individuals living inside or outside the country" and that "many official documents were destroyed in the January 2010 earthquake."<sup>357</sup> Moreover, the Haitian government "did not register all births immediately and did not keep statistics concerning the number of unregistered births each year."<sup>358</sup>

It is accordingly likely that a number of individuals who are or will be denaturalized in the United States will be unable to re-acquire Haitian nationality. A similar situation occurred following the 2013 *Sentencia* in the Dominican Republic, following which the prime minister of Haiti publicly stated that affected Dominicans of Haitian descent were *stateless* and not citizens of Haiti under the operation of its nationality laws in effect at the time.<sup>359</sup>

## India

The highest proportion of individuals targeted for denaturalization in the United States are from India. According to the Constitution of India, "[n]o person shall be a citizen of India...or be deemed to be a citizen of India...if he has voluntarily acquired the citizenship of any foreign State."<sup>360</sup> Article 9 of India's Citizenship Act (1955, amended 2003) regulates termination of citizenship, and states that "Any citizen of India who by naturalization, registration [or] otherwise voluntarily acquires, or has at any time between the 26th January, 1950 and the commencement of this Act, voluntarily acquired the citizenship of another country shall, upon such acquisition...cease to be a citizen of India."<sup>361</sup>

Article 10 details provisions relating to deprivation of citizenship. Accordingly, some citizens, including those who naturalized, may be deprived of Indian citizenship "by an order of the Central Government" if it believes that naturalization was obtained by fraud; if the "citizen has shown himself by act or speech to be disloyal or disaffected towards the Constitution of

India”; “assist[ed] an enemy” in war; has within five years since naturalizing, been sentenced, in any country, to imprisonment for two years or more; or has resided outside of India for a continuous period of seven years without notification to relevant authorities.<sup>362</sup>

Article 8 permits the renunciation of citizenship. However, should a citizen renounce their citizenship, “every minor child of that person shall thereupon cease to be a citizen of India.”

According to Article 5, “[n]o person who has renounced, or has been deprived of, his Indian citizenship or whose Indian citizenship has terminated, under this Act shall be registered as a citizen of India...except by order of the Central Government.”

India’s citizenship laws, on their face, raise significant risks of statelessness for denaturalized U.S. citizens.

## **Nigeria**

President Trump has described Nigerian immigrants in insulting terms in connection with his administration’s policies.<sup>363</sup> His remarks were offensive and also disproportionate: as of June 2015, Nigerian immigrants accounted for only about 0.6% of naturalized U.S. citizens.<sup>364</sup>

According to Nigeria’s Constitution, only “a citizen of Nigeria by birth” may acquire another citizenship and still retain Nigerian citizenship. Section 28 of the Constitution provides that: “. . . a person shall forfeit forthwith<sup>365</sup> his Nigerian citizenship if, not being a citizen of Nigeria by birth, he acquires or retains the citizenship or nationality of a country, other than Nigeria, of which he is not a citizen by birth.”<sup>366</sup> Nigeria’s Constitution defines “citizens by birth” as those born in Nigeria whose parent or grandparent is a Nigerian citizen or born outside Nigeria to a parent who is a Nigerian citizen.<sup>367</sup>

There is a risk that denaturalized U.S. citizens from Nigeria would become stateless, if they held Nigerian citizenship by naturalization, and no other citizenship, particularly given that the loss of Nigerian citizenship in such cases occurs “forthwith,” and thus is immediate and automatic.

As stated above, further research on the operation of foreign nationality laws in practice would be needed in order to conclude that there is a risk of statelessness in individual cases. A major conclusion of this report is that the U.S. government is currently incapable of undertaking that assessment, a situation that requires urgent attention. Considering the severe impact of statelessness on an individual’s life and security, and the practical and legal complications that statelessness raises for states in the orderly and humane administration of immigration law, this report makes several important recommendations as to how these glaring gaps in U.S. law should be closed. In the context of denaturalization proceedings, the likely creation of statelessness should be explored as a matter of priority, not only due to the moral implications of

generating statelessness *per se*, but also as a component of a more comprehensive consideration of post-deprivation implications, in view of the serious human rights concerns raised by the deprivation of nationality.

## Denaturalization Threatens Constitutional Rights

*“To treat a denaturalization proceeding, whether procedurally or otherwise, as if it were nothing more than a suit for damages for breach of contract or one to recover overtime pay ignores...every consideration of justice and of reality concerning the substance of the suit and what is at stake.”*

-Justice Wiley B. Rutledge, *Klapprott v. United States* (concurring opinion, 1949)<sup>368</sup>

Denaturalization threatens a number of constitutional rights, particularly those established under the Fourteenth, Eighth, Fifth, and Sixth Amendments. This section outlines many (but by no means all) of threats to constitutional rights posed by the denaturalization statutes, informed by a comprehensive review of 168 cases filed and litigated since January 1, 2017.

The section is organized in light of the history explored above. First, there are longstanding big picture questions that have been raised—and not answered—at least since the inception of OSI. These questions concern: how the denaturalization statutes comply with the equality of all citizens “born or naturalized” in the U.S. under the Fourteenth Amendment; how the severe result—loss of nationality—does not raise Eighth Amendment issues; and, how the interplay between criminal and civil statutes meets basic standards of fundamental fairness. Second, the section explores several “known infirmities” in the use of civil denaturalization in particular, including the lack of a right to counsel, absence of a statute of limitations, and lack of consistent application of the applicable burden of proof. Finally, the section turns to concerns that emerge specifically from the Operation Janus and Operation Second Look cases, and from the current administration’s enthusiasm for employing denaturalization as a generalized immigration enforcement tool in the context of its broader nativist agenda.

### Unanswered Questions of Constitutional Proportions

#### Fourteenth Amendment: The Citizenship Clause and Second Class Citizenship

The denaturalization statutes create a defining—and yet virtually unknown—difference in treatment between naturalized American citizens and American citizens by birth on U.S. soil.<sup>369</sup> The provisions appear on their face to contradict the Constitutional framework of American citizenship.

The Citizenship Clause of the Fourteenth Amendment states, “All persons born or naturalized in the United States...are citizens...” The Constitution draws only one distinction between the two categories of U.S. citizen: only citizens by birth may run for the offices of president and vice president.<sup>370</sup> The Supreme Court has affirmed this as the only difference, holding that naturalized citizens “possess...all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native.”<sup>371</sup>

Yet the U.S. retains the denaturalization statutes, and voices opposed to those statutes, arguing that denaturalization is an unconstitutional scheme of second-class citizenship, have yet to command a majority.<sup>372</sup> In one of a series of denaturalization cases heard by the Supreme Court in the 1940s, for example, Justices Wiley B. Rutledge and Frank Murphy expressed their concern with the use of denaturalization. They wrote, “No such procedures could strip a naturalborn [sic] citizen of his birthright or lay him open to such a penalty... the Constitution does not countenance either that deprivation or the ensuing liability to such a punishment for naturalized citizens.”<sup>373</sup>

In another case during this era, involving a member of the German Nazi party who had naturalized as an American, Justice Rutledge wrote:

My concern is not for Paul Knauer. The record discloses that he has no conception of, much less attachment to, basic American principles or institutions. He was a thorough-going Nazi, addicted to philosophies altogether hostile to the democratic framework in which we believe and live. But if one man’s citizenship can thus be taken away, so can that of any other...Not merely Knauer’s rights, but those of millions of naturalized citizens in their status and all that it implies of security and freedom, are affected by what is done in this case. By the outcome they are made either second-class citizens or citizens having equal rights and equal security with others.<sup>374</sup>

Over 70 years later, the same concern persists. In a 2019 denaturalization case before U.S. District Judge William B. Shubb, he wrote:

This court must once again dispel the commonly held misconception that all American citizens are afforded the same rights of citizenship. Through the denaturalization process, Congress has created two distinct classes of American citizens.

...The government can always initiate proceedings to revoke a naturalized individual’s citizenship if it believes that the naturalization was illegally procured or procured by concealment of a material fact or by willful misrepresentation...this boundless discretion means that these second-class citizens can never feel entirely secure in their claim to American citizenship...There is also no assurance that the government will always institute these proceedings fairly, as it may harbor any number of ulterior motives.<sup>375</sup>

The Fourteenth Amendment’s Citizenship Clause sits within a provision of our Constitution that towers over the history of equal rights movements in this country. The Fourteenth Amendment is a technical masterpiece, written in the aftermath of the Civil War and wide awake to the illegitimacy of self-government when subordination, violence, and hateful treatment against powerless minorities abides.<sup>376</sup> Today, when the denaturalization statutes function as an anonymous, arbitrary enforcement tool, used to target some of the most vulnerable communities in the country, it is time to pull back and reckon with the nation’s constitutional conscience.

**“A Procedural Morass” – Overlapping Civil and Criminal Statutes and a Tortured Jurisprudence**

Although this report strives to lend clarity to the operation of the two denaturalization statutes, in reality the lines between categories and procedural rules are perpetually blurred, such that the law of denaturalization functions by its own rules, analogized to everything from property suits, to breach of contract, to excommunication. The few academics and practitioners familiar enough with the statutes to explain them find themselves mired in the Supreme Court’s hyper-technical ruminations on the statutory language, still grasping to answer the foundational constitutional questions that continue to plague this area of law.<sup>377</sup>

*Threats to Rights and Liberties in Criminal and Civil Denaturalization Proceedings*

<b>Criminal Denaturalization</b>	<b>Civil Denaturalization</b>
Ten-year statute of limitations	No statute of limitations
Pretrial detention	No right to an attorney
Movement restrictions	No right to trial by jury
Forfeiture claims	No right not to testify
Plea agreements with immigration waivers	<i>In absentia</i> denaturalization
Removal by district judge	Settlement agreements with immigration waivers
25 years imprisonment and fine	
Automatic citizenship revocation	

In recognition of the disproportionality between the outcome (loss of nationality, deportation, potential statelessness) and the standard procedural protections afforded in civil cases, the Supreme Court has developed a line of jurisprudence engineered to equalize the litigants’ rights and burdens under the two statutes, chiefly through the heightened burden of proof in civil cases.<sup>378</sup> The enduring advantages in civil denaturalizations are described in a 2017 U.S. Attorneys Bulletin: “non-criminal due process protections often result...in civil

denaturalization actions being the most effective remedy.” Conversely, criminal denaturalization prosecution “presents a number of constraints that the government does not face when bringing a civil denaturalization,” including that “the accused has the right to all of the constitutionally guaranteed due process rights...that are not available in a civil denaturalization proceeding.”<sup>379</sup>

That the civil and criminal statutes operate in parallel also creates problems associated with double jeopardy, deportation, and the ability to appeal. The government has capitalized on this, urging prosecutors to try defendants civilly if the criminal prosecution either failed or was declined for prosecution. The same DOJ bulletin states:

Because of the advantages of a civil denaturalization...prosecutors should strongly consider referring any declination for [criminal denaturalization] for consideration as a civil denaturalization action. In particular, prosecutions declined based on the ten-year statute of limitations are often viable in civil proceedings. Moreover, pursuing civil denaturalization actions may be appropriate when a criminal denaturalization action results in an acquittal, as the causes of action between the two suits are not identical.<sup>380</sup>

Of the 168 cases analyzed for this report, criminal denaturalizations outnumbered civil denaturalizations nearly three to one. While pursuing civil denaturalization presents more latitude for government prosecutors, a criminal conviction remains on one’s record and can serve as a permanent bar to entering the United States following removal. The conviction may also preclude a person from re-naturalizing. A civil judgment carries no other consequences, beyond denaturalization (legally understood as an administrative measure to remove an improperly obtained immigration benefit). Reverting to permanent residency status without a criminal conviction allows a person to remain in the U.S. and potentially to re-naturalize should the facts of their case not preclude it.

*Deportation and ability to appeal.* Conviction under the criminal denaturalization statute results in automatic denaturalization. Upon conviction, the newly unmade citizen is susceptible to deportation. Additionally, a district or magistrate judge can issue a Judicial Removal Order (JRO), which orders the expedited removal of the defendant from the United States, bypassing the immigration system and circumventing the individual’s opportunity to raise defenses to removal before an immigration judge. As of May 2019, JROs had already been issued in 13 closed cases reviewed for this report.

In *Logan v. Zimmerman Brush Co.* (1982), the Supreme Court held that while “access to the courts is an entitlement, deprivation of that access may violate due process.” Courts have recognized the substantial difficulties faced by a person appealing their case from abroad, noting the “difficulties of pursuing an effective appeal while abroad,”<sup>381</sup> and recognizing that



doing so is a “Herculean task.”<sup>382</sup> Thus, permitting deportations before denaturalized persons “have had the opportunity to waive or exhaust direct appeals that are guaranteed to them as of right can substantially frustrate, or in some instances, effectively extinguish, their ability to exercise these established rights.”<sup>383</sup>

The denaturalized and deported will likely be unable to pay counsel (provided they have counsel) to continue pursuing their appeal and will face overwhelming logistical obstacles attempting to appear *pro se* from abroad, including navigating the U.S. court system, obtaining timely notice of docket entries, meeting filing deadlines, complying with filing procedures, and appearing for oral argument.<sup>384</sup>

The “rule of finality” holds that a conviction is not considered “final”—so as to trigger removal consequences or bar relief from removal—unless and until the individual’s direct appeals of that conviction have been exhausted or waived.<sup>385</sup> Absent express recognition of the “finality” rule, DHS may continue to improperly pursue deportation of noncitizens based on non-final criminal convictions that remain under direct appellate review, thus subjecting many immigrants to removal on the basis of potentially wrongful or flawed convictions and eroding enshrined appellate rights. Failure to recognize the “finality” rule thus seriously affects the lives of many immigrants and their families and communities.

### **Eighth Amendment: An “Ill-Gotten” Benefit that “Makes Life Worth Living”**

While the law treats the denaturalization statutes as a corrective measure, administrative in character, this gloss is difficult to square with the Supreme Court’s jurisprudence on the harms inflicted by expatriation and denaturalization.

The Eighth Amendment prohibits cruel and unusual punishments. While this is usually discussed in the context of capital punishment and torture cases, the Supreme Court has also found citizenship stripping to qualify. In *Trop v. Dulles* (1958), the court held that denaturalization was cruel and unusual, finding that “the total destruction of the individual’s status...is a form of punishment more primitive than torture...” In *Knauer v. United States* (1946), the court noted, “Denaturalization, like deportation, may result in the loss ‘of all that makes life worth living.’”<sup>386</sup>

The government recognizes the gravity and harm inflicted when it pursues denaturalization. Motions *in limine* by the government in recent criminal cases seek to enjoin defendants from “refer[ring] to any punishment or immigration consequences [they] might suffer if convicted,”<sup>387</sup> noting that the severity of denaturalization might sway a jury’s sympathies.

The U.S. justice system is based on a premise that the punishment must fit the crime. As confirmed by the Supreme Court in *Solem v. Helm* (1983), the nature and gravity of an offense

must be weighed against the harshness of the penalty—that is, it must be proportional. In *Graham v. Florida* (2010), the court declared that “[t]he concept of proportionality is central to the Eighth Amendment.”<sup>388</sup>

Yet, as noted above regarding the creation of statelessness through denaturalization, there is no space for a proportionality analysis under either civil or criminal denaturalization statutes, and no indication that the government is engaging in such an analysis prior to initiating proceedings.

## **DENATURALIZATION THROUGH OPERATION SECOND LOOK**

Zarrin Hoque came to the U.S. from Bangladesh in the early 1990s. Desperate for work, Hoque was introduced to a broker who promised she would help Hoque secure a work permit that would allow her to make a living in the U.S. In the meantime, in 1995, Hoque won the Diversity Visa lottery, through which she naturalized. According to Hoque, the broker obtained work authorization for her in a different name, Munia Parvin. Hoque did not disclose this fact prior to naturalizing. Hoque owns a market with her husband and as she noted, “after being in this country for more than 20 years and spending the better part of my life, I consider the USA as my country. I took the oath and believe in this great nation. This is the only country I practically known today.”<sup>389</sup> Hoque was denaturalized in December 2017 as a part of Operation Second Look and her whereabouts are currently unknown.

## **The Known Infirmities: Civil Proceedings**

This section provides an overview of the lack of safeguards in the design and operation of the civil denaturalization statute. The concerns raised by the dual criminal and civil statutes are explored above, but it is important to note how those ambiguities are exacerbated by the fact that the civil statute itself offers underwhelming protection of basic procedural rights, given the proceeding can result in loss of nationality.

### **Burden of Proof**

Technically, the burden of proof when attempting to revoke a person's citizenship is substantially the same whether pursued criminally or civilly. For criminal revocation, the burden of proof is "beyond a reasonable doubt."<sup>390</sup> For civil revocation of citizenship, the burden of proof is "clear, unequivocal and convincing evidence" that does "not leave the issue in doubt."<sup>391</sup> This civil standard "is substantially identical with that required in criminal cases—proof beyond a reasonable doubt."<sup>392</sup>

Despite this, current civil denaturalization cases have resulted in judgments employing "clear and convincing,"<sup>393</sup> not *clear, unequivocal and convincing evidence* that does *not leave the issue in doubt*. "Clear and convincing" is a lesser level of burden of proof and a less rigorous standard to meet than "beyond a reasonable doubt." Under the "clear and convincing" standard, the government must only "prove that the contention is substantially more likely than not that it is true."<sup>394</sup> In cases reviewed for this report in which this lower standard was used, the defendant was rarely represented by an attorney.

### **Fifth Amendment Protection against Double Jeopardy**

The Fifth Amendment's Double Jeopardy Clause prohibits persons from being prosecuted twice for the same crime. Similarly, *res judicata* is the principle that an action may not be litigated once judged on the merits. According to the DOJ bulletin, OIL "can also take advantage of the evidence, statements, and testimony generated during the criminal investigation and trial without violating double jeopardy or *res judicata*," citing to a district court and Fifth Circuit case from 1936 that was decided nearly two decades before the enactment of the criminal and civil denaturalization statutes. The publication surmises, "A civil case can provide another avenue to achieve a practically similar result."<sup>395</sup>

A review of denaturalization cases for this report found the government repeatedly using this tactic. As recommended to prosecutors by DOJ, "if the U.S. Attorney's Office declines to prosecute under 18 U.S.C. § 1425 and proceeds with a plea agreement to a lesser charge, the case agent and the Assistant U.S. Attorney should consult the ICE attorney who would be responsible for handling the civil case and attempt to reach a stipulation to civil denaturalization as a condition of the criminal plea agreement so that the civil denaturalization case can be more efficiently resolved."<sup>396</sup>

In a civil case reviewed, a 64-year-old asylum seeker from Haiti signed a plea agreement in a July 2011 criminal denaturalization case. This agreement stipulated that the government would dismiss the denaturalization charge in return for the defendant's pleading guilty to two lesser charges of making a false statement in an application for a passport and identity theft. The government subsequently waited seven years to initiate a civil denaturalization proceeding against him. While the case records state that the defendant was served with notice, he never appeared before the court, nor answered the complaint, and was denaturalized *in absentia* based on the government's motion for a judgment on the pleadings.

Under the Double Jeopardy Clause, only sanctions considered as “punishment” usually qualify to preempt re-litigating the issue. However, the Supreme Court has held that “the prohibition on double jeopardy extends to civil sanctions which are applied in a manner that is punitive in nature,”<sup>397</sup> and “a civil sanction qualifies as punishment if the sanction is overwhelmingly disproportionate and if the disproportionate award can be explained only as a deterrent or as having a retributive purpose.”<sup>398</sup> Furthermore, “Congress may impose both a criminal and a civil sanction in respect to the same act or omission, for the Double Jeopardy Clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense.”<sup>399</sup> Although the Supreme Court's logic would seem to prevent the sequential deployment of criminal and civil denaturalizations procedures, this does not appear to have stopped exactly that use.

### **Sixth Amendment: Right to Counsel**

The Sixth Amendment of the U.S. Constitution guarantees criminal defendants the right to be represented by legal counsel, including at no expense to the defendant should they be unable to afford an attorney.<sup>400</sup> However, there is no corresponding federal constitutional right in civil cases.<sup>401</sup> In denaturalization cases, despite the same potential consequence facing defendants—citizenship revocation—there is no right to counsel in civil cases.

Due to an inability to afford an attorney, many people facing civil denaturalization charges are forced to go it alone against the full force of the U.S. government. In the civil cases reviewed for this report, over 25% of civil defendants were unrepresented. *Pro se* defendants often faced three or more experienced government attorneys. In several civil cases reviewed for this report, attorneys for those threatened with denaturalization did not enter an appearance in the case until late in the proceedings, often only days prior to a settlement with the government.

Without access to legal counsel, individuals are likely unaware of their legal rights and possible defenses and claims.

Representation by a lawyer can have a profound material impact on an individual's case.<sup>402</sup> According to a meta-analysis of studies reviewing the effects of representation on adjudicated

civil cases, “parties represented by lawyers are between 17% and 1,380% more likely to receive favorable outcomes in adjudication than are parties appearing pro se.”<sup>403</sup> On average, those with representation were over five times more likely to prevail in court than were unrepresented litigants.<sup>404</sup>

The Criminal Justice Act provides for discretionary appointments of pro bono counsel “for a person charged with civil or criminal contempt who faces loss of liberty.”<sup>405</sup> As some have argued in the civil denaturalization cases we reviewed, stripping citizenship qualifies as “loss of liberty,” thus requiring appointment.<sup>406</sup>

Nationality is inextricably intertwined with one’s identity and access to basic needs, and as such, a person whose nationality is at risk of being stripped should be entitled to representation in order to assure a fair trial in which he or she “stands equal before the law.”<sup>407</sup> A U.S. district judge presiding over a civil denaturalization proceeding told the Justice Initiative that he himself ordered appointment of counsel, stating that the gravity of what was at stake—loss of nationality—made it essential the defendant had representation.<sup>408</sup>

The World Justice Project’s 2019 Rule of Law Index ranked the United States 99 out of 126 countries on the factor of “accessibility and affordability of civil justice.”<sup>409</sup> In 2014, both the UN Committee on the Elimination of Racial Discrimination (CERD) and the Human Rights Committee raised concerns regarding access to legal representation in civil cases in the United States.<sup>410</sup> The Trump administration has recommended defunding the Legal Services Corporation, the nation’s single largest funder of civil legal aid, providing financial support to 132 legal aid programs around the country.<sup>411</sup>

### **Denial of Presumption of Innocence**

While not explicitly mentioned in the Constitution, the “presumption of innocence” follows from the Fifth, Sixth, and Fourteenth Amendments and has been firmly established by the Supreme Court.<sup>412</sup> This means that for those accused of committing a criminal act, the burden of proving guilt is on the other party (in the case of denaturalization, the U.S. government), to demonstrate that the accused is actually guilty. This principle is also codified in international law.<sup>413</sup>

*Use of alias in proceedings.* In many of the cases reviewed, the defendant is accused of using multiple identities. In these cases, the government proceeds with referring to the defendant by the name the government determines is the defendant’s *real* name, not necessarily the name the defendant asserts as their true name. The entire proceeding signals the guilt of the defendant in using a “false” name as a foregone conclusion in such cases. The court similarly uses the name chosen by the government for docket purposes. For instance, Odette Dureland, a naturalized citizen from Haiti, was accused of being a woman named Enite Alindor. Despite

the government's consistent use of the name Enite Alindor, Ms. Dureland persisted that she was not known as Enite and signed all court documents as Odette Dureland. Ms. Dureland was eventually convicted and sentenced under the name Enite Alindor. The Justice Initiative reviewed other cases in which defendants continued to sign documents and refer to themselves with a name different from the one the government was alleging, including at the time of plea agreement.

*Impact of detention and bail procedures.* Whether the government brings a denaturalization proceeding civilly or criminally will determine whether one is at risk of infringements on their movement. Unlike those facing civil action, those charged criminally may be arrested, detained, and have restrictions placed on their movement, including house arrest, electronic monitoring, limits on travel, and curfews.

Despite the presumption of innocence, in all criminal denaturalization cases reviewed for this report, individuals were under some form of detainment.<sup>444</sup> For those subject to bond, the amounts ranged from \$5,000 to \$250,000.

For those who were able to post the bail amount—often in these cases by placing the family or a family member's home up as collateral—the defendant was required to comply with conditions of release. Nearly all required restrictions on movement, including surrendering travel documents to the government, agreeing not to leave the district, GPS or ankle monitoring, curfews, and house arrest.

Generally, individuals left in jail are more likely to be convicted. Studies have shown that conviction rates vary significantly depending on whether one is in jail awaiting the outcome of their case (non-felony 92%; felony 85%) as compared to those who are not (non-felony 50%; felony 59%).<sup>445</sup> Often these convictions are a result of plea agreements, which even innocent people may be willing to sign due to jail conditions or other compelling reasons.

### **No Statute of Limitations**

A statute of limitations dictates the amount of time within which a legal proceeding must begin. The purpose behind the statute is to spare a defendant the burden of defending against stale allegations “after memories may have faded or evidence is lost.”<sup>446</sup> As recently as 2017, the Supreme Court affirmed the importance of statutes of limitations, holding “Such limits are ‘vital to the welfare of society’ and rest on the principle that ‘even wrongdoers are entitled to assume that their sins may be forgotten.’”<sup>447</sup>

As noted above, the government has 10 years to bring a criminal denaturalization charge,<sup>448</sup> and essentially forever to file a civil denaturalization action. In the criminal context, the clock does not need to run from the moment of the initial act that prompted the charge, but can

begin any time when the act was performed again. For instance, if a false statement was allegedly made to a government official in 1996, and subsequently made again in 2006, the 10-year statute of limitations clock could start in 2006. If that person then takes the oath of naturalization in 2016, which incorporates all that was previously stated in the naturalization process, the 10 years could once again re-start from that point.

The criminal denaturalization files reviewed for this report contained several instances in which the government waited far beyond the moment the offense was committed—sometimes over 20 years—using the date of naturalization as the date from which the statute of limitations began to run. In several other instances, the government has initiated cases just months before the 10-year deadline.

In one case, the defendant moved for a “time lapse prejudice,” noting that he was:

[P]rejudiced in his ability to defend himself in multiple ways as a result of this unjustified 9.5-year delay. First, at least two witnesses to his state of mind at the time he filled out the relevant paperwork—relevant to whether his actions were intentional—are not available to testify: one has passed away, and the other, it appears, has no specific memory of [the defendant]. Second, records relating to whether any omission [was made] on [a form] completed was material to [USCIS] appear now to have been lost or destroyed as a result of the passage of time. The prejudice in this case is all the more severe because it is not simply [the defendant]’s liberty on the line; rather, if convicted he will be stripped of his United States citizenship. Because of this actual prejudice and because the government has no investigative justification for the 9.5 years it waited to bring this charge, the Court should dismiss the indictment for prejudicial pre-indictment delay in violation of [the defendant’s] Fifth Amendment due process rights.<sup>419</sup>

This case involved a 35-year-old man from Bolivia who legally immigrated to the United States with his family when he was a teenager. After his July 2008 interview with USCIS but before naturalizing in November 2008, he purportedly engaged in criminal conduct, for which he was not convicted until after he had naturalized. He was convicted of breaking a window of a vehicle and stealing two tires. In April 2018, the government arrested him and moved to denaturalize him based on the single fact that he did not update USCIS on his “criminal conduct” prior to taking the Oath of Naturalization. In September 2018, he was denaturalized and a stipulated JRO was entered against him—nearly two decades after he started his life in the U.S. as a teen.

Similarly, in the context of civil denaturalizations, defendants have raised a defense of laches, which is based on the maxim that “equity aids the vigilant and not those who slumber on their

rights.”<sup>420</sup> The defense of laches moves the court to deny a claim to a plaintiff who has unreasonably delayed asserting a claim. In the cases reviewed for this report, this defense was never successful.

In criminal law, the only offenses not subject to a statute of limitations are: 1) death penalty offenses, 2) terrorism-related offenses resulting in or involving the risk of death or serious injury, and 3) child abduction and sex offenses.<sup>421</sup> By way of comparison, other offenses subject to a 10-year or less time limitation<sup>422</sup> include use of weapons of mass destruction, chemical and biological weapons offenses, arson and bombing, slave trafficking, recruiting or using child soldiers.<sup>423</sup> Given the gravity of those offenses, and the victims affected, it seems disproportionate to hold a threat of denaturalization over a person’s head for a period stretching from a decade through the entirety of the person’s life.

While the criminal statute does have a shelf life of 10 years, even if the government misses this deadline, it still has recourse under the civil statute. As confirmed by the 2017 DOJ bulletin, “prosecutions declined based on the ten-year statute of limitations are often viable in civil proceedings.”<sup>424</sup>

### **Emerging Concerns**

This section explores specific concerns raised by the approach to denaturalizations instituted under Operation Janus, and continued and expanded under Operation Second Look. These concerns focus on three areas. First is the explicit selective targeting for exclusion based on race, religion, and national origin under Janus, using “special interest countries” as a proxy. The second is the role of digital records and technical evidence, including a lack of appreciation for the flawed nature of the evidentiary foundations of Janus and Second Look cases and the possibility that denaturalizations based on government tracking of digital trails will increase. The third is the government’s aggressive approach to litigating, which leaves little doubt that the central aim is deportation.

### **Equal Protection**

Operation Janus began as an initiative specifically “targeting” naturalized citizens from “special interest countries.” The 2016 OIG report covering Operation Janus’s activities describes special interest countries as “countries that are of concern to the national security of the United States, based on several U.S. Government reports.”<sup>425</sup>

In its 2016 report, the OIG noted that DHS was investigating individuals coming from “special interest countries” (SIC) as well as countries bordering them. SICs are defined as “countries that are of concern to the national security of the United States”<sup>426</sup>—a list that has changed from year to year<sup>427</sup> and of which no public, official version exists.<sup>428</sup> However, several countries—including Bangladesh, India, Nigeria, and Pakistan—that are known to appear



consistently on the list are also heavily represented in the denaturalization cases filed in 2017 and 2018. Based on publicly available SIC lists issued by the government since 2003,<sup>429</sup> denaturalization cases filed against individuals from SICs account for 49% of all cases reviewed for this report. In short, “Combining selective enforcement with race, religion, or national origin—as with Project Janus’s focus on ‘special interest countries,’ for example—gives rise to serious constitutional concerns.”<sup>430</sup>

Operation Janus’s use of SICs in the prioritization of cases intersects with a surge in targeting naturalized citizens from Mexico and Haiti as two of the top countries of origin in denaturalization cases in 2017 and 2018. Virtually all defendants in these cases are visible minorities. The correlation between these particular immigrant communities as targets for denaturalization *and* targets for harsh immigration policy measures and rhetorical invective from President Trump warrants explanation from his administration, if not yet in court then in the public domain, including specific information demonstrating a non-discriminatory justification for these disparities.

The equal protection component of the Fifth Amendment’s Due Process Clause safeguards against discrimination, subjecting classifications based on race, alienage, or national origin to strict scrutiny.<sup>431</sup> At least one, pre-Trump, legal analysis called for the invalidation of § 1451(c) (the basis for “attachment” cases; see the Denaturalization Statutes section earlier in this chapter), because it subjects recently naturalized citizens to unequal treatment “and potentially massive civil penalties” as compared to citizens by birth, on the sole basis of national origin.<sup>432</sup> The practice of scouring, in bulk, decades-old records and initiating denaturalization proceedings, strictly on the basis of national origin from an SIC, is not a narrowly tailored approach employing the least restrictive means available to address naturalization fraud. It is an over-inclusive and arbitrary program that aims to expel members of minority groups, subjecting them to degrading and unequal treatment.

It has been emphasized already that citizenship measures convey important messages about national belonging, particularly in the emotion-driven politics of the Trump era. Messages about the use of extreme measures like deprivation of nationality may be seen to convey a certain strength of conviction and commitment to an agenda—whether that agenda is white nationalism or defending national security, or both. For example, in 2019, according to one news analysis, the Department of Justice is six times likelier to issue press releases in terror cases involving Muslim suspects than non-Muslim suspects.<sup>433</sup> These messages are heard and processed within immigrant communities as well, as the Trump administration likely surmises. The stigmatizing impact of a denaturalization program, even though it may affect only a relatively small number of naturalized citizens, far exceeds the raw numbers. When those numbers are on the rise, by whatever order of magnitude, the risk only grows that

targeted communities will be more easily marginalized and discounted. It is entirely plausible that this stigmatizing effect is known and intentionally cultivated by the current administration in its use of denaturalization and its communications regarding the practice.

### **Procedural Due Process and the Notice Problem**

Recently denaturalized individuals may be unaware that they have lost their U.S. citizenship. Unlike criminal denaturalization charges—where individuals are clearly notified that charges have been levied against them because they are usually arrested and forced to appear in court—in a civil suit, a person is not subjected to detention, and an entire case can move forward without the person’s participation.

As held by the Supreme Court, “Procedural due process rules are meant to protect persons... from the mistaken or unjustified deprivation of life, liberty, or property.”<sup>434</sup> Thus, to “minimize substantively unfair or mistaken deprivations,” defendants in civil proceedings have a right to notice and a hearing whenever the government threatens to deprive them of protected interests, enabling them to contest the basis for the potential deprivation.<sup>435</sup>

In the cases reviewed for this report, the Justice Initiative found instances in which the government was unable to serve defendants with notice, instances in which it appeared that notice of service was improper, and instances in which defendants were served, but never appeared in court, nor answered the complaint filed against them.

Of particular concern are cases in which citizens have been denaturalized *in absentia*—that is, they were stripped of citizenship without being present for the proceedings. Under federal law, when a defendant does not respond to notice, the plaintiff can move for default judgment against the defendant. Pursuant to Rule 55 of the Federal Rules of Civil Procedure, “[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the [court] must enter the party’s default.”<sup>436</sup> In other words, a default judgment would be entered against the defendant, rendering a verdict against the individual solely based on the person’s failure to participate in the proceedings.

Recognizing the gravity of the penalty of revoking citizenship, the Supreme Court has expressed disfavor with default judgments in denaturalization cases. In *Klapprott v. United States* (1949), the court stated, “there is strong indication...that Congress did not intend to authorize courts automatically to deprive people of their citizenship for failure to appear.”<sup>437</sup> The court reasoned that:

This Court has long recognized the plain fact that to deprive a person of his American citizenship is an extraordinarily severe penalty...Because denaturalization proceedings have not fallen within the technical classification of crimes is hardly a satisfactory reason for allowing denaturalization without proof while requiring proof to support a mere money fine or a short imprisonment...because of the grave consequences incident to denaturalization proceedings...it is our opinion that courts should not in [civil denaturalization] proceedings 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>438</sup>

While the court disapproved of default judgments in cases of denaturalization, the government has found a workaround that still strips citizens of their citizenship *in absentia*, while narrowly complying with the requirement that government must “first offer...proof of its charges.”<sup>439</sup> Under Rule 12(c) of the Federal Rules of Civil Procedure, “[a] party may file a motion for judgment on the pleadings on the basis that no answer has been filed, or that the pleadings disclose that there are no material issues of fact to be resolved and that party is entitled to judgment as a matter of law.”<sup>440</sup> Thus, by taking the extra step of filing a “Motion for Judgment on the Pleadings,” the government can still obtain a judgment, without the defendant being present or available to counter the claims made in the pleadings. The pleadings consist of the complaint initially filed against the defendant and its associated exhibits. It is unknown if citizens denaturalized *in absentia* even know that they have lost their citizenship.

In other instances, the government has moved for and been granted summary judgment in cases where the defendant never appeared or did not answer the complaint against them. Pursuant to Federal Rule of Civil Procedure 56, the court can “grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” A summary judgment is a judgment summarily entered by the court for one party and against the other, without a full trial.

This happened in the widely publicized case of Baljinder Singh, an asylum seeker from India, in which the government celebrated its achievement in denaturalizing Singh, noting it as the first case to secure “[d]enaturalization as a result of Operation Janus.”<sup>441</sup> According to the case docket, Singh was never involved in the case, nor appeared on his own behalf. It remains unclear if Singh even knew of the proceedings. Based on a single fingerprint as evidence, the government was granted its motion for summary judgment, swiftly denaturalizing Singh nearly three decades after he arrived in the U.S. The questionable reliance on fingerprints, particularly those collected in the early 1990s, is discussed further below.

## EXCERPT FROM ORDER TO GRANT SUMMARY JUDGMENT: BALJINDER SINGH

Plaintiff has submitted a laboratory report by the Homeland Security Investigations-Forensic Laboratory of the U.S. Immigration and Customs Enforcement, which compares a January 24, 1992 fingerprint card bearing the name Baljinder Singh to a September 25, 1991 fingerprint card bearing the name Davinder Singh. Based on a comparative analysis of the friction ridge details of each fingerprint, the report concludes that the fingerprints match and belong to the same individual. Plaintiff relies on this report to contend that Baljinder Singh and Davinder Singh are, in fact, the same individual...Having received no opposition to this motion from Defendant to impeach the credibility of this scientific fingerprint analysis, this Court finds that there is no genuine issue as to the fact that Davinder and Baljinder Singh are the same individual.

There are multiple reasons why a person may not participate in their denaturalization proceeding after they have been served with notice. For instance, defendants may not speak or understand English well enough to understand the action that has been filed against them; they may be unaware of how to handle the situation or how to respond; they may lack the means to travel to the courthouse or afford counsel to help navigate the process. Moreover, given the current climate of fear permeating immigrant communities, even naturalized citizens may feel unsure if they should appear, especially if they do not fully understand that by not appearing they risk losing citizenship.

### Evidence

Digitization of paper-based fingerprint cards and the gradual linking of immigration and law enforcement databases are central to immigration enforcement today, including enforcement through denaturalization. These trends did not begin under the Trump administration, but they have been enthusiastically embraced and scaled-up during his time in office.

In *Schneiderman v. United States* (1943), the Supreme Court wrote that U.S. citizenship is “the highest hope of civilized men,” and it “would be difficult to exaggerate its value and importance.”<sup>442</sup> The court also noted that after U.S. citizenship has been granted, this “right once conferred should not be taken away without the clearest sort of justification and proof.”<sup>443</sup>

Denaturalization cases stemming from Operations Janus and Second Look often rely solely on one piece of evidence, a digital fingerprint match, to support the government’s claim that the defendant acquired citizenship illegally. A closer examination casts doubt on the true nature and materiality of this particular store of fingerprint evidence, and reveals basic human

misapprehensions about fingerprint evidence that should call into question its value in individual cases and as a rationale for massive government surveillance operations like Operation Janus and Operation Second Look.

The privacy concerns raised by systematic collection and digitization of biometric and other personal identifying information and the linking of government databases may be muted when such practices are directed toward non-citizens, or even naturalized citizens. But these developments are unfolding in a society currently engaged in debates about digital privacy, including revelations about government spying on U.S. citizens (born and naturalized) and non-citizens on a massive scale.<sup>444</sup> Given this context, skepticism about the government's approach should be seen as a responsible, even necessary endeavor, yet the reliability and materiality of fingerprint evidence for denaturalization cases has never been questioned.

*Database flaws.* Today, fingerprint data submitted with naturalization applications is uploaded into two databases: DHS's Automated Biometric Identification System (IDENT), established in 2007 and "built from a digital fingerprint repository originally deployed by INS in 1994,"<sup>445</sup> and the FBI's Next Generation Identification database (NGI), in use since 2014. From 1999 to 2014, the FBI used a database known as the Integrated Automated Fingerprint Identification System (IAFIS).<sup>446</sup> IDENT houses data collected by Customs and Border Protection (CPB), ICE, USCIS, the Transportation Security Administration (TSA), and Department of State, among others.

Before these systems were developed, earlier efforts to collect fingerprint information by U.S. agencies received extensive criticism, and the resulting data (card stock fingerprint files) is of questionable reliability. In 1994, an inspector general's report as well as a DOJ study found that INS (a predecessor agency to DHS) could not verify that fingerprints on cards belonged to the applicants listed on the top portion of the card.<sup>447</sup> These conditions prevailed when the cards now being digitized as part of Operation Janus and Operation Second Look were made. The OIG report notes several reasons why the information is of questionable reliability:

Applicants for naturalization, permanent residency and other benefits completed fingerprint cards at local police departments, voluntary agencies (VOLAGs) or "other reputable organizations," but the INS "ha[d] no effective controls" over other reputable organizations. INS had no way to ensure that such agencies verified the applicant's identity.

In most cases, [INS] would be unable to determine which organization was used because the card only contains the signature of the person taking the fingerprints and not the name of the fingerprint shop. In effect, a criminal alien, with his own ink pad, could take someone else's prints and submit the card as his own to INS.<sup>448</sup>

It is unknown what proportion of files currently under review as a result of Operation Janus and Operation Second Look involve fingerprint cards taken by private vendors in the 1990s. The suspect card stock records were never systematically removed from INS's A-files (the official individual files, matched to a unique Alien Number, or A-Number, for tracking all immigration and naturalization records related to a noncitizen). The unreliability of fingerprint cards gathered during this period and subsequently uploaded to IDENT 20 or even 30 years later warrants serious consideration, at a systemic level, in individual denaturalization investigations, and certainly by the courts. Yet neither of two OIG reports (September 2016 and September 2017) examining the issue of denaturalization based on a match between IDENT records and card stock files addressed the questionable evidentiary foundations of the entire effort. Even in criminal cases, where defendants have the benefit of counsel, judges have barred the admission of evidence questioning the reliability of card stock fingerprint data.

Operation Janus initially identified a pool of 315,000 records in IDENT with removal orders (and to an unspecified extent records with criminal convictions or fugitives) and without fingerprint records. Now the Trump administration is proposing to review up to 700,000 records by locating and uploading scans of old fingerprint cards (in ICE's terminology, "Historic Fingerprint Enrollment" or HFE). There are A-files containing fingerprint cards that were never uploaded into immigration databases, but it is not known how many.

Naturalized Americans whose fingerprints register a match against an HFE record under a different name may be unable to explain the discrepancy because their fingerprint or biographical information was mishandled without their knowledge.

The weight given to "historic" fingerprint evidence in Janus and Second Look cases bears scrutiny. A prior removal order may not have been fatal to a naturalization application had the applicant been confronted with information about it during the naturalization application process. A decade or more later, applicants are prejudiced by the passage of time, and may no longer have recourse to evidence or witnesses to establish their eligibility for naturalization and rebut an accusation of fraud. Yet, in current cases, fingerprint evidence is presented as not only probative or persuasive, but conclusive evidence of fraud.

IDENT and NGI first became interoperable under a program known as Secure Communities, which operated between 2008 and 2014 and has been resurrected under the current administration.<sup>449</sup> Secure Communities was hailed as a tool to identify and deport "criminal aliens."<sup>450</sup> A 2011 study examining the impact of Secure Communities (using a national random sample of 375 cases obtained through a Freedom of Information Act lawsuit) found that the program resulted in an estimated 3,600 mistaken ICE apprehensions of U.S. citizens due to inaccurate data. The program was also found to mirror disproportionate local policing patterns affecting communities of color in the United States.<sup>451</sup> As one analysis noted:

People of color and immigrants will shoulder much more of the burden of these misidentifications. For example, people of color are disproportionately represented in criminal and immigration databases, due to the unfair legacy of discrimination in our criminal justice and immigration systems.<sup>452</sup>

*The fallibility of biometric identification.* According to the National Academy of Sciences, no peer-reviewed study has ever been conducted to prove the basic assumption that each person's fingerprints are unique.<sup>453</sup>

The largest biometric database in the world is the Aadhaar project in India, a foundational population register in which approximately 1.2 billion people have enrolled as of 2019.<sup>454</sup> A 2012 study found that out of 1.2 billion enrollments in the system, the automated process that identifies duplicate fingerprints would register approximately 10 million false positives, resulting in exclusion from the system.<sup>455</sup>

Although computer algorithms—developed and sold to governments by private technology companies—are used worldwide to identify potential fingerprint matches from a database like IDENT, ultimately human examiners compare a list of potential matches generated by the automated search.<sup>456</sup> This is significant because studies have also demonstrated that fingerprint examiners are influenced by contextual bias when comparing fingerprints.<sup>457</sup> One study “found that fingerprint examiners can be improperly influenced by the use of automated fingerprint identification systems, which provide ordered lists of the most likely matches. The study found that examiners are more likely to wrongly identify one of the prints near the top of the list as a match, and to fail to make correct identifications if the print is down low on the list.”<sup>458</sup>

According to one analysis:

When examining this issue again in 2016, the President's Council of Advisors on Science and Technology (PCAST) in the US found that only two properly designed studies of latent fingerprint analysis had been conducted. These both found the rate of false matches (known as “false positives”) to be very high: 1 in 18 and 1 in 30. One of the main reasons for these high error rates is that fingerprint analysis involves human judgement, and relies on a methodology (known as “ACE-V”) that is not sufficient to ensure the accuracy and reliability of an examiner's conclusions. This means there is no guarantee that two different examiners who follow its steps will reach the same result.<sup>459</sup>

Questions regarding the reliability of databases and fingerprints are based on concerns about the use of old, outdated, and possibly inaccurate technologies. But a wave of new technologies examined below, including DNA capture, raises even greater concern about misapplication and permanent surveillance.

*Looking ahead: possible return to “political” denaturalizations.* IDENT was built by a subsidiary of the transnational identity management company Gemalto.<sup>460</sup> In March 2017, DHS announced a request for proposals to build a new biometric database that will house up to 500 million records.<sup>461</sup>

Marc Crego, the “chief architect” of the US-VISIT database (created in 2004, in the wake of the 9/11 attacks, to collect and store non-citizens’ biometric data at U.S. ports of entry),<sup>462</sup> explained that IDENT’s current operations exceed its technical capabilities. He noted, “The current DHS identity management system was designed to house up to 200 million people’s fingerprints, and support up to 250,000 identification transactions per day. Today the system has over 240 million identities and is conducting over 300,000 transactions per day, while simultaneously adding in face and iris biometric matching technologies.”

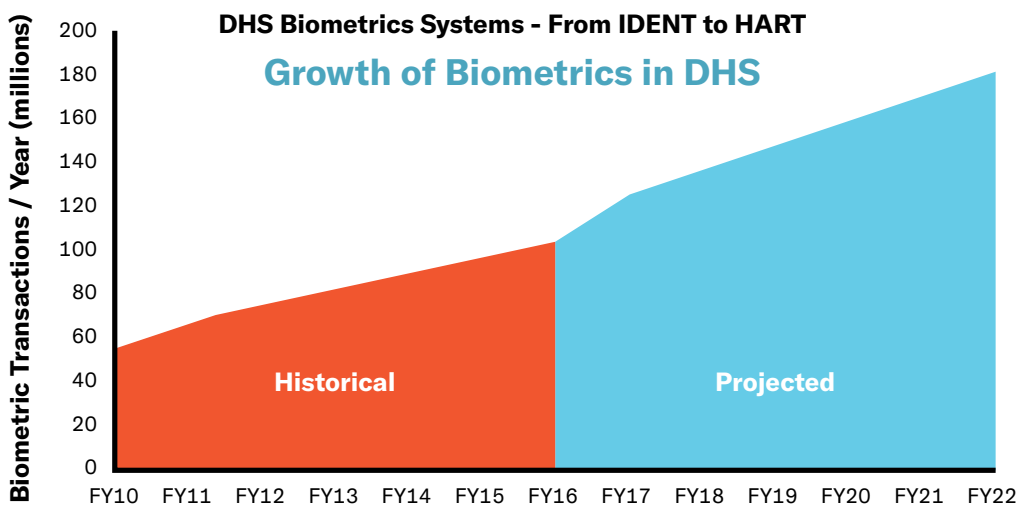
Plans and specifications released concerning the new database, Homeland Advanced Recognition Technology (HART), raise significant privacy concerns. One digital privacy organization has noted, “HART will support at least seven types of biometric identifiers, including face and voice data, DNA, scars and tattoos, and a blanket category for ‘other modalities.’ It will also include biographic information, like name, date of birth, physical descriptors, country of origin, and government ID numbers. And it will include data we know to be highly subjective, including information collected from officer ‘encounters’ with the public and information about people’s ‘relationship patterns.’”<sup>463</sup>

The collection of data on “relationship patterns” is especially problematic given the current administration’s approach to denaturalization. This functionality of the HART database not only may chill First Amendment free speech, but would also provide a new tool to fuel investigations under the “attachment” and “good moral character” elements of denaturalization cases, likely leading to an increase in political denaturalizations. Privacy rights groups have also pointed out that, as is the case for existing datasets, the underlying data that will populate the HART database is fundamentally unreliable for many of the reasons articulated above,<sup>464</sup> with flaws that will disproportionately affect communities of color.<sup>465</sup> The Electronic Frontier Foundation recently noted:

FBI and MIT research has shown that current face recognition systems misidentify people of color and women at higher rates than whites and men, and the number of mistaken IDs increases for people with darker skin tones. False positives represent real people who may erroneously become suspects in a law enforcement or immigration investigation. This is true even if a face recognition system offers several results for a search instead of one; each of the people identified could be detained or brought in for questioning, even if there is nothing else linking them to a crime or violation.<sup>466</sup>



Possessed of a massive database with massive capabilities, the current administration—and any subsequent administration—could abuse this powerful tool to investigate the activities and relationships of virtually anyone it chooses to target. The “good moral character” and “attachment” requirements for naturalization (and denaturalization), leave considerable flexibility for citizenship stripping based on alleged “subversive” activities.<sup>467</sup> As scholar Patrick Weil has shown regarding the attachment cases of the 20th century: denaturalization cases could use potential “fraud or illegality committed *before*” naturalization, as a means to punish people for something “they had done *after* they obtained American citizenship.”<sup>468</sup> Given the increased likelihood of false positives for people with darker skin tones, and overrepresentation of minority populations in the data, denaturalization cases alleging involvement in criminal activity and relying on such data could also proliferate, disproportionately affecting people of color. To date, courts have not been amenable to the introduction of rebuttal evidence that demonstrates these complex technical flaws and interrogates their potential impact on an individual case. It is critical that the U.S. government comes to grips with the racial and gender disparities associated with these new technologies.



**IDENT Gallery Size – 220m Unique Identities**

Office of Biometric Identity Management (OBIM)

*Slide from “DHS Identity Applications for Homeland Security Slide Presentation-9/12/17,”*  
 available at: <https://www.eff.org/document/dhs-identity-applications-homeland-security-slide-presentation-91217>

## **Plea Agreements and Consent Judgments**

Denaturalization cases reviewed for this report usually conclude by way of plea agreement (criminal), or consent judgment (civil). These agreements purportedly represent a resolution reached between the government and the defendant about a case, which prevents the case from going to trial. In a plea agreement, the defendant agrees to admit guilt to one or more of the charges, usually in return for some concession from the prosecution. In a consent judgment, both parties agree to a particular outcome by stipulation. Once the judge in the case accepts the plea agreement or consent judgment, a binding judgment is handed down based on what the parties submit to the court as their resolution.

Defendants forfeit several rights and protections when they enter into plea agreements and consent judgments. In the criminal context, a plea agreement requires a defendant to knowingly and voluntarily waive many rights, including three core constitutional rights: the right to a jury trial, the right against self-incrimination, and the right to confront witnesses. Generally, the right to appeal is also lost, unless the defendant can show that the agreement was not entered into voluntarily—a high bar.

In the closed denaturalization cases reviewed by the Justice Initiative as of May 2019, 77% of defendants accepted a plea or settled.<sup>469</sup> As noted throughout this report, denaturalization is an obscure area of law in which few immigration attorneys are even conversant, and which may appear particularly abstruse to public defenders, retained counsel, or the public. The many notice issues, application of various forms of detention, and dire *permanent* consequences for individuals and their families involved all make the use of plea bargaining and settlement agreements highly suspect in terms of their fundamental fairness in these cases. These factors are especially grievous considering the substantial number of cases in which older citizens who have been law-abiding members of society for a decade or more are suddenly subject to the full coercive power of the country's deeply conflated criminal justice and immigration enforcement systems.

Plea and settlement agreements reviewed for this report contained immigration protection waivers;<sup>470</sup> agreements to relinquish legal permanent residency status or other statuses; agreements to JROs; promises to assist in deportation; agreements to be removed to countries to which the denaturalized person had no apparent ties; and, in at least one agreement, the promise that a spouse will self-deport and renounce U.S. citizenship.

## **Judicial Removal Orders**

Judicial removal orders (or JROs) are not unique to denaturalization cases, but their use in denaturalization matters is in keeping with the overall approach, criticized here, of using denaturalization as a harsh and expedient immigration enforcement measure, and a prelude to deportation (or quasi-indefinite confinement in cases where deportation cannot be achieved).

As of May 2019, JROs were issued in 13 of all closed cases reviewed for this report. Historically, DOJ and federal court judges have largely avoided issuing judicial removals since they both “generally have insufficient expertise to navigate the immigration code and regulations” and “[e]xplaining the rights that are being waived alone is daunting to the non-expert.”<sup>471</sup> However, the Trump administration DOJ appears to be using them more extensively. This approach takes advantage of the historical division of the immigration and criminal systems, thwarting access to any immigration-related defenses to removal that may otherwise be available in any given case. On April 11, 2017, then Attorney General Jeff Sessions made this clear when he directed all U.S. Attorneys to seek JROs at the sentencing phase of every federal case “to the extent practicable.”<sup>472</sup>

Most deportation orders are handed down by immigration authorities, primarily immigration judges or the Board of Immigration Appeals (BIA), which has exclusive appellate jurisdiction over most decisions issued by immigration judges.

Pursuant to 8 U.S.C. § 1228(c)(1), a federal judge can order a person deported by effectively bypassing the immigration court system. There is no statutory or regulatory guidance for federal district and magistrate judges on whether a JRO should be issued. The judge can either grant a JRO upon the prosecutor’s motion, or it can be “stipulated” to in a plea agreement as part of the criminal sentence. Under 8 U.S.C. § 1228(c)(5), a U.S. Attorney can “enter into a plea agreement which calls for the defendant to stipulate to the entry of a judicial order of removal from the United States as a condition of the plea agreement...” The United States district court “may accept such a stipulation and shall have jurisdiction to enter a judicial order of removal pursuant to the terms of such stipulation.”

Under the statute, a stipulated JRO means that the defendant “waives a formal immigration hearing and waives the right to appeal from the order of removal.”<sup>473</sup> INA § 238(c)(5) requires that the defendant explicitly waive the right to appeal from such orders.

As noted in the 2017 DOJ bulletin, many prosecutors and immigration attorneys do not know what a JRO is, but JROs, “specifically those obtained by stipulation, offer a powerful and efficient tool for prosecuting criminal aliens—one that provides enormous value to the Department of Homeland Security (DHS) and furthers new Department of Justice policy.”<sup>474</sup> The bulletin highlights the “unique benefits” of using JROs, such as “the defendant will leave the country, presumably permanently,” and “using the JRO as a bargaining chip to negotiate a plea with a defendant.”<sup>475</sup> In the cases reviewed for this report, the government routinely includes language requiring the defendant to help facilitate the removal process when a stipulated JRO is included in the agreement.

In addition to the inability to appeal a stipulated JRO, the implications for the defendant are immense. The defendant is unable to raise protection claims that would prevent deportation,

# EXCERPTS FROM PLEA & SETTLEMENT AGREEMENTS

*“The defendant waives any potential relief from removal that may be available to the defendant and avows that the defendant has no fear of return to the defendant’s home country of Romania. The defendant agrees and stipulates that the defendant will not seek to appeal a judicial order of removal.”*

- Case against naturalized citizen from Romania, who became a permanent legal resident in 2008, naturalized in 2011, and was denaturalized in 2018.

*Defendant “waives any rights that he may have to apply for any relief or protection from removal, including but not limited to asylum, withholding of removal, adjustment of status, cancellation of removal, waiver of inadmissibility, protection under the United Nations Convention Against Torture, or any other relief or protection from removal whether stated herein or not, under the immigration and nationality act or any other federal statute, regulation, or treaty. Defendant further requests that an order be issued by this court for his removal to his country of citizenship, Bangladesh, or, subject to consultation with and approval of ICE, any other country which agrees to accept his admission. Defendant agrees to accept a written order of removal as a final disposition of these proceedings and waives any rights he may have to appeal the order issued.”*

- Case against naturalized citizen from Bangladesh who entered the U.S. on a false passport when applying for asylum in 1994. Upon removal, he left behind four U.S. citizen children and returned to a country he had not lived for nearly 25 years. The plea additionally stated that he “would happily accept a prison sentence if he and his family could remain together in the United States. However, that is not part of the agreement and is not anticipated.”

*“The defendant’s wife “states that she accepts responsibility for engaging in naturalization fraud and false swearing in an immigration matter. It states that the United States Attorney has agreed, contingent to her compliance with the promises in the agreement, not to prosecute her....But she agrees that she will give up her citizenship here in the United States by going back to Bangladesh and renouncing her citizenship at the U.S. consulate in Bangladesh, and that if she fails to do so, the government can prosecute here for these criminal offenses.”*

– Case involving the individual above.

*“Upon Defendant’s conviction...Defendant stipulates and agrees that his prior status as a Lawful Permanent Resident, and any/all other legal status in the United States will also be revoked, set aside, and declared void, without further hearing or process.”*

– Case of a 71-year-old naturalized citizen from Pakistan who naturalized in 2016.

*“Defendant...understands that once his United States citizenship is revoked he will revert to being a Lawful Permanent Resident of the United States. Defendant agrees that he will forfeit his Lawful Permanent Resident status... [and] he will not be allowed to remain in the United States. Defendant also understands that he will be barred by law from ever applying again to reenter the United States.”*

– Case of a 60-year-old naturalized citizen from Bangladesh who entered the U.S. in 1994, naturalized in 2010, and was denaturalized in 2018.

such as withholding of removal (which protects a person from being deported to a country where they fear persecution), or Convention against Torture relief. Had the person not been summarily removed, the person may also have had additional time to consult with an immigration attorney regarding additional claims—something a criminal defense attorney may not understand.

### *Sample Language from Judicial Removal Orders*

#### **Example 1**

- g.** The defendant has waived all potential forms of relief, including asylum, withholding of removal, and protection under the United Nations Convention Against Torture.
- h.** The defendant's conviction for Title 18 United States Code, Section 1425(a) Unlawful Procurement of Citizenship or Naturalization provides for automatic denaturalization under Title 8 United States Code, Section 1451(e); and
- i.** Defendant is a deportable alien under Title 8 United States Code, Section 1227(a)(1)(A) based on fraudulent and material representations he made in violation of Title 8 United States Code, Section 1182(a)(6)(C)(i) .

**IT IS THEREFORE ORDERED** pursuant to Title 8, United States Code, Section 1228(c)(5) that the defendant be removed from the United States to Romania or any other country that will accept the defendant upon the request of the immigration authorities, as prescribed by the Immigration and Nationality Act and its accompanying regulations.

#### **Example 2**

- 7.** The defendant has waived his right to notice and a hearing under Section 238(c) of the INA, 8 U.S.C. § 1228(c).
- 8.** The defendant has waived the opportunity to pursue any and all forms of relief and protection from removal. Accordingly, it is **ORDERED** that the defendant is to be removed from the United States to Bangladesh upon his sentencing, under Section 238(c) of the INA, 8 U.S.C. § 1228(c).

## Family Separation

Denaturalization creates risk of deportation, which can also mean a separation from one's family. In several cases reviewed for this report, court filings contained letters from family members pleading for leniency. Such requests will fail: revocation of citizenship and susceptibility to deportation is automatic in both civil and criminal denaturalizations.

The Trump administration has come under scrutiny for implementing a "zero-tolerance" policy across the southern border of the United States, resulting in the separation of thousands of families. Denaturalization is also tearing families apart.

### Case Example: Leaving behind Six Children

Twenty-five-years ago, J.O. entered the United States from Ghana using another person's passport. He then claimed asylum. He did not attend his scheduled asylum hearing, as according to him his attorney said he did not need to appear. Neither he nor his lawyer attended the hearing and J.O. was ordered removed *in absentia*. He was not aware of this order. J.O.'s wife, still in Ghana, received a Diversity Visa, and joined J.O. in the U.S. in 1996, and is now a U.S. citizen. J.O. naturalized in 2010 and has no criminal record. On his naturalization application, he neither disclosed using another's passport, nor that he was ordered removed. J.O.'s six children live in the United States as citizens and legal permanent residents. In May 2017, J.O. was denaturalized. In its sentencing memo, the U.S. government discussed at length the need for J.O. to go back to Ghana.

#### *Letter from J.O.'s Son*

My father led by example for the kind of person I should be. He helped me become a responsible adult and a model citizen to society. Many people grow up without fathers, or with fathers who do not do the right thing. He loved us so much and did his best to make his family happy. In one of my best memories with my father is when I would wait for him to come home from work. As soon as he would open the door, I would be there standing with my arms wide open. He would have the biggest smile as he would lift me up in the air and hold me in his arms. I am blessed to be able to grow up with a father who have the heart to give his children the best he could, to give them a foundation for a better life. I please ask you for sentencing to be merciful on my father. Nothing would make me happier than to give him a hug as he witnesses another milestone in my life, my graduation. It would break my heart if he could not be there to see what we both worked so hard for.

Thank you very much your Honor,

### Case Example: Forced Renunciation

A.S. entered the United States in September 1994, using a false Bangladeshi passport. He then applied for asylum. He has no criminal history or bankruptcy and has paid all of his taxes to date. His brother was granted U.S. citizenship through the Diversity Visa system. A.S. assumed his brother's identity as a U.S. citizen and his wife also naturalized. According to the terms of his plea agreement, A.S. and his wife must self-deport to Bangladesh, a country A.S. has not lived in for 25 years, leaving behind four young daughters—N., age 13; S., age 12; T., age 10; and P., age five. According to A.S., he is dreading sentencing as “[t]here is no future, only darkness.” A.S. was denaturalized in July 2018. The terms of his plea included that his wife would be *de facto* denaturalized. Based on a purported agreement with the prosecutor, the U.S. attorney agreed not to prosecute her, contingent on her renouncing her citizenship at the U.S. consulate in Bangladesh upon her return. If she fails to do so, the government stated that it would prosecute her criminally.

*Effects of a parent's deportation on U.S. citizen children.* Separating families causes significant and lasting consequences, including emotional distress, economic and housing instability, and food insecurity. This can have permanent consequences for children's development. According to the American Psychological Association, children separated from their deported parents show signs of trauma, depression, anxiety, and difficulties in school.<sup>476</sup> This can affect children for the entirety of their lives, resulting in learning, behavioral, emotional, and physical challenges.<sup>477</sup> A study that explored the ways that deportability affects U.S. citizen children found that: 1) children's own identity (as American) was irrevocably tied to their parents' deportability, generating a sense of not belonging in the United States; and (2) the rupture in the family bond created a sense of exclusion from citizenship and community.<sup>478</sup>

Even if the parent is not immediately deported, living in limbo and fear of deportation weighs heavily on family members. Young children are aware that their parent may be deported, and educators and other adults report pervasive fear, anxiety, and varied behavioral changes among children.<sup>479</sup> Stress relating to their potential deportation is linked with parents' diminished emotional well-being and worse academic outcomes among their children.<sup>480</sup>

## Conclusion

In *Knauer v. United States* (1946), a case which stripped U.S. citizenship of a Nazi-sympathizer, Judge Rutledge, dissenting, wrote, “there are other effective methods for dealing with those who are disloyal, just as there are for such citizens by birth.”<sup>481</sup> This is an essential point, even for pre-Janus type cases that target war criminals and other heinous actors. The early cases



that considered the wisdom of allowing denaturalizations at all under U.S. law focused on the potential for abuse, the effectiveness of the measure to achieve any worthy policy goal, and the paralyzing impacts for the individual. These animating principles remain important and were never adequately resolved after OSI was established.

As one scholarly article has observed:

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.’ And yet that is exactly what we see with Operation Janus and the proposed denaturalization task force [Operation Second Look]: 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>482</sup>

The informant who leaked the 2008 Denaturalization Handbook to an online media outlet claimed to have done so because, “the agency is systematically violating the human rights of countless immigrants.” As an example, the informant cited what they felt was a particularly unjust denaturalization case, and added, “They have created an extrajudicial process here that is not being subject to any transparency, and I believe there are many more cases like this we are not aware of.”<sup>483</sup> An underlying theme of this chapter has been the indefinite nature of Operation Second Look and the potential for further similar programs in the future, under any administration, if new constraints are not put in place in accordance with the recommendations of this report. The Department of Justice itself now boldly portrays denaturalization as an “ever-increasing” project.<sup>484</sup> Without transparency and oversight, the American public may be unaware that such measures are in place until it is too late to do anything about them.



## III. DENIAL AND REVOCATION OF DOCUMENTATION OF U.S. CITIZENSHIP

### Introduction

Classifications distinguishing “aliens” from citizens are presumptively legitimate in the eyes of U.S. law.<sup>485</sup> As one scholar has argued, “In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”<sup>486</sup> To administer these distinctions, the U.S., like other countries, deploys an increasingly elaborate regime of identity registration and documentation.<sup>487</sup> Proof of American citizenship—not quite citizenship itself, but the state’s official acknowledgement of it—distinguishes citizens from aliens. Over time, the consequences of a *lack* of accepted forms of documentation have only mounted, as the documentary link to a central, federal state became more important and benefits of American citizenship emerged in the public imagination as a globally sought-after “prize.”<sup>488</sup>

This chapter looks in depth at proof of identity and citizenship, and specifically at access to birth certificates and passports in the United States. Other scholars and commentators have begun to explore the same topic.<sup>489</sup> We conclude, echoing many other observers, that the systems that generate and maintain the evidentiary building blocks of American citizenship fail to work for everyone. In fact, a combination of institutional design and exceedingly narrow

legal protection against harm permits an unacceptable degree of affirmative targeting and state-sanctioned profiling based on race, gender, and class in this domain, with disastrous consequences for targeted communities.

Passport denial and deprivation leaves the affected person in a state of limbo. The impact does not wholly invalidate a claim to U.S. citizenship, but portends that ultimately the individual will not be able to live as a U.S. citizen, or, in the case of naturalized Americans, that they are likely to face denaturalization if located in the U.S. or permanent exile if they are abroad. Citizens by birth on the territory who happen to be outside the U.S. when their passport renewal is denied or their passports are revoked on grounds of non-citizenship must effectively apply for readmission as aliens. This means subjecting themselves to the full force of anti-immigration measures now in place, including indefinite periods of detention, family separation, and possibly criminal prosecution resulting in permanent bars to reentry into their own country. Citizens within the U.S. who suffer passport denial or deprivation cannot travel abroad, which acutely affects transnational families who may be suddenly separated by a hard border and cut off from livelihoods that have sustained them for generations.

The introduction of new technologies that promise unprecedented precision in identification cannot fix the problems of discretion and bias built into U.S. institutions. New technologies like the HART database (described in Chapter II, Denaturalizations) also create unprecedented capacity in the hands of the state to identify and target supposed “threat” communities and engage in collective punishment, rhetorically justified by the demands of fraud prevention and national security. In highlighting the largely unexamined risks to civil and human rights posed by the discretion built into the status quo, this chapter proposes, urgently, a new culture of restraint and accountability in the exercise of such expansive powers.

Research undertaken by the Justice Initiative in preparation of this report focused on the implementation of these practices along the southern U.S. border, in the Rio Grande Valley. There, immigration attorneys and affected individuals described an expanding effort to deny passports, and a more intensive and centralized effort to defend passport denials by the Department of Justice (which defends the Department of State when its actions are challenged in court). In April and May 2019, the Justice Initiative, with the support of pro bono attorneys, undertook empirical research on citizenship cases filed in the Southern District of Texas between August 3, 2014 and May 31, 2019 in order to investigate further these qualitative findings. In total, 111 cases were identified, and the process used in establishing this case list is presented in the Description of the Research section of this report’s Executive Summary. This analysis revealed the following key findings:

- A significant increase in the number of cases filed by plaintiffs seeking to (re-)establish citizenship since the beginning of 2017. This correlates with the observation by practitioners that fewer cases are being resolved administratively prior to the initiation of

judicial proceedings. It may also indicate an overall increase in the number of passport denials and revocations on grounds of non-citizenship.

- An increase in the number of bench trials held or set to be held since the beginning of 2017.
- A likelihood that the number of trials ultimately held will be substantially greater than prior to 2017, given the number of pending cases and their current posture.

The vast majority of challenges to passport denials and deprivations succeeds in reestablishing U.S. citizenship and securing fresh passports, but now at an even greater cost to the individuals concerned, their families and communities, and to the U.S. public purse.

## **The Burdens of Proof: A Brief History of Documenting United States Citizens**

*“The photograph, fine child of the age of mechanical reproduction, is only the most peremptory of a huge modern accumulation of documentary evidence (birth certificates, diaries, report cards, letters, medical records, and the like) which simultaneously records a certain apparent continuity and emphasizes its loss from memory. Out of this estrangement comes the conception of personhood, identity ... which, because it cannot be ‘remembered,’ must be narrated.”*

Benedict Anderson, *Imagined Communities*

### **Early Documentation Schemes – Federalizing the Identification of U.S. Citizens**

Some of the earliest forms of identity documentation in the United States functioned to track and control movement *within* the country.<sup>490</sup> “The United States issued its first passport in 1782, but for a long time passports were issued not only by the federal government but also, and more usually, by states and cities, by governors, by mayors, and even by neighborhood notary publics.”<sup>491</sup> In 1856, Congress federalized the issuance of passports and mandated that only U.S. citizens could obtain one.<sup>492</sup> In 1861, the secretary of state ordered that passports would be required to exit the United States, as a means of keeping people in the country for military service in the Civil War.<sup>493</sup>

As discussed in Chapter I, the Immigration Act of 1882 ushered in a new era of racially specific documentary surveillance of Chinese immigrants and their descendants. During the Chinese exclusion era, the country first experimented with the use of documentation requirements as a means of policing borders to exclude particular groups.<sup>494</sup> The exclusion laws only applied to

Chinese laborers, making the system class-based as well as racialized.<sup>495</sup> Women were overlooked entirely in this regime, and only through litigation would a solution be worked out: Chinese immigrant women and children would have no independent status and, at least on paper, were subsumed under the husband/father's case.<sup>496</sup> In debates surrounding the registration requirements instituted to administer the exclusion laws, one member of Congress justified these measures as “merely a passport system” because “it was impossible to identify Chinamen.”<sup>497</sup>

The bureaucratic approach developed in order to administer Chinese exclusion laws of the 1880s remained in place for decades.<sup>498</sup> Many of the basic conceits of modern human migration governance emerged through this particular experimentation with a sweeping travel ban against a human-made social classification: robust state sovereignty to administer borders,<sup>499</sup> externalization of state migration controls,<sup>500</sup> and deployment of new technologies in the service of systematic registration and documentation of race-based population groups.<sup>501</sup>

To obtain a passport beginning in 1896, all applicants, regardless of race, furnished detailed information about their physical appearance for the records of the U.S. passport office. From the very beginning, U.S. bureaucracy avidly pursued data on the biographical and physical characteristics of the population. As historian Jill Lepore writes, “In the unruly aftermath of the Civil War, the citizen was defined, described, measured, and documented. And the modern administrative state was born.”<sup>502</sup> The blending of immigration law and eugenics fostered a rapid expansion of categories of people deemed inadmissible to the United States as a means of “population management.”<sup>503</sup> This “proliferation of the categories of excludables”<sup>504</sup> led to increased centralization of state control over migration into the country. By the early 1900s, “the separate administration of Asian and European immigrant streams disappeared as the drift toward ‘nationalization’ of immigration regulation became consolidated institutionally.”<sup>505</sup>

### **A Documentation-Driven New Deal**

With the introduction of the Social Security Act in 1935, life “with a paper trail” emerged as an everyday reality for American citizens for the first time.<sup>506</sup> “[B]eing known to the government would become increasingly constitutive of citizenship itself: a necessary exchange for steady employment, increased economic security, and free movement across borders.”<sup>507</sup> In the New Deal era following the Great Depression, among many other revolutionary developments in the country, governance by registry emerged.<sup>508</sup> Prior to this time, aside from the decennial census, efforts to document the public were sparse and targeted toward actual or perceived threats to public order. During World War II, officials tasked with administering the defense industry discovered that one-third of Americans had no proof of birth.<sup>509</sup> When efforts to expand access to proof of birth geared up in the early 20th century, massive resistance to the introduction of biometrics shut down efforts to build a fingerprint registry. Americans associated fingerprinting with criminality and “those with their prints on record were much more likely to be poor, foreign, or nonwhite.”<sup>510</sup>

Among the many groups voicing concern that the new Social Security Number (SSN) could be used for discriminatory purposes (the Social Security Act became law two years after the Nazi registration laws of 1933),<sup>511</sup> were working women.<sup>512</sup> In the 1930s, women often provided false information about their age and marital status to employers in order to find work. Because of the age and marital status requirements for accessing social security entitlements, these women would now be financially disadvantaged or face loss of employment if the correct information was shared with their employers.

A group of anonymous women calling themselves “The ‘Fibbers’” wrote to the *Chicago Daily Tribune* in 1936 to sound their alarm about the “bad predicament” that the Social Security Act put them in.<sup>513</sup> Their letter illustrates a familiar phenomenon in which the introduction of new methods of documentation exposes earlier coping mechanisms that were possible, even openly tolerated, in a previous age of obscurity.<sup>514</sup> The introduction of Social Security made “Fibbers” into “fraudsters.” As one scholar noted:

When it came to their bosses, African American, Jewish, female, and unionized workers alike had no trouble grasping the dark side of legibility. ...In June 1937, the [Social Security Bureau]’s first regulation – Regulation No. 1 – formalized its pledge of confidentiality for information collected and maintained. Even so, the new administrative system threatened to unravel tried-and-true practices by which workers both kept certain kinds of information private and kept their jobs.<sup>515</sup>

Originally designed for a particular use—tracking eligibility and administering social security accounts—the SSN proliferated across government agencies as a quasi-foundational identification tool.<sup>516</sup> From the 1960s onward, the SSN became a de facto general identifier with the advent of computer record-keeping and automated data processing. Since the early 1970s, non-citizens can apply for and receive an SSN.<sup>517</sup>

### **Documentation of U.S. Citizenship Today**

This overview focuses on the document most associated with proof of U.S. citizenship: the passport. Under U.S. law, a passport is construed as a fundamental right pursuant to the liberty interest expressed in the Fifth Amendment Due Process Clause.<sup>518</sup> A passport does not have the same legal significance and effect as a certificate of citizenship or a certificate of naturalization, which can only be legally granted and taken away through a judicial process.<sup>519</sup> Consequently, taking away a passport does not automatically invalidate a certificate of citizenship or naturalization.<sup>520</sup> As explored in more depth through case studies below, the practical effects of passport retention, revocation, and confiscation can be identical to deprivation of nationality, and particularly disastrous for citizens who are overseas at the time.

More worryingly, the relationship between denial and deprivation of proof of citizenship has elsewhere laid the groundwork for more comprehensive and final denationalization of minority groups. This is why the comparative case study on the Dominican Republic presented earlier, and explored further in this chapter and the next, is so germane.

The rules regulating proof of U.S. citizenship state that birth certificates showing full name, place and date of birth, parents' full names, and signed and sealed by the official custodian of birth records with a filing date within one year of the birth are "primary evidence" of birth in the United States.<sup>521</sup> A birth certificate is not "conclusive proof" of U.S. citizenship, although it may be "almost conclusive" when made "contemporaneously with the birth."<sup>522</sup>

For those without a birth certificate, or those whose certificate's authenticity is challenged by the Department of State, "secondary evidence" is required to establish birth in the United States.<sup>523</sup> U.S. law defines secondary evidence, and accords vast discretion to the Department of State in assessing both the *reliability* of evidence furnished and its *sufficiency* in establishing U.S. citizenship. Evidence must be:

Sufficient to establish to the satisfaction of the Department [of State] that he or she was born in the United States. Secondary evidence includes but is not limited to hospital birth certificates, baptismal certificates,<sup>524</sup> medical and school records, certificates of circumcision, other documentary evidence created shortly after birth but generally not more than 5 years after birth, and/or affidavits of persons having personal knowledge of the facts of the birth.<sup>525</sup>

Furthermore, "The Department may require an applicant to provide any evidence that it deems necessary to establish that he or she is a U.S. citizen or non-citizen national, including evidence in addition to the evidence specified."<sup>526</sup> Federal regulations and consistent judicial authority confirm that the applicant must meet a preponderance (more likely than not) of the evidence standard to establish citizenship when applying for a passport.<sup>527</sup>

The case studies presented in this section gather recent information on U.S. government practice in administering access to passports for particular groups of citizens whose personal histories and identities place them in the sights of one of the most centralized components of the American state: its national security and border security apparatus. The case studies look at three groups: Yemeni-Americans, U.S. citizens living along the southern border, and U.S. citizens detained under the Secure Communities program and its progeny.

The stories themselves are followed by a technical roadmap setting out the legal framework for passport adjudications and remedies available to citizens whose documents are denied, retained, or revoked. The final sections of this chapter explore the much weaker state

infrastructure in the administration of birth registration (in stark contrast to the high modern security state administering passports and immigration fraud prevention), and present a brief analysis of constitutional rights infringements posed by the current system. The combined effect leaves certain communities much more vulnerable than others to arbitrary and retroactive challenges to the legitimacy of their claims to U.S. citizenship. Once again, the uniform introduction of centralized security and immigration controls, without regard to the local variation and individual impact of these measures, leaves virtually no room for redress when the system wrongfully excludes U.S. citizens who happen to fit hastily concocted, stereotype-driven profiles. These same dynamics may prevent the public and public institutions from seeing those without a claim to citizenship as equally human and entitled to the full complement of human rights.

## Yemeni-Americans

Mansour...is a twenty-two year old, naturalized Yemeni American who had temporarily relocated to Yemen in order to get married. When he and his spouse had their first baby in Yemen, they went to the U.S. embassy in Sana'a to register the birth abroad. At their arrival, embassy officials detained them and began interrogating him, yelling at him, and demanding that he admit that he had concealed his real name. They then threatened to keep Mansour and his wife and newborn in their custody until he agreed to sign a self-incriminating statement. With his family in tears and terrified, officials finally confiscated Mansour's U.S. passport and expelled him and his family from the premises.<sup>528</sup>

Complaints regarding a pattern of passport confiscations at the U.S. embassy in Sana'a, Yemen, reached the Department of State Office of Inspector General (DOS-OIG) in January 2016, although by that point the confiscations had been going on for several years.<sup>529</sup> Journalists uncovered the story in early 2014, when *Al Jazeera America* published information from a State Department whistleblower alleging, "Virtually all of the statements say that the individual naturalized under a false identity" and yet those same statements "appear to be involuntary."<sup>530</sup> The incidents followed a similar pattern: American citizens would approach the embassy for ordinary consular service,<sup>531</sup> such as registration of a birth or marriage, or an application for or renewal of a U.S. passport. The consular officer would then accuse the applicant or a family member of fraudulently acquiring admission to the United States years or decades earlier, often accompanied by threats and interrogation. Finally, the officer would confiscate and retain passports of the individuals concerned.<sup>532</sup>

A report enclosed with the initial complaint to the DOS-OIG states that family members seeking legal advice to assist their relatives in Yemen, now stranded in a conflict-torn country,



claimed “without exception” that harsh and lengthy interrogations by consular staff had resulted in coerced confessions to immigration fraud.<sup>533</sup> The practice affected naturalized citizens of the United States, “many of whom had been . . . living in the United States for decades.”<sup>534</sup> According to legal aid groups, Yemeni-Americans caught up in these practices reported that the State Department officials interrogating them directly attributed their conduct to blanket assumptions: “all Yemenis lie about their names and family relations.”<sup>535</sup>

Passport confiscation is a legal term, and by law, passports can be confiscated only after a formal process of passport revocation invalidates a passport (as explained in the boxes at right). Passport confiscation from naturalized Americans *without* following procedures for formal revocation amounts to an end-run around the limited due process guarantees provided in U.S. law.<sup>536</sup> The scheme also avoids the elaborate denaturalization procedures detailed in the previous chapter.<sup>537</sup> Yemeni-Americans in Yemen thus found themselves in a kind of legal vacuum, in this case because the State Department, without legal authority and in fact contrary to the law, spontaneously implemented a discretionary documentation regime based on national origin.

As one critic has noted:

By choosing to take aggressive administrative action on a large scale in Yemen, the State Department has achieved an outcome—with naturalized citizens stripped of their U.S. passports, stranded beyond U.S. borders, and unable to avail themselves of due privileges and protections—that could normally be achieved only through denaturalization.<sup>538</sup>

### **Retention**

Retention is temporary. The *Foreign Affairs Manual* “does not place any specific time limits on how long a passport may be retained by the Department [of State].” “There is likewise no specific guidance drawing distinctions between passports that are retained within the United States and those that are retained overseas.” – DHS, Office of Inspector General

### **Revocation**

Revocation is the formal process for invalidating a passport. The *Foreign Affairs Manual* requires the Department of State to send a formal notification to the passport holder including notice of the right to appeal.

### **Confiscation**

Confiscation of a passport is only permitted after revocation or pursuant to an arrest.

*The State Department's documentation powers overseas.* As is the case inside U.S. borders, the State Department is solely responsible for adjudicating passport applications when citizens apply from or are located outside the United States.<sup>539</sup> The State Department is also empowered to retain, revoke, and confiscate passports (see text boxes on previous page).<sup>540</sup> In the case of revocation, the department is empowered to issue a one-way travel document facilitating return to the United States in certain limited circumstances.<sup>541</sup> But such documents, if issued,<sup>542</sup> may be confiscated by U.S. Customs and Border Patrol upon arrival, potentially leaving the holder without proof of identity.<sup>543</sup> The Department of State is also responsible for registering births to U.S. citizens that take place abroad, issuing what is known as a Consular Report of Birth Abroad (CRBA).<sup>544</sup> The department issues a CBRA “Upon application and the submission of satisfactory proof of birth, identity and nationality.”<sup>545</sup> Under U.S. law, “the Secretary is also authorized to cancel a CRBA that was illegally, fraudulently, or erroneously obtained.”<sup>546</sup> Many of the families affected by the State Department’s practices in Yemen, including Mansour’s, sought CRBAs on behalf of their children.<sup>547</sup>

Department officials in the Yemen cases regularly asserted the power to revoke a passport upon suspicion that the *underlying certificate of naturalization* was obtained fraudulently. Crucially, even the *Foreign Affairs Manual* (FAM) provides conflicting guidance as to whether officials in fact have this power at all.<sup>548</sup> According to the DOS-OIG report, department staff also seized certificates of naturalization and identity documents issued by Yemen, apparently without seeking guidance on the legality of these seizures.<sup>549</sup> The situation in Yemen may have involved a small number of Americans and their families, but the degree of power that the Department of State staff claimed to possess over the lives and freedom of citizens abroad is a legal distortion that potentially affects all Americans.<sup>550</sup>

*The DOS-OIG's report and the need for institutional reform.* The DOS-OIG investigated the 2016 complaint and issued its report in October 2018. It found that between December 2012 and January 2013—the only period for which reliable information about these activities was retained by the State Department—there were 31 cases of passport confiscation. The DOS-OIG acknowledged, “this number likely understates the number of relevant cases.”<sup>551</sup> A major finding of the report was that the State Department lacks “a central system to track passport confiscations or retentions.”<sup>552</sup> According to the State Department, it revokes approximately 1,500 passports annually.<sup>553</sup>

Targeted anti-fraud activity at the Sana’a embassy stems in part from a memorandum of understanding (MOU) between two arms of the State Department designed to strengthen security in “posts with high levels of fraud that require investigations.”<sup>554</sup> The MOU created a new Assistant Regional Security Officer position to work with embassy Fraud Prevention Units. The DOS-OIG found a number of worrying legal infirmities and procedural irregularities in the processing of passport retention and revocation during the implementation of this scheme in Sana’a, including:

- No guidance exists in the Code of Federal Regulations or the FAM concerning the agency’s burden of proof in passport revocation decisions.<sup>555</sup>
- There is no system for tracking passport retentions.
- Although federal regulations and the FAM required notification and post-revocation hearings in passport revocation cases, in practice passports were retained for sometimes years at a time, amounting to de facto revocation and confiscation without the benefit of these procedural protections.<sup>556</sup>
- The State Department did not follow the policies in place for handling passport retention, including notifying applicants about the insufficiency of their documentation.<sup>557</sup>

The DOS-OIG issued four recommendations based on its findings:

- Develop databases to track and manage passport revocations, retentions, and confiscations.
- Issue guidance on the procedures required to revoke and confiscate passports.
- Clarify the circumstances in which individuals are entitled to limited-validity passports to return to the United States if their documentation is taken while they are abroad.
- Clarify the role of the legal adviser as the senior legal authority for the department, including considering whether attorneys in other offices should report directly to the legal adviser.<sup>558</sup>

The State Department concurred with all of the DOS-OIG’s recommendations.<sup>559</sup> None had been implemented at the time the DOS-OIG issued its report in October 2018. Based on the Justice Initiative’s research, the lack of implementation persists at the time of writing. In its official response to the DOS-OIG review, the State Department justifies its conduct by claiming that *every* passport decision raises an issue of national security. “One wrongfully issued valid passport, especially one issued in a false identity, poses an ongoing threat to U.S. national security and border security.”<sup>560</sup> Such a blanket approach fails to accord with basic standards of proportionality.

According to one lawyer who works closely with Yemeni-Americans affected by these policies, an abstract fear of terrorist plots to infiltrate the American homeland “has driven the exceptionalization of Yemeni Americans and has distorted the legal processes that deal with them.”<sup>561</sup>

In the United Kingdom, researchers Nisha Kapoor and Kasia Narkowicz interviewed British citizens who were pre-emptively deprived of passports (as discussed in the Comparative Case Studies section of Chapter I, History and Context). The researchers note the government’s tendency to rely on “collective punishment,” racial profiling, and “guilt by association,” in the administration of the Home Secretary’s Royal Prerogative to remove passports.<sup>562</sup> Their study also identified a growing problem of “deprivation by the back door,” whereby authorities

simply fail to respond to requests for passport renewals.<sup>563</sup> The impact of these measures is felt chiefly, if not exclusively, by British Muslims.<sup>564</sup> As in the case of the United States, while the numbers are increasing, they remain relatively small. However, as here, the cases that are happening suggest disturbing shifts in the application of state power to the realm of citizenship, and a drastic degradation in the experience of citizenship by targeted minority groups. Kapoor and Narkowicz observe:

Beyond these select cases, the significance of removing and cancelling passport [sic] lie in the symbolic nature of what the process represents and its elucidation on the nature of expanding state power. In this regard it represents much more than a restriction on one's freedom of movement, an established right. It forms a way of restricting social, cultural, political and legal claims in a more permanent fashion. It represents a possibility for unmaking citizens.<sup>565</sup>

The distortion of law (and the bureaucracy that administers it) based on collective criminalization of certain groups runs through the complex negotiation of citizenship and alienage in the United States.<sup>566</sup> For Yemeni-Americans, that distortion flowed from both a presumption of fraud and the expansion of a “security state” designed to respond to inherently collective “threats.” These same two sources of exceptional treatment of certain groups can also be seen in the growing contest over documentation of U.S. citizenship at the country's southern border, explored in the next section. While the DOS-OIG's recommendations address basic failures in establishing a culture of accountability in the State Department, more is needed to counter the underlying legal and institutional acceptance of practices collectively targeting the legal status of Americans from particular minority groups.

As one scholar has argued:

Citizenship is not an arbitrary status bestowed upon individuals in government offices stateside or abroad. Nor is it one that is self-evident or inferred from documents alone. It is, however, more easily defended by some individuals than others.<sup>567</sup>

## The U.S. Southern Border

*“The Department of State, and the attorneys who are usually sent to defend suits here, are generally clueless when it comes to such matters as the fact that in deep South Texas, the river is an artificial border, dividing communities that are historically and culturally interconnected. ... It appears the State*

***Department considers the Rio Grande Valley to be a proving ground, and, instead of deploying a pool of attorneys who regularly defend cases here, it consistently sends new hires, as if for training.***<sup>568</sup>

-Lisa Brodyaga

American citizens living along the southern border of the U.S.—many of whom speak Spanish and come from trans-border families—have, since at least the 1990s, increasingly struggled to reconcile their daily lives with “racialized presumptions” ingrained in the country’s rapidly centralizing administrative state.<sup>569</sup> The presumptions in this case hold that there is mass identity documentation fraud by parents in the Rio Grande Valley falsely claiming their children were born in the United States.<sup>570</sup> Extreme rhetoric by the Trump administration, warning of a foreign “invasion”<sup>571</sup> across the border, reflects a politically instrumentalized and mendacious version of these long-held attitudes, now embedded in the bureaucracy of the southern borderlands.<sup>572</sup>

In late August 2018, the *Washington Post* reported on a surge in passport revocations affecting individuals of Mexican heritage born within the United States, but often outside of hospitals with the assistance of local midwives.<sup>573</sup> The State Department disputed the story, denied that a policy change had occurred, and indicated that according to its information, passport revocations in “midwife cases” were at a six-year low in 2018.<sup>574</sup> Based on the Justice Initiative’s subsequent review of cases filed in the Southern District of Texas, there has been a significant increase in recourse to the courts in passport cases: 42 cases were initiated between mid-2014 and the end of 2016, while 69 cases were initiated between January 1, 2017 and May 31, 2019, an increase of approximately 64.5%. Attorneys who have litigated passport cases in South Texas for a decade or more stated that, in addition to increased court cases, there has emerged an indifferent, even punitive attitude on the part of the government: “Sometimes it appears they really don’t care if the person is a citizen or not.”<sup>575</sup>

Challenging passport revocations entails affirmative civil litigation in federal court (as reviewed in the Technical Roadmap section below). There is no right to counsel in such cases, and legal aid organizations are overwhelmed and not necessarily specialized in the complex regulatory and legal frameworks under which claims must be constructed. The handful of attorneys in South Texas with expertise in this field reported that, under the Trump administration, the Department of State and the Department of Justice have taken new approaches to such cases. They note that:

- Lawyers from outside of the region and unfamiliar with the local context increasingly appear on behalf of the government in passport cases.<sup>576</sup>

- The government defends cases differently and more aggressively, going to trial in the face of convincing evidence that the plaintiff was born in the United States and ultimately losing after a lengthy and expensive trial.<sup>577</sup>
- Denial of passport renewal and passport revocations often happen following a request for benefits, most often visa applications for family members.
- Individuals are not notified that their passport has been revoked.

In passport applications still in the administrative process, the State Department's requests for additional information to prove birth in the U.S. have grown increasingly burdensome and applications can take years to process as a result, delaying access to free movement and work and often causing long-term separation from family members.<sup>578</sup>

Examining the outcomes of passport revocation cases filed in the Southern District of Texas revealed a 14.3% increase in trials starting in 2017, with approximately 33% of post-January 1, 2017 cases still pending as of May 2019 (23 out of 69 cases). The number of joint dismissals has almost tripled, with an increase of approximately 233% over pre-2017 cases (from 6 to 20 cases). This finding is consistent with reports that it is increasingly difficult to resolve cases at the administrative level.

Many Americans think of a passport as a travel document tucked away in a drawer until needed for a vacation or business trip.<sup>579</sup> By far the most prevalent de facto identity credential in the United States is a driver's license.<sup>580</sup> But for communities living in South Texas and other parts of the southern border, the passport is essential for everyday life: livelihoods, economies, education, healthcare, and families naturally span the border and have for generations.<sup>581</sup> The passport is, uniquely to this area, the engine of local economies on both sides of the border. Passport denials and revocations do not just disrupt individual lives, the practice tears at the fabric of local culture developed over the course of decades. As one report noted:

Historically, all a native-born Texan needed to be able to live and work in the U.S., and cross freely back and forth from Mexico, was a baptismal certificate showing birth in Texas and baptism at a very early age. Texas birth certificates, even those showing birth with a midwife or filed years after the birth, also usually sufficed to obtain U.S. passports, to immigrate close relatives, and to transmit citizenship to the children of persons holding such certificates, even if the births had also been incorrectly registered in Mexico.<sup>582</sup>

The introduction of the Western Hemisphere Travel Initiative (WHTI) in 2009 made passports essentially mandatory to cross the border between the U.S. and Mexico, and "obtaining a passport simultaneously became a high priority, and many times more difficult" for those in South Texas.<sup>583</sup> Shortly after WHTI took effect, a lawsuit challenged the State Department's

practice at that time of marking passport applications as “filed without action”—effectively denying them but without taking a formal decision and thus evading judicial review.<sup>584</sup> This practice was challenged successfully in *Castelano v. Clinton*, a class action that resulted in a class-wide settlement and the issuance of passports to all 15 plaintiffs.<sup>585</sup>

*Numbers.* Because the Department of State does not keep comprehensive centralized records of the number of passport revocations requested and granted, and on which grounds, determining how many individuals are affected by a given practice involves a time-consuming search of administrative records. In the case of the DOS-OIG investigation into passport seizures in Yemen, a full review of all cases was not even possible.<sup>586</sup> Estimates supplied by the State Department to congressional offices suggest that the average annual number of recorded revocations on the basis of non-citizenship or identity fraud is in the hundreds.<sup>587</sup> One attorney in Texas who has litigated passport cases for the past 10 years estimated that he alone had handled 200 lawsuits and assisted more than 1,000 clients with responding to the department’s heightened vetting of passport applications.<sup>588</sup> The Justice Initiative’s review of existing court cases identified 69 post-January 1, 2017 civil actions in which claimants sought to confirm their citizenship following a passport denial or revocation or denial of citizenship, a 64.5% increase over the equivalent pre-2017 period. This figure represents only those instances in which claimants were able to lodge federal cases, which requires significant resources that many people living in the region simply do not have.

*Births attended by a midwife.* The *Castelano* litigation resulted in a 2009 settlement stipulating certain measures that the State Department would take in “suspicious birth attendant” (SBA) cases.<sup>589</sup> One of the attorneys representing the class discussed in a June 2017 article what she has learned about the potential breadth of such cases in South Texas:

The “suspicious midwife list” which the INS had used for years was only the beginning. The State Department has its own list, the “suspicious birth attendant” list, which it considers to be protected by the law enforcement privilege and which has many more names than the one used by INS (now U.S. Citizenship and Immigration Services (USCIS)), which is in the public domain. Under the *Castelano* settlement, it was clear that the list was to be comprised only of *midwives*, or other “birth attendants,” and not medical doctors. But it has been learned that the DOS has included some licensed physicians on the list. For example, a recently deceased obstetrician, Dr. J.H. Trevino, who practiced in the Rio Grande Valley for about 60 years and delivered over 15,000 babies, is on the list. Why? Because in one of those 15,000 cases, the DOS allegedly discovered an affidavit from a Mexican doctor asserting that he had birthed the child. For those familiar with cross-border issues, the first thought that comes to mind is: “So what?”<sup>590</sup>

A *U.S. Attorney Bulletin* article written by a DOJ litigator does not mention a list of suspect birth attendants and directs fraud investigators to public records on disciplinary actions from state licensing bureaus. The bulletin states: “Where the birth is attended by a midwife, the attorney should check with the issuing state to determine whether the midwife is registered and if there are any disciplinary actions or whether the midwife has been criminally prosecuted for fraud in other birth certificate cases.”<sup>591</sup> A version of the list was produced through discovery in the *Castelano* litigation, “[t]hat version of the SBA List includes the names of 249 midwives who practiced in South Texas between 1961 and 1996.”<sup>592</sup>

More recent efforts to obtain information on policy directives or agency practice in identifying and listing (or potentially delisting) midwives and licensed physicians have been unsuccessful.<sup>593</sup> The entire premise of the SBA list dragnet rests on a “tenuous at best” theory that because a birth attendant is suspected of fraud in one case, all birth attestations throughout their career are now suspect.<sup>594</sup> This approach has swept many thousands of unwitting citizens under scrutiny.<sup>595</sup> The uncertainty surrounding listing of birth attendants contributes to a general atmosphere of intimidation and surveillance among border communities in South Texas, the primary target of the current administration’s paralyzing “zero tolerance” policies.

*Contemporaneous birth record.* The *U.S. Attorney Bulletin* article mentioned above provides the following guidance to attorneys defending § 1503 cases (discussed more fully in the Denaturalization Statutes section of Chapter II, Denaturalization) on behalf of the Department of State:

[F]inding a contemporaneous record of birth is an important step in proving fraud in a contested section 1503 case, as there are usually competing birth certificates alleging two different places of birth. Where the birth certificate alleging birth in the United States is a delayed birth certificate, a contemporaneous record of foreign birth is “almost conclusive” evidence of birth in that country.<sup>596</sup>

Contrary to this guidance, practitioners in South Texas reported that in their cases the State Department routinely cites *later* birth registration in Mexico as grounds to deny or revoke passports.<sup>597</sup> More generally, the rush to connect double registration with identity fraud ignores the realities of border culture and history. As one scholar has noted:

For most of the twentieth century, Mexican citizenship law placed families in a bind if they returned to Mexico with U.S.-born children. Mexican law did not recognize dual nationality claims, deeming any acquisition of foreign citizenship, by birth or naturalization, to result in an automatic loss of all Mexican citizenship rights....Faced with the disjuncture between Mexican citizenship law on the one hand and the realities of circular migration and cross-border communities on the other, many



Mexicans with U.S.-born children chose a straightforward solution: re-registering their children's births in Mexico. This phenomenon is widely known in the region.<sup>598</sup>

Since the turn of this century, growing intolerance of once-accepted coping practices like double-registration has hit border families the hardest, while centralized state administrators notch victories in what they consider an existential struggle to root out fraud. Such “wins” threaten to undermine international norms (examined in Chapter I, History and Context) meant to protect individuals from arbitrary denationalization.

*Applications for benefits trigger scrutiny.* As was the case in the context of Yemeni-American passport seizures, interviews conducted in the Rio Grande Valley in early 2019 confirmed that requests for benefits trigger passport fraud investigations, particularly when passport applicants had pending I-130 petitions (petitions for immigration visas on behalf of non-citizen family members). As one lawyer for passport applicants has put it:

A [person], who was born with a midwife ... applied to be a U.S. soldier and there was no problem [joining the military]. And the moment he wants to get a benefit, meaning he wants to get a passport or he wants to petition for his mom or his wife, they're like “wait a second, we don't know if you were born here.” So we have a government that for you to die for is fine, but not when you're trying to ask something from them.<sup>599</sup>

*Interrogation and endless vetting.* As described above, State Department officials administering passport applications and revocations have wide discretion to ask for (and reject) additional evidence of U.S. citizenship. Triggers like double registration in the U.S. and Mexico and a record of birth from a midwife on the SBA List can lead not only to extensive vetting, but also to interrogation, harsh treatment, and extended periods of immigration detention. Even after citizenship is litigated and sorted, the stigma of a faulty removal order during this ordeal can linger long afterwards because it can take years to set the administrative record straight.

*Resource drain.* In the four counties of the Rio Grande Valley, per capita income in 2012 was between \$10,800 and \$13,695.<sup>600</sup> For individuals who since the introduction of WHTI need to litigate their passport cases to maintain their way of life, the effort presents a massive expense. For the government, too, investigating and litigating passport cases requires significant resources, especially in light of the reported trend to take more and more cases to trial, most often in a losing battle despite favorable procedural odds and vastly superior financial means.

# *Maria*

As a senior in high school, Maria<sup>601</sup> refused to choose between her boyfriend and her ambitions. Born in Brownsville, Texas, she had grown up and gone to school in Reynosa, Mexico. Now, in her final year of high school, she had a serious boyfriend, Antonio, but also serious intentions to achieve a college degree.

She chose both. Maria moved to Edinburg, Texas, where she studied accounting, earning first a bachelor's degree and then a master's degree. She graduated magna cum laude and twice represented the school in academic competitions.

Through it all, she maintained her relationship with Antonio, visiting him in Reynosa. Because he was a Mexican citizen, it was more complicated for him to visit her in the U.S., but on one of his visits, he proposed to her at a Six Flags amusement park. Maria and Antonio started to plan their future together, beginning with a wedding in Texas.

Maria applied for a fiancé visa for Antonio, and the two of them, plus Maria's mother, traveled to the U.S. consulate in Ciudad Juarez, Mexico for interviews. But during the interviews, Maria's mother was taken away and interrogated for two and a half hours. Denied even a sip of water, she was browbeaten and insulted: told to admit that Maria had not been born in the U.S., and told to admit that she did not even know who Maria's biological father was.

***“I’m just one more number. One more chance for them to take citizenship away from someone.”***



Antonio's visa was denied and he was forced to remain in Reynosa. The young couple forfeited the down payment at their wedding venue in Texas. Instead of starting their new life in Texas, Maria moved to Mexico, where she and Antonio were married. She commuted daily to her job on the U.S. side.

In January 2017, as Donald Trump was taking office and just four months after being married, Maria was stopped at the border and her U.S. passport was confiscated. Later, she was told the revocation was due to the existence of a Mexican birth certificate in her name. But since she does not have a Mexican birth certificate, Maria has another theory: "Just having a Hispanic last name ... that's all you need for them to be triggered to investigate you," she says.

For months after her passport was taken, Maria was unable to visit Antonio in Reynosa. Finally, in January 2019, after fighting the U.S. government in court, she was able to get a new passport. "All that I'm doing is the legal route. I'm not asking my husband to come here illegally—no. I want to do things right," she says. Regarding her court victory, she notes, "They can pretty much investigate me all they want. And if it takes years, that's fine."

As Maria continues to wait to begin life in the U.S. with Antonio, she is well aware of the forces arrayed against them. "They don't care," she says, "cause I'm just one more number. One more chance for them to take citizenship away from someone. Like that's an award for them."

Today, Maria is four months pregnant. She knows that Antonio will not be with her when she is due, and she will have to deliver their first child alone. But she is as determined and optimistic as ever: "I'm really looking forward to starting a family and seeing my kids grow up here ... I really love the U.S."

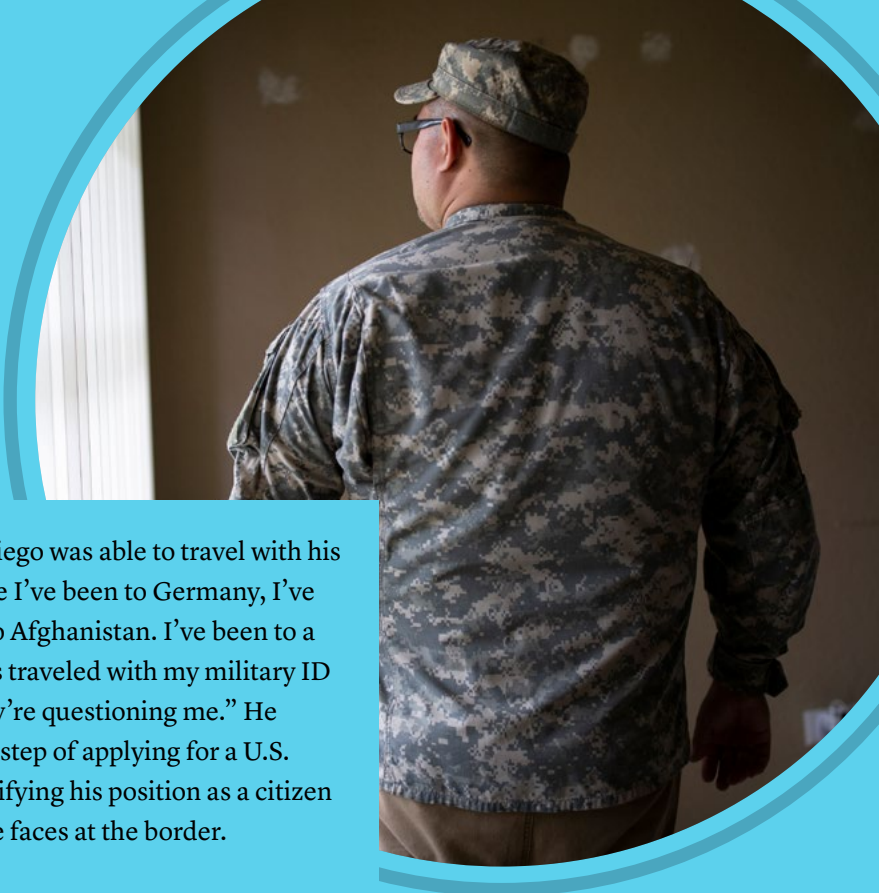
# Diego

When his country called, Diego was not afraid to answer. Born in Texas, he served in the U.S. Army for four years, including as a combat medic in Afghanistan during Operation Enduring Freedom. Yet today, back in Texas, he is frequently detained and threatened with removal from the United States.

Diego was born in Brownsville and has family on both sides of the border. As an American citizen, crossing back and forth should be routine, but it hasn't been recently. Instead, Diego has often been pulled aside by U.S. border officials, subjected to additional scrutiny, and told he will be placed in removal proceedings. In one case, he was arrested, forcibly separated from his two young daughters, detained for 15 hours, and told to confess that he was not a U.S. citizen.

Diego suspects this is because of his Hispanic last name: “[If] your last name is Spanish, they’re always gonna question if you were born here.” Perhaps for the same reason, his petitions for green cards for his wife and mother have been inexplicably delayed. Seated in his tidy South Texas home, where his old dress uniform is displayed behind glass, he notes the irony. “The Army summarizes everything that’s good in America: all the discipline, all the hard work, all the respect,” he says. “I really, really felt that I was doing something for the country that I loved—I was really proud.” He shakes his head and adds, “Now you’re telling me I’m gonna have to go to a judge to decide whether I’m a U.S. citizen or not?”

*“[If] your last name is Spanish, they’re always gonna question if you were born here.”*



Throughout his adult life, Diego was able to travel with his military ID. “It’s funny cause I’ve been to Germany, I’ve been to Canada, I’ve been to Afghanistan. I’ve been to a bunch of places and I always traveled with my military ID and my orders. But now they’re questioning me.” He recently took the additional step of applying for a U.S. passport in the hopes of fortifying his position as a citizen and reducing the scrutiny he faces at the border.

Crossing the border just to visit family had become an ordeal filled with fear. The constant uncertainty, interrogations, and interminable vetting have taken a toll on Diego, whose sacrifices in Afghanistan left him with PTSD. He is constantly worried about what would happen if he was placed in immigration detention or wrongfully removed. His wife would lose her green card and also face removal, leaving their three daughters—all U.S. citizens born in Texas—abandoned.

Threatening Diego with removal isn’t just a waste of resources. It could actively harm public safety in the community where he lives: it would leave the county jail where he works without one of its officers.

No one questioned Diego’s citizenship when he was saving the lives of his fellow infantry platoon members, but today things have changed. After a taxing court proceeding, Diego finally received a U.S. passport, and a measure of certainty, in May 2019.

# Alvaro

*“We’re all one family—that’s what makes this country great”*

An avid baseball and basketball fan, Alvaro still remembers how much he enjoyed little league. “I was so happy going to the games—they would play the national anthem,” he recalls. Born and raised in Texas, Alvaro loved being part of a team. He still values teamwork, and sees the United States in similar terms: “We’re all one family—that’s what makes this country great.” Standing in his front yard, he adds, “I’m very proud of being an American, a U.S. citizen, and I’m truly grateful for everything this country stands for and I believe in.”

When he was in his mid-20s, while visiting his grandmother in Matamoros, Mexico, Alvaro met and fell in love with his now wife, Natalia. After they married, they had an appointment at the U.S. Consulate in Ciudad Juarez, as part of the application process for Natalia to immigrate. Alvaro’s mother accompanied her son on this important occasion.

But rather than helping a U.S. citizen unite with his wife, officials at the consulate suddenly seized Alvaro’s mother. They interrogated her for hours,



insisting she admit that Alvaro was born in Mexico, or she would go to jail. Scared and desperate, she falsely stated that he was born in Matamoros. When pressed on exactly where in Matamoros her son was born, she named a hospital that had not even been built at the time of his birth. She was then forced to sign an official document, although she does not know what it was.

Following this disaster at the consulate, Alvaro and his mother were able to return to the U.S. But Natalia's green card application was rejected and she was forced to remain in Mexico.

Today, Alvaro owns a piece of land in South Texas and is building a house on it. But whether he and Natalia will ever be able to live together there legally is unclear. In 2018, Alvaro applied to renew his U.S. passport, in order to visit Natalia. His application was denied.

Despite the trauma of his mother's mistreatment and his separation from his wife, Alvaro retains his love of the United States. "One day they'll release my passport," he says. "I have faith in my country."

As Jaime Diez, a lawyer in Brownsville, Texas who works on such cases, puts it:

Maybe 2% of my cases I have found out that the person was not born here. All of the others were born here. So what's the benefit in taking someone who was a teacher, whose parents by mistake and without that person's participation decided to do something that's incorrect, which is registering somebody who was not born here as if he had been born here. You find out when you're 40 that everything that you have done, including your education, is worthless because you were not born here and all your documentation is fraudulent. What is the benefit of finding out for that person that he was not born here? Well, you're pretty much destroying his life. I don't see what's the benefit of it. But to spend all the money, all the resources they are spending—I really would like to know how much money the Department of State has spent in defending and prosecuting these cases.

### **U.S. Citizens Detained under Secure Communities and Similar Programs**

Since the DHS and FBI databases (IDENT and NGI) were linked under the Secure Communities program (2008-2014), thousands of U.S. citizens, legal permanent residents, and authorized immigrants have been mistakenly held under ICE detainers for suspected immigration law violations.<sup>602</sup> Officials charged with implementing immigration database checks under this program operate from flawed database records and the assumption that if an individual has *no record* this creates probable cause to issue a detainer. More likely than not, the lack of a record in an immigration database is an indicator that the individual concerned is a U.S. citizen, but since the program is designed to root out “criminal aliens,” the absence of a record is condemning.

Local officers are often unable to tell if the detainee is a citizen based on evidence presented to them.<sup>603</sup> While federal policies require ICE agents to “carefully and expeditiously” investigate any claim of U.S. citizenship made by an arrested individual,<sup>604</sup> there have been cases where ICE officers refuse to consider the arrested person's passport or citizenship certificate as evidence of citizenship, which in some cases has led to suits for false imprisonment.<sup>605</sup>

An April 2018 *Los Angeles Times* article captured examples of such detentions:

Victims include a landscaper snatched in a Home Depot parking lot in Rialto and held for days despite his son's attempts to show agents the man's U.S. passport; a New York resident locked up for more than three years fighting deportation efforts after a federal agent mistook his father for someone who wasn't a U.S. citizen; and a Rhode Island housekeeper mistakenly targeted twice, resulting in her spending a night in prison the second time even though her husband had brought her U.S. passport to a court hearing.<sup>606</sup>



Passports and certificates of citizenship should carry more weight than immigration databases, which the government has already recognized are incomplete and flawed.<sup>607</sup> Proving U.S. citizenship in erroneous immigration enforcement cases that progress to removal proceedings presents unique challenges because of changes in access to remedies instituted since the 9/11 attacks. Individuals caught up in removal proceedings must raise the question of citizenship to a federal circuit court for a determination regarding whether further factual investigation is required. If so, the case will be remanded to the appropriate district court for a *de novo* hearing on the citizenship question. The additional procedures preclude the more direct route formerly available to “alien citizens”—that is, through a federal *habeas* petition in district court.<sup>608</sup>

## Proving U.S. Citizenship: Anatomy of a Case

### Technical Roadmap

This section focuses on statutory remedies available to obtain a final judgment that an individual is a U.S. citizen. In the United States, this is accomplished through seeking a declaration of citizenship under the Immigration and Nationality Act (§ 1503). Specific constitutional concerns arising in the recent practice of passport adjudications by the Department of State are explored in more depth in the following sections. While constitutional claims reach systemic issues in instances like the case studies described above, on an individual level due process and equal protection claims, for example, do not result in a declaration of citizenship.

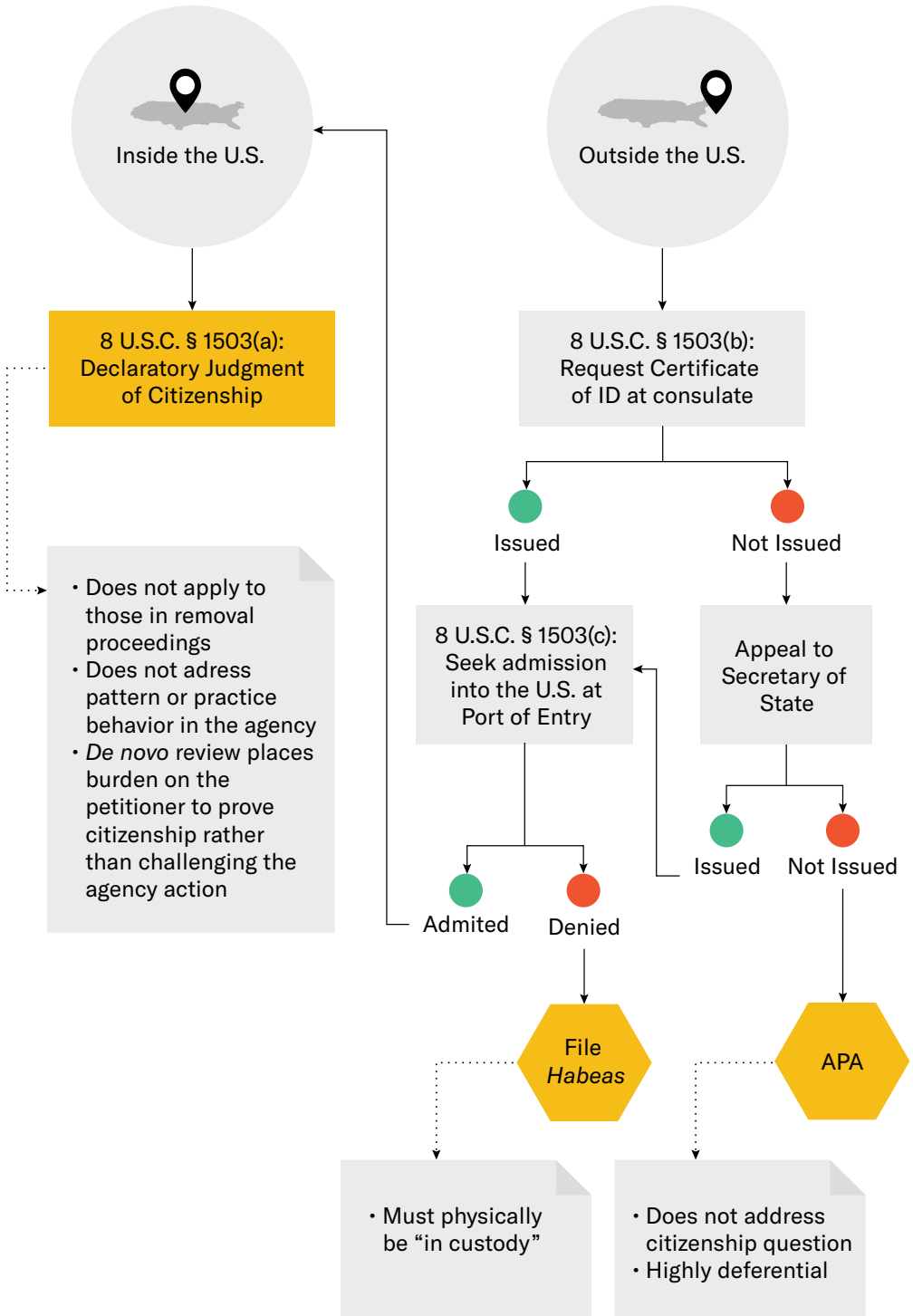
Ultimately, no single remedy is available to any American citizen who seeks to challenge discriminatory or arbitrary state action in the administration of proof of citizenship *and* confirm that they are U.S. citizens. For those who are excluded from the United States by a decision to deny or revoke a U.S. passport, it will in most cases be procedurally impossible to pursue either type of claim. Critics of the current statutory structure have referred to the situation of claimed Americans who are stranded abroad as “proxy denaturalization,”<sup>609</sup> or “effective exile.”<sup>610</sup>

### Declaratory Judgment of U.S. Citizenship (Immigration and Nationality Act)

With the enactment of the 1952 Immigration and Nationality Act, borders became decisive in determining how individuals whose claim to U.S. citizenship comes under scrutiny can establish that they are, in fact, Americans. Rachel Rosenbloom identifies a “citizenship line”—a collection of legal distinctions in treatment between citizens and aliens—that runs through U.S. procedural and substantive law in relation to apportionment and adjudication of human rights. The means of *establishing* one’s citizenship, too, turns on access to the territory as a proxy for the citizenship line, with the state exercising its “plenary” immigration power over those claiming U.S. citizenship from abroad.<sup>611</sup> In other words, not all people whose

# Seeking Confirmation of Citizenship in Passport Cases

This chart shows the narrow application of relevant potential remedies following denial or revocation of U.S. passports, as applied in cases reviewed by the Justice Initiative. Some of the interpretations depicted are currently being challenged in litigation.



passport is denied or revoked are treated equally under the law: the nation's borders play an outsized role in determining the fate of undocumented citizens.

*Within the United States.* In order to challenge the denial or revocation of a passport directly on the grounds of U.S. citizenship, remedies differ depending on the physical location of the claimant. Individuals who are inside the United States may bring an action to challenge the outcome of the administrative agency's decision (in this case, the U.S. Department of State) under § 1503(a) of the Immigration and Nationality Act of 1952 (INA). For individuals physically outside of the country's borders, § 1503(a) does not apply:

If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action...against the head of such department or independent agency for a judgment declaring him [or her] to be a national of the United States.<sup>612</sup>

The 1952 Act retained this remedy from the previous Nationality Act of 1940, but eliminated its availability for those outside the United States,<sup>613</sup> added a five-year statute of limitations (from the final administrative denial), and eliminated its availability where the issue of citizenship status arises in removal proceedings.<sup>614</sup>

The remedy in a § 1503(a) action is a declaratory judgment of citizenship (also known as a declaration of citizenship). The statute triggers a *de novo* review of the question of citizenship, which places the burden on the claimed citizen to produce supporting evidence. Such evidence can be impossible to obtain when the revocation occurs years or even decades after a passport was first issued.

Because passports and birth certificates are not definitive proof of U.S. citizenship, should any American need confirmation of citizenship by birth on U.S. soil, an action under § 1503 is the only available recourse.<sup>615</sup>

*Outside the United States.* For individuals seeking legal confirmation of their citizenship from abroad, a different scheme under the INA, covered in 8 U.S.C. §§ 1503(b) and (c), provides for a more complex route to review of the central question of citizenship. Throughout that route, the individual concerned is, procedurally speaking, treated as a foreigner.

## ***A Hollow Remedy: An In-Depth Analysis of 8 U.S.C. §§ 1503(b) and (c) in Practice***

**This is the text of the sections of 8 U.S.C. § 1503 that are applied to an individual whose passport is denied or revoked while they are abroad.**

*This provision entails significant costs and may be impossible due to family, health, economic or other reasons.*

*According to the City University of New York's CLEAR project and the DOS-OIG report, this requirement was systematically not being followed in practice in the cases of Yemeni-Americans examined.*

### *(b) Application for certificate of identity; appeal*

If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may **make application to a diplomatic or consular officer** of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of **traveling to a port of entry** in the United States and applying for admission. Upon **proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis**, he shall issue to

such person a certificate of identity. From any denial of an application for such certificate the applicant shall be entitled **to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing his reasons for his decision.** The Secretary of State shall **prescribe rules and regulations** for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who **at some time prior to his application for the certificate of identity has been physically present in the United States**, or to a person under sixteen years of age who was born abroad of a United States citizen parent.

*This section was narrowed in the 1952 INA – it used to be required that the officer would issue such proof. See 12 ALR Fed. 2d 501 § 2 (“It was expressly provided that such certificate of identity should not be denied solely on the ground that such person had lost his status as a national of the United States.”)*

*Excludes individuals who have never traveled to the U.S. and are over 16.*

*This is a point of contention in the Hinojosa et al. v. Horn et al. petition for writ of certiorari to the U.S. Supreme Court – does “may” actually mean “must”?*

*Habeas corpus, like the APA, is a “remedy of last resort” and, like the APA, only provides for a limited review of the agency action. Section 1503(a) is the most straightforward remedy (foreclosed to people outside the U.S.) that allows for judicial review of the question of citizenship.*

*(c) Application for admission to United States under certificate of identity; revision of determination*

A person who has been issued a certificate of identity under the provisions of subsection (b), and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this chapter relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General

that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in **habeas corpus proceedings** and not otherwise. Any person described in this section who is finally denied admission to the United States shall be subject to all the provisions of this chapter relating to aliens seeking admission to the United States.<sup>616</sup>

*This provision means that even people who have been recognized as Americans for their entire lives have to apply as foreigners to enter their own country.*

*This requirement subjects the person to administrative detention, potentially far away from the port of entry, their family members and local counsel if they have a representation.*

*It is unclear:*

- *If section 1503 (b) and (c) preclude a claim under the APA*
- *If an individual is required to exhaust all of the steps in order to seek habeas relief*
- *If so, whether these requirements represent an “adequate” remedy for the purposes of precluding a cause of action under the APA*
- *If federal habeas relief is sought without application for admission at a port of entry, whether the person is “in custody” for the purposes of the habeas statute (28 U.S.C. § 2241)*

Sections 1503(b) and (c) set forth several procedural undertakings necessary in order to access judicial review: application for a certificate of identity, travel to a U.S. port of entry and request for admission, and seeking relief under the federal *habeas corpus* statute.<sup>617</sup> The question as to which steps aggrieved parties *must* follow to challenge State Department decisions regarding access to U.S. passports in court, and under which circumstances, arose in a 2018 ruling by the Fifth Circuit Court of Appeals.<sup>618</sup> The circuit encompasses three states (Texas, Louisiana, and Mississippi), and includes a large portion of the U.S. southern border. Its decision in *Hinojosa et al. v. Horn et al.* means in practice that individuals whose passports are cancelled while they are in Mexico would have to apply for admission at a port of entry along the southern border, which currently entails significant hardships. In a petition for writ of *certiorari* from the Fifth Circuit Court of Appeals in the case, the petitioners describe the implications of a request for admission to the United States pursuant to § 1503(c):

Petitioners would be required to accept being treated as arriving aliens . . . Not having proper entry documents, they would be inadmissible.... If local detention facilities were full (as they often are), or space was needed for new arrivals, they could be sent anywhere in the U.S. for detention and hearing, even if they had local counsel. Detention could last for many months before a merits hearing on their citizenship was held.<sup>619</sup>

*Burden(s) of proof.* The relative burdens of establishing citizenship or justifying an agency passport denial predicated on non-citizenship vary depending on the cause of action and specific jurisdiction, with courts across the country applying different rules.<sup>620</sup>

In passport applications to the U.S. Department of State, 22 C.F.R. § 51.42 provides that applicants must establish birth in the U.S. by a preponderance of the evidence.<sup>621</sup> Under the Administrative Procedure Act (discussed in the next section), the agency bears the burden of proof to justify its denial of a passport.

In claims seeking a declaratory judgment of citizenship under INA § 1503, the courts are divided on the application of the burden and standard of proof. A recent article in the *U.S. Attorney Bulletin* states that the burden of proof in a § 1503 (a) action lies with “the person claiming U.S. citizenship.”<sup>622</sup> The *Bulletin* reflects the evidentiary scheme established in the Fifth Circuit.<sup>623</sup> The Fifth Circuit’s approach is critical because it covers an area where many cases of passport denials and revocations are concentrated.<sup>624</sup> Based on a review of standards in all federal circuits conducted for this report, several federal circuits apply a shared burden and burden-shifting scheme that is much more favorable to the claimed citizen:

The threshold showing required of a section 1503 plaintiff is minimal. She or he need only show *prima facie* evidence of citizenship. Presenting proof of a naturalization

certificate or passport—even if already administratively cancelled—would seem to satisfy that *prima facie* requirement. The government would then be put to its burden to establish by “clear, unequivocal, and convincing evidence” the plaintiff’s lack of entitlement to the disputed “right or privilege” of citizenship.<sup>625</sup>

This burden-shifting approach applies in the Second, Third, Ninth, and D.C. circuits, and has also been adopted by district courts in the Eighth Circuit.<sup>626</sup> It is based on a footnote in *Perez v. Brownell* cited in many of these decisions.<sup>627</sup> The Second Circuit cites to *Perez*, for example, to support the rule that, “where citizenship is conceded, or . . . plaintiff shows a prior governmental determination establishing his citizenship, the government must show by ‘clear, unequivocal and convincing evidence’ . . . that the plaintiff expatriated himself or that the prior administrative determination was erroneous.”<sup>628</sup> The Supreme Court has never directly ruled on the burden of proof in declaratory actions for citizenship.

Although citizenship claims arising in the context of removal proceedings are not the primary focus of this report, it is important to note the substantial hurdles imposed in reaching a determination of citizenship as a defense to removal. Citizenship claims in federal court during the administrative removal process (whether based on birth or derivative citizenship) are statutorily barred under § 1503. Such claims must be raised instead through extremely narrow administrative and judicial review with significant deference to the decisions of immigration judges.<sup>629</sup> In cases arising in this posture, the government bears the burden of proving alienage by “clear and convincing evidence.”<sup>630</sup> Where the government provides evidence of foreign birth, this creates a presumption of alienage that can be overcome by a “preponderance of the evidence.” The Ninth Circuit applies a more lenient standard of proof for respondents, however, holding that the presumption of alienage may be overcome with “substantial credible evidence,” a lower bar.<sup>631</sup> In 2018, the Ninth Circuit also ruled that this burden-shifting and standard of proof applies in all alienage cases, including declaratory judgment actions, as noted above.<sup>632</sup>

### **Administrative Procedure Act**

The Administrative Procedure Act (APA) provides a remedy to challenge administrative agency decisions that caused a “legal wrong” or where a person has been “adversely affected or aggrieved” by an agency action.<sup>633</sup> The APA does not supply jurisdiction and claims must be brought under the federal question statute (28 U.S.C. § 1331) or the *habeas* statute (28 U.S.C. § 2241).<sup>634</sup>

The APA is a remedy of last resort: all administrative remedies must be exhausted before an APA action in federal court is available, and claimants must show that there is “no other adequate remedy in court.”<sup>635</sup> Because “the State Department has no formal administrative

appeal process for denials of passports . . . a denial of a passport, and similar Department of State actions premised on lack of citizenship, would trigger an immediate ability to sue in federal court.”<sup>636</sup>

However, there is disagreement among courts of appeal as to whether the APA is an available remedy at all in passport cases because § 1503 provides an exclusive remedy. At least one court has recently held that § 1503(b) and (c) do not provide an “adequate remedy” and their availability should not preclude an action under the APA.<sup>637</sup> This interpretation follows from the Supreme Court’s decision in *Rusk v. Cort* (1962):

[T]he question posed is whether the procedures specified in § 360 [INA § 1503] (b) and (c) provide the only method of reviewing the Secretary of State’s determination that Cort has forfeited his citizenship. More precisely stated, the question in this case is whether, despite the liberal provisions of the Administrative Procedure Act, Congress intended that a native of this country living abroad must travel thousands of miles, be arrested, and go to jail in order to attack an administrative finding that he is not a citizen of the United States. We find nothing in the statutory language, in the legislative history, or in our prior decision which leads us to believe that Congress had any such purpose.<sup>638</sup>

In *Hinojosa*, as described above, the Fifth Circuit concluded that the Supreme Court’s decision in *Rusk v. Cort* did not apply in a case involving two women who claim they were born in the United States with the aid of midwives. The court found that the only available remedy for the plaintiffs was to follow the steps set out in § 1503(b) and (c) through to a *habeas* petition for judicial review of the passport denial.<sup>639</sup> Other courts allow applications submitted from abroad relying on a cause of action under the APA.<sup>640</sup>

Unlike § 1503 claims, the APA does permit the court to examine the *conduct* of the agency, which an action for declaration of citizenship does not broach.<sup>641</sup> The APA also provides recourse to challenge an agency’s failure to act, seeking to compel action that is unlawfully withheld or unreasonably delayed.<sup>642</sup> These actions can also be accompanied by a claim under the Declaratory Judgment Act seeking a determination of citizenship,<sup>643</sup> or, as in the *Castelano* litigation in South Texas, a petition for writ of *mandamus* to compel the State Department to adjudicate passport applications that were deemed “filed without further action.”<sup>644</sup>

The burden of proof under the APA lies with the agency in order to justify the denial or revocation, another reason why the cause of action is attractive in passport cases.<sup>645</sup>

Overall, however, the APA cause of action provides limited and contingent relief in passport cases. Review of agency actions, such as a denial of a passport, under the APA is “exceedingly

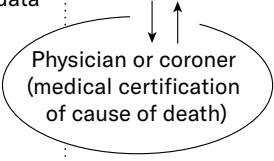

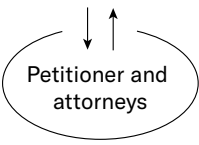


deferential” to executive decision-making.<sup>646</sup> Actions will be set aside only where they are found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”<sup>647</sup> The federal court’s review under the APA is also limited to the record before the agency at the time of the decision.<sup>648</sup> This means that if the agency record is “deficient, the court would not be empowered to issue a declaration that the person is a U.S. citizen. Instead, the case would be remanded to the agency.”<sup>649</sup> The APA recourse alone does not result in judicial confirmation of U.S. citizenship, as noted above. It is in many respects an unsatisfactory remedy for individuals who are wrongly adjudicated as non-citizens. Individuals or groups aggrieved as a result of a wider agency pattern of practice regarding passport adjudications must combine separate causes of action to seek comprehensive relief.<sup>650</sup>

### **Hidden Gaps and Increasing Securitization in Birth Registration**

The experiences of Mexican-Americans in the Rio Grande Valley form the front lines of the administration of U.S. citizenship today, where presumptions of fraud give rise to a heightened scrutiny of citizenship documentation that is wholly unfamiliar to most Americans. The melding of fraud prevention with national security policy outlined in the previous sections has only intensified the means available for differentiated surveillance and presumptions of fraud aimed at particular groups. Birth certificates are often called “breeder documents” because they serve as proof of identity for acquiring other forms of documentation, including passports. The foundational document whose authenticity is most susceptible to investigation and invalidation today is the birth certificate. The situation of many citizens living in southern border towns thus also reveals a stark juxtaposition between a gentler and diffused birth registration regime that has systematically underserved particular groups, and a turbocharged, centralized, security-based passport regime that systematically scrutinizes the birth records of particular groups.

*The decentralized state.* The U.S. birth registration system remains locally driven, with data sharing between local offices and the national vital statistics system (as illustrated on the next page).<sup>651</sup> Vital records offices in 57 “vital event registration areas”—the 50 states, the District of Columbia, New York City, and five territories (Puerto Rico, U.S. Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands)—collect vital event data, including on births and deaths.<sup>652</sup> These offices are responsible for processing data that is gathered from physicians and attendants, and transferring that information to the National Center for Health Statistics, a federal body. For individuals, the registration of birth data is one step toward obtaining proof of birth and related demographic information required to serve as primary evidence of citizenship. Each state and local administration, operating with a significant degree of autonomy, will also have separate procedures and practices for obtaining birth certificates.

	<b>Birth</b>	<b>Death</b>	<b>Marriage</b>	<b>Divorce</b>
<b>Completion of Certificate or Instrument</b>	Physician or attendant completes a certificate using demographic information from mother and data from medial records.	Funeral director completes certificate, using data from informant: obtains burial permit upon filing 	Clerk of local government processes marriage license request, including serological tests 	Clerk of court provides form, verifies entries, and enters facts from final decree 
<b>Initial Registration</b>	Local registrar of vital statistics verifies information, transfers copies to city or county health		In some states, marriage and divorce records held only by local offices (no state repository)	
<b>State Processing</b>	State vital registration office verifies information, maintains official copies, and codes and keys electronic record		State health department/registrar of vital statistics verifies information, maintains official copies	
<b>National Processing</b>	National Center for Health Statistics receives copies of electronic records from states, edits the data, and compiles national vital statistics files for analysis			

*Adapted from: Hetzel, A.M., History and Organization of the Vital Statistics System, National Center for Health Statistics, 1997.*

A relatively small percentage of U.S. citizens have no birth registration.<sup>653</sup> In 2006, the Brennan Center for Justice at New York University School of Law undertook a nationwide survey on access to documentary proof of citizenship in the United States. The study revealed that seven percent of respondents, corresponding to an estimated 13 million Americans based on 2000 population census figures, lacked “ready access to U.S. passports, naturalization papers, or birth certificates.”<sup>654</sup> Some of the major demographic groups affected include older African Americans born in the southern U.S., young people who are aging out of state foster care systems and who never obtained birth certificates, and children raised in families seeking to live “off the grid.”<sup>655</sup>

U.S.-born citizens whose parents hold identity documents from Mexico and Central American countries have experienced discriminatory practices in accessing birth certificates in Texas,

even when their births in the United States are officially registered. In 2015, legal aid and civil rights organizations brought an action on behalf of citizen children who were denied birth certificates by the Texas Department of State Health Services due to a policy regarding acceptable forms of identification required of their parents.<sup>656</sup> The parents or guardians of affected children were citizens of Mexico who used highly secure identification issued by Mexican authorities as proof of identity for the purposes of gaining birth certificates for their children. The case settled in 2016, with the state agreeing to accept certain additional forms of documentation issued by Mexico, El Salvador, Honduras, and Guatemala as proof of identity in order to register and obtain birth certificates for U.S.-born children.<sup>657</sup> Practitioners consulted in the preparation of this report have confirmed that access to birth certificates for border communities remains a fundamental challenge.<sup>658</sup>

Birth registration in the United States is not a *requirement* in order to obtain U.S. citizenship. If a state's identity and vital statistics infrastructure is susceptible to charges of unreliability or allegations of pervasive fraud, it places vulnerable citizens at risk of arbitrary denationalization, as is readily apparent from the Dominican Republic example explored in the Comparative Case Studies section of Chapter I. Another risk is that public narratives dislodged from factual realities of state or national public administration can spur aggressive policies that do more harm than good. For example, recent challenges to the validity of Texas voter rolls presented a threat to communities (in this case, naturalized Americans) whose authenticity as U.S. citizens is increasingly called into question. In January 2019, after an 11-month investigation, Texas Secretary of State David Whitley forwarded lists totaling 100,000 names of alleged non-citizens listed on voter rolls to county election officials for verification.<sup>659</sup> Almost immediately, the program came under scrutiny when tens of thousands of those named were confirmed as U.S. citizens. When a federal judge halted the effort one month later, he characterized the exercise as "ham-handed," and noted, "The challenge is how to ferret the infinitesimal needles out of the haystack of 15 million Texas voters."<sup>660</sup>

The secretary of state and other state defendants rescinded the effort in a settlement agreement with civil rights groups in April 2019.<sup>661</sup> The judge's description of the actual governance task at hand reflects a reality that is too easily lost in public narratives where allegations of massive voter and identity fraud abound. The potential to scale fraud-prevention measures more rapidly than ever demands an equally sophisticated vigilance of the aims and needs of local systems, and the exercise of restraint in the face of seductive new tools that promise an easy solution to complex governance issues.

In a 2009 report by the National Research Council Committee on National Statistics, the authors note the emerging role of vital statistics at the "front lines in *national security* efforts."<sup>662</sup> The December 2004 Intelligence Reform and Terrorism Protection Act set minimum standards to "secure birth certificates."<sup>663</sup> An intensified role for vital statistics data collection in

national security can detract from a longstanding, primary function of this aspect of population data collection: to serve as a public health tool.<sup>664</sup> The National Research Council report notes that, “security may become so tight and participation sufficiently strained that it may be more difficult to move the system into the kind of social, public health surveillance system that is needed for detection of early disease or other health incidents.”<sup>665</sup> By 2009, the birth registration process in the U.S. generated 60 unique data points on every birth, mostly covering data used for public health purposes, going beyond the basic information needed for civil registration purposes. (Canada, by contrast, collects just four: name, sex, and date and place of birth).<sup>666</sup>

Because birth certificates are breeder documents for identity verification purposes and serve as primary evidence of citizenship, the localized nature of the U.S. civil registration and documentation system will continue to face the strains of serving a national security function alongside its traditional role as a social security and public health tool. An increasingly centralized and securitized civil registration system in the United States would operate much like the passport system described in this section, including collective imputation of fraudulent behavior to members of specific racial or national groups.

Experts in civil registration and national statistics currently confronting the need to maintain accessibility of vital statistics and breeder documents while improving the security of these documents generally agree on two key recommendations. These are to increase incrementally the uniformity of documents issued by local entities, and to ensure that the matching of death and birth records occurs accurately and more rapidly.<sup>667</sup>

Fraud prevention is the main technical justification for most of the measures discussed in this report. That is, of course, an important aim—but it cannot be used as a blank check. Recent allegations of massive fraud in the voter lists of the United States (such as the president’s abandoned election integrity commission<sup>668</sup>) have been criticized as elaborate and expensive hunts for “needles out of the haystack.”<sup>669</sup> These election-related policy initiatives affected millions of Americans and made headlines. Yet the persistent assertions that U.S. foundational identification registries are illegitimate or unreliable are just as destructive as voter fraud allegations or the racist invective hurled from the president’s bully pulpit. More troubling still is the fact that for both denaturalizations and passport denial and revocation, measures are being applied retroactively spanning decades, with no fixed limits. In the case of voter fraud prevention measures, recourse to courts is relatively straightforward. But as the Technical Roadmap section above reveals, this is decidedly not the case when doubts arise as to an individual’s entitlement to citizenship in the first place.

## Constitutional Rights

*“The instant case is not about the admission of aliens but instead concerns the logically prior question whether an individual is a citizen in the first place.”*

Justice Sandra Day O’Connor, *Nguyen v. INS* (2001)<sup>670</sup>

This section summarizes major constitutional issues raised in this chapter.<sup>671</sup> However, the confluence of fraud-prevention, national security, immigration enforcement, and mixed federal and state or local administration of foundational proof of U.S. citizenship has obscured many practices in this area from a robust constitutional review.

As noted above, a further infirmity in fundamental rights protections on display when governments dispute the *predicate question* of an individual’s citizenship is that all of the relevant substantive and procedural protections hinge on one’s status as a citizen. Exclusion policies based on “national origin” suddenly apply when the citizen becomes a foreign national in the eyes of the law.<sup>672</sup> Procedural protections are more easily cut back or eliminated, thwarting serious administrative and judicial review and shifting procedural burdens from the state to the (non-) citizen; an expansive regime of administrative detention suddenly applies, accompanied by a torrent of other laws and regulations meticulously designed to effect expulsion of non-nationals as efficiently as possible. Buried in decades of rule-making and judicial doctrine, so much still depends on *when* the competent authority will reach the predicate question of citizenship and *how* the question is best answered.

### **Citizenship Rights under the Fourteenth Amendment**

The Fourteenth Amendment’s guarantees related to citizenship were narrowed considerably just a few years after the amendment’s adoption, with the 1873 *Slaughter-House Cases*. There, the Supreme Court ascribed little significance to the Privileges or Immunities Clause of the Fourteenth Amendment, which could have afforded robust protection of substantive rights enjoyed by citizens of the United States, particularly in the post-Civil War era and its total restructuring of American citizenship to include former slaves. When the Supreme Court eviscerated Congress’s power to *strip* citizenship unilaterally in *Afroyim v. Rusk* (1967), Justice Hugo Black’s majority opinion barred “congressional forcible destruction of ... citizenship,” upholding every American’s “constitutional right to remain a citizen in a free country.”<sup>673</sup> Legal scholar Patrick Weil has proposed that access to a passport is a fundamental privilege of citizenship, vital in protecting against unconstitutional “destruction” of citizenship.<sup>674</sup> He urges a new reading of the Fourteenth Amendment that would “read the Privileges or

Immunities Clause and the *Slaughter-House* jurisprudence in the spirit of *Afroyim*.”<sup>675</sup> At a minimum, the Fourteenth Amendment’s citizenship rights guarantees would place a currently missing constitutional limitation on government interference with access to passports.

As discussed earlier in this chapter, the situation of Yemeni-Americans stranded overseas due to passport denials also conflicts with procedural protections already established: the invalidation of administrative denaturalization (*Gorbach v. Reno*, 2000) and an “absolute right” of U.S. citizens “to enter its borders” under the Fourteenth Amendment’s Citizenship Clause.<sup>676</sup> These protections should serve as a first line of defense against denaturalization by proxy, but, as Weil also points out, the American citizens experiencing passport denials abroad would first need to find legal representation and bring their case to the courts.<sup>677</sup>

Denial of birth certificates by state authorities also triggers substantive rights and privileges including the right to be recognized as a person before the law and the obligation to act in the child’s best interest.<sup>678</sup> Administered as a means of enforcing immigration law, denial of a birth certificate has the effect of punishing U.S. citizen children for the actions or presumed actions of their parents. In 1958, the Supreme Court in *Trop v. Dulles* categorically barred the use of denationalization as a punitive measure, writing:

Citizenship is not a license that expires upon misbehaviour ... The deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen’s conduct, however reprehensible that conduct may be.<sup>679</sup>

Just as the Privileges or Immunities Clause can be read in the spirit of *Afroyim* to accord constitutional protections against passport stripping, especially in the case of children, access to proof of nationality at birth should be interpreted as absolute.

### **Deprivation of Liberty without Due Process**

Passport denials most obviously impede the right to travel internationally. As the ruling in *Kent v. Dulles* noted, “The right to travel is a part of the ‘liberty’ of which the citizen cannot be deprived without the due process of law under the Fifth Amendment.”<sup>680</sup>

Citizens enjoy strong procedural due process rights under the Fifth and Fourteenth Amendments. However, the level of process due to non-citizens varies on a sliding scale depending on their admission and indicators of attachment to the United States. Legal permanent residents enjoy more due process protections under the Constitution than those accorded to them by Congress under its power to regulate immigration and naturalization.<sup>681</sup>

As discussed above, where the predicate question of *citizenship* is not directly addressed, then in passport denial or revocation actions, the level of process required under the

Constitution slackens, giving license to the State Department to engage in an “end-run” around judicial denaturalization.<sup>682</sup>

Substantive due process protects the right to participation in family life as a fundamental right.<sup>683</sup> Refusing the issuance of birth certificates interferes with parents’ ability to direct the upbringing of their children and oversee their education, and to travel with their children, including to develop bonds with other family members. For trans-border families, the interference can be especially grave.

### **Equal Protection<sup>684</sup>**

Like the “Fibbers” of the New Deal era, Mexican-Americans who were double-registered on both sides of the border as children experience the same shrinking space for outmoded coping mechanisms. The consequences can be dire. Where the burdens of modernizing identity management systems fall disproportionately on minority communities because of their way of life, and call into question their very membership in the citizenry as a result, constitutional safeguards are needed.

Burdens fall disproportionately on groups based on other specific cultural, racial, ethnic, gender, and social class markers as well. In the *Castelano* case, the class-wide equal protection claim stated that, “a higher level of scrutiny imposed additional burdens” on the plaintiffs, “because they are citizens of Mexican descent or have Latino surnames and their births in southwestern border states were assisted by midwives.”<sup>685</sup> These are serious indications of discriminatory targeting based on suspect classifications that have yet to receive due constitutional scrutiny, a systemic failure to protect American citizens that demands urgent attention.

## **Conclusion**

The cases of passport denial and revocation explored in this chapter are symptomatic of an enduring challenge for the human rights field.<sup>686</sup> States need citizens; in response to that need, states have established a political order in which they hold sovereignty in *identifying* (measuring, labeling, and “sifting”<sup>687</sup>) citizens from non-citizens. As noted by Hannah Arendt:

Theoretically, in the sphere of international law, it had always been true that sovereignty is nowhere more absolute than in matters of “emigration, naturalization, nationality, and expulsion”; the point, however, is that practical consideration and the silent acknowledgement of common interests restrained national sovereignty until the rise of totalitarian regimes.<sup>688</sup>

The moral order that generated the human rights movement emerged in no small measure to answer the harrowing realization that human beings can commit unspeakable harms when basic decency is abandoned, leaving some cast aside in a state of exception.<sup>689</sup> International protections against statelessness and arbitrary deprivation of nationality, which Americans imagined and negotiated with other states, seek to respond to this challenge and must be applied within the United States. In the meantime, every presumption available in the domestic system should be activated to protect against placing human beings in a moral and legal vacuum. From a human rights perspective, on both sides of the “citizenship line”<sup>690</sup> human agency and freedom must ultimately prevail. Some key principles drawn from the international context serve as a ready guide for reforming practice in the U.S. Most urgently, reforms are needed to ensure that distinctions between citizens and aliens are only legitimate to the extent that they are “proportionately tailored to achieve a legitimate aim grounded in the substantive racial equality framework”<sup>691</sup> and maintain a standard of protection and treatment that evinces a commitment to the universality of human rights.

Specific recommendations that would begin to achieve this aim are presented in this report’s Executive Summary. They include uniformly placing the initial burden on the U.S. government to prove non-citizenship where citizenship questions arise, held to a sufficiently high standard to prevent arbitrary abuse, and with a comprehensive effort to expand access to meaningful remedies when proof of U.S. citizenship is in question. Such safeguards are especially needed in today’s climate of politicized attacks on citizenship, including the attacks on *jus soli* citizenship explored in the next chapter.





## IV. POLITICAL ATTACKS ON CITIZENSHIP BY BIRTH IN THE UNITED STATES

### **Background: *Jus Soli* Citizenship in the United States**

Citizenship by birth on the territory of the United States (or *jus soli*) is in many ways the foundation and starting point for thinking about what it means to be American. This chapter is nevertheless reserved for last because the stability of that foundation can only be fully assessed by considering the forces that work to erode it. The nativist platform returning to the White House under President Trump has, predictably, embraced a denaturalization program based on national origin, and immigration policies based on national origin. Perhaps more disturbing is that the administration and its surrogates are simultaneously seeking to redefine *jus soli* citizenship to align with this vision. Therefore, this report seeks not simply to raise more alarm, but to point out that addressing the technical and constitutional concerns raised in the previous two chapters is a foundational endeavor. It is essential to protecting the traditional conception of American citizenship. Step by step, passport revocations and denaturalizations of ordinary Americans encourage gradual acceptance of the idea that such extreme measures are needed to safeguard the national interest.

In fact, the stranded citizens of Yemeni descent in Sana'a; Alvaro, Maria, and Diego and their families in Texas; and the hundreds of naturalized citizens fighting denaturalization cases in U.S. courts today are harbingers of the attacks on citizenship yet to come. The numbers, it may be said, are currently too small to suggest these practices could dislodge longstanding precedent in interpreting the Citizenship Clause. The starting point should be, however, that every American matters—a sentiment that such policies seem designed to undermine. Another necessary response to the relatively small number of cases to date is to question why such massive resources are being mobilized to torment a miniscule fraction of the U.S. population in the pursuit of an un-American fantasy: a perfect, meticulously documented citizenry, homogeneous and docile.

As the previous chapter indicated, the law gives bureaucratic institutions developed to administer nationality in the United States license to assess the authenticity of Americans differently on the basis of visible markers of “excludable” characteristics—with race and class being the most prominent traits triggering additional scrutiny.<sup>692</sup> This feature of modern American life contradicts popular ideals of American citizenship as an equalizing condition; for these ideals to hold true on their own, citizenship would need to be self-evident, and it is not. As noted by Beatrice McKenzie:

Throughout the twentieth century and into the twenty-first, on the front lines of U.S. birthright citizenship policy, whether in U.S. embassies or consulates abroad, at the border, in the war zone, or at the local polling place, establishing credibility as a citizen has been more difficult for citizens of color.<sup>693</sup>

Although she was writing about the past, McKenzie’s words are particularly trenchant today.

## The American Political Community

***“Equality of condition, as the Jacobins had understood it in the French Revolution, became a reality only in America, whereas on the European continent it was at once replaced by a mere formal equality before the law.”***

-Hannah Arendt, *Origins of Totalitarianism*

Citizenship based on birth on the territory is the mode by which the vast majority of Americans access nationality.<sup>694</sup> Citizenship and “nationhood” are uniquely intertwined in the United States, and acquisition of citizenship based on *place* alone (not race, alienage, ethnicity, social

class, or religion) serves as the cornerstone of that conception of a sovereign “people” welded to the Constitution.<sup>695</sup>

In October 2018, President Trump was reported to be considering an executive order that would reinterpret the Citizenship Clause to exclude U.S.-born children of non-citizens.<sup>696</sup> Lawmakers (and commentators) have advanced similar proposals “since at least the early 1990s.”<sup>697</sup> The basis for this view turns on the interpretation of the phrase “subject to the jurisdiction” of the United States in the Citizenship Clause. The argument holds that “jurisdiction” requires “mutual consent” grounded in “undivided allegiance” to the United States. For the consent argument to work, the “allegiance” of the native-born would be discerned by reference to their parents’ allegiance, thus undermining the core premise of American nationhood as a civic community tied to *place*, and not subject to any higher political authority.<sup>698</sup> It is also difficult to fathom how such a construction of American citizenship would tolerate dual nationality, another “unsettled” area of nationality law in the United States (examined earlier in Chapter I, History and Context). The effort to reinterpret the Citizenship Clause is widely recognized as a minority viewpoint.<sup>699</sup>

Citizenship by birth on the territory in the United States traces its true origin not to the laws of England but to the momentous task of forging a functioning political community out of the ashes of the Civil War and the reality of abject inequality among its people. Some call it the country’s “second founding.” “It is one of the most promising and dangerous paradoxes of the American Republic that it dared to realize equality on the basis of the most unequal population in the world,” observed Hannah Arendt.<sup>700</sup> For free black Americans before the war, an inclusive citizenship promised not only all-important “privileges and immunities,” but also freedom from the threat of collective expulsion and exile.<sup>701</sup> These are the indelible social and historical origins of America’s Citizenship Clause. It is a *human rights instrument*, first and foremost, even if it is also an expression of the state’s sovereign power to establish the terms of membership in any political community.<sup>702</sup>

The Citizenship Clause “was meant as a direct rebuke to the infamous decision in *Dred Scott v. Sandford*.”<sup>703</sup> As noted above, in *Wong Kim Ark*, the Supreme Court considered the application of the Citizenship Clause to children of immigrants and held that, apart from children of diplomats and other foreign dignitaries with immunity, all persons born in the United States are citizens regardless of their parents’ migration status.<sup>704</sup> Nearly a century later, in *Plyler v. Doe* (1982), the court relied on *Wong Kim Ark* in securing the right of undocumented immigrants to public education under the Equal Protection Clause (which appears just one sentence away from the Citizenship Clause in Section 1 of the Fourteenth Amendment). The court found:

[N]o plausible distinction with respect to the Fourteenth Amendment “jurisdiction” can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful.<sup>705</sup>

## CITIZENSHIP DOCUMENTATION AND EXCLUSION IN *WONG KIM ARK*



Legal scholar and former vice consul in the U.S. embassy in Kampala, Uganda, Beatrice McKenzie, has conducted a forensic examination of the documentary proof used in the famous *Wong Kim Ark* case, and in Mr. Wong's four sons' immigration files.

She describes Mr. Wong's early life in California: "In 1870, Wong Kim Ark was born in an apartment over a storefront in San Francisco's Chinatown. While Wong's parents were Chinese nationals, his birth on U.S. soil made him a U.S. citizen. When Wong was quite young, his parents took him to their ancestral village in China, Ong Sing, in Taishan Province, where he attended school for three years. He returned to the United States at age eleven, entering with a 'native born affidavit,' and worked as a cook's apprentice in a Sierra Nevada mining camp. At age nineteen Wong returned to China and married Yee Shee. In keeping with the custom at the time, Wong traveled back and forth across the Pacific in adulthood to visit his wife and young children, who remained in the home village." (119)

Later, U.S. officials charged with implementing Chinese exclusion policy took an interest in Mr. Wong, as evidenced in his immigration file, according to McKenzie's review of it: "An unnamed Bureau of Immigration official investigated the truth of Wong's claim to birth in the United States." His note in Wong's immigration file read "I believe this [case] is fraudulent." (121)

On his next trip back to the United States, Mr. Wong was held by border officials on the steamship *Coptic* in San Francisco harbor for three months. He filed a *habeas* petition and won in the district court, but the United States appealed not on the facts of Mr. Wong's case, but on the merits of the notion that children born to "Chinese subjects" in the United States were citizens under the Fourteenth Amendment. The Supreme Court eventually heard the case and found in Mr. Wong's favor: "in clear words and in manifest intent, [the Fourteenth Amendment] includes the children born within the territory of the United States, or all other persons, of whatever race or color, domiciled within the United States." (121-22)

All quotes and factual background are from Beatrice McKenzie, "To Know a Citizen: Birthright Citizenship Documents Regimes in U.S. History," in *Citizenship in Question: Evidentiary Birthright and Statelessness*, Benjamin N. Lawrance and Jacqueline Stevens, eds. (2014).

*Photo courtesy of National Archives and Records Administration*

The court cited comments by Representative John A. Bingham of Ohio on the Civil Rights Bill of 1866, precursor to the Fourteenth Amendment, identifying the need to safeguard the rights of the “alien and stranger” alongside those of “freedmen”—otherwise the bill would condone by other means the very evils that Congress sought to eliminate.<sup>706</sup> Bingham went on to serve as the main author of the Fourteenth Amendment; Justice Hugo Black referred to him as “the Madison” of the Fourteenth Amendment.<sup>707</sup>

Justice William Brennan, the author of the note in *Plyler*, participated in virtually every major expatriation and denaturalization case that shaped modern jurisprudence regarding the first clause of the Fourteenth Amendment.<sup>708</sup> Not once throughout the Supreme Court’s decades-long debate over the application of these powers did a single justice raise the possibility that “the words ‘subject to the jurisdiction thereof’ might possibly limit the protections afforded by the citizenship clause to the children of undocumented immigrants.”<sup>709</sup>

### **Politicized Birthright Citizenship**

A detailed review of Wong Kim Ark’s immigration file and those of his children reveals “how flexible the Immigration Bureau’s documents requirements could be in the face of concerns about fraud.”<sup>710</sup> This broad government discretion holds true in our time, as the cases of Mexican-Americans at the southern border, Yemeni-Americans trapped in Sana’a, and U.S. citizens detained under Secure Communities and similar immigration enforcement programs today readily illustrate. Officials are empowered to set aside even the most sophisticated biometric identification tools available to them, and make life-altering decisions on the basis of appearance alone, when a fraud directive or arbitrary personal hunch overwrites a supposedly uniform and rules-based regime.

In the Dominican Republic (as explored in the Comparative Case Studies of Chapter I), racial animus against the Haitian minority has become embedded in the day-to-day bureaucracy of citizenship, rendering the question of *jus soli* citizenship increasingly unsettled and the need for reinterpretation gradually more palatable to a wider swath of the public. The introduction of an ethnicity-based citizenship in the Dominican Republic served the interests of a nativist political class, and ultimately transformed Dominican citizens of Haitian descent into deportable aliens. The measures and rhetoric unfolding in the U.S. today track, to some extent, the political strategy deployed in the Dominican Republic. In both the Dominican Republic and the United States, there is a strategic and wide-ranging effort to render citizenship “unsettled,”<sup>711</sup> in an atmosphere of heightened, state-sanctioned antipathy toward migrants and minorities.

## Impact: What We Stand to Lose

***“Since the Civil War, America has thrived as a republic of free and equal citizens. This would no longer be true if we were to amend our Constitution in a way that would create a permanent caste of aliens, generation after generation after generation born in America but never to be among its citizens. To have citizenship in one’s own right, by birth upon this soil, is fundamental to our liberty as we understand it. In America, a country that rejected monarchy, each person is born equal, with no curse of infirmity, and with no exalted status, arising from the circumstance of his or her parentage.”***

Walter Dellinger, assistant attorney general, Office of Legal Counsel (1995)

As recently as 2015, legislation was introduced in the United States—and the question of limiting access to *jus soli* citizenship considered—in congressional hearings, which aired at length the practical and legal debates set out above.<sup>712</sup> Such proposals generally focus on prospective changes, distinguishing them from changes in the Dominican Republic, where reinterpretation of the country’s citizenship law applied retroactively to a period from 2013 to 1929.<sup>713</sup> *Afroyim v. Rusk* would seem to foreclose retroactive application of a change, with the opinion’s emphatic defense of the sanctity of citizenship: “We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship.”<sup>714</sup>

But such protections are not always ironclad. Mass retroactive denationalization did happen in the Dominican Republic. Although the 2013 *Sentencia* decisively changed the legal landscape, the politicized and unsettled nature of citizenship in the country emerged incrementally, over many years. The Dominican Republic’s Constitutional Tribunal pointed to “erratic registrations, forgeries, impersonations and tampering with vital records, and also...deficiencies in the maintenance of books” as key justifications for its decision to retroactively interpret the citizenship and migration laws of the country to denationalize more than 200,000 Dominicans of Haitian descent.<sup>715</sup> According to the court, these “institutional and bureaucratic deficiencies,” had thwarted the proper implementation of the law, which was interpreted by the majority to exclude *jus soli* citizenship for children born to non-citizens without lawful residence.<sup>716</sup> The court traced the “deficiencies . . . in the system” back to 1929, the first time in which the exclusion from *jus soli* for children of “foreigners in transit” appeared in the constitutional citizenship definition. The opinion cites official 2012 survey data indicating that almost 90% of the “foreigners” affected (defined as “immigrants and their descendants”) were of Haitian descent.<sup>717</sup> The opinion stirred criticism for its openly race-based conception of citizenship:

[I]t is sociological, because, among other things, it involves the existence of a set of historical, linguistic, racial and geopolitical traits, that shape and sustain particular idiosyncrasies and collective aspirations...<sup>718</sup>

Nevertheless, the court concluded that because the civil registration “deficiencies” it sought to correct affect citizens as well as foreigners, its orders were not discriminatory.<sup>719</sup> Since the ruling, the Dominican Republic has expelled, through force or coercion, approximately 80,000 affected persons as of November 2018.<sup>720</sup> Approximately 19,000 others have acquired recognition of a statutory form of Dominican nationality that grants them fewer rights and is arbitrarily based on their names being recorded in the country’s “deficient” civil registry rolls.<sup>721</sup> Thousands more eke out a threatened existence in makeshift camps along the border between the Dominican Republic and Haiti.<sup>722</sup>

It is not difficult to envision such as scenario unfolding in the United States. A study of ending birthright citizenship estimated that a non-retroactive denial of *jus soli* citizenship targeting only children of unauthorized immigrants would create a population of 13.5 million native-born children without a status in the country by 2050.<sup>723</sup> Many of these children would be stateless, making deportation an extremely resource-intensive and morally offensive endeavor.<sup>724</sup> Statelessness could arise, for example, in the case of children born out of wedlock in the U.S. to undocumented parents whose country of nationality discriminates based on gender or legitimacy or both.<sup>725</sup> Long periods away from the territory of a state can trigger involuntary loss of nationality in many countries, which would leave parents unable to pass nationality to their U.S.-born children.<sup>726</sup> Other countries impose registration and residency requirements in order for children born abroad to access their parent’s nationality.<sup>727</sup> Children of refugees would struggle immensely to establish a link with their parent’s country of nationality. The U.S. lacks a statelessness status determination process or a protection status, let alone a pathway to citizenship, for stateless people.<sup>728</sup> It is likely that statelessness would spread as a long-term and intergenerational condition, creating what one academic termed a “permanent under-class” of undeportable non-citizens.<sup>729</sup>

As a party to the International Covenant on Civil and Political Rights, the United States is bound to uphold the rights of children to acquire a nationality immediately after birth. The U.S. also undertook to institute positive measures to guarantee the enjoyment of rights under the covenant (Article 2(2)), including specific measures that may be necessary to safeguard the rights of children to acquire a nationality at birth (Article 2(1)). In the event that access to citizenship by birth on the territory is restricted in any way, these obligations would require the U.S. to first determine any ensuing risk of childhood statelessness and then ensure that no child is left stateless as a result of such a policy, including by granting U.S. nationality to children born on the territory who would otherwise be stateless.

In 2004, the Supreme Court heard *Hamdi v. Rumsfeld*, which addressed the rights of a U.S. citizen, born in Louisiana to non-citizen parents from Saudi Arabia, who was detained by the United States in Afghanistan as an “enemy combatant.” The Claremont Institute’s Center for Constitutional Jurisprudence filed an *amicus* brief in the case arguing that Hamdi should not be recognized as a citizen, because he was the child of non-citizen visitors to the United States.<sup>730</sup> For the first time, this thesis was raised as a means to establish a state of exception—placing Hamdi outside of the protection of the law—thus creating a license to engage in acts widely renounced as contrary to international humanitarian and human rights law. The episode serves as a reminder that abhorrent state crimes have been repeatedly facilitated by the creation of stateless masses, robbed of their political agency and recognition before the law.

## Conclusion

Unlike other sections of this report, this chapter address a threat that is still largely theoretical. However, President Trump’s suggestion that he could introduce an executive order denying citizenship to children of undocumented immigrants in the United States is real. The initiatives covered in earlier chapters could all be deployed and expanded to support the same broad nativist agenda. They also serve to sensitize the American public to the idea that an executive order restricting “birthright citizenship” is not altogether far-fetched. If these efforts are allowed to continue and grow, U.S. citizenship will be irreparably destabilized, to the detriment of millions and the benefit of the intolerant and the powerful. This report seeks to document this exclusionary strategy and provide a call and a roadmap for its neutralization and demise.



## CONCLUSION: THE THIN END OF THE WEDGE

The laws, policies, and practices described in this report directly affect relatively few people, but cause outsized harm—and have the potential to spread. As Hannah Arendt pointed out 60 years ago, the creation of mass categories of human beings who “live...outside the pale of the law” historically starts small. “Easy precedents” in the form of denaturalizations affecting a small number of naturalized Europeans prior to World War I gave way to mass denationalization during the interwar period. The phenomenon ultimately left millions stateless.<sup>731</sup>

Deprivation and denial of citizenship are radical measures, leading to deportation, statelessness, detention, and other forms of extraordinary abuse catalogued in these pages. This report has shown that such measures are now applied almost exclusively to marginalized communities, in the United States and elsewhere, with national origin used as a more legally and socially pliable proxy for race and religion. Although denaturalization and denial and revocation of U.S. passports have only been applied to perhaps a few hundred people so far under the Trump administration, these cases represent a systematic attack on the American conception of citizenship. The current administration’s racist and xenophobic rhetoric, actions, and policies on citizenship and immigration suggest the developments examined in this report are just the beginning. If this administration’s current policies and practices proceed unchallenged, deprivation of nationality in all forms will increase, and additional groups will be targeted.

In a *jus soli* country like the United States, children born on the territory cannot inherit the migration status of their parents.<sup>732</sup> Children born in the United States are U.S. citizens. The baseline premise, forged in the crucible of Civil War and the economy of human bondage that ignited it, is that children are not born into “illegality” and are not defined by the persecution, beliefs, choices, or identity of their parents.

Policies that pander to false narratives of authenticity or seize on the state’s own governance weaknesses to further such narratives serve only to undermine the foundational and revolutionary innovation of the U.S. political system: a bold attempt, however imperfect, to construct a society in which people can be born free.

# ENDNOTES

1. In this report, the term “alien” refers to any person not a citizen or national of the United States as defined in 8 U.S.C. § 1101(a)(3). The terms “citizen” and “national” are used interchangeably, to indicate a legal connection between an individual and a state. Where relevant, for example in the case of “non-citizen nationals” under U.S. law, the terms may take on different meanings, as will be indicated in the text and notes. The term “denaturalization” covers multiple forms of involuntary loss of nationality, including denaturalization (loss of citizenship acquire by naturalization) and deprivation of citizenship acquired at birth.
2. United States Citizenship and Immigration Services (USCIS), *USCIS partners with Justice Department and Secures First Denaturalization As a Result of Operation Janus*, (2018), <https://www.uscis.gov/news/news-releases/uscis-partners-justice-department-and-secures-first-denaturalization-result-operation-janus>.
3. Nurith Aizenman, *Trump Wishes We Had More Immigrants From Norway. Turns Out We Once Did*, NPR, (Jan. 12, 2018), <https://www.npr.org/sections/goatsandsoda/2018/01/12/577673191/trump-wishes-we-had-more-immigrants-from-norway-turns-out-we-once-did>.
4. Cassandra Burke Robertson and Irina D. Manta., *(Un)Civil Denaturalization*, 94 New York University Law Review 402, 453 (2019), <https://www.nyulawreview.org/wp-content/uploads/2019/06/NYULawReview-94-3-RobertsonMantapdf.pdf>.
5. Jie Zong, Jeanne Batalova & Micayla Burrows, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, Migration Policy Inst. (Feb. 8, 2018), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states>.
6. Because historical data used in this study is catalogued by year, numerical estimations for past administrations are approximate and not absolute.
7. United States Department of Justice, Civil Division (“Civil Division”), *FY2020 Budget & Performance Plans*, 26, 16 (Mar. 2019), <https://www.justice.gov/jmd/page/file/1143936/download>.
8. *Id.* at 26.
9. This is a conservative estimate based on case identification and coding, as explained in the Description of Research. Operation Janus and Second Look type cases may account for between 50-55% of all cases filed in 2017 and 2018.
10. Cassandra Burke Robertson and Irina D. Manta, *(Un)Civil Denaturalization*, 94 New York University Law Review 402, 466-67 (2019), <https://www.nyulawreview.org/wp-content/uploads/2019/06/NYULawReview-94-3-RobertsonMantapdf.pdf> (citing Marta Tienda, Demography and the Social Contract, 39 Demography 587, 607 (2002)).
11. The information requested covered historical data on past denaturalization practice. The Civil Division provided information on the number of civil cases from 1972-2018, which is incorporated and analyzed in this report. Further responsive information could have allowed for a more comprehensive comparative analysis across different administrations.
12. There is no comprehensive way to search for civil denaturalization cases. Instead, a general search must be performed (using a civil nature of suit code for “Other Immigration Actions”), which may not capture all cases. At least one case identified through other means was not coded under this category. The Northern District of Georgia does not permit specific case searches under the criminal denaturalization statute, although cases are being filed in this district. Cases filed prior to January 1, 2017, but refiled due to a jurisdiction transfer, are not included in the data set.
13. As is the case for many denaturalization cases, some case dockets were sealed or unavailable. For sealed and unavailable dockets, the final case list includes actions in which available information regarding the parties involved, unsealed orders, and docket codes supported the conclusion that immigration and passport revocation were the issues at hand. For that reason, these cases were included where possible in the research, including in the total tally of cases identified during the relevant period, in order to provide a sense of the number of cases dealing with this issue that were brought before the federal judiciary. The universe of cases identified is not exhaustive, but is sufficiently comprehensive to provide reliable and objective results from a sample of cases from the Southern District of Texas for the relevant period of time. The universe was established through the following process. A key search on Lexis was performed using the search terms “*passport or citizenship and (apply or application or denied or deny or denial or revoc! or revok!) and not (criminal or diversity w/s citizenship)*.” The list was then reviewed to remove irrelevant cases. The remaining cases were cross-checked by case number on PACER and Bloomberg, using the Nature of Suit Code “465 Other Immigration Actions,” and narrowed by Cause of Action Code 28:1331 Federal Question. Following the establishment of the final case sample, all available orders that were related to each case and material to the subject-matter were compiled. Data from all cases under review were organized into an Excel spreadsheet containing the following columns, used in a basic quantitative analysis that is presented in the report: (i) case name; (ii) file number; (iii) date; (iv) parties; (v) claim basis; (vi) government actions/arguments; (vii)

resolution; (viii) pending; (ix) history; and (x) observations. Once the chart was populated with case data, it was organized chronologically, and divided into the two main periods, pre- and post-2017, which were transferred into two new sheets to be codified, allowing for collated results and graphic representation, for ease of interpretation and analysis.

14. The Justice Initiative has conducted extensive field work and advocacy in the Dominican Republic on the issue of access to nationality for Dominicans of Haitian descent. *See, e.g.* Open Society Justice Initiative, *Expelled Dominicans and Haitians v. Dominican Republic*, Open Society Foundations, (2014), <https://www.justiceinitiative.org/litigation/expelled-dominicans-and-haitians-v-dominican-republic> (expert opinion); Open Society Justice Initiative, *Factsheet: Deportation and Citizenship in the Dominican Republic: Unanswered Questions*, Open Society Foundations, (July 2015), <https://www.justiceinitiative.org/publications/deportation-and-citizenship-dominican-republic-unanswered-questions>; Cassandre Theano, *Finding a Way out of Legal Limbo in the Dominican Republic*, Open Society Foundations (Apr. 19, 2017), <https://www.justiceinitiative.org/voices/finding-way-out-legal-limbo-dominican-republic>. The organization has contributed amicus briefs in two leading cases on deprivation of nationality in the United Kingdom: Open Society Justice Initiative, *Home Secretary v. Al-Jedda*, Open Society Foundations, <https://www.justiceinitiative.org/litigation/home-secretary-v-al-jedda> (amicus brief submitted in June 2013); Open Society Justice Initiative, *Pham (previously B2) v. Home Secretary*, Open Society Foundations, <https://www.justiceinitiative.org/litigation/pham-previously-b2-v-home-secretary> (amicus brief submitted March 2014). *See also*, Open Society Justice Initiative, *Opinion on Clause 60 of UK Immigration Bill and Article 8 of UN Convention on Reducing Statelessness*, Open Society Foundations (Mar. 11, 2014), <https://www.justiceinitiative.org/publications/opinion-clause-60-uk-immigration-bill-and-article-8-un-convention-reducing>. The Open Society Justice Initiative regularly engages with leading experts on deprivation of nationality, most recently through a project to document and disseminate human rights-based standards covering deprivation of nationality as a national security measure, in collaboration with the Institute on Statelessness and Inclusion and Asser Institute. *See* Asser Institute, *Expert Roundtable on Citizenship Stripping as a Security Measure*, (June 28, 2018), <https://www.asser.nl/about-the-institute/asser-today/expert-roundtable-on-citizenship-stripping-as-a-security-measure/>.

15. Jill Lepore, *These Truths: A History of the United States* 312 (2018).

16. 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, 496-97 (2018) (discussion of “constitutional nationalism” in the United States: “[T]he Constitution is understood to represent the central expression of the nation’s civil ideals that bind

together the people of the United States.”).

17. Jill Lepore, *These Truths: A History of the United States* 312 (2018) (referencing Madison in Federalist No. 52).

18. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 827-28 (1824).

19. *See, e.g.*, Martha S. Jones, *Birthright Citizens: A History of Race and Rights in Antebellum America* 12 (2018) (“Citizenship had a piecemeal quality in antebellum America, defined only as needed.”).

20. Jill Lepore, *These Truths: A History of the United States* 314 (2018).

21. *See, e.g.*, Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (1997); 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 (2018); James Q. Whitman, *Hitler’s American Model: The United States and the Making of Nazi Race Law* (2017); David Scott FitzGerald, *The History of Racialized Citizenship*, in Ayelet Shachar, Rainer Baubock, Irene Bloemraad, and Maarten Vink, eds., *The Oxford Handbook of Citizenship* 129 (2017).

22. Jill Lepore, *These Truths: A History of the United States* 314 (2018).

23. Martha S. Jones, *Birthright Citizens: A History of Race and Rights in Antebellum America* 15 (2018).

24. *See generally* Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (1997). *See* 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, 499-500 (2018) (discussing Smith’s work, arguing that, contra Smith’s view, nativism and constitutional nationalism have “always been intertwined” in American history).

25. Jill Lepore, *These Truths: A History of the United States* 326 (2018); Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C.L. Rev. 1695, 1990 & notes accompanying (2013) (“The Chinese Exclusion Era spanned from 1882-1943.”).

26. *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

27. Jill Lepore, *These Truths: A History of the United States* 337 (2018). In 1924, Congress conferred by statute citizenship on all Native Americans born in the U.S..

28. Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* 290 (1997).

29. Isabel Wilkerson, *The Warmth of Other Suns: The Epic Story of America’s Great Migration* 39 (2010).

30. Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* 341 (1997).

31. Isabel Wilkerson, *The Warmth of Other Suns: The Epic Story of America's Great Migration* 8-9 (2010).
32. Isabel Wilkerson, *The Warmth of Other Suns: The Epic Story of America's Great Migration* 38 (2010).
33. Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C.L. Rev. 1695, 1993 (2013) (“U.S. citizenship opened up across racial lines at virtually the same time that the border started closing in racially specific ways.”). 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, 506 (2018) (citing statement of Sen. Jones in 1882, 13 Cong. Rec. 1742, “Free institutions are only possible with the favored races. ...[N]o other race is capable of treading freedom’s heights with firm and unwavering step.”).
34. David Scott FitzGerald, *The History of Racialized Citizenship*, in Ayelet Shachar, Rainer Baubock, Irene Bloemraad, and Maarten Vink, eds., *The Oxford Handbook of Citizenship* 131 (2017); 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, 504 (2018) (“These dual requirement for naturalized citizenship—commitment to constitutional principles and membership in the white race—persisted, with relatively few changes, until 1952, when Congress finally repealed any racial criteria for citizenship.”).
35. David Scott FitzGerald, *The History of Racialized Citizenship*, in Ayelet Shachar, Rainer Baubock, Irene Bloemraad, and Maarten Vink, eds., *The Oxford Handbook of Citizenship* 138 (2017) (citing Ian Haney-Lopez, *White by Law: The Legal Construction of Race* (1996)).
36. Beatrice McKenzie, *To Know a Citizen: Birthright Citizenship Documents Regimes in U.S. History*, in Benjamin N. Lawrance and Jacqueline Stevens, eds., *Citizenship in Question: Evidentiary Birthright and Statelessness* 117-131 (2016).
37. John C. Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* 118-120 (2d ed. 2018); Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C.L. Rev. 1695 (2013).
38. 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, 504 (2018).
39. *Id.* at 525.
40. *Id.* at n.219.
41. *Id.* at 529.
42. Adolf Hitler, *Second Book* (1928).
43. See Juan R. Torruella, *Ruling America's Colonies: The Insular Cases*, 32 Yale L. & Pol’y Rev. 57 (2013). The other major unincorporated territories are Guam, American Samoa, the Northern Mariana Islands, and the U.S. Virgin Islands. See USCIS, *U.S. Territories* (Mar. 27, 2018), <https://www.uscis.gov/tools/glossary/us-territories>. According to USCIS, “A U.S. territory is a partially self-governing piece of land under the authority of the U.S. government. U.S. territories are not states, but they do have representation in Congress. Each territory is allowed to send a delegate to the House of Representatives. The people who live in American Samoa are considered U.S. nationals; the people in the other four territories are U.S. citizens. Citizens of the territories can vote in primary elections for president, but they cannot vote in the general elections for president.” *Id.*
44. See, e.g., *Downes v. Bidwell*, 182 U.S. 244 (1901).
45. *Id.* at 286-87.
46. See Brief for the Scholars of International Law as Amicus Curiae, *Tuaua v. United States*, 788 F.3d 300, at 6, (2015), <https://www.scotusblog.com/wp-content/uploads/2016/06/15-981-Scholars-of-International-Law-Amicus-Brief.pdf>.
47. United States Department of Interior, Office of Insular Affairs, *Definitions of Insular Area Political Organizations*, <https://www.doi.gov/oia/islands/politicatypes>.
48. In a series of tweets on April 2, 2019, for example, President Trump disparaged Puerto Rico in connection with disaster relief aid, suggesting he considers (erroneously) Puerto Rico is not part of the United States.
49. See Aaron Steckelberg and Chiqui Esteban, *More than 4 million Americans don't have anyone to vote for them in Congress*, The Washington Post (Sept. 28 2017), [https://www.washingtonpost.com/graphics/2017/national/fair-representation/?utm\\_term=.845a8339d35f](https://www.washingtonpost.com/graphics/2017/national/fair-representation/?utm_term=.845a8339d35f) (estimating the total 2017 population of U.S. territories at 4.4 million, based on figures from U.S. Census Bureau).
50. James Q. Whitman, *Hitler's American Model: The United States and the Making of Nazi Race Law* 4-5 (2017).
51. 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, 495 (2018).
52. See Alex Ross, *The Hitler Vortex: How American racism influenced Nazi thought*, The New Yorker (April 30, 2018), at 72.
53. Cassandra Burke Robertson and Irina D. Manta, (*Un*) *Civil Denaturalization*, 94 New York University Law Review 402, 427 (2019), <https://www.nyulawreview.org/wp-content/uploads/2019/06/NYULawReview-94-3-RobertsonMantapdf.pdf>.
54. *Id.*
55. See Eric L. Muller, *Japanese American Cases – A Bigger Disaster Than We Realized*, 49 How. L. J. 417, 455 (2006).

- 56.** *Abo v. Clark*, 77 F. Supp. 806, 812 (N.D. Cal. 1948), *rev'd in part on other grounds*, *McGrath v. Abo*, 186 F.2d 766, 770 (9th Cir. 1951). Nearly all renunciations were ultimately invalidated. See Eric L. Muller, *Japanese American Cases – A Bigger Disaster Than We Realized*, 49 How. L. J. 417, 457 (2006) (92% of the 5,409 applications for restoration of citizenship were successful). The total number of renunciations at Tule Lake was around 6,000. *Ibid.* at 454.
- 57.** Patrick Weil, *The Sovereign Citizen: Denaturalization and the Origins of the American Republic* 101 (2013).
- 58.** *Id.* at 105.
- 59.** David Scott FitzGerald, *The History of Racialized Citizenship*, in Ayelet Shachar, Rainer Baubock, Irene Bloemraad, and Maarten Vink, eds., *The Oxford Handbook of Citizenship* 139-40 (2017) (citing Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (2004)).
- 60.** Cassandra Burke Robertson and Irina D. Manta, (Un) *Civil Denaturalization*, 94 New York University Law Review 402, 429 (2019), <https://www.nyulawreview.org/wp-content/uploads/2019/06/NYULawReview-94-3-RobertsonMantapdf.pdf>.
- 61.** Proposals have been made in 2003, 2010, 2011, 2014, 2015, and 2017. The most recent bill, introduced in 2017 (the Expatriate Terrorists Act) would equate “voluntary relinquishment” of citizenship with “membership, training, and oaths of allegiance” to a terrorist group.
- 62.** Peter J. Spiro, *Expatriating Terrorists*, 82 Fordham L. Rev. 2169, 2170 (2014).
- 63.** See generally Patrick Weil, *The Sovereign Citizen: Denaturalization and the Origins of the American Republic* (2013); Cassandra Burke Robertson and Irina D. Manta, (Un) *Civil Denaturalization*, 94 N.Y.U. L. Rev. 402, 440-445 (2019), <https://www.nyulawreview.org/wp-content/uploads/2019/06/NYULawReview-94-3-RobertsonMantapdf.pdf>.
- 64.** *Trop v. Dulles*, 356 U.S. 86, 101-102 (1958).
- 65.** 1940 Nationality Act, § 401(j).
- 66.** *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967). For discussion of subsequent jurisprudence on the scope of application of *Afroyim*, see Patrick Weil, *The Sovereign Citizen: Denaturalization and the Origins of the American Republic* 176-178 (2013) (discussing *Bellei* (application to citizenship acquired through birth abroad to American parents) and *Vance v. Terrazas* (1980) (on the meaning of voluntariness)).
- 67.** 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, 538 (2018).
- 68.** See Peter Spiro, *Multiple Citizenship*, Ayelet Shachar, Rainer Baubock, Irene Bloemraad, and Maarten Vink, eds., *The Oxford Handbook of Citizenship* 636 (2017) (“[A]lmost all of the more than one million Mexican citizens who have acquired citizenship in the United States since 1998 became dual citizens upon naturalization.”).
- 69.** United States Department of State, Bureau of Consular Affairs, *Dual Nationality*, <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/Advice-about-Possible-Loss-of-US-Nationality-Dual-Nationality/Dual-Nationality.html>.
- 70.** *Id.*
- 71.** USCIS, *Naturalization Oath of Allegiance to the United States of America*, (June 25, 2014), <https://www.uscis.gov/us-citizenship/naturalization-test/naturalization-oath-allegiance-united-states-america/>.
- 72.** 12 USCIS, Policy Manual Part D, General Naturalization Requirements, *Chapter 7 - Attachment to the Constitution*, (June 6, 2019), <https://www.uscis.gov/policy-manual/volume-12-part-d-chapter-7#footnote-1>.
- 73.** The United States is a party to the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (CCPR), the Convention against Torture (CAT), and the 1951 Convention relating to the Status of Refugees.
- 74.** Leslie Esbrook, *Citizenship Unmoored: Expatriation as a Counter-Terrorism Tool*, 37 U. Pa. J. Int'l L. 1273, 1305-06 (2016).
- 75.** See UN General Assembly, International Law Commission, *Expulsion of Aliens: Texts and Titles of the Draft Articles Adopted by the Drafting Committee on Second Reading*, U.N. Doc. A/CN.4/L.832, 20 May 2014, Article 8 (“[a] State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her.”).
- 76.** See Audrey Macklin, *Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien*, 40 Queen's L. J. 1, 15 (2014).
- 77.** Martha S. Jones, *Birthright Citizens: A History of Race and Rights in Antebellum America* 4 (2018) (“At its core, citizenship was a claim to place, to enter and remain within the nation’s borders. Citizenship..., would protect free black people from expulsion.”).
- 78.** Eric Fripp, ed., *The Law and Practice of Expulsion and Exclusion from the United Kingdom: Deportation, Removal, Exclusion and Deprivation of Citizenship* 41 (2015) (citing *Oppenheim’s International Law*: “international recognition and protection of human rights was in accordance not only with an enlightened conception of the objects of international law but also with an essential requirement of international peace.”).

- 79.** *Id.* at 44; UN General Assembly, Universal Declaration of Human Rights (UDHR), 10 December 1948, 217 A (III), Article 15. That provision states that “everyone has the right to a nationality” and (Article 15(2)) “no one shall be arbitrarily deprived of ... nationality.” The UDHR is a non-binding declaration, but carries significant weight in interpreting the binding provisions of treaties and rules of international custom.
- 80.** Article 24 of the CCPR, Article 5(d)(iii) of the CERD, Article 9 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Articles 7 and 8 of the Convention on the Rights of the Child (CRC), Article 18 of the Convention on the Rights of Persons with Disabilities (CRPD), Article 20 of the American Convention on Human Rights, and Article 6 of the African Charter on the Rights and Welfare of the Child. *See generally* UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: report of the Secretary-General*, 14 December 2009, A/HRC/13/34; United Nations High Commissioner for Refugees (UNHCR), *Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality - Summary Conclusions*, para. 59 (March 2014), <http://www.refworld.org/docid/533a754b4.html> [hereinafter *Tunis Conclusions*].
- 81.** CCPR, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* March 23, 1976.
- 82.** The United States ratified the CCPR on June 8, 1992.
- 83.** This right is also enumerated in Article 13 of the UDHR, Article 5(d)(iii) of the CERD, and Article 8 of the American Declaration on the Rights and Duties of Man, among others.
- 84.** UN Human Rights Committee, *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, U.N. Doc. CCPR/C/21/Rev.1/Add.9, 2 November 1993.
- 85.** UN Human Rights Committee, *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, U.N. Doc. CCPR/C/21/Rev.1/Add.9, November 2, 1993. The HRC also hears individual complaints under the ICCPR (states must ratify an optional protocol in order for the remedy to apply; the United States has not done so). In *Stewart v. Canada*, in relation to the protection granted by Article 12(4), the committee’s decision established that the principle of non-expulsion of nationals should be understood broadly, maintaining that “his own country” is a concept that applies to individuals who are nationals as well as to certain categories of individuals, who while not nationals in a formal sense, are also not “aliens.” UN Human Rights Committee, *Stewart v. Canada*, Merits, Communication No 538/1993, November 1, 1996, para 12.3-12.5.
- 86.** R.Y. Jennings & A. Watts, eds., *Oppenheim’s International Law* at 944-45 (9th ed. 2008).
- 87.** A/Conf.9/C.1/SR.12, at 8 (delegate from Turkey); A/Conf.9/C.1/SR.14, at 3 (delegate from Pakistan). For a more recent account, see Eric Fripp, ed., *The Law and Practice of Expulsion and Exclusion from the United Kingdom: Deportation, Removal, Exclusion and Deprivation of Citizenship* 385 (2015) (“The admission of a British citizen to the territory of another state on the basis of British nationality, where he or she is not a national of that state and so does not have a general right of entrance and residence to it, creates a relationship between the two states within which the UK has a duty not to impinge upon the sovereignty of the other state by frustrating its ability to expel an alien who entered its territory as a British citizen.”).
- 88.** R.Y. Jennings & A. Watts, eds., *Oppenheim’s International Law* 880 (9th ed. 2008) (“In so far as deprivation of nationality results in statelessness, it must be regarded as retrogressive, and the fact that some states find no need (subject to certain exceptions) to provide for deprivation of nationality suggests that no vital national interest requires it.”).
- 89.** UN Human Rights Committee, *CCPR General Comment No. 17: Article 24 (Rights of the Child)*, 7 April 1989, <https://www.refworld.org/docid/45139b464.html>.
- 90.** *See, e.g.*, Bronwen Manby, *Citizenship and Statelessness in Africa: The law and politics of belonging* 43 (2016) (“[A] retrospective finding that a person was not a national and was issued nationality documents in error, or arbitrary application of rules relating to loss by operation of law, are equally subject to rules prohibiting arbitrary deprivation of nationality”).
- 91.** *See Report of the Secretary-General on Human Rights and arbitrary deprivation of nationality*, U.N. Doc. A/HRC/13/34, 14 December 2009, para. 23 (deprivation of nationality “covers all forms of loss of nationality, including those that arbitrarily preclude a person from obtaining or retaining a nationality, particularly on discriminatory grounds, as well as those that automatically deprive a person of a nationality by operation of law, and those acts taken by administrative authorities that result in a person being arbitrarily deprived of nationality.”).
- 92.** UN Human Rights Council, *Report of the Working Group on Arbitrary Detention*, 24 December 2012, A/HRC/22/24; *see also* Eric Fripp, ed., *The Law and Practice of Expulsion and Exclusion from the United Kingdom: Deportation, Removal, Exclusion and Deprivation of Citizenship* 384 (2015).
- 93.** UN Human Rights Council, *Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General*, 19 December 2013, A/HRC/25/28.
- 94.** *Expulsion of aliens: Texts and titles of the draft articles adopted by the Drafting Committee on second reading*, International Law Commission Sixty-sixth session, UN General Assembly, A/CN.4/L.797, May 24, 2012.

95. Third Report on the Situation of Human Rights in Chile, IACHR OEA/Ser/L/V/II.40.

96. See, e.g., Court of Justice of the European Union, *Janko Rottmann v. Freistaat Bayern*, Judgment, Case C-135/08, Mar. 2, 2010.

97. UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: Report of the Secretary-General*, 19 December 2013, A/HRC/25/28, at paras. 10-11, <https://www.refworld.org/docid/52f8d19a4.html>.

98. See Audrey Macklin, *Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien*, 40 Queen's L. J. 1, 15 (2014) (“Indicia of arbitrariness may include (but are not exhausted by) disproportionality, unreasonableness, denial of procedural fairness, lack of independent judicial engagement, discrimination and a desire to effectuate exile.”).

99. UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations Treaty Series, vol. 660, p. 195.

100. CCPR, Art. 2(1).

101. Laura van Waas and Sangita Jaghai, *All Citizens are Created Equal, but Some are More Equal Than Others*, 65 Netherlands Int'l L. Rev. 413 (2018).

102. UN Human Rights Council, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, A/HRC/38/52, Apr. 25, 2018, at paras. 12-13, <https://undocs.org/A/HRC/38/52>.

103. *Id.* at para. 14.

104. *Id.* at para. 19.

105. *Id.* at para. 30.

106. In the *Modise* decision, the African Commission on Human and Peoples' Rights concluded that living as a stateless person was “degrading treatment.” *Modise v. Botswana*, Comm. 97/93, para. 92. In *Open Society Justice Initiative v. Cote d'Ivoire*, the commission identified a “supreme and dependent relationship” between the right to dignity and the right to legal status, stating that “the failure to grant nationality as a legal recognition is an injurious infringement of human dignity.” According to the commission, “the very existence of the victim . . . is vitally compromised” when his or her legal status is extinguished. *Open Society Justice Initiative v. Cote d'Ivoire*, Comm. 318/06, Decision of Feb. 25, 2015, para. 146. The African Committee of Experts on the Rights and Welfare of the child found in the *Kenyan Nubian Children* decision that the Kenyan government’s discriminatory treatment of children of Nubian descent was “a violation of the recognition of the children’s juridical personality, and is an affront to their dignity and best interests.” *Institute for*

*Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on Behalf of Children of Nubian Descent in Kenya) v. Government of Kenya*, African Committee of Experts on the Rights and Welfare of the Child, Decision No 002/Com/002/2009, para. 80. These principles were emphasized in the committee’s General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child, adopted in 2014. *General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child*, ACERWC/GC/02 (2014). The European Court of Human Rights (ECtHR) has recognized that arbitrary denial of nationality can interfere with the close link between nationality and identity. *Genovese v. Malta*, ECtHR, Judgment of October 11, 2011, at para. 33; *Mennesson v. France*, ECtHR, Judgment of June 26, 2014, at para. 97; *Kurić and others v. Slovenia*, ECtHR [GC], Grand Chamber Judgment of June 26, 2012, at para. 337. The Council of Europe has also recognized that “certain provisions [of the European Convention on Human Rights] may apply also to matters related to nationality questions. Amongst the most important ones are: Article 3,” which prohibits torture, and inhuman and degrading treatment, on the basis that “actions that lower a national or alien in rank, position or reputation and are designed to debase or humiliate can be a violation of Article 3.” Council of Europe, *European Convention on Nationality Explanatory Report*, (1997) ETS No. 166, paras. 16, 18.

107. See, e.g., Eric Fripp, ed., *The Law and Practice of Expulsion and Exclusion from the United Kingdom: Deportation, Removal, Exclusion and Deprivation of Citizenship* 62 (2015) (citing cases covering “discriminatory practices impeding birth registration of children of undocumented refugees in Ecuador (which would support their identification as citizens by birth on the territory), the failure by Colombia to confer its nationality on children born stateless on its territory and Zimbabwean laws denying its citizenship to the children of Zimbabwean parents born abroad.”).

108. *Id.* at 61.

109. Sarah Bantu, *Contingent Citizenship: The Law and Practice of Citizenship Deprivation in International European and National Perspectives* 36 (2015).

110. Patti Tamara Lenard, *Democracies and the Power to Revoke Citizenship*, 30 Ethics & International Affairs 73, 75 (2016).

111. See UNHCR, *Handbook on Protection of Stateless Persons* (2014), at para. 23.

112. See Audrey Macklin, *Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien*, 40 Queen's L. J. 1, 15 (2014).

113. Bronwen Manby, *Citizenship and Statelessness in Africa: The law and politics of belonging* 46 (2016).

114. Tunis Conclusions, at para. 59.

115. *Id.* at paras. 25-26.
116. UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: Report of the Secretary-General*, Dec. 19, 2013, A/HRC/25/28, at para. 33, <https://www.refworld.org/docid/52f8d19a4.html>.
117. *Expelled Dominicans and Haitians v. Dominican Republic*, Inter-American Court of Human Rights (IACtHR), Aug. 28, 2014, at para. 253.
118. Organization of American States (OAS), *American Convention on Human Rights*, Nov. 22, 1969.
119. Eve Hayes de Kalaf, Making Foreign: Legal Identity, Social Policy and the Contours of Belonging in the Contemporary Dominican Republic, in Cruz-Martinez, G. (ed.) *Welfare and Social Protection in Contemporary Latin America* (2019).
120. *Expelled Dominicans and Haitians v. Dominican Republic*, Inter-American Court of Human Rights (IACrTHR), Aug. 28, 2014, at para. 256.
121. See, e.g., *Case of the Yean and Bosico Children v. The Dominican Republic*, Inter-American Court of Human Rights (IACrTHR), 8 September 2005, <https://www.refworld.org/cases,IACRTHR,44e497d94.html>, at paras. 141-42; *Expelled Dominicans and Haitians v. Dominican Republic*, Inter-American Court of Human Rights (IACrTHR), Aug. 28, 2014, at paras. 262-264.
122. Eve Hayes de Kalaf, *Making Foreign: Legal Identity, Access to Documentation, Race and Belonging in the Contemporary Dominican Republic* (2020); Allyn Gaestel, *Stateless in the Dominican Republic: Residents stripped of citizenship*, Al Jazeera America (May 4, 2014), <http://america.aljazeera.com/articles/2014/5/4/stateless-in-the-dominicanrepublicresidentsstrippedofcitizenship.html>.
123. Dominican Republic, *Migration Law 285-04* (2004).
124. David Scott FitzGerald, *The History of Racialized Citizenship*, in Ayelet Shachar, Rainer Baubock, Irene Bloemraad, and Maarten Vink, eds., *The Oxford Handbook of Citizenship* 144 (2017).
125. Jonathan M. Katz, *What Happened When a Nation Erased Birthright Citizenship*, *The Atlantic* (Nov. 12, 2018), <https://www.theatlantic.com/ideas/archive/2018/11/dominican-republic-erased-birthright-citizenship/575527/>.
126. Allyn Gaestel, *Stateless in the Dominican Republic: Residents stripped of citizenship*, Al Jazeera America (May 4, 2014), <http://america.aljazeera.com/articles/2014/5/4/stateless-in-the-dominicanrepublicresidentsstrippedofcitizenship.html>.
127. Jonathan M. Katz, *What Happened When a Nation Erased Birthright Citizenship*, *The Atlantic* (Nov. 12, 2018), <https://www.theatlantic.com/ideas/archive/2018/11/dominican-republic-erased-birthright-citizenship/575527/>.
128. Aida Alami, *Between Hate, Hope, and Help: Haitians in the Dominican Republic*, *The New York Review of Books* (Aug. 13, 2018), <https://www.nybooks.com/daily/2018/08/13/between-hope-hate-help-haitians-in-the-dominican-republic/>.
129. Home Office, *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain*, Cm 5387, at p. 35 (Feb. 2002).
130. House of Commons Library, *Deprivation of British Citizenship and Withdrawal of Passport Facilities*, 2017, H.C. SN06820, <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06820>.
131. *Id.*
132. *Id.* at 8.
133. Patrick Weil and Nicholas Handler, *Revocation of Citizenship and Rule of Law: How Judicial Review Defeated Britain's First Denaturalization Regime*, 36 *Law and History Rev.* 296 (2018) (citing Audrey Macklin, *Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien*, *Queens Law Journal* 40 (October 2014)).
134. Victoria Parsons, *What Do We Know About Citizenship Stripping*, *The Bureau of Investigative Journalism* (Oct. 12, 2014), <https://www.thebureauinvestigates.com/stories/2014-12-10/what-do-we-know-about-citizenship-stripping>.
135. Dilwar Hussain, *Statelessness and Britain's Secret Courts*, Al Jazeera (Dec. 20, 2014), <https://www.aljazeera.com/humanrights/2014/12/statelessness-britain-secret-courts-2014121895842702446.html>; Dilly Hussain, "Theresa May Exiled Me to Pakistan Via a 'Secret Court'", *The Huffington Post* (Dec. 22, 2014), [https://www.huffingtonpost.co.uk/dilly-hussain/theresa-may-pakistan\\_b\\_6363868.html?guccounter=1&guce\\_referrer=aHR-ocHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce\\_referrer\\_sig=AQAAAFsGpsbEjHz-t2WPk42gR1GDQL16\\_J9ROli\\_iS-mdiZxz5u3hQCmPOLcS\\_Lxwwf5xonKbpMwVcR4-fdE-Bu\\_4PFjtt3We79vQpgmFWuFQ4G8Sp4zbCK8H8f4Jz-F0l6RHCxdHkhxzJZ3sj9WiytmUpbngXw2ZIGiXDG-mw96efH9NGF](https://www.huffingtonpost.co.uk/dilly-hussain/theresa-may-pakistan_b_6363868.html?guccounter=1&guce_referrer=aHR-ocHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAFsGpsbEjHz-t2WPk42gR1GDQL16_J9ROli_iS-mdiZxz5u3hQCmPOLcS_Lxwwf5xonKbpMwVcR4-fdE-Bu_4PFjtt3We79vQpgmFWuFQ4G8Sp4zbCK8H8f4Jz-F0l6RHCxdHkhxzJZ3sj9WiytmUpbngXw2ZIGiXDG-mw96efH9NGF).
136. See Open Society Justice Initiative, *Opinion on Clause 60 of the UK Immigration Bill & Article 8 of United Nations Convention on Reducing Statelessness* (Mar. 5, 2014), <https://www.justiceinitiative.org/publications/opinion-clause-60-uk-immigration-bill-and-article-8-un-convention-reducing>.
137. See *id.*
138. *Secretary of State for the Home Department v. Al-Jedda*, [2013] UKSC 62.
139. Sandra Mantu, *Citizenship in times of terror: citizenship deprivation in the UK*, Paper prepared for ECPR



Standing Groups, Warsaw (Mar 29-Apr. 2, 2015), at 19, <https://ecpr.eu/Filestore/PaperProposal/2a-b106b5-1c2a-4be4-9313-8d858890cb39.pdf>.

**140.** Open Society Justice Initiative, *Pham (previously B2) v. Home Secretary*, Open Society Foundations, <https://www.justiceinitiative.org/litigation/pham-previously-b2-v-home-secretary>.

**141.** Benjamin Weiser, *British Man Admits Past in Terror Cell in Yemen*, N.Y. Times, Jan. 8, 2016, <https://www.nytimes.com/2016/01/09/nyregion/minh-quang-pham-britain-man-linked-to-yemeni-militants-plea.html>.

**142.** Open Society Justice Initiative, *supra* note 140.

**143.** *Id.*

**144.** Nisha Kapoor, *Deport, Deprive, Extradite: 21st Century Extremism* 87 (2018).

**145.** *Id.* at 88.

**146.** *Id.*

**147.** House of Commons Library, *Deprivation of British Citizenship and Withdrawal of Passport Facilities*, 2017, H.C. SN06820, <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06820>.

**148.** Tufyal Choudhury, *The radicalization of citizenship deprivation*, *Critical Social Policy* 37(2), 225-244.

**149.** Nisha Kapoor & Kasia Narkowicz, *Unmaking citizens: passport removals, pre-emptive policing and the reimagining of colonial governmentalities*, 42 *Ethnic and Racial Studies* 45, 48 (2017).

**150.** *Id.*

**151.** Don Davies, NDP MP for Vancouver Kingsway (B.C.), during Citizenship Act Government Orders, June 3, 2016, <https://openparliament.ca/bills/42-1/C-6/>.

**152.** Don Davies, NDP MP for Vancouver Kingsway (B.C.), during Citizenship Act Government Orders, June 3, 2016, <https://openparliament.ca/bills/42-1/C-6/>.

**153.** Tu Thanh Ha, *Federal Court Voids Canadian Citizenship Revocation for 312 People*, *The Globe and Mail* (July 12, 2017), <https://www.theglobeandmail.com/news/national/federal-court-voids-canadian-citizenship-revocation-for-312-people/article35675424/>.

**154.** *Id.*

**155.** *Hassouna v. Canada* (Citizenship and Immigration), [2017] 4 FCR 555, 2017 FC 473 (CanLII), <http://canlii.ca/t/h4052>.

**156.** Tu Thanh Ha, *supra* note 153.

**157.** Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration*

*Agenda*, N.Y. Times (Dec. 23 2017), <https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html>.

**158.** *Id.*

**159.** Civil Division, *FY2020 Budget & Performance Plans*, at 16 (Mar. 2019), <https://www.justice.gov/jmd/page/file/1143936/download>.

**160.** Civil Division, *FY2020 Budget & Performance Plans*, at 26 (Mar. 2019), <https://www.justice.gov/jmd/page/file/1143936/download>.

**161.** These former peaks, which are reflected in the higher averages under the Reagan and George W. Bush administrations, may be attributable to the passage of the 1986 Immigration Reform and Control Act (IRCA), which pressed for the deportation of all immigrants convicted of a deportable offenses, and the events of September 11, 2001. See American Immigration Council, *The Growth of the U.S. Deportation Machine – More Immigrants Are Being “Removed” from the United States Than Ever Before* (Mar. 1, 2014), <https://www.americanimmigrationcouncil.org/research/growth-us-deportation-machine>. Most electronic files for civil denaturalization cases are not accessible through PACER. These files can only be obtained directly from courthouses across the country. The findings also present publicly available historical data. Freedom of Information Act requests filed in December 2018 to three divisions within the Department of Justice (DOJ) and USCIS, a component of the Department of Homeland Security (DHS), concerning the use of denaturalization, have not yielded significant information. The Civil Division partially responded to narrowed requests for historical data, citing 5 U.S.C. § 552(b)(5)-(6) exemptions. The Criminal Division of DOJ and Executive Office of U.S. Attorneys (which house information relating to criminal denaturalization), and USCIS (which retains information relating to denaturalization investigations, statelessness and deportations), did not supply information responsive to the request.

**162.** Data provided by the U.S. government was organized by calendar years, thus precise comparisons by presidential administrations was not possible. U.S. presidential annual terms run from January 20th through January 19th. The data used to generate this graph do not include the additional seven cases identified by the Open Society Justice Initiative in its independent review.

**163.** A 2017 article on § 1425 prosecutions states that 46 criminal denaturalization cases were brought in 2016, based on data from the Executive Office for United States Attorneys derived from the United States Attorneys' Case Management System. See U.S. Dep't of Justice Executive Office for U.S. Attorneys, *Civil Immigration Enforcement* and the Office of Immigration Litigation - District Court Section, volume 65, number 3 (Jul. 2017), <https://www.justice.gov/usao/page/file/984701/download>.

**164.** *Drug dealers, criminals, rapists: What Trump thinks of Mexicans*, BBC News (Aug. 31, 2016), <https://www.bbc>

com/news/av/world-us-canada-37230916/drug-dealers-criminals-rapists-what-trump-thinks-of-mexicans.

**165.** Stef W. Kight, *Report: Trump said Haitian Immigrants ‘All Have AIDS,’* Axios (Dec. 23, 2017), <https://www.axios.com/report-trump-said-haitian-immigrants-all-have-aids-1515110820-4d6f7da4-ca7a-4e01-9329-7f25b49e709c.html>.

**166.** Alex Daugherty, *Trump called Haiti a ‘sh--hole’ campaigning in Miami in 2016, Woodward’s book says,* Miami Herald (Sept. 11, 2018), <https://www.miamiherald.com/news/politics-government/article218202540.html>.

**167.** Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda,* N.Y Times, Dec. 23 2017, <https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html>.

**168.** Current as of May 2019.

**169.** Eleven (11) cases were closed or dismissed.

**170.** In 72 cases against naturalized U.S. citizens, the case was resolved against them. At the time of review, one denaturalization was on hold pending appeal, and in a handful of cases revocation had not yet been ordered.

**171.** These figures cover only those cases for which the Justice Initiative was able to accurately identify the relevant information from the case materials obtained. Median age was 51 years old, mode of 50, and age range between 24-72 years old (N = 144); median naturalization date was 9-10 years, with a mode of 11 years (N = 131).

**172.** Bond amounts were calculated based on 60 criminal cases in which bail was ordered.

**173.** Press Release, Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time,* Prison Policy Initiative (May 10, 2016), <https://www.prisonpolicy.org/reports/incomejails.html>.

**174.** Very few case files mentioned Operation Janus or Operation Second Look. Cases in which a fingerprint analysis or failure to disclose a prior removal were mentioned as evidence against the defendant were coded as Operation Janus/Operation Second Look cases. This is likely a conservative estimate. “Fraudulent documents” cases and “immigration issue” cases may also be Operation Janus/Operation Second Look cases, though fingerprinting or a prior removal order were not mentioned. Cases coded as “immigration issue” include allegations such as not disclosing an alias. “Fraudulent document” cases cover, for example, allegations that the defendant used another person’s passport or an alias to procure a document used to enter the U.S., or to apply for a benefit. The Justice Initiative does not have disaggregated data on case types in pre-2017 cases.

**175.** See Chapter IV, *Political Attacks on Citizenship by Birth*

*in the United States.*

**176.** See Immigration Direct, *How Difficult is it to Become a US Citizen,* <https://www.uscitizenship.info/articles/how-difficult-is-it-to-become-a-us-citizen/>

**177.** Citizenship acquired by naturalization or by birth may be voluntarily relinquished.

**178.** Comment, *Denaturalization of Nazi War Criminals: Is There Sufficient Justice for Those Who Would Not Dispense Justice,* 40 Md. L. Rev. 39, 46-47 (1981).

**179.** See *Gorbach v. Reno,* 219 F.3d 1087, 1094 (9th Cir. 2000) (USCIS is permanently enjoined from revoking citizenship status); see also Immigrant Legal Resource Center (ILRC), *Practice Advisory: Denaturalization* (December 2018), at 9 (“Administrative Denaturalization Enjoined”).

**180.** Nikki Marquez & Eric Cohen, *Denaturalization – Understanding the Process and Recent Increases in Denaturalization Efforts,* ILRC (Dec. 2018), [https://www.ilrc.org/sites/default/files/resources/denaturalization\\_und\\_prs\\_rcnt\\_effrts-20181221.pdf](https://www.ilrc.org/sites/default/files/resources/denaturalization_und_prs_rcnt_effrts-20181221.pdf).

**181.** In December 2018, the Justice Initiative requested this specific information through a Freedom of Information Act request, but had not received responsive information at the time of publication.

**182.** 8 U.S.C. § 1451(a); INA § 340(a).

**183.** 8 U.S.C. § 1451(e), referencing 18 U.S.C. § 1425.

**184.** 8 U.S.C. § 1440(c); INA § 329(c).

**185.** 8 U.S.C. § 1451(a); INA § 340(a).

**186.** Nikki Marquez & Eric Cohen, *Denaturalization – Understanding the Process and Recent Increases in Denaturalization Efforts,* ILRC, at 3 (Dec. 2018), [https://www.ilrc.org/sites/default/files/resources/denaturalization\\_und\\_prs\\_rcnt\\_effrts-20181221.pdf](https://www.ilrc.org/sites/default/files/resources/denaturalization_und_prs_rcnt_effrts-20181221.pdf).

**187.** 12 USCIS Policy Manual L.2 § (B)(1), Grounds for Revocation, <https://www.uscis.gov/policy-manual/volume-12-part-1-chapter-2> (emphasis added); 8 U.S.C. § 1451(a). Concealments or misrepresentations can be made orally, for instance, during the naturalization interview, or written in the naturalization application. USCIS also considers omissions to constitute concealments or misrepresentations. 12 USCIS Policy Manual L.2 § (B)(1), Grounds for Revocation, available at <https://www.uscis.gov/policy-manual/volume-12-part-1-chapter-2>.

**188.** *Kungys v. United States,* 485 U.S. 759, 760 (1988).

**189.** *Id.* at 761.

**190.** 12 USCIS Policy Manual L.2 § (B)(1), Grounds for Revocation, <https://www.uscis.gov/policy-manual/volume-12-part-1-chapter-2>.

- 191.** Form N-400, Application for Naturalization 14 (2016), <https://www.uscis.gov/n-400> (emphasis in original). The provision does not qualify whether the crime to be reported is a crime under U.S. law, or a crime under any jurisdiction, which would implicate, for example, laws against political speech or gender-bias laws. The question also does not account for cultural differences and customs under which something not considered illegal in a foreign jurisdiction might be considered criminal in the United States—for example, polygamy or legal drinking age.
- 192.** *United States v. Oribello Eguielos*, 2019 WL 1643234, at \*1 (E.D. Cal. Apr. 16, 2019) (internal citations omitted).
- 193.** Cong. Red. Vol. 107, pt. 4, at 18283 (1961).
- 194.** 12 USCIS Policy Manual L.2 § (B)(1), Grounds for Revocation, available at <https://www.uscis.gov/policy-manual/volume-12-part-l-chapter-2> (citing INA § 340(a)).
- 195.** 12 USCIS Policy Manual L.2 § (B)(1), Grounds for Revocation, available at <https://www.uscis.gov/policy-manual/volume-12-part-l-chapter-2> (citing INA § 340(a)).
- 196.** See 8 U.S.C. § 1429.
- 197.** See 8 U.S.C. § 1429.
- 198.** See ILRC, at 5 (citing *U.S. v. Kaur*, 2014 WL 285077 (E.D. Pa. 2014) (revoking naturalization where the court concluded that derivative asylum status and adjustment were not lawfully obtained for a derivative asylee when principal’s asylum grant was not valid); *Turfah v. USCIS*, 845 F.3d 668 (6th Cir. 2017) (not permitting citizenship where individual received his legal permanent resident status by mistake by the government, even though the individual did not commit any fraud in obtaining his status)).
- 199.** 12 USCIS Policy Manual L.3, Continuous Residence, <https://www.uscis.gov/policy-manual/volume-12-part-d-chapter-3>.
- 200.** USCIS, *Continuous Residence and Physical Presence Requirements for Naturalization* (Apr. 17, 2019), <https://www.uscis.gov/us-citizenship/citizenship-through-naturalization/continuous-residence-and-physical-presence-requirements-naturalization>.
- 201.** There are some exceptions to the physical presence requirement, such as for those applicants working abroad for the U.S. government. See Section 316 paragraphs (b), (c), and (f).
- 202.** See INA § 101(f).
- 203.** Immigration and Nationality Act, 8 U.S.C. § 1101(f)(1) (1952), <https://www.law.cornell.edu/uscode/text/8/1101>.
- 204.** Catholic Legal Immigration Network, *Immigration Law & The Criminal Client*, Chapter 4 Good Moral Character, at 2, [https://cliniclegal.org/sites/default/files/cerra/March-16-](https://cliniclegal.org/sites/default/files/cerra/March-16-Workshops/Good-Moral-Character-and-Naturalization/Good-Moral-Character-Chapter-CLINIC-Crimes-Manual.pdf)
- Workshops/Good-Moral-Character-and-Naturalization/Good-Moral-Character-Chapter-CLINIC-Crimes-Manual.pdf.
- 205.** *Id.* at 3.
- 206.** See INA § 101(a)(43). See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, 110 Stat. 3009-546 (September 30, 1996).
- 207.** INA § 101(a)(43)(P).
- 208.** INA § 101(a)(43)(T).
- 209.** 12 USCIS, Policy Manual, Part F, Good Moral Character, Chapter 5 – Conditional Bars for Acts in Statutory Period (June 6, 2019), <https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-5#footnotelink-5>.
- 210.** USCIS summarizes that “[w]hether an offense is a CIMT is largely based on whether the offense involves willful conduct that is morally reprehensible and intrinsically wrong, the essence of which is a reckless, evil or malicious intent.” *Id.*
- 211.** See USCIS, *Policy Alert* (Apr. 19, 2019), <https://www.uscis.gov/sites/default/files/policymanual/updates/20190419-ControlledSubstanceViolations.pdf>.
- 212.** USCIS, *supra* note 210.
- 213.** See INA § 316(a); 8 CFR 316.11.
- 214.** 12 USCIS, Policy Manual Part D, General Naturalization Requirements, Chapter 7 – Attachment to the Constitution, (June 6, 2019), available at <https://www.uscis.gov/policy-manual/volume-12-part-d-chapter-7>. See generally Aram A. Gavor and Daniel Miktus, *Snap: How the Moral Elasticity of the Denaturalization Statute Goes Too Far*, 23 Wm. & Mary Bill Rts. J. 637, 640 (2015) (calling for elimination of attachment requirement as unconstitutional).
- 215.** 12 USCIS, Policy Manual Part D, General Naturalization Requirements, Chapter 7 – Attachment to the Constitution (June 6, 2019), <https://www.uscis.gov/policy-manual/volume-12-part-d-chapter-7>.
- 216.** *Id.*
- 217.** Comment, *Denaturalization of Nazi War Criminals: Is There Sufficient Justice for Those Who Would Not Dispense Justice*, 40 Md. L. Rev. 39, 54-55 (1981).
- 218.** See *Fedorenko v. United States*, 1010 S. Ct. 737 (1981); Comment, *Denaturalization of Nazi War Criminals: Is There Sufficient Justice for Those Who Would Not Dispense Justice*, 40 Md. L. Rev. 39, 85 (1981) (“In the 1952 version of the [Immigration and Naturalization] Act, Congress deleted the ground of illegal procurement, thereby placing a uniform requirement that the Government must prove intent to be triumphant in a denaturalization case. In apparent reaction to the Court’s imposition of a heavy burden of proof, Congress in 1961 once again included the ground of illegal

procurement in the denaturalization statute. Notwithstanding that the Court has decided few denaturalization cases since the effective date of the 1961 amendment, the *Fedorenko* case is the first indication in several decades that the Court will countenance the denaturalization of a citizen based solely on the ground of illegal procurement.”).

**219.** According to the civil statute, 8 U.S.C. § 1451, subsection (e), upon criminal conviction, the court must “declare the certificate of naturalization of such person to be canceled.” If the offender is a birthright citizen, then this is a complete defense against denaturalization, however the person may still be imprisoned.

**220.** Comment, *Denaturalization of Nazi War Criminals: Is There Sufficient Justice for Those Who Would Not Dispense Justice*, 40 Md. L. Rev. 39, 46-47 (1981).

**221.** 18 U.S.C. § 3291.

**222.** *Maslenjak v. United States*, 137 S. Ct. 1918 (2017) Nikki Marquez & Eric Cohen, *Denaturalization – Understanding the Process and Recent Increases in Denaturalization Efforts*, ILRC, at 8 (Dec. 2018), [https://www.ilrc.org/sites/default/files/resources/denaturalization\\_und\\_prcc\\_rcnt\\_ef-frts-20181221.pdf](https://www.ilrc.org/sites/default/files/resources/denaturalization_und_prcc_rcnt_ef-frts-20181221.pdf).

**223.** For instance, the Ninth Circuit read the statute to require “materiality in order for misrepresentation to be contrary to law,” *United States v. Puerta*, 982 F.2d 1297, 1301 (9th Cir. 1992); whereas the Southern District of New York did not require materiality, *United States v. Rogers*, 898 F. Supp. 219, 220-21 (S.D.N.Y. 1995).

**224.** *Maslenjak v. United States*, 137 S. Ct. 1918, 1925, 198 L. Ed. 2d 460 (2017)

**225.** *Id.* The court remanded the case and the Sixth Circuit held oral arguments on October 3, 2018. See *Audio tape: United States v. Divna Maslenjak* (Oct. 3, 2018), <https://www.courtlistener.com/audio/58819/united-states-v-divna-maslenjak/>. At the time of writing, the Sixth Circuit has not decided the matter.

**226.** Cassandra Burke Robertson and Irina D. Manta, (*Un*) *Civil Denaturalization*, 94 New York University Law Review 402, 446 (2019), <https://www.nyulawreview.org/wp-content/uploads/2019/06/NYULawReview-94-3-RobertsonMantapdf.pdf> (critiquing the court’s textual approach to the phenomenon of denaturalizations, rather than confronting broader constitutional questions raised by their existence and operation).

**227.** *Id.* The court remanded the case and the Sixth Circuit held oral arguments on October 3, 2018. See *Audio tape: U.S. v. Divna Maslenjak* (Oct. 3, 2018), <https://www.courtlistener.com/audio/58819/united-states-v-divna-maslenjak/>. At the time of writing, the Sixth Circuit had not decided the matter.

**228.** Patrick Weil, *The Sovereign Citizen: Denaturalization and the Origins of the American Republic* (2013).

**229.** As noted in a U.S. Immigration and Customs Enforcement (ICE) Denaturalization Handbook, “Prosecution under 8 U.S.C. § 1425 also is an important consideration for subsequent removal proceedings because an attorney could argue that a conviction for this offense is a crime involving moral turpitude or an aggravated felony.” U.S. Immigration and Customs Enforcement (ICE), Office of Investigations, *Denaturalization Investigations Handbook*, OI HB 08-01, Jan. 15, 2008, <https://www.unicornriot.ninja/wp-content/uploads/2018/02/Denaturalization-full-hsi.pdf>. For a list of removable offenses see Section 237 of the INA, 8 U.S.C. § 1227, <http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1227&num=0&edition=prelim>.

**230.** American Immigration Council, *The Growth of the U.S. Deportation Machine – More Immigrants Are Being “Removed” from the United States Than Ever Before* (Mar. 1, 2014), <https://www.americanimmigrationcouncil.org/research/growth-us-deportation-machine>.

**231.** ICE, Office of Investigations, *Denaturalization Investigations Handbook*, OI HB 08-01, 14-15, Jan. 15, 2008, <https://www.unicornriot.ninja/wp-content/uploads/2018/02/Denaturalization-full-hsi.pdf>.

**232.** *USA v. Okwampa*, 1:17-cr-71 (Doc. 17-1), Guilty Plea and Plea Agreement 4-5 (May 11, 2017) (emphasis added).

**233.** The Naturalization Act of 1906, Pub. L. No. 59-338, § 15.

**234.** Nationality Act of 1940, H.R. 9980, Pub. L. No. 76-853, § 338.

**235.** U.S. Const. amend. IXX (1920).

**236.** *United States v. Bhagat Singh Thind*, 261 U.S. 204, 215 (1923); Cassandra Burke Robertson and Irina D. Manta, (*Un*) *Civil Denaturalization*, 94 New York University Law Review 402, 425 (2019), <https://www.nyulawreview.org/wp-content/uploads/2019/06/NYULawReview-94-3-RobertsonMantapdf.pdf>.

**237.** See Cassandra Burke Robertson and Irina D. Manta, (*Un*) *Civil Denaturalization*, 94 New York University Law Review 402, 425 (2019), <https://www.nyulawreview.org/wp-content/uploads/2019/06/NYULawReview-94-3-RobertsonMantapdf.pdf> (citing the Mary Das case).

**238.** *Id.*

**239.** *United States v. Lopez*, 704 F.2d 1382, 1387 (5th Cir. 1983); see also *United States v. Ness*, 245 U.S. 319 (1917) (“Due to widespread fraud and abuse in the procurement of naturalization, Act of June 29, 1906, of which predecessor to 18 U.S.C.S. § 1425 was part, passed as attempt to remedy and prevent occurrence of fraud in naturalization proceedings.”); *Bindczyck*, 342 U.S. at 79, 82 (“[T]he history of the Act of 1906 makes clear that elections

could be influenced by irregular denaturalizations as well as by fraudulent naturalizations.”).

**240.** The Naturalization Act of 1906, Pub. L. No. 59-338, § 15; *Gorbach v. Reno*, 219 F.3d 1087, 1099-1100 (9th Cir. 2000).

**241.** *United States v. Adielizio*, 77 F.2d 841 (2d Cir. 1935) (“Any doubt as to whether the Act of 1870 purported to punish the procurement by fraud of certificates which did not relate to naturalization must, under well-recognized principles, be construed against the broadening the scope of a criminal statute.”); see generally *Amouzadeh v. Winfrey*, 467 F.3d 451, 457 (5th Cir. 2006) (“[There is] no basis for concluding that Congress intended to criminalize procurement of naturalization that is contrary to law when applicant or procurer does not know that naturalization is contrary to law[.]”).

**242.** See Patrick Weil, *The Sovereign Citizen: Denaturalization and the Origins of the American Republic* 52 (2013) (drawing distinction between administrative “clean up” in the early 20<sup>th</sup> Century and political denaturalization after World War I).

**243.** Memorandum from Sam Bernsen, Gen. Counsel, U.S. Immigration and Naturalization Service (INS), *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* at 4 (Jul. 15, 1976), <https://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf>.

**244.** ICE, Special Agent’s Field Manual, *Chapter 22 - Denaturalization Investigations* (Jan. 15, 2008), <https://www.hoppocklawfirm.com/wp-content/uploads/2019/02/Pre-2008-Denatz-Handbook.pdf>. (This manual was in effect until 2008, at which time it was superseded by OI HB 08-01, ICE’s Denaturalization Investigations Handbook, which does not reference prioritization).

**245.** *Id.*

**246.** Patrick Weil, *The Sovereign Citizen: Denaturalization and the Origins of the American Republic* 30 (2013).

**247.** Comment, *Denaturalization of Nazi War Criminals: Is There Sufficient Justice for Those Who Would Not Dispense Justice?* 40 Md. L. Rev. 39, 54 (1981); See also Aram A. Gavoor and Daniel Miktus, *Snap: How the Moral Elasticity of the Denaturalization Statute Goes Too Far*, 25 Wm. & Mary Bill Rts. J. 637, 651 n.101 (2015) (citing H.R.REP.NO. 72-1353 (1932), S.REP.72-808(1932), and H.R.REP.NO. 74-1023 (1935)); *Schneiderman*, 320 U.S. 118, 132 n.8 (1942) (“Bills to write a definition of ‘communist’ into the Immigration and Deportation Act of 1918 as amended . . . and to provide for the deportation of ‘communists’ failed to pass Congress in 1932 and again in 1935.”).

**248.** Comment, *Denaturalization of Nazi War Criminals: Is There Sufficient Justice for Those Who Would Not Dispense Justice?* 40 Md. L. Rev. 39, 55 (1981).

**249.** Patrick Weil, *The Sovereign Citizen: Denaturalization*

*and the Origins of the American Republic* 52 (2013).

**250.** This figure is derived from data on Naturalization Cancellations in the United States, 1907-1973, compiled by Patrick Weil. See Patrick Weil, *The Sovereign Citizen: Denaturalization and the Origins of the American Republic* Appendix 3 (2013).

**251.** Aram A. Gavoor and Daniel Miktus, *Snap: How the Moral Elasticity of the Denaturalization Statute Goes Too Far*, 25 Wm. & Mary Bill Rts. J. 637, 651 (2015).

**252.** Patrick Weil, *The Sovereign Citizen: Denaturalization and the Origins of the American Republic* 95 (2013); Cassandra Burke Robertson and Irina D. Manta, *(Un)Civil Denaturalization*, 94 New York University Law Review 402, 427 (2019), <https://www.nyulawreview.org/wp-content/uploads/2019/06/NYULawReview-94-3-RobertsonMantapdf.pdf>.

**253.** See Patrick Weil, *The Sovereign Citizen: Denaturalization and the Origins of the American Republic* 56 (2013) (categories added included draft evasion, joining a foreign army, and participating in foreign elections).

**254.** Cassandra Burke Robertson and Irina D. Manta, *(Un)Civil Denaturalization*, 94 New York University Law Review 402, 427 (2019), <https://www.nyulawreview.org/wp-content/uploads/2019/06/NYULawReview-94-3-RobertsonMantapdf.pdf>.

**255.** H.R. Rep. No. 82-1365, 1740, 1741 (1952) (“The bill changes the basis for judicial revocation of naturalization from fraud and illegal procurement to procurement by concealment of a material fact or by willful misrepresentation.”). See also Aram A. Gavoor and Daniel Miktus, *Snap: How the Moral Elasticity of the Denaturalization Statute Goes Too Far*, 25 Wm. & Mary Bill Rts. J. 637 (2015).

**256.** S. Rep. No. 1515, 81st Cong., 1st Sess. 755-58 (1950).

**257.** S. Rep. No. 1515, 81st Cong., 1st Sess. 769 (1950). Aram A. Gavoor and Daniel Miktus, *Snap: How the Moral Elasticity of the Denaturalization Statute Goes Too Far*, 25 Wm. & Mary Bill Rts. J. 637, 653 n.115 (2015) (citing H.R. Rep. No. 82-1365, 1740, 1741 (1952) (“The bill changes the basis for judicial revocation of naturalization from fraud and illegal procurement to procurement by concealment of a material fact or by willful misrepresentation.”)).

**258.** S. Rep. No. 1515, 81st Cong., 1st Sess. 769 (1950).

**259.** See Marion T. Bennett, *American Immigration Policies* 154 (1963).

**260.** Andrew Nagorski, *The Nazi Hunters* 247 (2016).

**261.** *Id.* at 244.

**262.** *Id.*

**263.** The National Security Archive, *Justice Department Censors Nazi-Hunting History*, The George Washington

University (Nov. 24, 2010), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB331/index.htm>.

**264.** Judy Feigin, *The Office of Special Investigations: Striving for Accountability in the Aftermath of the Holocaust* 49 (December 2006), <https://www.nytimes.com/interactive/projects/documents/confidential-report-provides-new-evidence-of-notorious-nazi-cases?ref=us#p=1>.

**265.** *Id.* at 526.

**266.** Andrew Nagorski, *The Nazi Hunters* 318 (2016). Patrick Weil recites the following figures between 1979 and 2012: “OSI and its successor the Human Rights and Special Prosecutions Section, pursued the denaturalization or deportation of 137 individuals on the basis of participation in Nazi-sponsored acts of persecution. 86 such persons have been denaturalized (the last one in 2007) and 67 have been removed.”). Patrick Weil, *The Sovereign Citizen: Denaturalization and the Origins of the American Republic* 178 (2013).

**267.** Public Law 108-408, § 5501-26, 118 Stat. 3638 (2004).

**268.** Judy Feigin, *The Office of Special Investigations: Striving for Accountability in the Aftermath of the Holocaust* 49 (December 2006), <https://www.nytimes.com/interactive/projects/documents/confidential-report-provides-new-evidence-of-notorious-nazi-cases?ref=us#p=1> (citing three OSI cases to come before the Supreme Court: *Federenko v. United States* (1981), *Kungys v. United States* (1988), and *United States v. Balsys* (1998)).

**269.** Comment, *Denaturalization of Nazi War Criminals: Is There Sufficient Justice for Those Who Would Not Dispense Justice?*, 40 Maryland L. Rev. 39, 88-89 (1981).

**270.** Beth Van Schaack, *EXCLUSIVE: FBI’s War Crimes Unit on the Chopping Block*, Just Security (Feb. 10, 2019), <https://www.justsecurity.org/62548/exclusive-fbis-war-crimes-unit-chopping-block/>.

**271.** See Gregory S. Gordon, *OSI’s Expanded Jurisdiction under the Intelligence Reform and Terrorism Prevention Act of 2004*, in 54 U.S. Attorneys’ Bulletin (January 2006), at 24. IRTPA gave OSI authority over cases of naturalized citizens “who participated abroad in acts of genocide or, acting under color of foreign law, participated in acts of torture or extrajudicial killing.” *Id.* at 25.

**272.** See United States Department of Justice Office of the Inspector General (DOJ-OIG), *Special Report: An Investigation of the INS’s Citizenship USA Initiative*, <https://oig.justice.gov/special/0007/>.

**273.** See Rosemary Jenks, *Testimony Prepared for the U.S. House of Representatives, Committee on the Judiciary Subcommittee on Immigration, Border Security, and Claims*, Center for Immigration Studies (CIS) (Apr. 30, 1997), <https://cis.org/United-States-Citizenship>. In addition to IRCA eligibility, CIS cites the passage of Proposition 187 in

California (November 1994) and proposed legislation to restrict access to public benefits for non-citizens as negative incentives that could drive an increase in applications for naturalization.

**274.** DOJ-OIG, *Special Report: An Investigation of the INS’s Citizenship USA Initiative*, <https://oig.justice.gov/special/0007/>.

**275.** DOJ-OIG, *Special Report: An Investigation of the INS’s Citizenship USA Initiative – Criminal History*, 155 n.143, <https://oig.justice.gov/special/0007/crimhist.pdf>.

**276.** Patrick Weil, *The Sovereign Citizen: Denaturalization and the Origins of the American Republic* 179 (2013).

**277.** Timothy M. Belsan, Aram A. Gavoor, Jennifer E. Levy, and Holly D’Andrea-Read, *Civil Immigration Enforcement in National Security Cases*, in 65 U.S. Attorneys’ Bulletin (July 2017), at 19, <https://www.justice.gov/usao/page/file/984701/download>.

**278.** In February 2018, a leaked copy of the “Denaturalization Investigations Handbook” dated January 15, 2008, appeared. ICE, Office of Investigations, *Denaturalization Investigations Handbook*, OI HB 08-01, Jan. 15, 2008, <https://www.unicornriot.ninja/wp-content/uploads/2018/02/Denaturalization-full-hsi.pdf>. The handbook “includes information an agent would consult on whether to attempt stripping citizenship, and the intricacies of building up the case against a naturalized citizen.” Government Attic, a public records website, obtained the HSI “Special Agent Manual Index” through a FOIA request on January 28, 2018, and indicates that, at least until 2016, the leaked version remained in use. Government Attic, *ICE FOIA Case Number 2017-IC-FO-16778* (Jan. 29, 2018), [https://www.governmentattic.org/26docs/ICE-HSISpecAgentManTOC\\_2016.pdf](https://www.governmentattic.org/26docs/ICE-HSISpecAgentManTOC_2016.pdf).

**279.** ICE, Office of Investigations, *Denaturalization Investigations Handbook*, OI HB 08-01, Jan. 15, 2008, <https://www.unicornriot.ninja/wp-content/uploads/2018/02/Denaturalization-full-hsi.pdf>.

**280.** *Id.*

**281.** *Id.*

**282.** *Id.*

**283.** *Id.*

**284.** DHS-OIG, *Potentially Ineligible Individuals Have Been Granted U.S. Citizenship Because of Incomplete Fingerprint Records*, OIG-16-130, at 1 n.1 (Sept. 8, 2016), <https://www.oig.dhs.gov/assets/Mgmt/2016/OIG-16-130-Sept16.pdf>.

**285.** *Id.* at 1.

**286.** *Id.* at 6.

**287.** See 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>

**288.** DHS-OIG, *Potentially Ineligible Individuals Have Been Granted U.S. Citizenship Because of Incomplete Fingerprint Records*, OIG-16-130, at 1 (Sept. 8, 2016), <https://www.oig.dhs.gov/assets/Mgmt/2016/OIG-16-130-Sep16.pdf>.

**289.** *Id.* at 8. The 2016 DHS-OIG report noted that DHS “appears to be taking actions...[and] has established a team to review the records of the 858 aliens with final deportation orders who were naturalized under a different identity. The team will also review the 953 cases that OPS identified more recently...During these reviews, the team will determine which individuals appear to have been ineligible for naturalization and will coordinate with DOJ for possible prosecution and denaturalization.”

**290.** USCIS, *USCIS Partners with Justice Department and Secures First Denaturalization As a Result of Operation Janus* (Jan. 10, 2018), <https://www.uscis.gov/news/news-releases/uscis-partners-justice-department-and-secures-first-denaturalization-result-operation-janus>.

**291.** ICE, Department of Homeland Security, *Budget Overview - Fiscal Year 2019 Congressional Justification*, <https://www.dhs.gov/sites/default/files/publications/U.S.%20Immigration%20and%20Customs%20Enforcement.pdf>.

**292.** Amy Taxin, *APNewsBreak: US Launches Bid to Find Citizenship Cheaters*, Associated Press (June 11, 2018), <https://apnews.com/1da389a535684a5f9d-oda74081c242f3>.

**293.** *Id.*

**294.** C-SPAN, *United States Citizenship and Immigration Services (USCIS) Director Frank Cissna addresses annual immigration law and policy conference* (Oct. 22, 2018), [https://archive.org/details/CSPAN3\\_20181022\\_195100\\_U.S.\\_Citizenship\\_Immigration\\_Services\\_Director\\_Frank\\_Cissna\\_Addresses](https://archive.org/details/CSPAN3_20181022_195100_U.S._Citizenship_Immigration_Services_Director_Frank_Cissna_Addresses).

**295.** See Frank Cissna, *Director USCIS, Director's Remarks, 15th Annual Immigration Law and Policy Conference Organized by the Migration Policy Institute, Georgetown Law* (Oct. 1, 2018), [https://www.uscis.gov/sites/default/files/files/nativedocuments/Directors\\_Remarks\\_at\\_the\\_15th\\_Annual\\_Immigration\\_Law\\_and\\_Policy\\_Conference.pdf](https://www.uscis.gov/sites/default/files/files/nativedocuments/Directors_Remarks_at_the_15th_Annual_Immigration_Law_and_Policy_Conference.pdf).

**296.** Civil Division, *FY2020 Budget & Performance Plans*, at 26 (Mar. 2019), <https://www.justice.gov/jmd/page/file/1143936/download>.

**297.** Cassandra Burke Robertson and Irina D. Manta, (*Un*) *Civil Denaturalization*, 94 New York University Law Review 402, 404-05 (2019), <https://www.nyulawreview.org/wp-content/uploads/2019/06/NYULawReview-94-3-RobertsonMantapdf.pdf>.

**298.** *Schneiderman v. United States*, 320 U.S. 118 (1943).

**299.** Adam Gabbatt, *Donald Trump's tirade on Mexico's 'drugs and rapists' outrages US Latinos*, The Guardian (June 16, 2015), <https://www.theguardian.com/us-news/2015/jun/16/donald-trump-mexico-presidential-speech-lati-no-hispanic>.

**300.** Jeff Sessions, *Introduction*, in 65 U.S. Attorneys' Bulletin (July 2017), at 1, <https://www.justice.gov/usao/page/file/984701/download>.

**301.** Interview notes on file with the Open Society Justice Initiative.

**302.** See Judy Feigin, *The Office of Special Investigations: Striving for Accountability in the Aftermath of the Holocaust* (2006), <https://www.nytimes.com/interactive/projects/documents/confidential-report-provides-new-evidence-of-notorious-nazi-cases?ref=us#p=1>; Andrew Nagorski, *The Nazi Hunters* (2016).

**303.** Maryam Saleh, *Trump Administration is Spending Enormous Resources to Strip Citizenship from a Florida Truck Driver*, The Intercept, (Apr. 4, 2019), <https://theintercept.com/2019/04/04/denaturalization-case-citizenship-parvez-khan/>.

**304.** U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security, *Budget Overview - Fiscal Year 2019 Congressional Justification*, at 5, <https://www.dhs.gov/sites/default/files/publications/USCIS%20FY19%20CJ.pdf>

**305.** Civil Division, *FY2020 Budget & Performance Plans*, 16 (Mar. 2019), <https://www.justice.gov/jmd/page/file/1143936/download>.

**306.** USCIS, *Historical National Average Processing Time for All USCIS Offices*, <https://egov.uscis.gov/processing-times/historic-pt>.

**307.** *Id.*

**308.** Boundless, *How Long Does it Take to Get U.S. Citizenship After Applying*, <https://www.boundless.com/immigration-resources/how-long-does-it-take-to-get-citizenship-after-applying/>

**309.** Miriam Jordan, *Wait Times for Citizenship have Doubled in the Last Two Years*, N.Y. Times, Feb. 21, 2019, <https://www.nytimes.com/2019/02/21/us/immigrant-citizenship-naturalization.html>

**310.** *Id.*

**311.** *Id.*

**312.** *Id.*

**313.** William A. Kandel, *U.S. Citizenship and Immigration Services (USCIS) Functions and Funding*, Congressional Research Service R44038, 7-5700 (May 15, 2015), <https://>

314. Jordan, *supra* note 309.

315. Asian Americans Advancing Justice, *Keep the Path to Citizenship Open – Tell USCIS to Reject the Proposed Changes to Fee Waiver Eligibility*, [https://advancingjustice.salsalabs.org/protectfeewaivers/index.html?eType=E-mailBlastContent&eId=2f-3d730d-4301-4987-9f79-c172046c706c&sl\\_tc=feewaive-remail](https://advancingjustice.salsalabs.org/protectfeewaivers/index.html?eType=E-mailBlastContent&eId=2f-3d730d-4301-4987-9f79-c172046c706c&sl_tc=feewaive-remail)

316. See e.g., Carlotta Mohamed, *LIC Clinic Helps Immigrants Apply for Citizenship*, Times Ledger News (Aug. 8, 2018), [https://www.timesledger.com/stories/2018/31/naturalizationclinic\\_2018\\_o8\\_o3\\_q.html](https://www.timesledger.com/stories/2018/31/naturalizationclinic_2018_o8_o3_q.html) (“there is now a general feeling of fear about becoming denaturalized, since it’s a risky time to apply for citizenship”).

317. John Ganz, *Trump’s New Target in the Politics of Fear: Citizenship*, N.Y. Times, July 23, 2018, <https://www.nytimes.com/2018/07/23/opinion/trump-birthright-citizenship-mccarthy.html>.

318. INA § 340(d); 8 USC § 1451(d).

319. Nikki Marquez & Eric Cohen, *Denaturalization – Understanding the Process and Recent Increases in Denaturalization Efforts*, ILRC, at 10 (Dec. 2018), [https://www.ilrc.org/sites/default/files/resources/denaturalization\\_und\\_prcc\\_rcnt\\_effrts-20181221.pdf](https://www.ilrc.org/sites/default/files/resources/denaturalization_und_prcc_rcnt_effrts-20181221.pdf).

320. 8 USC § 1451(d) (emphasis added).

321. USCIS, Policy Manual Part L, *Chapter 3 – Effects of Revocation of Naturalization*, C(1)-(2), <https://www.uscis.gov/policy-manual/volume-12-part-l-chapter-3#footnote-link-3>.

322. Nikki Marquez & Eric Cohen, *supra* note 319, at 11.

323. *Sanders v. Clark*, 76 F. Supp. 489, 491 (E.D. Pa. 1948).

324. *U.S. ex rel. Harrington v. Schlotfeldt*, 136 F.2d 935, 939 (7th Cir. 1943).

325. U.S. Immigration and Customs Enforcement (ICE), Office of Investigations, *Denaturalization Investigations Handbook*, OI HB 08-01, at 11 (Jan. 15, 2008), <https://www.unicornriot.ninja/wp-content/uploads/2018/02/Denaturalization-full-hsi.pdf>. In its FOIA request, the Justice Initiative sought information regarding the number of derivative citizens whose citizenship had been revoked every year since 1948, along with any policies pertaining to the practice of revoking derivative citizenship. Only the Civil Division complied with its requirement to respond to the request, but stated that it “does not maintain...records regarding derivatives.” Email from Civil Division, Feb. 25, 2019 (on file with the Open Society Justice Initiative).

326. Interview notes on file with the Open Society Justice Initiative.

327. See, e.g., INA § 101(a)(23) (“‘naturalization’ means the conferring of nationality . . . on a person after birth, by any means whatsoever”).

328. 1954 United Nations Convention relating to the Status of Stateless Persons, Article 1(1).

329. UN News, “12 million” *Stateless People Globally, Warns UNHCR Chief in Call to States for Decisive Action* (Nov. 12, 2018), <https://news.un.org/en/story/2018/11/1025561>; Institute on Statelessness and Inclusion, *Statelessness in Numbers: 2018 – An Overview and Analysis of Global Statistics*, [https://www.institutesi.org/ISI\\_statistics\\_analysis\\_2018.pdf](https://www.institutesi.org/ISI_statistics_analysis_2018.pdf).

330. Due to a lack of reliable, comprehensive data on stateless individuals in the United States, this number is undetermined. UNHCR & Open Society Justice Initiative, *Citizens of Nowhere: Solutions for the Stateless in the U.S.*, at 1 (Dec. 2012), <https://www.opensocietyfoundations.org/sites/default/files/citizens-of-nowhere-solutions-for-the-stateless-in-the-us-20121213.pdf>.

331. See UNHCR & Open Society Justice Initiative, *Citizens of Nowhere: Solutions for the Stateless in the U.S.*, at 23 (Dec. 2012), <https://www.unhcr.org/en-us/about-us/background/56fbfcea4/citizens-of-nowhere-solutions-for-the-stateless-in-the-us.html>. Because the U.S. Constitution and subsequently enacted laws on acquisition by birth are generally inclusive, the laws of the United States do not “create” stateless individuals and the *jus soli* provision of the Fourteenth Amendment in particular ensures that statelessness is not passed from one generation to the next for children born in the United States.

332. See 12 USCIS, Policy Manual Part H, *Children of U.S. Citizens, Chapter 3 – United States Citizens at Birth (INA 301 and 309)* (June 6, 2019), <https://www.uscis.gov/policy-manual/volume-12-part-h-chapter-3#footnote-4> (“Until the Act of October 10, 1978, persons who had acquired U.S. citizenship through birth outside of the United States to one U.S. citizen parent had to meet certain physical presence requirements to retain their citizenship. This legislation eliminated retention requirements for persons who were born after October 10, 1952. There may be cases where a person who was born before that date, and therefore subject to the retention requirements, may have failed to retain citizenship.”). In *Rogers v. Bellei*, 401 U.S. 815 (1971), the Supreme Court upheld distinctions between citizens born in the United States and citizens born abroad to American parents on the ground that the Fourteenth Amendment’s Citizenship Clause only covers citizens born or naturalized in the United States. *Id.* at 830.

333. See UNHCR, *Handbook on Protection of Stateless Persons* (2014).

334. See World Bank, *1.1 Billion ‘Invisible’ People without ID are Priority for new High Level Advisory Council on Identification for Development*, Press Release (Oct. 12,



2017), <https://www.worldbank.org/en/news/press-release/2017/10/12/11-billion-invisible-people-without-id-are-priority-for-new-high-level-advisory-council-on-identification-for-development>.

**335.** See UN General Assembly, *Report of the Special Rapporteur on minority issues – Statelessness: a minority issue*, July 20, 2018, U.N. Doc. A/73/205, at para. 21 (“Unless the systematic targeting of or disproportionate impact on certain minorities, resulting in their statelessness, is directly acknowledged and addressed, the predicament and challenges of the statelessness of more than 10 million individuals will not be significantly reduced.”).

**336.** Global Campaign for Equal Nationality Rights, *The Problem*, <https://equalnationalityrights.org/the-issue/the-problem>.

**337.** UNHCR, *Ending Statelessness*, <https://www.unhcr.org/stateless-people.html>.

**338.** *Trop v. Dulles*, 356 U.S. 86, 102 (1958). In this landmark decision the Supreme Court struck down a law authorizing the deprivation of citizenship as punishment for conviction by court martial for wartime desertion.

**339.** United States Department of State, *Statelessness – Bureau of Population, Refugees, and Migration*, <https://www.state.gov/other-policy-issues/statelessness/>.

**340.** UNHCR & Open Society Justice Initiative, *Citizens of Nowhere: Solutions for the Stateless in the U.S.*, at 20-21 (Dec. 2012), <https://www.opensocietyfoundations.org/sites/default/files/citizens-of-nowhere-solutions-for-the-stateless-in-the-us-20121213.pdf> (“U.S. law provides that all non-citizens detained following a final order of removal have the right to release after six months if they can demonstrate that there is ‘no significant likelihood of removal in the reasonably foreseeable future.’”) (citing *Zadvydias v. Davis*, 533 U.S. 678, 701 (2001)).

**341.** UNHCR & Open Society Justice Initiative, *Citizens of Nowhere: Solutions for the Stateless in the U.S.*, at 25 (Dec. 2012), <https://www.unhcr.org/en-us/about-us/background-d/56fbfcea4/citizens-of-nowhere-solutions-for-the-stateless-in-the-us.html>. See also current challenge to indefinite detention by stateless person: Lev Sugarman, *Document: Habeas Petition Challenging Indefinite Detention Under “Special Circumstances,”* Lawfare (Mar. 26, 2019), <https://www.lawfareblog.com/document-habeas-petition-challenging-indefinite-detention-under-special-circumstances>; *Hassoun v. Searls*, No. 19-cv-6196 (W.D.N.Y. Mar. 15, 2019), *verified petition for writ of habeas corpus under 28 U.S.C. §2241*, <https://int.nyt.com/data/documenthelper/689-adham-hassoun-habeas-complaint/3445cb2deaff16e785d8/optimized/full.pdf#page=1>; Phil Fairbanks, *Terrorist Supporter Without a Country Seeks Release from Batavia*, *The Buffalo News* (Mar. 18, 2019), <https://buffalonews.com/2019/03/18/terrorist-supporter-without-a-country-seeks-release-from-batavia/>; Charlie Savage, *Testing Novel Powers, Trump Administration*

*Detains Palestinian After Sentence Ends*, *N.Y. Times* (Mar. 26, 2019), <https://www.nytimes.com/2019/03/26/us/politics/adham-hassoun-indefinite-detention.html>.

**342.** UNHCR & Open Society Justice Initiative, *Citizens of Nowhere: Solutions for the Stateless in the U.S.*, at 20-21 (Dec. 2012), <https://www.opensocietyfoundations.org/sites/default/files/citizens-of-nowhere-solutions-for-the-stateless-in-the-us-20121213.pdf> (citing *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005); 8 U.S.C. § 1231(b)).

**343.** This is one example of the language used by the government when it includes removal terms in a plea agreement. Depending on the district in which the case is adjudicated, the specific language may vary.

**344.** UNHCR & Open Society Justice Initiative, *Citizens of Nowhere: Solutions for the Stateless in the U.S.*, at 19 (Dec. 2012), <https://www.opensocietyfoundations.org/sites/default/files/citizens-of-nowhere-solutions-for-the-stateless-in-the-us-20121213.pdf>.

**345.** United States Department of State, Office of the Legal Advisor, Digest of United States Practice in International Law, Chapter 1, *Nationality, Citizenship and Statelessness 2* (2013), <https://2009-2017.state.gov/documents/organization/226329.pdf>.

**346.** *Trop v. Dulles*, 356 U.S. 86, 102 (1958).

**347.** Eli Watkins and Abby Phillip, *Trump Decries Immigrants from ‘Shithole Countries’ Coming to US*, *CNN* (Jan. 12, 2018), <https://www.cnn.com/2018/01/11/politics/immigrants-shithole-countries-trump/index.html>.

**348.** Yeganeh Torbati, *Trump Administration Bars Haitians from U.S. Visas for Low-Skilled Work*, *Reuters* (Jan. 17, 2018), <https://www.reuters.com/article/us-usa-immigration-haiti/trump-administration-bars-haitians-from-u-s-visas-for-low-skilled-work-idUSKBN1F702O>.

**349.** Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, *N.Y. Times* (Dec. 23 2017), <https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html>.

**350.** “The Secretary of Homeland Security may designate a foreign country for TPS due to conditions in the country that temporarily prevent the country’s nationals from returning safely, or in certain circumstances, where the country is unable to handle the return of its nationals adequately.” USCIS, *Temporary Protected Status* (June 7, 2019), <https://www.uscis.gov/humanitarian/temporary-protected-status>.

**351.** Joseph Tanfani, *Trump Administration Plans to End Protected Status for About 60,000 Haitian Immigrants*, *L.A. Times* (Nov. 20, 2017), <https://www.latimes.com/politics/la-na-pol-haiti-tps-20171120-story.html>.

**352.** Current as of April 11, 2019. See *Ramos, et al. v.*

Nielsen, et al., No. 18-cv-01554 (N.D. Cal. Oct. 3, 2018). As a result of the preliminary injunction, TPS designations of Sudan, Nicaragua, Haiti, and El Salvador remain in effect (as of July 30, 2019). See Update on Ramos v. Nielsen, USCIS, <https://www.uscis.gov/update-ramos-v-nielsen>.

353. Constitution of Haiti, art. 11-12 (1987), <http://pdba.georgetown.edu/Constitutions/Haiti/haiti1987.html>.

354. Constitute Project, Haiti 1987 (rev. 2012), [https://www.constituteproject.org/constitution/Haiti\\_2012](https://www.constituteproject.org/constitution/Haiti_2012).

355. *Id.*

356. Immigration and Refugee Board of Canada, *Haiti: Dual citizenship, including legislation; requirements and procedures for former Haitian citizens to re-acquire citizenship*, HT1104293.E (Feb. 8, 2013), <https://www.refworld.org/docid/51dd18df4.html>.

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359. Response by the Ministry of Foreign Affairs of Haiti conveying the position of the Haitian government in respect of the ruling (TC/0168/13 of 23 September 2013) issued by the Dominican Constitutional Court concerning Dominicans of Haitian descent, the position adopted by the Ministry of Haitians Living Abroad, Port of Prince, Oct. 24, 2013, and the statement made by the Permanent Mission of Haiti before the Organization of American States on Oct. 29, 2013.

360. Constitution of India, art.9 (1950), [https://www.india.gov.in/sites/upload\\_files/npi/files/coi\\_part\\_full.pdf](https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf).

361. Citizenship Amendment Act, No. 6 of 2004, § 9; Citizenship Rules, 1956; Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003 (Jan. 7, 2004), <https://www.refworld.org/docid/410520784.html>.

362. With regard to a seven year absence, the law stipulates that this does not apply to: a citizen who is “a student of any educational institution in a country outside India or in the service of a Government in India or of an international organisation of which India is a member, nor registered annually in the prescribed manner at an Indian consulate his intention to retain his citizenship of India.”

363. Michael D. Shear & Julie Hirschfeld Davis, *Stoking fears, Trump defied bureaucracy to advance immigration agenda*, N.Y. Times (Dec. 23, 2017), <https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html?r=0>.

364. Migration Policy Institute, *RAD Diaspora Profile, The Nigerian Diaspora in the United States*, Migration Policy Institute (June 2015 rev.), <https://www.migrationpolicy.org/sites/default/files/publications/RAD-Nigeria.pdf> (as of June 2015, Nigerians were more likely to be naturalized U.S. citizens than the overall U.S. foreign-born population: 52% of Nigerians vs 44% of the U.S. foreign-born population. In light of the fact that half of Nigerian immigrants arrived in the United States in 2000 or later, their relatively high naturalization rate suggests that many Nigerian immigrants applied for U.S. citizenship shortly after they became eligible).

365. In other words, immediately and without delay at the time that such registered—or naturalized—citizen acquires the additional foreign citizenship.

366. Const., art. 28(1) (1999) (Nigeria), <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>.

367. *Id.*

368. *Klapprott v. United States*, 335 U.S. 601, 616–17 (1949).

369. See INA §§ 301 and 309 (acquisition of U.S. nationality by children born abroad to one or both American parents). INA § 349 provides for expatriation of citizens by birth by voluntary commission of expatriating acts committed with the intention of relinquishing citizenship. See also United States Department of State, Office of the Legal Advisor, *Digest of United States Practice in International Law*, Chapter 1: Nationality, Citizenship, and Immigration. However, the Supreme Court has severely curtailed the use of this measure. *Afroyim v. Rusk*, 387 U.S. 253 (1967).

370. U.S. Const. art. II § 1; *id.* at amend. XII.

371. *Schneider v. Rusk*, 377 U.S. 163, 166 (1964) (quoting *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 827 (1824)).

372. See generally Cassandra Burke Robertson and Irina D. Manta., (Un)Civil Denaturalization, 94 New York University Law Review 402, 437 (2019), <https://www.nyulawreview.org/wp-content/uploads/2019/06/NYULawReview-94-3-RobertsonMantapdf.pdf>.

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374. *Knauer v. United States*, 328 U.S. 654, 676 (1946).

375. *United States v. Oribello Eguilos*, 2019 WL 1643234, at \*1-2 (E.D. Cal. Apr. 16, 2019).

- 376.** See *United States v. Carolene Products Co.*, 304 U.S. 144 (1938) (footnote 4).
- 377.** See Cassandra Burke Robertson and Irina D. Manta., (Un)Civil Denaturalization, 94 New York University Law Review 402, *passim* (2019), <https://www.nyulawreview.org/wp-content/uploads/2019/06/NYULawReview-94-3-RobertsonMantapdf.pdf>; Comment, *Denaturalization of Nazi War Criminals: Is There Sufficient Justice for Those Who Would Not Dispense Justice?*, 40 Md. L. Rec. 39 (1981) (“Whether denaturalization is considered a civil proceeding, a criminal proceeding, or something in between is a determination crucial to arriving at a formula of due process which will pass fifth amendment tests.”); Abbe L. Dienstag, *Comment: Fedorenko v. United States: War Crimes, the Defense of Duress, and American Nationality Law*, 82 Columbia L. Rev. 120, 121 (1982) (“[T]he Supreme Court erred in its superficial approach to a case fraught with profound and perplexing issues of moral and legal significance.”).
- 378.** See, e.g., Comment, *Denaturalization of Nazi War Criminals: Is There Sufficient Justice for Those Who Would Not Dispense Justice?*, 40 Md. L. Rec. 39 (1981).
- 379.** Anthony D. Bianco, Paul Bullis & Troy Liggett, *Civil Denaturalization: Safeguarding the Integrity of U.S. Citizenship*, in 65 U.S. Attorneys’ Bulletin (July 2017), at 8, <https://www.justice.gov/usao/page/file/984701/download>.
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- 381.** *Thapa v. Gonzales*, 460 F.3d 323, 331 (2d Cir. 2006).
- 382.** *Dorelien v. U.S. Atty. Gen.*, 317 F.3d 1314, 1325 (11th Cir. 2003).
- 383.** Brief for the Immigrant Defense Project as Amicus Curiae Supporting Respondent in removal proceedings (redacted date and matter), <https://www.immigrantdefenseproject.org/wp-content/uploads/IDP-Amicus-Brief-on-Finality-Redacted.pdf>.
- 384.** *Id.*
- 385.** *Pino v. Landon*, 349 U.S. 901, 901 (1955); *Matter of Ozkok*, 19 I. & N. Dec. at 552 n.7; see also Brief for the Immigrant Defense Project as Amicus Curiae Supporting Respondent in removal proceedings (redacted date and matter), <https://www.immigrantdefenseproject.org/wp-content/uploads/2016/09/IDP-Amicus-Brief-on-Finality-with-Exhibits.pdf>.
- 386.** *Knauer v. United States*, 328 U.S. 654, 659 (1946)
- 387.** E.g., *USA v. Anderson*, 0:18-cr-60252 (Doc. 26), Motion in Limine Improper Jury Nullification Arguments by USA 1-2 (Oct. 24, 2018).
- 388.** *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010).
- 389.** *United State v. Parvin*, 8:17-cr-00269, Def. Statement, at para. 8 (Dec. 12, 2017).
- 390.** *United States v. Gaudin*, 515 U.S. 506, 509-510 (1995).
- 391.** *Schneiderman v. United States*, 320 U.S. 118, 125, 135 (1943).
- 392.** *Klapprott v. United States*, 335 U.S. 601, 612 (1949).
- 393.** See, e.g., *United States of America v. Singh*, 2:17-cv-07214 (Doc. 9), Opinion 11 (Jan. 5, 2018). (“Since the Government has demonstrated, *through clear and convincing evidence*, that all four denaturalization requirements...are satisfied, this Court will grant its motion for summary judgment and enter an order to revoke Defendant’s naturalization and cancel his certificate of naturalization.”) (emphasis added).
- 394.** Cornell Law School, Legal Information Institute (LII), *Clear and Convincing Evidence*, [https://www.law.cornell.edu/wex/clear\\_and\\_convincing\\_evidence](https://www.law.cornell.edu/wex/clear_and_convincing_evidence).
- 395.** Timothy M. Belsan, Danielle K. Schuessler & Sebastian Kielmanovich, *OIL-DCS Availability for Assistance and Support in Denaturalization Prosecutions under 18 U.S.C. § 1425*, in 65 U.S. Attorneys’ Bulletin (July 2017), at 33, <https://www.justice.gov/usao/page/file/984701/download>.
- 396.** U.S. Immigration and Customs Enforcement (ICE), Office of Investigations, *Denaturalization Investigations Handbook*, OI HB 08-01, Jan. 15, 2008, <https://www.unicornriot.ninja/wp-content/uploads/2018/02/Denaturalization-full-hsi.pdf>.
- 397.** *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984).
- 398.** *United States v. Halper*, 490 U.S. 435 (1989) (regarding a False Claims Act action and overwhelmingly disproportionate in compensating the government for its loss).
- 399.** *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972).
- 400.** In *Gideon v. Wainwright* (1963), the U.S. Supreme Court recognized the disadvantage faced by unrepresented defendants in civil cases, observing that: “reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth...That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries... From the very beginning, our

state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.” 372 U.S. 335, 344 (1963).

**401.** *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981).

**402.** Emily S. Taylor Poppe & Jeffrey J. Rachlinski, *Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes*, 43 *Pepperdine L. R.* 881 (2016).

**403.** Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 *Fordham Urb. L.J.* 37, 39 (2010) (citing Rebecca Sandefur, *Elements of Expertise: Lawyers’ Impact on Civil Trial and Hearing Outcomes* 24 (Mar. 26, 2008) (unpublished manuscript)).

**404.** IOLA and the Future of Legal Services in N.Y. State: Hearing before the N.Y. State Senate (Dec. 9, 2009) (written testimony of David S. Udell, Brennan Center for Justice) (citing Rebecca L. Sandefur, *Elements of Expertise: Lawyers’ Impact on Civil Trial and Hearing Outcomes* 3 (Mar. 26, 2008) (unpublished manuscript)), <https://www.brennancenter.org/analysis/testimony-ny-senate-hearing-future-civil-legal-services>.

**405.** CJA § 210.20.20, <https://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-210-representation-under-cja>.

**406.** See e.g., *U.S. v. Becker*, 2:18-cv-02049 (Doc. 23), Reply in support of motion for order appointing Federal Public Defender (Dec. 3, 2018) (citing *Chaunt v. U.S.*, 364 U.S. 350, 353 (1960) (stating that citizenship is “so important to the liberty” of a citizen); *Klaprott v. U.S.*, 335 U.S. 601, 616 (1949) (noting that citizenship is “a right not less precious...than liberty”)).

**407.** *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

**408.** Interview notes on file with the Open Society Justice Initiative.

**409.** Legal Services Corporation, National Coalition for a Civil Right to Counsel, *U.S. Rank on Access to Civil Justice in Rule of Law Index Drops to 99th out of 126 Countries* (Mar. 10, 2019), [http://civilrighttocounsel.org/major\\_developments/217](http://civilrighttocounsel.org/major_developments/217).

**410.** Comm. on the Elimination of All Forms of Racial Discrimination, 85th Sess., Aug 11-29, 2014, Concluding Observations on the combined seventh to ninth periodic reports of the United States of America, at paras. 18, 23, U.N. Doc. CERD/C/USA/CO/7-9 (Aug. 29, 2014); Human Rights Comm. 110th Sess., Mar. 10-28, 2014, *Concluding Observations of the Human Rights Committee: United States of America*, at paras. 15, 16, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014).

**411.** Legal Services Corporation, *Legal Services Corporation Optimistic About Bipartisan Support in Congress Despite White House Proposal to Defund* (Mar. 18, 2019), <https://www.lsc.gov/media-center/press-releases/2019/legal-services-corporation-optimistic-about-bipartisan-support>.

**412.** See *Coffin v. United States* 156 U.S. 432 (1895) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary...”); *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (stating the presumption of innocence is a “basic component of a fair trial.”).

**413.** See e.g., Article 11(1) of the UDHR and Article 14(2) of the CCPR.

**414.** In one case, detention could not be determined as the file was sealed both online and in-person.

**415.** See Mary T. Phillips, *Pretrial Detention and Case Outcomes, Part 1: Nonfelony Cases*, and *Pretrial Detention and Case Outcomes, Part 2: Felony Cases Final Report*, New York Criminal Justice Agency, Inc. (2007).

**416.** Charles Doyle, *Statute of Limitation in Federal Criminal Cases: An Overview*, Cong. Res. Serv. Rep. RL3125 (Nov. 14, 2017), <https://fas.org/sgp/crs/misc/RL31253.pdf>.

**417.** *Kokesh v. Sec. & Exch. Comm’n*, 137 S. Ct. 1635, 1641-42 (2017) (citing *Gabelli v. SEC*, 568 U.S. 442, 449 (2013)).

**418.** See 18 U.S.C. § 3291 (“No person shall be prosecuted, tried, or punished for violation of any provision of sections 1423 to 1428, inclusive, of chapter 69 and sections 1541 to 1544, inclusive, of chapter 75 of title 18 of the United States Code, or for conspiracy to violate any of such sections, unless the indictment is found or the information is instituted within ten years after the commission of the offense.”).

**419.** *United States v. Martinez*, 1:18-cr-00216, Motion to Dismiss Indictment and Continue Evidentiary Hearing, 1-2 (June 14, 2018).

**420.** See, e.g., John N. Pomeroy, *A Treatise on Equity Jurisprudence* §§ 5) 419-418th ed.1941).

**421.** Doyle, *supra* note 416.

**422.** An exception is “major art theft” (20 years).

**423.** Doyle, *supra* note 416.

**424.** Anthony D. Bianco, Paul Bullis & Troy Liggett, *Civil Denaturalization: Safeguarding the Integrity of U.S. Citizenship*, in 65 *U.S. Attorneys’ Bulletin* (July 2017), at 9, <https://www.justice.gov/usao/page/file/984701/download>.

**425.** DHS-OIG, *Potentially ineligible individuals have been granted U.S. citizenship because of incomplete fingerprint records* (Sept. 8, 2016), OIG-16-130, 1, <https://www.oig.dhs.gov/assets/Mgmt/2016/OIG-16-130-Sep16.pdf>.

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427. CATO Institute, CATO At Liberty, 45,000 “Special Interest” aliens caught since 2007, but no U.S. terrorist attacks from illegal border crossers (Dec. 17, 2018), <https://www.cato.org/blog/45000-special-interest-aliens-caught-2007-no-us-terrorist-attacks-illegal-border-crossers>; Todd Bensman, Center for Immigration Studies, *Terrorist infiltration threat at the southwest border* (Aug. 2018), [https://cis.org/sites/default/files/2018-08/bensman-infiltration\\_o.pdf](https://cis.org/sites/default/files/2018-08/bensman-infiltration_o.pdf).

428. Bensman, *supra* note 427, at 3 & 11 n.20.

429. Bensman, *supra* note 427, at 11 n.20; CATO Institute, *supra* note 427, Table 1, <https://www.cato.org/blog/45000-special-interest-aliens-caught-2007-no-us-terrorist-attacks-illegal-border-crossers>.

430. Cassandra Burke Robertson and Irina D. Manta., (*Un*) *Civil Denaturalization*, 94 New York University Law Review 402, 467 (2019), <https://www.nyu.edu/lawreview/wp-content/uploads/2019/06/NYULawReview-94-3-Robertson-Mantapdf.pdf>.

431. *City of Cleburne v. Cleburne Living Ctr.*, 515 U.S. 432, 440 (1985) (“[R]ace, alienage, or national origin . . . are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subject to strict scrutiny.”).

432. *See generally*: Aram A. Gavoor and Daniel Miktus, *Snap: How the Moral Elasticity of the Denaturalization Statute Goes Too Far*, 23 Wm. & Mary Bill Rts. J. 637, 662 (2015).

433. Murtaza Hussain, *The Department of Justice loves publicizing arrests of alleged terrorists – but not the white nationalist Coast Guard officer*, *The Intercept* (Feb. 21, 2019), <https://theintercept.com/2019/02/21/white-nationalist-coast-guard-terrorism-justice-department-christopher-hasson/>.

434. *Carey v. Phipps*, 435 U.S. 247, 259 (1978)

435. *Fuentes v. Shevin*, 407 U.S. 67, 80–81 (1972) (“central meaning of procedural due process” is the “right to notice and an opportunity to be heard...at a meaningful time and in a meaningful manner”); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

436. Fed. R. Civ. P. 55(b)(2).

437. *Klapprott v. United States*, 335 U.S. 601, 610 (1949).

438. *Klapprott v. United States*, 335 U.S. 601, 611–13 (1949) (emphasis added).

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442. *Schneiderman v. United States*, 320 U.S. 118, 122 (1943).

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446. *See generally* USCIS, Policy Manual, *Volume 12 – Citizenship and Naturalization*, (2019), <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12.html>; *see also* DHS-OIG, *Potentially ineligible individuals have been granted U.S. citizenship because of incomplete fingerprint records*, OIG-16-130, 2 (Sept. 8, 2016), <https://www.oig.dhs.gov/assets/Mgmt/2016/OIG-16-130-Sep16.pdf>; Federal Bureau of Investigation (FBI), *Privacy Impact Assessment Integrated Automated Fingerprint Identification System (IAFIS)/Next Generation Identification (NGI) Biometric Interoperability*, § I.1, n.1 (SCOPE), <https://www.fbi.gov/services/information-management/foipa/privacy-impact-assessments/iafis-ngi-biometric-interoperability>.

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people identified for deportation through Secure Communities are from Latin American countries, while 2% are from Asia and 1% are from Europe and Canada.”).

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identified as criminal suspects, immigration law violators, or terrorists.” (internal references omitted).

465. *Id.*

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- 480.** Leila Schochet & Nicole Prchal Svajlenka, Center for Am. Progress, *How ending TPS will hurt U.S.-citizen children* (Feb. 11, 2019), <https://www.americanprogress.org/issues/immigration/reports/2019/02/11/466022/ending-tps-will-hurt-u-s-citizen-children/>; Kalina M. Brabeck and Qingwen Xu, *The Impact of Detention and Deportation on Latino Immigrant Children and Families: A Quantitative Exploration*, 32 *Hispanic J. Behav. Sci.* 341 (2010), [https://www.researchgate.net/publication/247721989\\_The\\_Impact\\_of\\_Detention\\_and\\_Deportation\\_on\\_Latino\\_Immigrant\\_Children\\_and\\_Families\\_A\\_Quantitative\\_Exploration](https://www.researchgate.net/publication/247721989_The_Impact_of_Detention_and_Deportation_on_Latino_Immigrant_Children_and_Families_A_Quantitative_Exploration); Hirokazu Yoshikawa, Erin B. Godfrey & Ann C. Rivera, *Access to institutional resources as a measure of social exclusion: relations with family process and cognitive development in the context of immigration*, 2008 *New Directions for Child & Adolescent Dev.* 63 (2008), <https://nyuscholars.nyu.edu/en/publications/access-to-institutional-resources-as-a-measure-of-social-exclusio>.
- 481.** 328 U.S. 654.
- 482.** Cassandra Burke Robertson and Irina D. Manta, (Un)Civil Denaturalization, 94 *New York University Law Review* 402, 461 (2019), <https://www.nyulawreview.org/wp-content/uploads/2019/06/NYULawReview-94-3-RobertsonMantapdf.pdf>.
- 483.** Unicorn Riot, *Icebreaker Pt 1 - secret Homeland Security ICE/HSI manual for stripping US citizenship* (Feb. 14, 2018), <https://unicornriot.ninja/2018/ice-breaker-pt-1-secret-homeland-security-ice-hsi-manual-stripping-us-citizenship/>.
- 484.** Civil Division, *FY 2020 Budget & Performance Plans* (Mar. 2019), at 16, <https://www.justice.gov/jmd/page/file/1143936/download>.
- 485.** See *Mathews v. Diaz*, 426 U.S. 78 & n.12 (1976): "The Constitution protects the privileges and immunities only of citizens, Amdt. 14, § 1; see Art. IV, § 2, cl. 1, and the right to vote only of citizens. Amdts. 15, 19, 24, 26. It requires that Representatives have been citizens for seven years, Art. I, § 2, cl. 2, and Senators citizens for nine, Art. I, § 3, cl. 3, and that the President be a 'natural born Citizen.' Art. II, § 1, cl. 5. "A multitude of federal statutes distinguish between citizens and aliens. The whole of Title 8 of the United States Code, regulating aliens and nationality, is founded on the legitimacy of distinguishing between citizens and aliens. A variety of other federal statutes provide for disparate treatment of aliens and citizens. These include prohibitions and restrictions upon Government employment of aliens, e.g., 10 U.S.C. § 5571; 22 U.S.C. § 1044(e), upon private employment of aliens, e.g., 10 U.S.C. § 2279; 12 U.S.C. § 72, and upon investments and businesses of aliens, e.g., 12 U.S.C. § 619; 47 U.S.C. § 17; statutes excluding aliens from benefits available to citizens, e.g., 26 U.S.C. § 931 (1970 ed. and Supp. IV); 46 U.S.C. § 1171(a), and from protections extended to citizens, e.g., 19 U.S.C. § 1526; 29 U.S.C. § 633a (1970 ed., Supp. IV); and statutes imposing added burdens upon aliens, e.g., 26 U.S.C. § 6851(d); 28 U.S.C. § 1391(d). Several statutes treat certain aliens more favorably than citizens. E.g., 19 U.S.C. § 1586(e); 50 U.S.C. App. § 453 (1970 ed., Supp. IV). Other statutes, similar to the one at issue in this case, provide for equal treatment of citizens and aliens lawfully admitted for permanent residence. 10 U.S.C. § 8253; 18 U.S.C. § 613(2) (1970 ed., Supp. IV). Still others equate citizens and aliens who have declared their intention to become citizens. E.g., 43 U.S.C. § 161; 30 U.S.C. § 22. Yet others condition equal treatment of an alien upon reciprocal treatment of United States citizens by the alien's own country. E.g., 10 U.S.C. § 7435(a); 28 U.S.C. § 2502." See also Brubaker, *Citizenship and Nationalism in France and Germany* 21 ("There is a conceptually clear, legally consequential, and ideologically charged distinction between citizens and foreigners.").
- 486.** *Demore v. Kim*, 538 U.S. 510, 521 (2003) (quoting *Mathews*, 426 U.S. at 79-80). See also Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 *B.C.L. Rev.* 1695, 1982 (2013) (quoting *Demore v. Kim*).
- 487.** See James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (1998).
- 488.** See Judge Kozinski in *Angov v. Lynch*, 788 F.3d 893, 901 ("Those born with U.S. citizenship cannot imagine what this is worth to the world's poor and oppressed billions, most of whom would come here tomorrow if they could. Gaining a lawful foothold in America is an incalculable benefit. It sets an immigrant on the path to a peaceful life in a free society, economic prosperity, citizenship and the opportunity to bring family members in due course. A prize like this is worth a great deal of expense and risk. Telling an elaborate lie, and coming up with forged documents and mendacious witnesses to back it up, is nothing at all when the stakes are so high."). See also Sarah Igo, *The Known Citizen* 89 (2018) (On the Social Security Number: "Never simply a means of tracking

citizens, the SSN—by re-mapping the population via exclusions and benefits—helped to produce a specific kind of national citizenship, one that carried substantive privileges.”).

**489.** See, e.g., James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (1998); Patrick Weil, *The Sovereign Citizen: Denaturalization and the Origins of the American Republic* (2013); Beatrice McKenzie, *To Know a Citizen: Birthright Citizenship Documents Regimes in U.S. History*, in Benjamin N. Lawrance and Jacqueline Stevens, eds., *Citizenship in Question: Evidentiary Birthright and Statelessness* (2016); Rachel E. Rosenbloom, *From the outside Looking in: U.S. Passports in the Borderlands*, in Benjamin N. Lawrance and Jacqueline Stevens, eds., *Citizenship in Question: Evidentiary Birthright and Statelessness* (2016); Sarah Igo, *The Known Citizen* (2018); John C. Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (2d ed. 2018).

**490.** But see John C. Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* 115-16 (2d ed. 2018) (covering control of passenger ships pre-Civil War, including indemnification requirements for ship owners whose passengers “would fall on the public purse after their arrival.”).

**491.** Jill Lepore, *These Truths: A History of the United States* 314 (2018).

**492.** John C. Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* 116 (2d ed. 2018).

**493.** Jill Lepore, *These Truths: A History of the United States* 315 (2018).

**494.** John C. Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* 121 (2d ed. 2018).

**495.** Beatrice McKenzie, *To Know a Citizen: Birthright Citizenship Documents Regimes in U.S. History*, in Benjamin N. Lawrance and Jacqueline Stevens, eds., *Citizenship in Question: Evidentiary Birthright and Statelessness* 120 (2016).

**496.** John C. Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* 118-120 (2d ed. 2018).

**497.** John C. Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (2d ed. 2018).

**498.** Beatrice McKenzie, *To Know a Citizen: Birthright Citizenship Documents Regimes in U.S. History*, in Benjamin N. Lawrance and Jacqueline Stevens, eds., *Citizenship in Question: Evidentiary Birthright and Statelessness* 119 (2016).

**499.** John C. Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* 1122 (2d ed. 2018).

**500.** *Id.* at 121, 124.

**501.** Beatrice McKenzie, *To Know a Citizen: Birthright Citizenship Documents Regimes in U.S. History*, in Benjamin N. Lawrance and Jacqueline Stevens, eds., *Citizenship in Question: Evidentiary Birthright and Statelessness* 119 (2016) (“Chinese American challenges to racial exclusion led to a particular documents regime that relied on lengthy investigative interviews and the use of photographs and notarized affidavits.”); John C. Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* 123 (2d ed. 2018) (photography).

**502.** Jill Lepore, *These Truths: A History of the United States* 316 (2018).

**503.** John C. Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (2d ed. 2018).

**504.** *Id.*

**505.** *Id.* at 125.

**506.** Sarah Igo, *The Known Citizen* 56 (2018).

**507.** *Id.*

**508.** *Id.* at 59. See also *id.* at 71.

**509.** *Id.* at 61; Wendy Hunter, *Undocumented Nationals: Between Statelessness and Citizenship* 4, 22 (2019).

**510.** *Id.* See also *id.* at 62 (“In a nation in which the original ‘undocumented’ were white middle- and upper-class citizens, to be known to the authorities was at the turn of the century a badge of deficiency.”).

**511.** See *id.* at 72-73.

**512.** *Id.*

**513.** *Id.* at 74.

**514.** See Evan Selinger & Woodrow Hartzog, *Privacy and Obscurity*, Routledge Companion to Philosophy of Technology (2014).

**515.** Sarah Igo, *The Known Citizen* 75 (2018).

**516.** *Id.* at 79 (“In the post-New Deal era, SSNs would evolve without much comment from a ‘single-use’ identifier into one useful to a profusion of agencies in both the public and private sector.”).

**517.** Soc. Sec. Admin., *Report to Congress on Options for Enhancing the Social Security Card, Chapter II – The Number*, <https://www.ssa.gov/history/reports/ssnreport2.html>; Soc. Sec. Admin., *Social Security Numbers for Noncitizens* (Mar. 2018), <https://www.ssa.gov/pubs/EN-05-10096.pdf>.

**518.** *Kent v. Dulles*, 357 U.S. 116 (1958).

**519.** *Gorbach v. Reno*, 219 F.3d 1087, 1096 (9th Cir. 2000).

**520.** Ramzi Kassem, *Passport Revocation as Proxy*



*Denaturalization: Examining the Yemen Cases*, 82 Fordham L. Rev. 2099, n.72-74 and accompanying text (2014).

521. 22 C.F.R. § 51.42.

522. Anthony D. Bianco, Michael A. Celone & Sherease Pratt, *Defending Agency Immigration Fraud Adjudications*, in 65 U.S. Attorneys' Bulletin (July 2017), at 102, <https://www.justice.gov/usao/page/file/984701/download>.

523. 22 C.F.R. § 51.45.

524. Anthony D. Bianco, Michael A. Celone & Sherease Pratt, *Defending Agency Immigration Fraud Adjudications*, in 65 U.S. Attorneys' Bulletin (July 2017), at 103, <https://www.justice.gov/usao/page/file/984701/download>, (“[C]ertificates of baptism are often based on baptism registries which are recorded at the time of the ceremony, are official records of the church, maintained in a secure location [sic], and which are not easily tampered. While a person may fraudulently alter or create a certificate of baptism, he or she would be less likely to fraudulently alter a church's registry to match the fraudulent certificate.”).

525. 22 C.F.R. § 51.42.

526. *Id.*

527. 22 C.F.R. § 51; *Castelano et al. v. Clinton*, 2d Amend. Compl., para. 36, U.S. Dist. Ct. S.D. Tex., 08-cv-57.

528. Ramzi Kassem, *Passport Revocation as Proxy Denaturalization: Examining the Yemen Cases*, 82 Fordham L. Rev. 2099, 2100 (2014).

529. DOS-OIG, *Review of Allegations of Improper Passport Seizures at Embassy in Sana'a, Yemen*, OIG-ESP-19-01, at 1 (October 2018). *See also* *Stranded Abroad: Shadow Report on Coercive Interrogations and Due Process Violations in the Confiscation or Revocation of Passports of American Citizens of Yemeni Origin*, Submission by civil society organizations to the U.N. Committee on the Elimination of All Forms of Racism (July 11, 2014). The complaint to the OIG enclosed a more recent version of the CERD shadow report, *Stranded Abroad: Shadow Report on Coercive Interrogations and Due Process Violations in the Confiscation or Revocation of Passports of American Citizens of Yemeni Origin*, Asian Americans Advancing Justice (the Asian Law Caucus) and the City University of New York (CUNY) Creating Law Enforcement Accountability & Responsibility Project (January 2016). *Id.* at 2 n.2.

530. Amel Ahmed, *Yemeni Americans Cry Foul Over Passport Revocations*, Jan. 21 (cited in *Stranded Abroad: Shadow Report on Coercive Interrogations and Due Process Violations in the Confiscation or Revocation of Passports of American Citizens of Yemeni Origin*, Asian Americans Advancing Justice (the Asian Law Caucus) and the City University of New York (CUNY) Creating Law Enforcement Accountability & Responsibility Project (January 2016)).

531. *See, e.g., Stranded Abroad: Shadow Report on Coercive Interrogations and Due Process Violations in the Confiscation or Revocation of Passports of American Citizens of Yemeni Origin*, Submission by civil society organizations to the U.N. Committee on the Elimination of All Forms of Racism, 2 (July 11, 2014).

532. Department of State, Office of Inspector General (DOS-OIG), *Review of Allegations of Improper Passport Seizures at Embassy in Sana'a, Yemen*, OIG-ESP-19-01, at 2 (October 2018) (noting also that in some cases other documents including certificates of naturalization were confiscated).

533. *Stranded Abroad: Shadow Report on Coercive Interrogations and Due Process Violations in the Confiscation or Revocation of Passports of American Citizens of Yemeni Origin*, Asian Americans Advancing Justice (the Asian Law Caucus) and the City University of New York (CUNY) Creating Law Enforcement Accountability & Responsibility Project (January 2016), at 5.

534. Department of State, Office of Inspector General (DOS-OIG), *Review of Allegations of Improper Passport Seizures at Embassy in Sana'a, Yemen*, OIG-ESP-19-01, at 2 (October 2018).

535. *Stranded Abroad: Shadow Report on Coercive Interrogations and Due Process Violations in the Confiscation or Revocation of Passports of American Citizens of Yemeni Origin*, Asian Americans Advancing Justice (the Asian Law Caucus) and the City University of New York (CUNY) Creating Law Enforcement Accountability & Responsibility Project (January 2016).

536. DOS-OIG, *Review of Allegations of Improper Passport Seizures at Embassy in Sana'a, Yemen*, OIG-ESP-19-01, at 11-12 (October 2018).

537. *See* 8 U.S.C. § 1504(a) (revocation of a passport “shall affect only the document and not the citizenship status of the person in whose name the document was issued.”).

538. Ramzi Kassem, *Passport Revocation as Proxy Denaturalization: Examining the Yemen Cases*, 82 Fordham L. Rev. 2099, 2100 (2014).

539. 22 U.S.C. § 211a (Bureau of Consular Affairs (CA) has the authority “to issue, grant, and verify passports and to establish rules concerning the issuance of passports.”). *See also* 8 U.S.C. § 1504; 22 C.F.R. § 51.62(a)(2).

540. DOS-OIG, *Review of Allegations of Improper Passport Seizures at Embassy in Sana'a, Yemen*, OIG-ESP-19-01 (October 2018).

541. *See, e.g.,* 22 C.F.R. § 51.62(i).

542. One of the OIG's critiques is that the State Department has not adopted consistent policy as to the eligibility for limited validity passports. DOS-OIG, *Review of Allegations of Improper Passport Seizures at Embassy in*

*Sana'a, Yemen*, OIG-ESP-19-01, Highlights (October 2018).

**543.** *Stranded Abroad: Shadow Report on Coercive Interrogations and Due Process Violations in the Confiscation or Revocation of Passports of American Citizens of Yemeni Origin*, Asian Americans Advancing Justice (the Asian Law Caucus) and the City University of New York (CUNY) Creating Law Enforcement Accountability & Responsibility Project (January 2016).

**544.** “Congress has charged the Secretary of State with “the administration and the enforcement of ... immigration and nationality laws relating to ... the determination of nationality of a person not in the United States.” *Chacoty v. Tillerson*, 285 F. Supp. 3d 293, 298 (D.D.C. 2018) (citing 8 U.S.C. § 1104).

**545.** 22 C.F.R. § 50.7(a).

**546.** 8 U.S.C. § 1504(a). On the legal effect of a CRBA, *see, e.g., Chacoty v. Tillerson*, 285 F. Supp. 3d 293, 298 (D.D.C. 2018) (“The issuance or rescission of a CRBA, however, “affect[s] only the document and not the citizenship status of the person.” 8 U.S.C. § 1504(a). This is because CRBAs, like passports, do not confer citizenship; rather, they merely provide proof of one’s status as a citizen. *See* 22 U.S.C. § 2705.”).

**547.** *Stranded Abroad: Shadow Report on Coercive Interrogations and Due Process Violations in the Confiscation or Revocation of Passports of American Citizens of Yemeni Origin*, Asian Americans Advancing Justice (the Asian Law Caucus) and the City University of New York (CUNY) Creating Law Enforcement Accountability & Responsibility Project (January 2016).

**548.** *Stranded Abroad: Shadow Report on Coercive Interrogations and Due Process Violations in the Confiscation or Revocation of Passports of American Citizens of Yemeni Origin*, Asian Americans Advancing Justice (the Asian Law Caucus) and the City University of New York (CUNY) Creating Law Enforcement Accountability & Responsibility Project (January 2016), at 19 (“[T]he Department’s policy is a collateral attack on citizenship because it abrogates a right of citizenship (access to a passport) even though citizenship itself has not been abrogated. Such collateral attacks are explicitly forbidden in well-established judicial precedent and prior opinions of the Attorney General, and also contradict the Department’s own policies”) (citing specific policies); DOS-OIG, *Review of Allegations of Improper Passport Seizures at Embassy in Sana’a, Yemen*, OIG-ESP-19-01, at 19 n.2 (October 2018) (“There were, and are, differing views in the Department on whether the passport may be revoked in such a case on the basis of fraud in the identity document, or whether, because the identity document matches a certificate of naturalization or citizenship, the passport may not be revoked until the certificate is revoked.”) (citing 7 FAM 1153e(4) & 7 FAM 1381.2d(1) as mutually contradictory on this question).

**549.** DOS-OIG, *Review of Allegations of Improper Passport*

*Seizures at Embassy in Sana’a, Yemen*, OIG-ESP-19-01, at 17 n.54 (October 2018).

**550.** Ramzi Kassem, *Passport Revocation as Proxy Denaturalization: Examining the Yemen Cases*, 82 *Fordham L. Rev.* 2099, notes 72-73 and accompanying text (2014).

**551.** DOS-OIG, *Review of Allegations of Improper Passport Seizures at Embassy in Sana’a, Yemen*, OIG-ESP-19-01, at 9 (October 2018).

**552.** *Id.* Generally, DOS-OIG reported “difficulty in locating information relevant to the review.”

**553.** *Id.* at 6.

**554.** *See id.* at 5 n.8 (agreement between Bureau of Consular Affairs and Bureau of Diplomatic Security).

**555.** *Id.* at 7-8.

**556.** *Id.*

**557.** *Id.* at 11.

**558.** *Id.* at 23.

**559.** *Id.* Highlights.

**560.** *Id.*

**561.** Ramzi Kassem, *Passport Revocation as Proxy Denaturalization: Examining the Yemen Cases*, 82 *Fordham L. Rev.* 2099, 2100 (2014).

**562.** Nisha Kapoor, *Deport, Deprive, Extradite: 21st Century Extremism* 55 (2018).

**563.** *Id.*

**564.** *Id.*

**565.** *Id.*

**566.** *See* Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 *B.C.L. Rev.* 1695 (2013).

**567.** Beatrice McKenzie, *Birtright Citizenship Documents Regimes in U.S. History*, in Benjamin N. Lawrance and Jacqueline Stevens, eds., *Citizenship in Question: Evidentiary Birtright and Statelessness* 118 (2016).

**568.** Elizabeth Brodyaga, *Mexican-Americans and the Southern Border: So You Think You Were Born Here? Prove It!*, 17-06 *Immigr. Briefings* 1 (June 2017).

**569.** Rachel E. Rosenbloom, *From the outside Looking in: U.S. Passports in the Borderlands*, in Benjamin N. Lawrance and Jacqueline Stevens, eds., *Citizenship in Question: Evidentiary Birtright and Statelessness* (2016).

**570.** *Id.*

**571.** Damian Paletta, Mike DeBonis & John Wagner,

*Trump declares national emergency on southern border in bid to build wall*, The Washington Post (Feb. 15, 2019), [https://www.washingtonpost.com/politics/trumps-border-emergency-the-president-plans-a-10-am-announcement-in-the-rose-garden/2019/02/15/fo310e62-3110-11e9-86ab-5d02109aeb01\\_story.html?utm\\_term=.192355096079](https://www.washingtonpost.com/politics/trumps-border-emergency-the-president-plans-a-10-am-announcement-in-the-rose-garden/2019/02/15/fo310e62-3110-11e9-86ab-5d02109aeb01_story.html?utm_term=.192355096079).

572. *Id.*

573. *Id.*

574. See State Department Statement (the 2018 numbers were, of course, not comprehensive for the entire year in August 2018). Roque Planas, *Bombshell Washington Post Story on Trump Passport Crackdown Withheld, Distorted Key Facts*, Huff Post (Sept. 17, 2018), [https://www.huffpost.com/entry/washington-post-trump-passport-crackdown\\_n\\_5b9ec246e4b046313fbcb2bd1](https://www.huffpost.com/entry/washington-post-trump-passport-crackdown_n_5b9ec246e4b046313fbcb2bd1).

575. Lorenzo Zazueta-Castro, *State Department: Passport denials at 6-year low*, The Monitor (Sept. 1, 2018), <https://www.themonitor.com/2018/09/01/state-department-passport-denials-at-6-year-low-2/>.

576. Interview with Jaime Diez, January 2019. Interview notes on file with the Open Society Justice Initiative. Elizabeth Brodyaga, *Mexican-Americans and the Southern Border: So You Think You Were Born Here? Prove It!!*, 17-06 Immigr. Briefings 1 (June 2017).

577. Zazueta-Castro, *supra* note 575.

578. See, e.g., Elizabeth Brodyaga, *Mexican-Americans and the Southern Border: So You Think You Were Born Here? Prove It!!*, 17-06 Immigr. Briefings 1 (June 2017) (“Both initial passport applications and applications to renew passports often required two or three sets of requests for information and/or documents, and even then, were sometimes denied.”).

579. Rachel E. Rosenbloom, *From the outside Looking in: U.S. Passports in the Borderlands*, in Benjamin N. Lawrance and Jacqueline Stevens, eds., *Citizenship in Question: Evidentiary Birthright and Statelessness* 143 (2016) (citing Avon (2011) for the proposition that Americans “are far less likely to acquire passports than citizens of Canada or many European countries”).

580. In 2005, in the wake of the September 11, 2001, terror attacks, Congress passed the REAL ID Act, which directs DHS to establish federal standards for identification credentials, including REAL ID compliant driver’s licenses. Pub. L. No. 109-13, 119 Stat. 231, 302. The Act and DHS’s final implementing regulations have met with criticism from a variety of stakeholders, including many U.S. states, citing, for example, the high costs of implementing the scheme. See DHS-OIG, *Potentially High Costs and Insufficient Grant Funds Pose a Challenge to REAL ID Implementation*, OIG-09-36 (March 2009), [https://www.oig.dhs.gov/assets/Mgmt/OIG\\_09-36\\_Mar09.pdf](https://www.oig.dhs.gov/assets/Mgmt/OIG_09-36_Mar09.pdf). Civil liberties and digital rights groups have warned that the statute “creates a de facto national ID card” in the United

States, by linking together a network of state DMV databases. Geoffrey D. Kravitz, *REAL ID: The Devil You Don’t Know*, 3 Harv. L. & Pol’y Rev. 431, 431 (2009); American Civil Liberties Union, *Issues: REAL ID*, <https://www.acu.org/issues/privacy-technology/national-id/real-id>. On April 4, 2019, the Transportation Security Administration (TSA, a DHS component), issued a press release “reminding” the public that beginning on October 1, 2020 “every traveler must present a REAL ID-compliant driver’s license, or another acceptable form of identification, to fly within the United States.” TSA, *TSA reminds travelers of REAL ID identification requirements* (Apr. 4, 2019), <https://www.tsa.gov/news/releases/2019/04/04/tsa-reminds-travelers-real-id-identification-requirements>. In July 2019, researchers at Georgetown Law School’s Center on Privacy and Technology revealed records demonstrating extensive surveillance employing facial recognition technology to scour state DMV databases for law enforcement investigations, including immigration enforcement investigations led by ICE accessing data in states that issue licenses to undocumented residents. See Drew Harwell, *FBI, ICE find state driver’s license photos are a gold mine for facial-recognition searches*, Washington Post (July 7, 2019), [https://www.washingtonpost.com/technology/2019/07/07/fbi-ice-find-state-drivers-license-photos-are-gold-mine-facial-recognition-searches/?utm\\_term=.79dc9a9797cd](https://www.washingtonpost.com/technology/2019/07/07/fbi-ice-find-state-drivers-license-photos-are-gold-mine-facial-recognition-searches/?utm_term=.79dc9a9797cd).

581. Zazueta-Castro, *supra* note 575.

582. See, e.g., Elizabeth Brodyaga, *Mexican-Americans and the Southern Border: So You Think You Were Born Here? Prove It!!*, 17-06 Immigr. Briefings 1 (June 2017).

583. Rachel E. Rosenbloom, *From the outside Looking in: U.S. Passports in the Borderlands*, in Benjamin N. Lawrance and Jacqueline Stevens, eds., *Citizenship in Question: Evidentiary Birthright and Statelessness* 134 (2016); Elizabeth Brodyaga, *Mexican-Americans and the Southern Border: So You Think You Were Born Here? Prove It!!*, 17-06 Immigr. Briefings 1 (June 2017).

584. See, e.g., Elizabeth Brodyaga, *Mexican-Americans and the Southern Border: So You Think You Were Born Here? Prove It!!*, 17-06 Immigr. Briefings 1 (June 2017); *Castelano et al. v. Clinton*, 2d Amend. Compl., U.S. Dist. Ct. S.D. Tex., 08-cv-57.

585. See *id.*

586. See Yemeni-Americans.

587. Information on file with Open Society Justice Initiative.

588. Interview with Jaime Diez, January 2019. Interview notes on file with the Open Society Justice Initiative.

589. See, e.g., Rosenbloom, *Borderlands in Citizenship in Question* 135 (2014); Elizabeth Brodyaga, *Mexican-Americans and the Southern Border: So You Think You Were Born Here? Prove It!!*, 17-06 Immigr. Briefings 1 (June 2017).

- 590.** See, e.g., Elizabeth Brodyaga, *Mexican-Americans and the Southern Border: So You Think You Were Born Here? Prove It!*, 17-06 Immigr. Briefings 1 (June 2017).
- 591.** Anthony D. Bianco, Michael A. Celone & Sherease Pratt, *Defending Agency Immigration Fraud Adjudications*, in 65 U.S. Attorneys' Bulletin (July 2017), at 103, <https://www.justice.gov/usao/page/file/984701/download> (directing attorneys to the Texas Department of State Health Services page posting actions for violations by midwives).
- 592.** Rachel E. Rosenbloom, *From the outside Looking in: U.S. Passports in the Borderlands*, in Benjamin N. Lawrance and Jacqueline Stevens, eds., *Citizenship in Question: Evidentiary Birthright and Statelessness* 135 (2016).
- 593.** See Freedom of Information Act request by Hassan Ahmad, <https://www.muckrock.com/foi/unit-ed-states-of-america-10/state-department-passport-adjudication-policy-60158/> (seeking “[a]ny and all documents, emails, internal memos, external memos, cables, correspondences, directives, or any other media dated January 20, 2017 to the present containing any of the following words: 1. ‘passport adjudication’ or ‘adjudication of passports’ 2. ‘birth certificate’ 3. ‘fraudulent’ 4. ‘citizenship fraud’ 5. ‘border’ 6. ‘midwife’ or ‘midwives’).
- 594.** Rachel E. Rosenbloom, *From the outside Looking in: U.S. Passports in the Borderlands*, in Benjamin N. Lawrance and Jacqueline Stevens, eds., *Citizenship in Question: Evidentiary Birthright and Statelessness* 165 (2016).
- 595.** See *Why has a Texas-born marine veteran been left “stateless” under U.S. immigration policies?* (Democracy Now! broadcast Jan. 13, 2016), <https://www.kcet.org/shows/democracy-now/why-has-a-texas-born-marine-veteran-been-left-stateless-under-us-immigration>.
- 596.** Anthony D. Bianco, Michael A. Celone & Sherease Pratt, *Defending Agency Immigration Fraud Adjudications*, in 65 U.S. Attorneys' Bulletin (July 2017), at 102, <https://www.justice.gov/usao/page/file/984701/download> (citing authorities from the Fifth Circuit and S.D. Tex.).
- 597.** Elizabeth Brodyaga, *Mexican-Americans and the Southern Border: So You Think You Were Born Here? Prove It!*, 17-06 Immigr. Briefings 1 (June 2017) (“[W]henver there is a ‘trigger,’ such as the passport holder applying to renew the passport or to immigrate a relative, a search is made to determine whether a Mexican birth certificate exists. If so, the passport usually is revoked, even if the Mexican birth certificate was filed many years after the person was registered in Texas.”).
- 598.** Rachel E. Rosenbloom, *From the outside Looking in: U.S. Passports in the Borderlands*, in Benjamin N. Lawrance and Jacqueline Stevens, eds., *Citizenship in Question: Evidentiary Birthright and Statelessness* 138 (2016).
- 599.** Interview with Jaime Diez, January 2019. Interview notes on file with the Open Society Justice Initiative.
- 600.** Rachel E. Rosenbloom, *From the outside Looking in: U.S. Passports in the Borderlands*, in Benjamin N. Lawrance and Jacqueline Stevens, eds., *Citizenship in Question: Evidentiary Birthright and Statelessness* 124 (2016).
- 601.** Pseudonyms are used throughout this and other case studies in this chapter.
- 602.** Aarti Kohli, Peter L. Markowitz & Lisa Chavez, Chief Justice Earl Warren Institute on Law and Social Policy, University of California, Berkeley School of Law, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process* (October 2011), at 3, [https://www.law.berkeley.edu/files/Secure\\_Communities\\_by\\_the\\_Numbers.pdf](https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf).
- 603.** See David J. Bier, *U.S. Citizens Targeted by ICE: U.S. Citizens Targeted by Immigration and Customs Enforcement in Texas* (CATO Institute, Immigration Research & Policy Brief No. 8, Aug. 29, 2018), <https://www.cato.org/publications/immigration-research-policy-brief/us-citizens-targeted-ice-us-citizens-targeted>.
- 604.** Paige St. John & Joel Rubin, *ICE Held an American Man in Custody for 1,273 days. He’s Not the Only One Who Had to Prove His Citizenship*, L.A. Times (Sept. 17, 2018), <https://www.latimes.com/local/lanow/la-me-citizens-ice20180427-htlm1story.html>.
- 605.** *Creedle v. Miami-Dade Cty.*, No. 17-cv-22477, 2018 U.S. Dist. LEXIS 192708, at \*3 (S.D. Fla. Nov. 9, 2018).
- 606.** St. John & Rubin, *supra* note 604.
- 607.** See *supra* notes 445-452 and accompanying text.
- 608.** *Proof of citizenship*, Immigration Law & Family § 15:27 (2018 ed.).
- 609.** Ramzi Kassem, *Passport Revocation as Proxy Denaturalization: Examining the Yemen Cases*, 82 Fordham L. Rev. 2009 (2014).
- 610.** Petition for Writ of Certiorari at 27, *Hinojosa et al. v. Horn et al.* (Oct. 8, 2018).
- 611.** Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C.L. Rev. 1695, 1682 (2013) (“The starting point for any discussion of immigration exceptionalism is the plenary power doctrine.”).
- 612.** 8 U.S.C. § 1503(a).
- 613.** Under the 1940 Act, actions for declaration of citizenship could be instituted from abroad. Individuals bringing an action under the previous statute could submit a sworn application demonstrating good faith and substantial basis for the claim to citizenship and obtain from diplomatic or consular authorities a certificate of identity permitting admission to the United States for the duration of the proceedings. 12 A.L.R. Fed. 2d 501 § 2.

- 614.** 8 U.S.C. § 1503. See, e.g., *Forbes v. I.N.S.*, 2001 WL 869646 (N.D. Tex. 2001) (concluding that a claim of derivative citizenship in the context of deportation proceedings arises under 28 U.S.C. § 2241, the federal habeas statute).
- 615.** Compare N-400 leading to naturalization certificate and N-600 leading to certificate of citizenship for U.S. citizens by birth on account of *jus sanguinis* (birth abroad to U.S. citizen parent). 8 U.S.C. § 1433.
- 616.** 8 U.S.C. § 1503(b).
- 617.** On availability of a writ of habeas corpus, see Hiroshi Motomura, *Immigration law and Federal Court Jurisdiction through the Lens of Habeas Corpus*, 91 Cornell L. Rev. 459, 484 (2006), <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3019&context=clr> (“Since the 1960s, it has been well settled that a final removal order against a noncitizen satisfies the threshold requirement that he be ‘in custody’ before he may file a habeas petition. It is also well settled that the departure of a noncitizen who has filed a habeas petition challenging a final removal order does not deprive the court of jurisdiction. Put more generally, the in-custody requirement must be satisfied only at the time the petition is filed. If a noncitizen leaves the United States before filing a habeas petition, however, the general rule says that it is too late to do so because the noncitizen will no longer be able to satisfy the in-custody requirement.”). The availability of habeas to claimants outside the United States but without a final order of removal or seeking admission, e.g. pursuant to § 1503 (c), hinges on the interpretation of the “in custody” requirement. The argument in favor of jurisdiction in “non-detained” cases without a final removal order may be grounded, for example, in the fundamental right of a citizen to return to his country. See Elizabeth Brodyaga, *Mexican-Americans and the Southern Border: So You Think You Were Born Here? Prove It!!*, 17-06 Immigr. Briefings 1 (June 2017) (citing *Worthy v. United States*).
- 618.** *Hinojosa et al. v. Horn et al.*, 896 F.3d 205 (5th Cir. 2018).
- 619.** Petition for Writ of Certiorari at 20-21, *Hinojosa et al. v. Horn et al.* (Oct. 8, 2018).
- 620.** Claims of citizenship arise in two principle postures: (1) affirmative cases seeking declaratory judgments of citizenship and (2) defenses to removal by respondents in immigration courts. In the latter scenario, immigration judge (IJ) decisions are reviewed by the Board of Immigration Appeals under the authority of the Attorney General (BIA) (8 C.F.R. § 1003.1(e)(4)(i) (2019)). BIA precedent is binding unless it is contradicted by Supreme Court or federal circuit court decisions. See *Matter of Anselmo*, 20 I&N Dec. 25, 31-32 (BIA 1989). Neither IJs nor the BIA will be bound by a federal district court decision. *Matter of K-S-*, 20 I&N Dec. 715, 718 (BIA 1993).
- 621.** *Castelano et al. v. Clinton*, 2d Amend. Compl., U.S. Dist. Ct. S.D. Tex., 08-cv-57, at para. 35.
- 622.** Anthony D. Bianco, Michael A. Celone & Sherease Pratt, *Defending Agency Immigration Fraud Adjudications*, in 65 U.S. Attorneys’ Bulletin (July 2017), at 90, <https://www.justice.gov/usao/page/file/984701/download> (citing *De Vargas v. Brownell*, 251 F.2d 869, 871 (5th Cir. 1958) (burden of proof is on the claimant to prove that she is an American citizen); *Reyes v. Neely*, 264 F.2d 673, 678 (5th Cir. 1959) (providing that the burden of proving citizenship is a preponderance of the evidence standard)).
- 623.** *De Vargas v. Brownell*, 251 F.2d 869, 871 (5th Cir. 1958), and the burden of proving citizenship is a preponderance of the evidence standard (see *Reyes v. Neely*, 264 F.2d 673, 678 (5th Cir. 1959)).
- 624.** See, e.g., Elizabeth Brodyaga, *Mexican-Americans and the Southern Border: So You Think You Were Born Here? Prove It!!*, 17-06 Immigr. Briefings 1 (June 2017).
- 625.** *L. Xia v. Tillerson*, 865 F.3d 643, 656 (D.C. Cir. 2017). See also *Chacoty v. Tillerson*, 285 F. Supp. 3d 293, 298 (D.D.C. 2018) (“An aggrieved party seeking to take advantage of § 1503 must take one of two paths. If she is “within the United States,” § 1503(a) creates a cause of action allowing her to seek a declaration that she is a U.S. national. 8 U.S.C. § 1503(a). She need only make “a prima facie case establishing [her] citizenship.” The government must then produce ‘clear, unequivocal, and convincing’ evidence to rebut her showing”) (citing *Perez v. Brownell*, 356 U.S. 44, 47 n.2 (1967)) (internal citation omitted).
- 626.** See *Campbell v. Sessions*, 737 F. App’x 599, 601 (2d Cir. 2018); *Delmore v. Brownell*, 236 F.2d 598, 600 (3d Cir. 1959); *Olivas v. Salazar*, 743 F. App’x 890, 890 (9th Cir. 2018); *Xia v. Tillerson*, 865 F.3d 643, 652 (D.C. Cir. 2017); *Wing Ying Gee v. Kennedy*, 214 F. Supp. 903, 905 (D. Minn. 1963).
- 627.** *Perez v. Brownell*, 356 U.S. 44, 47 n.2 (1958), *overruled on other grounds by Afroyim v. Rusk*, 387 U.S. 253 (1967).
- 628.** *United States v. Ghaloub*, 385 F.2d 567, 570 (2d Cir. 1966).
- 629.** See 8 U.S.C. § 1503(a); 8 U.S.C. § 1252(e)(2). Section 1252 provides for exclusive jurisdiction for federal circuit courts of appeal to review final orders of removal
- 630.** *Nijhawan v. Holder*, 557 U.S. 29, 42 (2009).
- 631.** See, e.g., *Mondaca-Vega v. Lynch*, 808 F.3d 413, 419–20 (9th Cir. 2015) (applying a burden-shifting framework in which the government presents evidence of alienage, the petitioner responds with substantial credible evidence of citizenship, and then the burden shifts back to the government to prove alienage by clear and convincing evidence); *Lee Hon Lung v. Dulles*, 261 F.2d 719, 724 (9th Cir. 1958) (“[W] here one has, over a long period of years, acted in reliance upon a decision . . . admitting him as a citizen of the United States, the fraud or error which will warrant disregard of such decision must be established by evidence which is clear, unequivocal, and convincing.”). In reality, “in expedited removal proceedings, there is at best only a very limited opportunity to prove U.S. citizenship if the Customs and

Border Patrol agent believes otherwise.” Polly Price, *Stateless in the United States: Current Reality and Future Prediction*, 46 Vand. J. Transnat’l L. 443, 468 (2013).

**632.** In 2018, the Ninth Circuit Court of Appeals, in *Olivas v. Salazar*, held that the burden-shifting framework used in removal proceedings when the government offers evidence of foreign birth applies in all alienage cases, including declaratory judgment actions. *Olivas v. Salazar*, 743 F. App’x 890, 890 (2018) (citing the framework applied in *Mondaca-Vega v. Lynch*, 808 F.3d 413, 419 (9th Cir. 2015)).

**633.** Anthony D. Bianco, Michael A. Celone & Sherease Pratt, *Defending Agency Immigration Fraud Adjudications*, in 65 U.S. Attorneys’ Bulletin (July 2017), at 88, <https://www.justice.gov/usao/page/file/984701/download>; 5 U.S.C. § 702.

**634.** Elizabeth Brodyega, *Mexican-Americans and the Southern Border: So You Think You Were Born Here? Prove It!*, 17-06 Immigr. Briefings 1 (June 2017), n. 46.

**635.** 5 U.S.C. § 704.

**636.** National Lawyers Guild, *U.S. Citizenship and Naturalization Handbook* (2018-19), § 10:21 (citing *Bensky v. Powell*, 391 F.3d 894, 898 (7th Cir. 2004)).

**637.** *Chacoty v. Tillerson*, 285 F.Supp.3d 293 (D.D.C. 2018).

**638.** *Rusk v. Cort*, 369 U.S. 367, 375 (1962), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

**639.** Brief of Petitioner-Appellants, *Hinojosa et al. v. Horn et al.*, Nos. 17-40077 & 17-40134 (5th Cir.). There are other reasons why clarity on the application of *Rusk v. Cort* is needed from the Supreme Court, which are beyond the scope of the present analysis. *See, e.g., Coming to United States to claim citizenship*, U.S. Citizenship and Naturalization Handbook § 10:27 (“However, the clarity of this holding was undercut by an unrelated development regarding the APA, when the Supreme Court found the APA to be a waiver of sovereign immunity, but not itself a grant of jurisdiction [*Califano v. Sanders*, 430 U.S. 99, 105 (1977)]. As such, some courts have suggested that the validity of *Rusk* may be in doubt,<sup>12</sup> though the existence of other jurisdictional vehicles such as 28 U.S.C.A. § 1331 [federal question jurisdiction] would seem to afford an individual a separate means to bring suit.”).

**640.** *See, e.g., Chacoty v. Tillerson*, 285 F.Supp.3d 293, 303 (D.D.C. 2018) (“[A]lthough the [State] Department has identified factual distinctions between *Cort* and this case, neither distinction makes a difference.”). The plaintiffs in *Hinojosa* have petitioned the Supreme Court to hear their case on this issue. The cert. petition had not been decided at the time of writing.

**641.** *See Castelano et al. v. Clinton*, Opp. to Def. Mot. to Dismiss, U.S. Dist. Ct. S.D. Tex., 08-cv-57, Doc. 45 (Nov. 4, 2008) (“As the plain text of the statute makes clear, a declaratory judgment brought pursuant to § 1503(a) can result only in a declaration of citizenship. The Court in

such an action must independently review the evidence supporting the Plaintiff’s claim of citizenship and is limited to declaring whether the individual has demonstrated citizenship by a preponderance of the evidence. The Court does not look at what the agency did leading up to the litigation. A § 1503(a) proceeding thus does not examine the policies, procedures, or practices used to adjudicate a passport application or determine whether the use of those policies, procedures, or practices violates the Constitution and federal law.”)

**642.** 7 U.S.C. § 701.

**643.** Elizabeth Brodyega, *Mexican-Americans and the Southern Border: So You Think You Were Born Here? Prove It!*, 17-06 Immigr. Briefings 1 (June 2017) (citing *Rusk v. Cort* “a declaratory judgment is available as a remedy to secure a determination of citizenship”).

**644.** *Castelano et al. v. Clinton*, Opp. to Def. Mot. to Dismiss, U.S. Dist. Ct. S.D. Tex., 08-cv-57, Doc. 45 (Nov. 4, 2008), at p. 14-16.

**645.** Elizabeth Brodyega, *Mexican-Americans and the Southern Border: So You Think You Were Born Here? Prove It!*, 17-06 Immigr. Briefings 1 (June 2017).

**646.** *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 541 (11th Cir. 1996); 5 U.S.C. § 702, 704.

**647.** 5 U.S.C. § 706(2)(A).

**648.** *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam).

**649.** Elizabeth Brodyega, *Mexican-Americans and the Southern Border: So You Think You Were Born Here? Prove It!*, 17-06 Immigr. Briefings 1 (June 2017) (also noting exceptions to “no discovery” rule with significant showing that material in agency possession would show bad faith or incomplete record).

**650.** Elizabeth Brodyega, *Mexican-Americans and the Southern Border: So You Think You Were Born Here? Prove It!*, 17-06 Immigr. Briefings 1 (June 2017).

**651.** National Research Council of the National Academies, Committee on National Statistics, *Vital Statistics: Summary of a Workshop*, Michael J. Siri and Daniel L. Cork, rapporteurs (2009), <https://www.nap.edu/catalog/12714/vital-statistics-summary-of-a-workshop> (“In the United States, all vital events are local.”).

**652.** *Id.*

**653.** UNICEF’s global statistics state that in the United States birth registration for children under five (the global indicator for measuring birth registration coverage) is 100%.

**654.** Brennan Center for Justice, *Citizens without Proof: A Survey of Americans’ Possession of Documentary Proof of Citizenship and Photo Identification* (Nov. 2006), <https://www.brennancenter.org/analysis/citizens-without-proof>.

- 655.** Wendy Hunter, *Undocumented Nationals: Between Statelessness and Citizenship* 22 & n.31 (2019). See also Sarah Igo, *The Known Citizen* 61 (2018). On parents living “off the grid” see Barbara Cotter, *Born in the USA; without a shred of proof*, *The Gazette* (Sep. 30, 2011), [https://gazette.com/news/born-in-the-usa-without-a-shred-of-proof/article\\_a9a684fd-d024-531d-9b17-2282578cda4a.html](https://gazette.com/news/born-in-the-usa-without-a-shred-of-proof/article_a9a684fd-d024-531d-9b17-2282578cda4a.html); children born to midwives (<https://www.sfchronicle.com/opinion/article/Born-in-the-USA-When-a-birth-certificate-isn-t-6644984.php>); on foster care see Joy Diaz and Becky Fogel, *Unidentified: How Kids Can Age Out of Texas Foster Care Without Documentation*, Austin, Texas, Texas Standard, <http://specials.texasstandard.org/unidentified/>.
- 656.** Manny Fernandez, *Immigrants fight Texas’ birth certificate rules*, *N.Y. Times* (Sept. 17, 2015), [https://www.nytimes.com/2015/09/18/us/illegal-immigrant-birth-certificates.html?\\_r=0](https://www.nytimes.com/2015/09/18/us/illegal-immigrant-birth-certificates.html?_r=0).
- 657.** Julia Preston, *Lawsuit forces Texas to make it easier for immigrants to get birth certificates for children*, *N.Y. Times* (July 24, 2016), [https://www.nytimes.com/2016/07/25/us/lawsuit-texas-immigrants-birth-certificates.html?\\_r=0&login=smartlock&auth=login-smartlock](https://www.nytimes.com/2016/07/25/us/lawsuit-texas-immigrants-birth-certificates.html?_r=0&login=smartlock&auth=login-smartlock).
- 658.** Interview notes on file with the Open Society Justice Initiative.
- 659.** Niraj Chokshi, *Federal Judge halts ‘ham-handed’ Texas voter purge*, *N.Y. Times* (Feb. 28, 2019), <https://www.nytimes.com/2019/02/28/us/texas-voter-rolls.html>.
- 660.** *Id.*
- 661.** Settlement Agreement, *Texas League of United Latin American Citizens et al. v. Secretary of State David Whitley et al.* (Apr. 2019), Nos. SA-19-CA-074-FB, SA-19-CA-159-FB, SA-19-CS-171-FB, [https://www.aclutx.org/sites/default/files/4-25-10\\_voter\\_purge\\_settlement\\_agreement.pdf](https://www.aclutx.org/sites/default/files/4-25-10_voter_purge_settlement_agreement.pdf).
- 662.** National Research Council of the National Academies, Committee on National Statistics, *Vital Statistics: Summary of a Workshop*, Michael J. Siri and Daniel L. Cork, rapporteurs, at 38 (2009), <https://www.nap.edu/catalog/12714/vital-statistics-summary-of-a-workshop>.
- 663.** IRTPA would soon be followed by the REAL ID Act of 2005, which introduced further and stricter requirements for verification of state-issued identity documents. See note 580, *supra*.
- 664.** National Research Council of the National Academies, Committee on National Statistics, *Vital Statistics: Summary of a Workshop*, Michael J. Siri and Daniel L. Cork, rapporteurs, at 38 and Appendix B (2009), <https://www.nap.edu/catalog/12714/vital-statistics-summary-of-a-workshop>.
- 665.** *Id.*
- 666.** *Id.* Appendix A, at 66.
- 667.** Texas Department of Health and Human Services, Office of Inspector General, *Birth Certificate Fraud*, oEI-07-99-00570 (Sept. 2000), <https://oig.hhs.gov/oei/reports/oei-07-99-00570.pdf>; National Research Council of the National Academies, Committee on National Statistics, *Vital Statistics: Summary of a Workshop*, Michael J. Siri and Daniel L. Cork, rapporteurs (2009), <https://www.nap.edu/catalog/12714/vital-statistics-summary-of-a-workshop>.
- 668.** Lee Harris & Quinn Owen, *Trump panel found no evidence of widespread voter fraud, sought ‘pre-ordained outcome’: former member*, ABC News (Aug. 5, 2018), <https://abcnews.go.com/Politics/trump-panel-found-evidence-widespread-voter-fraud-sought/story?id=56995344> (quoting former member Maine Secretary of State Mark Dunlap: “While individual cases of improper or fraudulent voting occur infrequently, the instances of which I am aware do not provide any basis to extrapolate widespread or systematic problems.”).
- 669.** Chokshi, *supra* note 659.
- 670.** *Nguyen v. INS*, 533 U.S. 53, 96-97 (2001) (O’Connor, J., dissenting).
- 671.** This is not, and is not intended to be, a comprehensive list.
- 672.** *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).
- 673.** *Afroyim*, 387 U.S. at 268.
- 674.** Patrick Weil, *Citizenship, Passports, and the Legal Identity of Americans: Edward Snowden and Others Have a Case in the Courts*, Yale L.J. Forum (April 23, 2014).
- 675.** *Id.* at 576.
- 676.** *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 67 (2001).
- 677.** Patrick Weil, *Citizenship, Passports, and the Legal Identity of Americans: Edward Snowden and Others Have a Case in the Courts*, Yale L.J. Forum (April 23, 2014).
- 678.** See generally Open Society Justice Initiative, *Zhao v. The Netherlands*, Compl. to U.N. Human Rights Committee (Nov. 23, 2016), <https://www.justiceinitiative.org/litigation/zhao-v-netherlands>.
- 679.** *Trop v. Dulles*, 356 U.S. 86, 92 (1958).
- 680.** *Kent v. Dulles*, 357 U.S. 116, 125-26 (1958).
- 681.** Gretchen C. F. Shappert, Aram A. Gavoor & Steven A. Platt, *Constitutional Aspects of Civil Immigration Enforcement*, in 65 U.S. Attorneys’ Bulletin (July 2017), at 45, <https://www.justice.gov/usao/page/file/984701/download>; *Yamataya v. Fisher*, 459 U.S. 86, 101 (1903).
- 682.** *Stranded Abroad: Shadow Report on Coercive Interrogations and Due Process Violations in the Confiscation or Revocation of Passports of American Citizens of Yemeni*

*Origin*, Submission by civil society organizations to the U.N. Committee on the Elimination of All Forms of Racism (July 11, 2014), at 2.

**683.** *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (“[T]he interests of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment.”).

**684.** As noted above, the Fifth Amendment’s Due Process Clause incorporates the equal protection guarantee applied to the federal government. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

**685.** *Castelano et al. v. Clinton*, 2d Amend. Compl., para. 36, U.S. Dist. Ct. S.D. Tex., 08-cv-57, para. 200.

**686.** Hannah Arendt, *The Origins of Totalitarianism*, 293 (1973) (“The Rights of Man, supposedly inalienable, proved to be unenforceable—even in countries whose constitutions were based upon them—whenever people appeared who were no longer citizens of any sovereign state...Although everyone seems to agree that the plight of these people consists precisely in their loss of the Rights of Man, no one seems to know which rights they lost when they lost these human rights.”).

**687.** Beatrice McKenzie, *To Know a Citizen: Birthright Citizenship Documents Regimes in U.S. History*, in Benjamin N. Lawrance and Jacqueline Stevens, eds., *Citizenship in Question: Evidentiary Birthright and Statelessness* (2016).

**688.** Hannah Arendt, *The Origins of Totalitarianism* 278 (1973) (“[T]here was hardly a country left on the Continent that did not pass between the two wars some new legislation which, even if it did not use this right extensively, was always phrased to allow for getting rid of a great number of its inhabitants at any opportune moment.”).

**689.** See, e.g., Linda Kerber, *The Stateless as the Citizen’s Other: A View from the United States*, in Seyla Benhabib & Judith Resnik, eds., *Migrations and Mobilities: Citizenship, Borders, and Gender* 84-86, 90 (2009); Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* 132-33 (1995).

**690.** Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C.L. Rev. 1695 (2013).

**691.** UN Human Rights Council, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, A/HRC/38/52, Apr. 25, 2018, at para. 67, <https://undocs.org/A/HRC/38/52>.

**692.** Beatrice McKenzie, *To Know a Citizen: Birthright Citizenship Documents Regimes in U.S. History*, in Benjamin N. Lawrance and Jacqueline Stevens, eds., *Citizenship in Question: Evidentiary Birthright and Statelessness* 120 (2016)

(on Chinese exclusion: “With other groups, immigration officials looked for indications of inadmissibility among a largely admissible group. ...For those of Chinese descent on the West Coast, however, government officials looked for admissible individuals within a largely excludable group.”)

**693.** *Id.*

**694.** *Id.* at 19 (“Adapted from English common law, citizenship by *jus soli* applied to the children of white immigrants, those “free white persons” deemed naturalizable under the Naturalization Act of 1790.”).

**695.** Rogers Brubaker, *Citizenship and Nationhood in France and Germany* 50 n.2 (1992) (“In the United State, the semantic overlap between ‘nationality’ and ‘citizenship’ reflects the political definition of nationhood and the fusion of the concepts of nation and sovereign people.”); Jared A. Goldstein, *Unfit for the Constitution: Nativism and the Constitution, from the Founding Fathers to Donald Trump*, 20 J. of Const. L. 489, 496 (2018) (citing Hans Kohn, *American Nationalism: An Interpretive Essay* 20 (1961)).

**696.** Jonathan Swan & Stef W. Knight, *Exclusive: Trump targeting birthright citizenship with executive order*, Axios (Oct. 30, 2018), <https://www.axios.com/trump-birthright-citizenship-executive-order-ocf4285a-16c6-48f2-a933-bd71fd72ea82.html>.

**697.** Alexandra M. Wyatt, *Birthright Citizenship and Children Born in the United States to Alien Parents: An Overview of the Legal Debate*, Congressional Research Service (Oct. 28, 2015), at 17; see also *id.* at 1 n.1 (citing congressional hearing testimony from 2005 and 2015 in the House Judiciary Committee, Subcommittee on Immigration and Border Security).

**698.** Alexandra M. Wyatt, *Birthright Citizenship and Children Born in the United States to Alien Parents: An Overview of the Legal Debate*, Congressional Research Service (Oct. 28, 2015), at 14.

**699.** See, e.g., Jeffrey S. Passel, D’Vera Cohn & John Gramlich, Pew Research Center, *Number of U.S.-born babies with unauthorized immigrant parents has fallen since 2007* (Nov. 1, 2018), <https://www.pewresearch.org/fact-tank/2018/11/01/the-number-of-u-s-born-babies-with-unauthorized-immigrant-parents-has-fallen-since-2007/> (“An NBC News/Wall Street Journal survey conducted in September 2017 found that around two-thirds of Americans (65%) said birthright citizenship should continue, compared with 30% who said it should end.”).

**700.** Hannah Arendt, *The Origins of Totalitarianism* 55 (1973).

**701.** Martha S. Jones, *Birthright Citizens: A History of Race and Rights in Antebellum America* 4 (2018).



- 702.** As many who have examined the citizenship laws of the United States, and the historical record in other countries, have concluded, *jus soli* citizenship can and does coincide with racialized citizenship and immigration regimes, and with race-based differentiations in the rights and privileges of citizens. See, e.g., David Scott FitzGerald, *The History of Racialized Citizenship*, in Ayelet Shachar, Rainer Baubock, Irene Bloemraad, and Maarten Vink, eds., *The Oxford Handbook of Citizenship* 148 (2017). The point is that the Fourteenth Amendment's Citizenship Clause with its *jus soli* guarantee was affirmatively intended to serve as a bulwark against racist ideology in the attribution of citizenship by birth.
- 703.** Letter of constitutional law scholars in response to Trump administration consideration of executive order regarding "birthright" citizenship.
- 704.** *United States v. Wong Kim Ark*, 169 U.S. 649 (1898); letter of constitutional law scholars in response to Trump administration consideration of executive order regarding "birthright" citizenship.
- 705.** *Plyler v. Doe*, 457 U.S. 202, 214 (1982).
- 706.** *Id.* (citing Cong. Globe, 39th Cong., 1st Sess. 1292 (1866)).
- 707.** *Adamson v. California*, 332 U.S. 46, 74 (1947) (Black, J., dissenting).
- 708.** Patrick Weil, *The Sovereign Citizen: Denaturalization and the Origins of the American Republic* 181-82 (2013).
- 709.** *Id.* ("The legality of parental residence status was never raised as an issue either in majority or in dissenting opinions despite numerous opportunities presented to the different Justices.").
- 710.** Beatrice McKenzie, *To Know a Citizen: Birthright Citizenship Documents Regimes in U.S. History*, in Benjamin N. Lawrance and Jacqueline Stevens, eds., *Citizenship in Question: Evidentiary Birthright and Statelessness* 122 et seq. (2016).
- 711.** See, e.g., Michael Anton, *Citizenship shouldn't be a birthright*, *The Washington Post* (July 18, 2018), [https://www.washingtonpost.com/opinions/citizenship-shouldnt-be-a-birthright/2018/07/18/7d0e2998-8912-11e8-85ae-511bc1146bob\\_story.html?utm\\_term=.0efaff5a4d18](https://www.washingtonpost.com/opinions/citizenship-shouldnt-be-a-birthright/2018/07/18/7d0e2998-8912-11e8-85ae-511bc1146bob_story.html?utm_term=.0efaff5a4d18); Alexandra M. Wyatt, *Birthright Citizenship and Children Born in the United States to Alien Parents: An Overview of the Legal Debate*, Congressional Research Service (Oct. 28, 2015), at 13 ("Those who seek reinterpretation of the Citizenship Clause would seem to face substantially greater legal and constitutional hurdles than those who would maintain the birthright citizenship status quo. Nevertheless, it is not necessarily clear that the question has been truly settled.").
- 712.** Alexandra M. Wyatt, *Birthright Citizenship and Children Born in the United States to Alien Parents: An Overview of the Legal Debate*, Congressional Research Service (Oct. 28, 2015), at 21; Polly J. Price, *Stateless in the United States: Current Reality and Future Prediction*, 46 Vand. J. Transnat'l L. 442 (2013) (analyzing Birthright Citizenship Act of 2013, H.R. 140, "the leading model for legislation to limit birthright citizenship in the United States," which would amend § 301 of the INA).
- 713.** Alexandra M. Wyatt, *Birthright Citizenship and Children Born in the United States to Alien Parents: An Overview of the Legal Debate*, Congressional Research Service (Oct. 28, 2015), at 21.
- 714.** *Afroyim v. Rusk*, 387 U.S. 253, 267-68 (1967).
- 715.** Record No. TC-05-2012-0077, concerning an appeal of a writ of *amparo* filed by Mrs. Juliana Dequis (or Deguis) Pierre, challenging Ruling No. 473/2012 rendered by the Civil, Commercial and Labor Branch of the Court of First Instance in the Judicial District of Monte Plata on July ten (10), two thousand twelve (2012), §11.1.4.1 (p. 89 of 147) (translation by Haitian American Lawyers Association of New York, Inc., 2014).
- 716.** *Id.*
- 717.** The figure given is 87.3%. *Id.* at 23 ("These figures show an overwhelming prevalence of Haitian immigrants.").
- 718.** *Id.* at 24.
- 719.** *Id.* at 89.
- 720.** Jonathan M. Katz, *What happened when a nation erased birthright citizenship*, *The Atlantic* (Nov. 12, 2018), <https://www.theatlantic.com/ideas/archive/2018/11/dominican-republic-erased-birthright-citizenship/575527/>.
- 721.** *Id.*; Inter-Am. C.H.R., Annual Report 2017, *Chapter V – Follow-up on the recommendations by the IACHR regarding the situation of human rights in the Dominican Republic* (2018), <http://www.oas.org/en/iachr/docs/annual/2017/docs/IA2017cap.5RD-en.pdf>.
- 722.** Katz, *supra* note 720; "Placeless" is borrowed from Lyndsey Stonebridge, *Placeless People: Writing, Rights and Refugees* (2018).
- 723.** Margaret Stock, National Foundation of American Policy, *The Cost to Americans and America of Ending Birthright Citizenship* (NFAP Policy Brief, Mar. 2012), 1, <https://www.nfap.com/pdf/NFAPPolicyBrief.Birthright-Citizenship.March2012.pdf>.
- 724.** See Polly J. Price, *Stateless in the United States: Current Reality and Future Prediction*, 46 Vand. J. Transnat'l L. 442, 492 (2013).
- 725.** *Id.* at 495.
- 726.** *Id.*

727. *Id.*

728. United Nations High Commissioner For Refugees (UNHCR) & Open Society Justice Initiative, *Citizens of Nowhere: Solutions for the Stateless in the U.S.* (Dec. 2012), <https://www.opensocietyfoundations.org/sites/default/files/citizens-of-nowhere-solutions-for-the-stateless-in-the-us-20121213.pdf>.

729. *Id.* at 511.

730. Brief for the Claremont Institute Center for Constitutional Jurisprudence as Amicus Curiae Supporting Respondents, 542 U.S. 507 (2004) (No.03-6696), <https://www.claremont.org/strategic-litigation/separation-of-powers/hamdi-v-rumsfeld-2004/>.

731. Hannah Arendt, *The Origins of Totalitarianism*, 277 n.20 (1973) (“The problem of statelessness became prominent after the Great War. Before the war, provisions existed in some countries, notably in the United States, under which naturalization could be revoked in those cases in which the naturalized person ceased to maintain a genuine attachment to his adopted country. A person so denaturalized became stateless. During the war, the principal European States found it necessary to amend their laws of nationality so as to take power to cancel naturalization.”).

732. See *Case of the Yean and Bosico Children v. The Dominican Republic*, Inter-American Court of Human Rights (IACtHR), 8 September 2005, <https://www.refworld.org/cases,IACRTHR,44e497d94.html>, at para. 156.



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In the United States, citizenship is a unifying force built around a core set of commonly agreed ideals, including the inherent equality of all people. Yet U.S. citizenship law and practice are marked by gaps, weaknesses, and opportunities for arbitrary decision-making. Today, those gaps and weaknesses are being exploited to take U.S. citizenship away from members of marginalized groups.

This report documents three techniques currently being used to attack the identity and sense of belonging of U.S. citizens:

- Denaturalizations, the stripping of U.S. citizenship from naturalized Americans.
- Denial and revocation of U.S. passports, the discretionary deprivation of Americans' proof of citizenship.
- Political attacks on citizenship by birth, the normalization of policy proposals that would fundamentally alter American society by denying U.S. citizenship to children born in the U.S. to non-citizens.

*Unmaking Americans* looks at the costs of these initiatives, providing first-hand accounts from affected U.S. citizens. The report also shows how current efforts to destabilize the security of citizenship for certain groups fit within historical patterns of politicians seeking to manipulate xenophobia for political gain, and offers recommendations for reform that would prevent further abuse.