

## Snap: How the Moral Elasticity of the Denaturalization Statute Goes Too Far

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# SNAP: HOW THE MORAL ELASTICITY OF THE DENATURALIZATION STATUTE GOES TOO FAR

Aram A. Gavoor\* and Daniel Miktus\*\*

## ABSTRACT

Comprehensive immigration reform is a popular topic in Congress. While many reform bills have been offered, none have addressed the significant substantive and procedural issues surrounding denaturalization, the process where the federal government may seek to have a naturalized person’s citizenship revoked in federal court if his citizenship was unlawfully or fraudulently procured. Though denaturalization serves public policy as a final check on naturalization fraud, existing law also permits the government to denaturalize an individual solely for speech and expressive association that occurs after one acquires citizenship. This provision, 8 U.S.C. § 1451(c), violates naturalized citizens’ First Amendment rights to free speech and association, interferes with their Fifth Amendment right of equal protection, and also has a tendency to over-penalize otherwise innocent conduct. Moreover, authority to initiate a denaturalization proceeding is spread among the Attorney General and all U.S. Attorneys. Congress has not codified an evidentiary burden for denaturalization since the process was initially enacted in 1906. To protect the constitutional rights of all U.S. citizens and to provide legislative clarity, Congress should excise 8 U.S.C. § 1451(c) from immigration law, vest sole authority to initiate denaturalization proceedings with the Attorney General, and codify the “clear, unequivocal, and convincing” evidentiary burden.

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## INTRODUCTION

In 1956, Anton Geiser immigrated to the United States, and in 1962 he successfully became a U.S. citizen.<sup>1</sup> After living in the U.S. for the following forty-two years, the United States government<sup>2</sup> sought to revoke Geiser’s citizenship because he was a guard at Nazi concentration camps when he was seventeen, and lied about it while naturalizing.<sup>3</sup> The government successfully revoked his citizenship in federal district

<sup>1</sup> *United States v. Geiser*, 527 F.3d 288, 290 (3d Cir. 2008).

<sup>2</sup> All references to “government” refer to the United States government.

<sup>3</sup> *Geiser*, 527 F.3d at 290–91; Rich Lord, *Board May Deport Former Nazi Guard Living in Pennsylvania*, PITT. POST-GAZETTE (Nov. 24, 2012), <http://www.post-gazette.com/stories/local/region/board-may-deport-former-nazi-guard-living-in-pennsylvania-663435/>; see also Anita Henkel Blumenstock, Note, *Immigration Law—Voluntary Assistance to the Enemy and Assistance in Persecution as Alternative Grounds for Denaturalization of Suspected Nazi War Criminals—United States v. Kowalchuk*, 59 TEMP. L.Q. 1291, 1302 (1986) (“[T]he

court and, in 2012, at the age of 88, Geiser died, still fighting proceedings to remove him to Austria.<sup>4</sup> Geiser was subjected to a civil denaturalization proceeding,<sup>5</sup> which Congress first created through passage of the Naturalization Act of 1906.<sup>6</sup> In most cases, and certainly in Geiser's, denaturalization based on fraudulently or illegally obtained citizenship serves public policy and is an important *final check* in the enforcement of U.S. immigration laws.<sup>7</sup> The Supreme Court has held that no alien has the right to retain any immigration benefit that was fraudulently or illegally obtained.<sup>8</sup>

Now imagine if a naturalized citizen had her citizenship revoked, not based on evidence of fraud or illegality while naturalizing, but solely based on group association *after* becoming a citizen.<sup>9</sup> A 1952 addition to the denaturalization provision, the

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Immigration and Nationality Act ('INA') requires the Department of Justice to institute denaturalization proceedings against World War II criminals who have unjustly obtained American citizenship.”)

<sup>4</sup> *Geiser*, 527 F.3d at 291; *Former Nazi Concentration Camp Guard Fighting Deportation From the U.S. Dies at Age 88*, DAILY MAIL (Dec. 26, 2012 11:18 PM), <http://www.dailymail.co.uk/news/article-2253577/Anton-Geiser-Former-Nazi-Guard-fighting-deportation-US-dies-88.html>.

<sup>5</sup> 8 U.S.C. § 1451(a) (2012). Denaturalization is also referred to as “revocation of naturalization.” Such terms will be used interchangeably in this Article. The process of denaturalization is a civil action brought by the United States government against an individual to revoke the individual's citizenship and citizenship credentials, such as their certificate of naturalization or U.S. passport. The process of denaturalization, the grounds upon which the U.S. government may pursue denaturalization, and the historical context are all discussed in detail later in this Paper.

<sup>6</sup> The Naturalization Act of 1906, Pub. L. No. 59-338, § 15, 34 Stat. 601; Michael Heyman, *Language and Silence: The Supreme Court's Search for the Meaning of American Denaturalization Law*, 5 GEO. IMMIGR. L.J. 409, 410 (1991) (“United States' citizens lose citizenship through only two means: (1) voluntary expatriation and (2) denaturalization.”).

<sup>7</sup> See, e.g., *Geiser*, 527 F.3d at 288; *United States v. Friedrich*, 402 F.3d 842 (8th Cir. 2005); *United States v. Reimer*, 356 F.3d 456 (2d Cir. 2004). In each of these cases, a naturalized citizen had his citizenship revoked for assisting the Nazi government in its persecution of Jews during the Holocaust. In *Friedrich* and *Reimer*, Eli Rosenbaum assisted in prosecuting the defendants. For over 30 years, Rosenbaum has been investigating and prosecuting individuals believed to be Nazi war criminals. Andrea Fuller, *As Old Nazis Die Off, Pursuit Goes On*, N.Y. TIMES (Aug. 26, 2009), [http://www.nytimes.com/2009/08/27/us/27nazi.html?\\_r=0](http://www.nytimes.com/2009/08/27/us/27nazi.html?_r=0). As of 2011, the Department of Justice's Office of Special Investigations, which Rosenbaum headed from 1995 through 2010, has succeeded in 107 cases against Nazi persecutors and has denied admission to the United States to an additional 180 suspected Nazi persecutors. *Detroit-Area Man Who Shot Jews While Serving as Nazi Policeman Ordered Removed from the United States*, U.S. DEP'T OF JUST., OFF. OF PUB. AFFS. (Feb. 2, 2011), <http://www.justice.gov/opa/pr/2011/February/11-crm-142.html>.

<sup>8</sup> *Knauer v. United States*, 328 U.S. 654, 673 (1946) (““An alien has no moral nor constitutional right to retain the privileges of citizenship if, by false evidence or the like, an imposition has been practiced upon the court, without which the certificate of citizenship could not and would not have been issued.”” (quoting *Johannessen v. United States*, 225 U.S. 227, 241 (1912))).

<sup>9</sup> See *United States v. Chruszczak*, 127 F. Supp. 743, 747 (N.D. Ohio 1954).

group association provision of 8 U.S.C. § 1451(c), provides a statutory mechanism for the government to revoke a naturalized person's citizenship solely on the basis of actions taken after gaining his citizenship.<sup>10</sup> This provision is a vestigial remnant of McCarthyism<sup>11</sup> and acts as a presumption of fraud or illegal procurement of naturalization solely on the basis of membership in, or association with, certain groups within five years of naturalization. This Article will demonstrate how 8 U.S.C. § 1451(c) fails to provide a reliable check for enforcement, is facially unconstitutional, and serves no important public policy.

Section 1451(c) remains relatively unnoticed by legislators of today, aside from those well-versed in immigration law.<sup>12</sup> Much of the denaturalization statute is antiquated, explaining why it has received little to no discussion by Congress since its creation in 1906 and revision in 1952.<sup>13</sup> In fact, all recent comprehensive immigration reform bills fail to address the subject of denaturalization, and the constitutional and procedural defects of § 1451(c) in particular.<sup>14</sup> Congress should recognize the fallacies and shortcomings of the denaturalization statute when it ultimately passes immigration reform, and amend the statute to free it of its significant constitutional flaws and longstanding procedural defects. In doing so, Congress will encourage only appropriate enforcement of the nation's immigration laws and minimize the possibility of unscrupulous, unconstitutional use of those laws at the whims of bureaucratic fiat.

The denaturalization statute should be modified to: (1) eliminate the group membership and association provision, § 1451(c), in its entirety; (2) consolidate sole authority to the Attorney General to initiate denaturalization proceedings; and (3) codify the evidentiary burden required for denaturalization. First, the group association

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<sup>10</sup> 8 U.S.C. § 1451(c) (2012).

<sup>11</sup> Irving Louis Horowitz, *Culture, Politics and McCarthyism: A Retrospective from the Trenches*, 22 WM. MITCHELL L. REV. 357, 365 (1996) ("McCarthyism is another word for intolerance backed by power.").

<sup>12</sup> See, e.g., Border Security, Economic Opportunity, and Immigration Modernization Act, H.R. 15, 113th Cong. (2013); Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013); Strengthen and Fortify Enforcement Act (SAFE Act), H.R. 2278, 113th Cong. (2013); Development, Relief, and Education for Alien Minors (DREAM) Act of 2011, S. 952, H.R. 1842, 112th Cong. (2011); Border Security Results Act, H.R. 1417, 113th Cong. (2013); see also AMERICAN IMMIGRATION LAWYERS ASSOCIATION INFONET, <http://www.aila.org/Issues/AllIssues.aspx> (last visited Mar. 11, 2015) (failing to name denaturalization as a "Featured Topic"); IMMIGRATION POLICY CENTER: AMERICAN IMMIGRATION COUNCIL, <http://www.immigrationpolicy.org/issues> (last visited Mar. 11, 2015) (failing to name denaturalization as one of the "issues" for reform).

<sup>13</sup> Congress initially codified denaturalization proceedings in The Naturalization Act of 1906, Pub. L. No. 59-338, § 15, 34 Stat. 596, 601. Since then, this civil proceeding has been amended by The Nationality Act of 1940, Pub. L. No. 76-853, § 338, 54 Stat. 1137, 1158, and The Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 340, 66 Stat. 163, 260. It has not seen significant revision since 1952. It is the Immigration and Nationality Act of 1952 in which § 340, or 8 U.S.C. § 1451, sets out the current statutory requirements for denaturalization.

<sup>14</sup> See *supra* note 12 and accompanying text.

provision provides that one's membership in a particular group defined by law within five years after naturalizing establishes prima facie evidence that an individual should have been precluded from naturalization from the start.<sup>15</sup> Such a provision is dangerously at odds with the protections provided by the First and Fifth Amendments because it proscribes protected expressive association and delineates classes of citizens based on national origin. Second, the statutory split enforcement authority that empowers both the U.S. Attorney General and ninety-four United States Attorneys to initiate denaturalization actions is superfluous and inefficient.<sup>16</sup> Finally, as a measure of legislative clarity, Congress should codify the Supreme Court's stringent evidentiary standard that naturalization will not be revoked without "clear, unequivocal, and convincing" evidence.<sup>17</sup> Both legislative and judicial history observe the common understanding that denaturalization is a very significant action that potentially subjects individuals to one of the harshest penalties imaginable.<sup>18</sup> Congress should recognize the significant and substantial consequences that may accompany any further failure to reform this portion of U.S. immigration law.

This Article will first provide an overview of the denaturalization procedure to provide important context on the statutory and judicial development of denaturalization. Then, it will analyze the substantive and procedural areas where Congress should take immediate action to amend the denaturalization statute.

## I. DENATURALIZATION OVERVIEW

### A. *The Anatomy of a Denaturalization Action*

Statutory authority to denaturalize is contained in the sweeping Immigration and Nationality Act of 1952 (INA).<sup>19</sup> The INA established the modern foundation for federal governance of most immigration issues.<sup>20</sup> From this framework of immigration legislation, 8 U.S.C. §§ 1421 through 1450 provide the procedures and requirements

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<sup>15</sup> 8 U.S.C. § 1451(c) (2012).

<sup>16</sup> See *infra* Part II.B.1.

<sup>17</sup> *Schneiderman v. United States*, 320 U.S. 118, 125 (1943) ("To set aside such a grant the evidence must be 'clear, unequivocal, and convincing'—it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt.").

<sup>18</sup> See *Fedorenko v. United States*, 449 U.S. 490, 505 (1981) ("[T]he right to acquire American citizenship is a precious one, and that once citizenship has been acquired, its loss can have severe and unsettling consequences."); *Johnson v. Eisentrager*, 339 U.S. 763, 791 (1950) (Black, J., dissenting) (referring to United States citizenship as a "priceless treasure"); *Klapprott v. United States*, 335 U.S. 601, 616 (1949) (Rutledge, J., concurring) ("To take away a man's citizenship deprives him of a right no less precious than life or liberty . . .").

<sup>19</sup> 8 U.S.C. §§ 1101–1537 (2012); see also *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1973 (2011).

<sup>20</sup> The Supreme Court stated that the INA "established a 'comprehensive federal statutory scheme for regulation of immigration and naturalization' and set 'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'" *Whiting*, 131 S. Ct. at 1973 (citing *De Canas v. Bica*, 424 U.S. 351, 353, 359 (1976)).

for the United States to confer citizenship to individuals not born in the United States via the naturalization process.<sup>21</sup> To successfully naturalize, an individual must satisfy enumerated procedural prerequisites, including but not limited to residency, limited length of absence, and physical presence requirements.<sup>22</sup> The INA provides substantive requirements that individuals applying for naturalization possess “good moral character,” be “attached to the principles” of the U.S. Constitution, and be “well disposed to the good order and happiness of the United States.”<sup>23</sup> The INA makes clear that applicants should “neither oppose our form of government nor pledge allegiance to totalitarian regimes.”<sup>24</sup> The Supreme Court construes these requirements strictly and militates that “[n]o alien has the slightest right to naturalization unless all statutory requirements are complied with.”<sup>25</sup> Based on the language of the INA, each certificate of citizenship provided to a naturalized citizen “must be treated as granted upon condition that the government may challenge it . . . and demand its cancellation unless issued in accordance with such requirements.”<sup>26</sup>

After completing a naturalization application and successfully completing a review, the individual may then take the oath and receive a certificate of naturalization.<sup>27</sup> The certificate of naturalization is said to confer all the rights and responsibilities of a natural-born United States citizen.<sup>28</sup> The Supreme Court has emphasized, on several occasions, the importance of gaining United States citizenship and the significance of any attempt to revoke one’s citizenship.<sup>29</sup> Although a newly naturalized citizen is

<sup>21</sup> 8 U.S.C. §§ 1421–50 (2012).

<sup>22</sup> See 8 U.S.C. § 1427(a)–(c) (2012); see also *United States v. Jean-Baptiste*, 395 F.3d 1190, 1192 (11th Cir. 2005) (describing the naturalization requirements in 8 U.S.C. § 1427).

<sup>23</sup> 8 U.S.C. § 1427(a), (d) (2012).

<sup>24</sup> Amy D. Ronner, *Denaturalization and Death: What It Means to Preclude the Exercise of Judicial Discretion*, 20 GEO. IMMIGR. L.J. 101, 109 (2005).

<sup>25</sup> *Fedorenko v. United States*, 449 U.S. 490, 506 (1981) (quoting *United States v. Ginsberg*, 243 U.S. 472, 475 (1917)).

<sup>26</sup> *Id.*

<sup>27</sup> See *Naturalization Oath of Allegiance to the United States of America*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/us-citizenship/naturalization-test/naturalization-oath-allegiance-united-states-america>; *USCIS Form N-400, Application for Naturalization*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/files/form/n-400.pdf>; see also *Gorbach v. Reno*, 219 F.3d 1087, 1089 (9th Cir. 2000) (“The oath is an essential element in the process of becoming a naturalized citizen, conducted in a public ceremony.”).

<sup>28</sup> *Gorbach*, 219 F.3d at 1090 (describing the certificate as a finding by the United States Attorney General that the individual “has met the requirements and taken the oath of allegiance” and is now considered a United States citizen); see also *Luria v. United States*, 231 U.S. 9, 22 (1913) (“Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency.”). Some argue, however, that taking the oath thereby confers the benefits of citizenship and the certificate is merely evidence of those benefits. See 8 C.F.R. § 338.1(a) (2014) (“When an applicant for naturalization has taken and subscribed to the oath of allegiance . . . USCIS will issue a Certificate of Naturalization at the conclusion of the oath administration ceremony.”).

<sup>29</sup> See *Fedorenko*, 449 U.S. at 505 (“[T]he right to acquire American citizenship is a precious one, and that once citizenship has been acquired, its loss can have severe and unsettling

purportedly conferred the same rights that a natural-born citizen holds,<sup>30</sup> a naturalized citizen doesn't *really* have the same rights because unlike a natural-born citizen, a naturalized citizen can still be subject to having his citizenship revoked through a denaturalization proceeding.<sup>31</sup>

Typically, denaturalization is initiated as a civil proceeding that may be brought by a United States Attorney.<sup>32</sup> A complaint must assert that a naturalized citizen's certificate of naturalization was "illegally procured" or procured through "concealment of a material fact or by willful misrepresentation."<sup>33</sup> An accompanying affidavit satisfies the "procedural prerequisite" of "showing good cause" for the United States to bring such a proceeding.<sup>34</sup> The government faces a high evidentiary burden to revoke an individual's citizenship. The Supreme Court requires that the government provide "clear, unequivocal, and convincing" evidence that naturalization was obtained through illegal means, concealment of a material fact, or willful misrepresentation.<sup>35</sup> With regard to the "illegally procured" ground for denaturalization under § 1451(a), the Supreme Court has held that "there must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship."<sup>36</sup> If any of the conditions are not completed or complied with, the certificate was procured by illegal means and

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consequences."); *Johnson v. Eisentrager*, 339 U.S. 763, 791 (1950) (Black, J., dissenting) (referring to United States citizenship as a "priceless treasure"); *Klapprott v. United States*, 335 U.S. 601, 616 (1949) (Rutledge, J., concurring in result) ("To take away a man's citizenship deprives him of a right no less precious than life or liberty . . ."); *Schneiderman v. United States*, 320 U.S. 118, 122, 125 (1943).

<sup>30</sup> See *supra* note 28 and accompanying text.

<sup>31</sup> See 8 U.S.C. § 1451 (2012).

<sup>32</sup> 8 U.S.C. § 1451(a) (2012). Although rarely used, denaturalization may also be initiated as a criminal proceeding. See 18 U.S.C. § 1425 (2012).

<sup>33</sup> 8 U.S.C. § 1451(a) states:

It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any district court of the United States in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation . . . .

8 U.S.C. § 1451(a) (2012); see also *Kungys v. United States*, 485 U.S. 759, 767 (1988) (holding that in a § 1451(a) denaturalization proceeding initiated because the individual misrepresented information during the naturalization process, he must have done so in a willful and material way).

<sup>34</sup> *United States v. Zucca*, 351 U.S. 91, 99 (1956).

<sup>35</sup> *Fedorenko v. United States*, 449 U.S. 490, 505 (1981) (citing *Schneiderman v. United States*, 320 U.S. 118, 125 (1943)).

<sup>36</sup> *Id.* at 506.



revocation becomes possible.<sup>37</sup> If the burden is met, the court *must* enter an order revoking the naturalization order and canceling the certificate of naturalization—“courts lack equitable discretion to refrain from entering a judgment of denaturalization against a naturalized citizen whose citizenship was procured illegally or by willful misrepresentation of material facts.”<sup>38</sup>

The Supreme Court’s last foray into denaturalization was in 1988 when it decided *Kungys v. United States*.<sup>39</sup> In *Kungys*, the Court elaborated on the evidence requisite to establish willful and material fraud.<sup>40</sup> The Court established four requirements that the government must satisfy to revoke one’s naturalization: “the naturalized citizen must have misrepresented or concealed some fact, the misrepresentation or concealment must have been willful, the fact must have been material, and the naturalized citizen must have procured citizenship as a result of the misrepresentation or concealment.”<sup>41</sup> Further interpreting the four independent requirements, the Court defined the term “material” to include a misrepresentation that “had a natural tendency to influence the decisions of the Immigration and Naturalization Service.”<sup>42</sup> The Court further noted that the phrase “procured by” in the fourth requirement requires something more than the applicant’s misrepresentation of something in the application proceeding.<sup>43</sup>

A significant section of the denaturalization statute, and the main focus of this Article, is 8 U.S.C. § 1451(c). This section provides that membership in, or association with, certain groups during a five-year period after the individual naturalizes constitutes prima facie evidence that an individual was not attached to the principles of the U.S. Constitution at the time of naturalization.<sup>44</sup> Under § 1451(c), membership in

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<sup>37</sup> See *id.* (holding that “naturalization that is unlawfully procured can be set aside”); see also U.S. IMMIGRATION AND NATURALIZATION SERV., REVOCATION OF CITIZENSHIP: MEMORANDUM OPINION FOR THE GENERAL COUNSEL, IMMIGRATION AND NATURALIZATION SERVICE (Mar. 3, 1997), available at <https://www.hsdl.org/?view&did=742439>.

<sup>38</sup> *Fedorenko*, 449 U.S. at 517.

<sup>39</sup> 485 U.S. 759 (1988).

<sup>40</sup> *Id.* at 767.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 772. The Immigration and Naturalization Service responsibilities are now transferred to United States Citizenship and Immigration Services of the United States Department of Homeland Security under the Homeland Security Act of 2002, 6 U.S.C. § 101.

<sup>43</sup> *Kungys*, 485 U.S. at 773, 777 (suggesting that “[p]roof of materiality can sometimes be regarded as establishing a rebuttable presumption,” but “[p]rocurment of other benefits, including visas, is not covered.”).

<sup>44</sup> 8 U.S.C. § 1451(c) provides:

If a person who shall have been naturalized . . . shall within five years next following such naturalization become a member of or affiliated with any organization, membership in or affiliation with which at the time of naturalization would have precluded such person from naturalization under the provisions of section 1424 of this title, it shall be considered prima facie evidence that such person was not attached to the principles of the Constitution of the United States and was not well disposed to the good order and happiness of the United States at the time of naturalization,

defined groups after gaining citizenship, on its own, is sufficient evidence to revoke a naturalized citizen's certificate of naturalization.<sup>45</sup> The history of denaturalization proceedings based on group membership begins with individuals known for communist or Nazi ties.<sup>46</sup> Section 1451(c) cross-references to 8 U.S.C. § 1424, which provides the statutory framework for how the government determines which organizations will preclude an individual from eligibility for citizenship.<sup>47</sup> Section 1424 includes a specific provision that prohibits naturalization for individuals affiliated with the Communist Party.<sup>48</sup>

Other portions of the denaturalization statute provide further procedural requirements for denaturalization proceedings. Section 1451(b) requires the government to provide sixty days' personal notice to an individual it plans to denaturalize, and gives the individual time to respond to the government's future complaint in U.S. district court.<sup>49</sup> Section 1451(f) provides that, upon the district court's cancellation of an individual's certificate of naturalization, the court will send the order to the Attorney General and the denaturalized individual must return his certificate of naturalization

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and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation . . . .

8 U.S.C. § 1451(c) (2012); *see also* Charles R. Hooker, *The Past as Prologue: Schneiderman v. United States and Contemporary Questions of Citizenship and Denaturalization*, 19 EMORY INT'L L. REV. 305, 362 (2005) ("Section 1451(c) allows the government to make out a prima facie case of non-attachment when a person becomes a member of certain organizations within five years of naturalization.").

<sup>45</sup> 8 U.S.C. § 1451(c) (2012).

<sup>46</sup> *See* Hooker, *supra* note 44, at 363–64; *see also* RICHARD D. STEEL, STEEL ON IMMIGRATION LAW § 1:2 (2014) (The Immigration and Nationality Act, "and others enacted in the same time period, reflected the times, and particularly incorporated the fear and threat of Communism.").

<sup>47</sup> *See* 8 U.S.C. §§ 1424, 1451(c) (2012).

<sup>48</sup> 8 U.S.C. § 1424(a)(2) provides that no individual may be naturalized: who is a member of or affiliated with (A) the Communist Party of the United States; (B) any other totalitarian party of the United States; (C) the Communist Political Association; (D) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (E) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (F) the direct predecessors or successors of any such association or party . . . .

8 U.S.C. § 1424(a)(2) (2012).

<sup>49</sup> 8 U.S.C. § 1451(b) (2012). The Civil Justice Reform Act also requires each district court to devise a "civil justice expense and delay reduction plan," in which the presiding judicial officer provides the naturalized citizen notice and an opportunity to settle, with certain exceptions, before a complaint is filed. *See* 28 U.S.C. § 473 (2012). *See generally* 28 U.S.C. §§ 471–82 (2012).

to the Attorney General.<sup>50</sup> Additionally, § 1451(d) contains provisions regarding how derivative citizens who obtained their naturalization via a relationship with a denaturalized individual are treated.<sup>51</sup> Also, as a general catchall, § 1451(h) permits the Attorney General “to correct, reopen, alter, modify, or vacate an order naturalizing the person.”<sup>52</sup> This provision gives the Attorney General the ability to pursue denaturalization without any statute of limitations on when the case can be brought.<sup>53</sup> Such prosecutorial freedom allows the federal government to pursue denaturalization many years after a person was admitted as a United States citizen.<sup>54</sup> After denaturalization, an individual reverts to the previous status he held, usually lawful permanent resident, and the federal government can determine if removal is necessary.<sup>55</sup>

The larger statutory scheme of the INA provides further context and definitions to regulate the denaturalization process. Under 8 U.S.C. § 1101(f)(6), an individual shall not be considered to have good moral character if the individual “has given false testimony for the purpose of obtaining any [immigration] benefits.”<sup>56</sup> The Supreme Court further elaborated that § 1101(f)(6) does not distinguish between material and immaterial misrepresentation.<sup>57</sup> Section 1101(f)(9) provides that an individual will not be found to have good moral character for taking part “in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings.”<sup>58</sup> Section 1101 provides the definitions for good moral character within the denaturalization statute, and the government uses such definitions to create affidavits of good cause arguing that an individual was not fit for naturalization.<sup>59</sup>

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<sup>50</sup> 8 U.S.C. § 1451(f) (2012).

<sup>51</sup> 8 U.S.C. § 1451(d) (2012). This provision was later held to only affect derivatives who claimed citizenship through an individual denaturalized for “actual fraud.” *See Developments in the Law Immigration and Nationality*, 66 HARV. L. REV. 643, 730 (1953) (“In interpreting this provision so as to reduce the number of derivatives losing citizenship courts held that actual fraud did not include the ‘constructive fraud’ resulting from a consent judgment. The 1952 Act also invalidates rights of derivatives who claim through persons denaturalized for actual fraud—now concealment or willful misrepresentation.” (footnote omitted)).

<sup>52</sup> 8 U.S.C. § 1451(h) (2012).

<sup>53</sup> *See* Sherry L. Brever, Comment, *Denaturalization of Nazi War Criminals: Is There Sufficient Justice for Those Who Would Not Dispense Justice?*, 40 MD. L. REV. 39, 73 (1981) (“There is no statute of limitations attached to the denaturalization statute, and the courts have uniformly rejected laches as a defense.” (footnote omitted)).

<sup>54</sup> *See, e.g.*, *United States v. Geiser*, 527 F.3d 288 (3d Cir. 2008) (describing denaturalization of an individual with former Nazi ties forty-two years after he obtains citizenship); Brever, *supra* note 53, at 73–74.

<sup>55</sup> *See* Brever, *supra* note 53, at 50. As an example, the government could pursue deportation proceedings if the individual obtained entry and permanent residence through illegal or fraudulent means. “Deportation” and “removal” are used interchangeably; removal is the current statutory term, which replaced the term deportation.

<sup>56</sup> 8 U.S.C. § 1101(f)(6) (2012).

<sup>57</sup> *Kungys v. United States*, 485 U.S. 759, 779 (1988) (“On its face, § 1101(f)(6) does not distinguish between material and immaterial misrepresentations.”).

<sup>58</sup> 8 U.S.C. § 1101(f)(9) (2012).

<sup>59</sup> 8 U.S.C. §§ 1101(f), 1451(a) (2012).

Most denaturalization actions are filed as a civil action under 8 U.S.C. § 1451,<sup>60</sup> but criminal proceedings are also available under 18 U.S.C. § 1425.<sup>61</sup> Section 1425 provides the federal government with permission to pursue criminal sanctions against an individual that obtains naturalization illegally.<sup>62</sup> If a person is convicted under the criminal statute, “the court in which such conviction is had shall thereupon revoke . . . the final order admitting such person to citizenship” under 8 U.S.C. § 1451(e).<sup>63</sup> Again, significance is placed on Congress’ removal of judicial discretion in submitting the final orders. A court *must* revoke the citizenship of an individual convicted under 18 U.S.C. § 1424.<sup>64</sup> These few federal statutes govern the entire denaturalization process, but it was the original codification of the process in 1906 that made the current procedures possible.<sup>65</sup>

### B. Legislative History Analysis

Before Congress enacted standards for naturalization, common law methods existed for alien-immigrants to obtain citizenship. Prior to 1906, courts generally mandated an individual satisfy four requirements to procure naturalization.<sup>66</sup> First, an alien would take an oath declaring the alien’s “bona fide” intent to become a citizen and “renounce forever all allegiance and fidelity to any foreign sovereignty.”<sup>67</sup> Second, the alien needed to wait two years between making the oath and applying for citizenship.<sup>68</sup> Third, the alien would need to satisfy four criteria—a minimum five-year residence in

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<sup>60</sup> 8 U.S.C. § 1451(2) (2012).

<sup>61</sup> 8 U.S.C. § 1425 (2012).

<sup>62</sup> 8 U.S.C. § 1425 makes it a federal crime for:

(a) Whoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship; or

(b) Whoever, whether for himself or another person not entitled thereto, 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 . . . .

8 U.S.C. § 1425(a)–(b) (2012). For an example application of 18 U.S.C. § 1425(a), see *United States v. Latchin*, 554 F.3d 709 (7th Cir. 2009).

<sup>63</sup> 8 U.S.C. § 1451(e) (leading to cancellation of the naturalization certificate according to the procedures of § 1451(f)).

<sup>64</sup> *See id.* (“When a person shall be convicted under section 1425 of Title 18 . . . the court in which such conviction is had *shall* thereupon revoke, set aside, and declare void the final order admitting such person to citizenship, and shall declare the certificate of naturalization of such person to be canceled.” (emphasis added)).

<sup>65</sup> Immigration and Naturalization Act of 1906, Pub. L. No. 59-338, § 15, 34 Stat. 596, 601.

<sup>66</sup> *Luria v. United States*, 231 U.S. 9, 22–23 (1913).

<sup>67</sup> *Id.* at 23.

<sup>68</sup> *Id.*

the United States, good moral character during that time period, attachment to “the principles of the Constitution of the United States,” and being “well disposed to the good order and happiness” of the U.S. Constitution.<sup>69</sup> Finally, the alien would take another oath to “support the Constitution of the United States” and “absolutely and entirely” renounce “all allegiance and fidelity to every foreign sovereignty.”<sup>70</sup> Courts developed these requirements over time, with little regulation by Congress prior to 1906.<sup>71</sup> Similarly, before Congress codified any statutory procedures for denaturalization, naturalized citizens could have their citizenship revoked. “[F]ederal courts granted bills in equity introduced by the Government to vacate naturalization judgments procured by fraud.”<sup>72</sup>

The introduction of statutory denaturalization legislation came during a time when President Theodore Roosevelt was responding to a flawed immigration system full of abuses and lacking any real safeguards.<sup>73</sup> As early as 1844, members of the United States Senate inquired into how they could legislate a legal method for revoking citizenship.<sup>74</sup> Over time, the President and others directed Congress’s attention to the need for a legislative effort to create formalized denaturalization proceedings.<sup>75</sup> The effort was intended to create a uniform system of naturalization and provide “uniform fairness” to individuals seeking to naturalize.<sup>76</sup> Between 1903 and 1904, President Roosevelt called “for the immediate attention of the Congress,” and for “a comprehensive revision of the naturalization laws.”<sup>77</sup> In March 1905, “Roosevelt appointed

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

<sup>70</sup> *Id.*

<sup>71</sup> See REPORT OF THE NATURALIZATION COMMISSION TO THE PRESIDENT, H.R. REP. NO. 59-46, at 19 (1905) (regarding the naturalization process of the judicial system at the time, the Commission suggested to the President and Congress that “the wisest course is to regulate it and not destroy it”).

<sup>72</sup> *Developments in the Law Immigration and Nationality*, *supra* note 51, at 717 (“This power was deemed inherent in equity, and since citizenship was considered a public grant, naturalization judgments could be set aside without regard to laches or estoppel.”); see also *United States v. Norsch*, 42 F. 417 (E.D. Mo. 1890) (“The right of the United States to sue for the cancellation of a certificate of decree of naturalization that has been obtained by fraud is probably co-extensive with the right now accorded the United States to sue for the cancellation of patents that have been fraudulently procured.”).

<sup>73</sup> See *Bindczyck v. Finucane*, 342 U.S. 76, 79–80 (1951); H.R. REP. NO. 59-46, *supra* note 71, at 11–13 (suggesting that motives of fraud included political parties trying to collect more votes, individuals attempting to gain employment of jobs that required U.S. citizenship, and the ability to travel internationally with U.S. citizen credentials).

<sup>74</sup> *Bindczyck*, 342 U.S. at 79 n.3 (citing S.J. Res., 28th Cong., 2d Sess. 40, 44 (1844)).

<sup>75</sup> *Id.*

<sup>76</sup> H.R. REP. NO. 59-46, *supra* note 71, at 19, 23.

<sup>77</sup> Theodore Roosevelt, *Fourth Annual Message* (Dec. 6, 1904), available at <http://www.presidency.ucsb.edu/ws/?pid=29545> (“The courts having power to naturalize should be definitely named by national authority; the testimony upon which naturalization may be conferred should be definitely prescribed; publication of impending naturalization applications

a commission to further investigate this proposal,” and “[t]he Purdy Commission delivered its report on November 8, 1905.”<sup>78</sup> The investigation determined the “incidence and causes of naturalization frauds” and “became the basis for the 1906 Naturalization Act.”<sup>79</sup> The Naturalization Act of 1906 created the first statutory mechanism for denaturalization.<sup>80</sup>

### 1. The Naturalization Act of 1906

The newly enacted Naturalization Act of 1906 (“1906 Naturalization Act”) “was the culmination of half a century’s agitation directed at naturalization frauds, particularly in their bearing upon the suffrage.”<sup>81</sup> The 1906 Naturalization Act’s validity under the Constitution is founded on the right of Congress “[t]o establish a uniform Rule of Naturalization.”<sup>82</sup> It was formally titled “An Act to Establish a Bureau of Immigration and Naturalization, and to Provide for a Uniform Rule for the Naturalization of Aliens Throughout the United States.”<sup>83</sup> With regard to denaturalization, § 15 of the 1906 Naturalization Act provided the authority to United States district attorneys “upon affidavit showing good cause therefore, to institute proceedings . . . for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud” or illegal procurement.<sup>84</sup> United States district attorneys now held authority to petition courts for orders of denaturalization.<sup>85</sup> In *Johannessen v. United States*,<sup>86</sup> the Supreme

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should be required in advance of their hearing in court; the form and wording of all certificates issued should be uniform throughout the country, and the courts should be required to make returns to the Secretary of State at stated periods of all naturalizations conferred.”); Theodore Roosevelt, *Third Annual Message* (Dec. 7, 1903), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29544#axzz1iuWhfMV1>.

<sup>78</sup> PATRICK WEIL, *THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC* 17 (2013).

<sup>79</sup> *Bindczyck*, 342 U.S. at 79–80; WEIL, *supra* note 78, at 17.

<sup>80</sup> WEIL, *supra* note 78, at 17.

<sup>81</sup> *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.”).

<sup>82</sup> U.S. CONST. art. I, § 8, cl. 4.

<sup>83</sup> Immigration and Naturalization Act of 1906, Pub. L. No. 59-338, 34 Stat. 596.

<sup>84</sup> *Id.* at § 15; *Gorbach v. Reno*, 219 F.3d 1087, 1099–1100 (9th Cir. 2000) (Thomas, C.J., concurring) (“The 1906 Act instituted the judicial denaturalization procedure that remains substantially intact to this day: the appropriate United States Attorney files a civil complaint ‘upon affidavit showing good cause therefore.’”).

<sup>85</sup> Immigration and Naturalization Act of 1906, Pub. L. No. 59-338, § 15, 34 Stat. 596; *Gorbach*, 219 F.3d at 1100 (Thomas, C.J., concurring) (stating that the 1906 Naturalization Act’s main framework for denaturalization proceedings “remains substantially intact to this day”); see also *Schneiderman v. United States*, 320 U.S. 118, 133 (1943) (“[T]here is something to be said for the proposition that the 1906 Act created a purely objective qualification, limiting inquiry to an applicant’s previous conduct.”).

<sup>86</sup> 225 U.S. 227 (1912).

Court explained the provisions authorizing statutory denaturalization, stating that “[a]n alien has no moral nor constitutional right to retain the privileges of citizenship if, by false evidence or the like, an imposition has been practiced upon the court, without which the certificate of citizenship could not and would not have been issued.”<sup>87</sup>

In *Schneiderman v. United States*,<sup>88</sup> the Supreme Court held that the 1906 Naturalization Act’s oath requirement “did not require the applicant to swear that he was attached to the Constitution, but only that he would support it.”<sup>89</sup> Additionally, the 1906 Naturalization Act “for the first time imported the test of present belief into the naturalization laws when it provided in § 7 that disbelievers in organized government and polygamists could not become citizens.”<sup>90</sup> In another decision, *Bindczyck v. Finucane*,<sup>91</sup> the Court posited that “Congress formulated a self-contained, exclusive procedure” for denaturalization for fraud or illegal procurement.<sup>92</sup>

Finally, “[t]o prevent fraud in a proceeding before a naturalization court,” the 1906 Naturalization Act established a waiting period between filing an application for naturalization and a final decision.<sup>93</sup> The new 90-day waiting period provided time for the Bureau of Immigration and Naturalization to receive notice and intervene if necessary after investigation.<sup>94</sup> Congress provided the United States government with the authority to appear at a naturalization hearing, cross-examine the witnesses for the individual seeking naturalization, and produce its own evidence.<sup>95</sup> The Supreme Court acknowledged that “Congress recognized that enforcement is the heart of the law.”<sup>96</sup>

## 2. The Nationality Act of 1940

Congress expanded its role in legislating on the issue of immigration through passage of the Nationality Act of 1940 (“1940 Nationality Act”).<sup>97</sup> Section 338 of the 1940 Nationality Act specifically included language regarding denaturalization

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<sup>87</sup> *Id.* at 241.

<sup>88</sup> 320 U.S. 118 (1943).

<sup>89</sup> *Id.* at 133 n.12. *But see* Immigration and Naturalization Act of 1906, Pub. L. No. 59-338, 34 Stat. 596, 603–04 (1906) (“I am attached to the principles of the Constitution of the United States.”).

<sup>90</sup> *Schneiderman*, 320 U.S. at 134 n.12.

<sup>91</sup> 342 U.S. 76 (1951).

<sup>92</sup> *Id.* at 83.

<sup>93</sup> *Id.* at 80.

<sup>94</sup> *Id.* at 80–81.

<sup>95</sup> Immigration and Naturalization Act of 1906, Pub. L. No. 59-338, § 11, 34 Stat. 596; *see also* *Bindczyck*, 342 U.S. at 80 (stating that § 11 was a “scheme of administrative oversight”).

<sup>96</sup> *Bindczyck*, 342 U.S. at 81.

<sup>97</sup> Nationality Act of 1940, Pub. L. No. 76-853, 54 Stat. 1137. The Supreme Court has clearly stated that the federal government “has broad, undoubted power over the subject of immigration and the status of aliens.” *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012).

proceedings.<sup>98</sup> According to the Supreme Court, § 338 reenacted § 15 of the 1906 Naturalization Act.<sup>99</sup>

Although the overall denaturalization procedures remained relatively intact, Congress made some modifications. One change was the behavior requirement for naturalization such that “[n]o person . . . shall be naturalized unless [he] . . . has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.”<sup>100</sup> Part of the impetus for including behavior requirements was the rise in communist fears during the time. Legislative history includes multiple bills suggesting that Congress added “communist” beliefs as a restriction to prevent communist or Nazi supporters from naturalizing.<sup>101</sup> In *Schneiderman*, the Supreme Court stated that, while the 1940 Nationality Act expanded the range of “beliefs disqualifying persons” from gaining United States citizenship, Congress did not explicitly add communist beliefs or affiliation as reasons to deny citizenship.<sup>102</sup>

Section 338 of The 1940 Nationality Act reaffirmed Congress’s support of denaturalization proceedings. Congressional committee reports lacked any real mention of

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<sup>98</sup> Section 338 of the Nationality Act of 1940 states:

(a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.

(b) The party to whom was granted the naturalization alleged to have been fraudulently or illegally procured shall, in any such proceedings under subsection (a) of this section, have sixty days’ personal notice in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

Nationality Act of 1940, Pub. L. No. 76-853, 54 Stat. 1158–59.

<sup>99</sup> *Bindzyck*, 342 U.S. at 79. (“Section 338 of the Nationality Act of 1940 is for our purpose the reenactment of § 15 of the Act of June 29, 1906 . . .”).

<sup>100</sup> The Nationality Act of 1940, Pub. L. No. 76-853, 54 Stat. 1137, 1142; *see Schneiderman v. United States*, 320 U.S. 118, 133 n.12 (1943).

<sup>101</sup> *See, e.g.*, H.R. REP. NO. 72-1353 (1932); S. REP. 72-808 (1932); H.R. REP. NO. 74-1023 (1935); *see also Schneiderman*, 320 U.S. at 132 n.8 (“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.”).

<sup>102</sup> *Schneiderman*, 320 U.S. at 132 n.8.



denaturalization and most changes were “not regarded as a change in substance.”<sup>103</sup> Nonetheless, the 1940 Nationality Act reinforced the ability of the United States government to revoke an order admitting an individual to citizenship because it was obtained through fraud or otherwise illegally procured.<sup>104</sup>

### 3. The Immigration and Nationality Act of 1952

The Immigration and Nationality Act of 1952<sup>105</sup> (INA) contains the current framework for a denaturalization proceeding. Since enactment of the INA, the Supreme Court has shaped denaturalization proceedings in a number of cases.<sup>106</sup> In *De Canas v. Bica*, the Court held that the “[p]ower to regulate immigration is unquestionably exclusively a federal power,” and the states possess no role in its regulation.<sup>107</sup> In attaining naturalization under the law, the Court concluded that “there must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship.”<sup>108</sup> “Failure to comply with any of these conditions renders the certificate of citizenship ‘illegally procured,’ and naturalization that is unlawfully procured can be set aside.”<sup>109</sup> Even with this constitutionally prescribed power, however, the Court has found that “the right to acquire American citizenship is a precious one, and that once citizenship has been acquired, its loss can have severe and unsettling consequences.”<sup>110</sup>

Aware of these two considerations, the precious right of citizenship and the need to prevent fraudulently procured citizenship, Congress modified the denaturalization procedure in the INA. In earlier immigration legislation, “a judgment of denaturalization could be secured only upon a finding that the naturalization decree was obtained by ‘fraud’ or ‘illegal procurement.’”<sup>111</sup> The INA made denaturalization possible if such benefit was “illegally procured” or “procured by concealment of a material fact or by

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<sup>103</sup> *Id.* at 133 n.12.

<sup>104</sup> *Bindzyck*, 342 U.S. at 77–78.

<sup>105</sup> The Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, 269–72.

<sup>106</sup> *See, e.g.*, *Kungys v. United States*, 485 U.S. 759 (1988); *Fedorenko v. United States*, 449 U.S. 490 (1981); *De Canas v. Bica*, 424 U.S. 351 (1976).

<sup>107</sup> 424 U.S. at 354, *rev'd on other grounds*; *see also* *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1974 (2011) (quoting *De Canas*, 424 U.S. at 354); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (“The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States.”).

<sup>108</sup> *Fedorenko*, 449 U.S. at 506.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 505; *see also* Vinineath Nuon Gopal, Comment, *From Judicial to Administrative Denaturalization: For Better or For Worse?*, 72 U. COLO. L. REV. 779, 784 (2001) (“[C]itizenship is a precious right not to be taken (or taken away) lightly.”); Catherine Yonsoo Kim, Note, *Revoking Your Citizenship: Minimizing the Likelihood of Administrative Error*, 101 COLUM. L. REV. 1448, 1467 (2001) (“The right to citizenship . . . provides the foundation from which other rights arise.”).

<sup>111</sup> *Developments in the Law Immigration and Nationality*, *supra* note 51, at 719.

willful misrepresentation.”<sup>112</sup> This change was significant—previously a simple fraud was sufficient to warrant denaturalization—as the INA required a more specific finding of willful and material fraud.<sup>113</sup> Prior to enactment of the INA, fraud could be found and naturalization cancelled if an individual had “mere procedural defects” in his application.<sup>114</sup> The legislative history confirms that these changes were a deliberate attempt to move from a simple fraud standard to the more specific willful and material fraud standard.<sup>115</sup> Accordingly, the government faced a higher evidentiary burden for proving fraud by having to show willful and material misrepresentations where in the past “the Government could avoid having to prove difficult issues of intent by bringing suit based on illegal procurement grounds.”<sup>116</sup>

Ultimately, the INA’s language provided for denaturalization through § 340(a) (currently 8 U.S.C. § 1451(a)) as well as the savings clause in § 340(j) (current amended version codified as 8 U.S.C. § 1451(h)) that allowed courts “to correct, reopen, alter, modify, or vacate an order naturalizing such person.”<sup>117</sup> Section 1451(j) acted as a savings clause for judges in that it provided judicial authority to denaturalize a naturalized citizen.<sup>118</sup> If new evidence was brought forward, the judge could determine if reconsideration was warranted.<sup>119</sup> Congress’s initial addition of the savings clause in § 340(j) focused on “what Congress perceived as the pre-existing power of courts over their own judgments.”<sup>120</sup> However, the § 340(j) savings clause was edited in the Immigration Act of 1990, giving that power to the Attorney General.<sup>121</sup> The changes were an attempt to “preserve the pre-existing general authority of an agency to modify its own issued order.”<sup>122</sup> No significant changes have been made to the denaturalization statute since, although some attempts have been made by members of Congress to add other categories to the list of prohibited group membership.<sup>123</sup>

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<sup>112</sup> 8 U.S.C. § 1451(a); *Fedorenko*, 449 U.S. at 493.

<sup>113</sup> *See Developments in the Law Immigration and Nationality*, *supra* note 51, at 720.

<sup>114</sup> *Id.*

<sup>115</sup> 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.”).

<sup>116</sup> *Brever*, *supra* note 53, at 54 n.50.

<sup>117</sup> 8 U.S.C. § 340(a), (j) (currently 8 U.S.C. § 1451(a), (h)); *Gorbach v. Reno*, 219 F.3d 1087, 1100–01 (9th Cir. 2000) (Thomas, C.J., concurring).

<sup>118</sup> *See Gorbach*, 219 F.3d at 1100–01 (Thomas, C.J., concurring).

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

<sup>120</sup> *Id.* at 1101.

<sup>121</sup> Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, § 18(d); *see also Gorbach*, 219 F.3d at 1101 (Thomas, C.J., concurring) (“The 1990 Act retained § 340(a), but repealed the saving clause at § 340(j) (redesignated § 340(i) in 1988). No new denaturalization power or procedure was created. Thus, denaturalization procedure reverted to its pre-1952 state.”).

<sup>122</sup> *Gorbach*, 219 F.3d at 1101–02 (Thomas, C.J., concurring).

<sup>123</sup> *Hooker*, *supra* note 44, at 310 (“In September 2002, a group of twenty-five Republicans in the House of Representatives introduced a bill containing provisions to allow the government to strip citizenship from persons for ‘becoming a member of, or taking any action at the behest of, a foreign terrorist organization.’”).

In the 1960s, the Supreme Court expressed doubt regarding the constitutionality of denaturalization.<sup>124</sup> In *Afroyim v. Rusk*, the Supreme Court seemed to indicate that the Fourteenth Amendment precluded the federal government from cancelling a naturalized individual's citizenship, stating that "the Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit."<sup>125</sup> However, the Supreme Court later read the holding of *Afroyim* narrowly, insisting that this is not the case when citizenship was obtained illegally or by willful misrepresentation.<sup>126</sup>

In *Fedorenko v. United States*, the Court explicitly held that "district courts lack equitable discretion to refrain from entering a judgment of denaturalization against a naturalized citizen whose citizenship was procured illegally or by willful misrepresentation of material facts."<sup>127</sup> Accordingly, obtaining citizenship illegally or by willful misrepresentation appears to be the only grounds upon which naturalization may constitutionally be cancelled. Considering that "the bulk of denaturalization after 1909 . . . occurred out of a desire to expel . . . 'un-American' citizens" or those considered to be behaving in "un-American" ways based on what they had done after naturalization, many denaturalization actions may actually have been carried out unconstitutionally.<sup>128</sup> This is precisely the case if the government seeks denaturalization under § 1451(c) based solely on actions taken after naturalization that have no bearing on whether that individual engaged in unlawful or fraudulent conduct during the naturalization process.

## II. AREAS FOR AMENDMENT OF THE DENATURALIZATION STATUTE

Americans generally believe that immigration reform is one of the most pressing issues of our time.<sup>129</sup> Congress and the President have acknowledged that "comprehensive immigration reform remains a top priority,"<sup>130</sup> and on August 1, 2014, the U.S. House of Representatives sought to pass immigration legislation.<sup>131</sup>

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<sup>124</sup> See generally *Afroyim v. Rusk*, 387 U.S. 253 (1967).

<sup>125</sup> *Id.* at 262.

<sup>126</sup> See *Fedorenko v. United States*, 449 U.S. 490 (1981); see also *Rogers v. Bellei*, 401 U.S. 815 (1971).

<sup>127</sup> *Fedorenko*, 449 U.S. at 517.

<sup>128</sup> WEIL, *supra* note 78, at 52.

<sup>129</sup> See Sheldon G. Adelson et. al., *Break the Immigration Impasse*, N.Y. TIMES (July 10, 2014), [http://www.nytimes.com/2014/07/11/opinion/sheldon-adelson-warren-buffett-and-bill-gates-on-immigration-reform.html?\\_r=0](http://www.nytimes.com/2014/07/11/opinion/sheldon-adelson-warren-buffett-and-bill-gates-on-immigration-reform.html?_r=0).

<sup>130</sup> *Obama Taunts "Scared" Republicans, Says Immigration Reform is a Priority*, WASH. TIMES (Feb. 14, 2014), <http://www.washingtontimes.com/news/2014/feb/14/obama-says-immigration-reform-still-priority-2014/?page=all>.

<sup>131</sup> *Congress, Unhinged on Immigration*, N.Y. TIMES (Aug. 1, 2014), <http://www.nytimes>

While much attention regarding immigration reform focuses on issues such as border security and how to properly handle the 11 million undocumented aliens currently residing in the U.S.,<sup>132</sup> Congress must also take care not to overlook other portions of the current immigration law that drastically need reformation. Specifically, Congress should: (1) eliminate the group membership and association provision because it is facially unconstitutional under the First and Fifth Amendments; (2) vest sole authority to initiate denaturalization proceedings to the Attorney General; and (3) codify the evidentiary standard of denaturalization. While not discussed as frequently as other aspects of U.S. immigration law, these areas are in just as much need for reform, and failure to amend these sections will lead to a lack of clarity regarding the law, and potentially flagrant constitutional violations by a future administration or a reckless civil servant.<sup>133</sup>

*A. Congress Should Eliminate 8 U.S.C. § 1451(c) in its Entirety Because it Is Facialy Unconstitutional and it Over-Penalizes Innocent Conduct*

8 U.S.C. § 1451(c), the group membership and association provision of the denaturalization statute, violates the First Amendment's protection of expressive association and the equal protection component of the Fifth Amendment's Due Process Clause.<sup>134</sup> Additionally, § 1451(c) over-penalizes innocent conduct, and therefore bears a striking resemblance to criminal laws that overcriminalize harmless conduct. For these reasons, Congress should eliminate 8 U.S.C. § 1451(c) from the denaturalization law.

1. Section 1451(c) Violates the First Amendment's Guarantees of Freedom of Speech and Expressive Association

Section 1451(c) was enacted many years prior to *NAACP v. Alabama ex rel. Patterson*,<sup>135</sup> the first Supreme Court case holding that the First Amendment protects freedom of expressive association.<sup>136</sup> Section 1451(c) tramples on the holding of

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.com/2014/08/02/opinion/congress-unhinged-on-immigration.html. Within the past few years, Congress has tried repeatedly to pass immigration reform. *See, e.g., supra* note 12.

<sup>132</sup> *Congress, Unhinged on Immigration, supra* note 131.

<sup>133</sup> The Justice Department does not currently use § 1451(c) as a basis to denaturalize individuals. However, some believe that Congress may at some point amend that section to target members of groups currently considered unlawful, dangerous, or immoral. *See* Hooker, *supra* note 44, at 376 (suggesting that "War on Terror proponents will likely propose . . . to make membership in terrorist organizations prima facie evidence of non-attachment to the Constitution" under § 1451(c)).

<sup>134</sup> U.S. CONST. amends. I, V.

<sup>135</sup> 357 U.S. 449 (1958).

<sup>136</sup> *Compare* 8 U.S.C. § 1451(c) (enacted in 1952), *with Patterson*, 357 U.S. 449 (1958) (decided in 1958). The Supreme Court later added to its expressive association jurisprudence.

*NAACP* and other Supreme Court cases regarding expressive association. By providing that a naturalized individual may be denaturalized merely for associating with a particular group or for espousing a certain viewpoint within five years after he naturalizes, 8 U.S.C. § 1451(c) unconstitutionally deprives newly naturalized citizens of protections guaranteed by the First Amendment of the U.S. Constitution.

United States citizens have the basic right to freedom of speech and expressive association, fundamental to the fabric of American ideals.<sup>137</sup> “[F]reedom of speech” is specifically protected by the First Amendment, and while freedom of expressive association is not *expressly* protected, the Supreme Court has noted that “its existence is necessary in making the express guarantees fully meaningful.”<sup>138</sup> The First Amendment’s “protection does not end at the spoken or written word.”<sup>139</sup> Rather, an association’s members are entitled to First Amendment protection when that association “is organized for specific expressive purposes.”<sup>140</sup>

Whenever an individual engages in expressive conduct and “‘intends thereby to express an idea,’ [the Court has] acknowledged that conduct may be ‘sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments . . . .’”<sup>141</sup> Freedom of association “includes the right to express one’s attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means.”<sup>142</sup> Freedom of expressive association, then, encompasses an individual’s right to associate with others to pursue a wide array of goals, and those goals may extend at least to social, political, educational, economic, cultural, and religious objectives.<sup>143</sup> Specifically, “freedom to associate with others for the common

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*See generally* *Texas v. Johnson*, 491 U.S. 397, 404 (1989); *N.Y. State Club Ass’n v. City of New York*, 487 U.S. 1, 13 (1988); *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

<sup>137</sup> U.S. CONST. amend. I; *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984); *Griswold*, 381 U.S. at 483.

<sup>138</sup> *Griswold*, 381 U.S. at 483.

<sup>139</sup> *Johnson*, 491 U.S. at 404.

<sup>140</sup> *N.Y. State Club Ass’n*, 487 U.S. at 13.

<sup>141</sup> *Johnson*, 491 U.S. at 404 (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974) and *United States v. O’Brien*, 391 U.S. 367, 376 (1968)). *But see* *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (“It is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.”).

<sup>142</sup> *Griswold*, 381 U.S. at 483; *see also* *Developments in the Law Immigration and Nationality*, *supra* note 51, at 723 (“Moreover, in view of the very broad statutory definition of affiliation it may be an unconstitutional encroachment on the right to freedom of political thought.”).

<sup>143</sup> *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987); *Griswold*, 381 U.S. at 483; *see also* *Roberts*, 468 U.S. at 617–18 (“Our decisions have referred to constitutionally protected ‘freedom of association’ in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal

advancement of political beliefs and ideas is a form of ‘orderly group activity’ protected by the First and Fourteenth Amendments.”<sup>144</sup>

The Court acknowledges that “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. . . .”<sup>145</sup> While freedom of association is not absolute,<sup>146</sup> freedom from state intrusion into group association may be “indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”<sup>147</sup> As Justice Holmes originally stated in dissent in 1929, “‘if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought that we hate.’”<sup>148</sup>

The Court held in *Texas v. Johnson*<sup>149</sup> that, “[i]n deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play,” a court must ask two questions: first, whether “[a]n intent to convey a particularized message was present;” and second, whether “‘the likelihood was great that the message would be understood by those who viewed it.’”<sup>150</sup> If association with a particular group satisfies these two requirements, “state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”<sup>151</sup> Such a regulation “may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas that cannot be achieved through means significantly less restrictive of associational freedoms.”<sup>152</sup> “A law that infringes on the right of expression or association must survive strict scrutiny, which requires the law

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liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.”)

<sup>144</sup> *Kusper v. Pontikes*, 414 U.S. 51, 56–57 (1973).

<sup>145</sup> *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

<sup>146</sup> *Roberts*, 468 U.S. at 623.

<sup>147</sup> *Patterson*, 357 U.S. at 462.

<sup>148</sup> *Schneiderman v. United States*, 320 U.S. 118, 138 (1943) (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

<sup>149</sup> 491 U.S. 397 (1989).

<sup>150</sup> *Id.* at 404 (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)).

<sup>151</sup> *Patterson*, 357 U.S. at 460–61; *see also Roberts*, 468 U.S. at 623 (“Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”).

<sup>152</sup> *Roberts*, 468 U.S. at 623; *see also* Peter Swire, *Social Networks, Privacy, and Freedom of Association: Data Protections vs. Data Empowerment*, 90 N.C. L. REV. 1371, 1386–87 (2012). Note however, that the language “through means significantly less restrictive” is a departure from the traditional strict scrutiny standard of “least restrictive means,” and perhaps “does not require the government to exhaust every possible means of furthering its interest.” *See Tabbaa v. Chertoff*, 509 F.3d 89, 105 (2d Cir. 2007).

be narrowly tailored to address only the government's specific interest."<sup>153</sup> The speech and expressive association prohibited by § 1451(c) deserves First Amendment protection under the *Texas v. Johnson* test such that the statute does not satisfy strict scrutiny. Accordingly, the provision is facially unconstitutional under the First Amendment.

*a. Membership in, and Advocacy For, the Groups Listed in § 1424(a) Is Deserving of First Amendment Protection for All Citizens*

Under the test laid out in *Texas v. Johnson*, one must ask whether “[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.”<sup>154</sup> Because membership in, and advocacy for, the groups described in § 1424(a), such as “the Communist Party,” satisfies this test, § 1451(c) is subject to strict scrutiny. The Supreme Court held in *Kusper v. Pontikes*<sup>155</sup> that “advancement of political beliefs and ideas” is protected by the First Amendment.<sup>156</sup> At a minimum, association with the groups listed in § 1424(a)(1)–(3) (communist and totalitarian groups) warrants First Amendment strict scrutiny.

Irrespective of the holding in *Kusper*, membership in a § 1424(a) group is intended to convey a particularized message. Courts have looked to the individual's actual intent in this inquiry.<sup>157</sup> In most cases, it would seem apparent that an individual intends to help convey an association's message upon joining such association. An individual joins a communist organization or espouses a totalitarian viewpoint because he wishes to convey that organization's particularized message. Accordingly, the first prong of the *Texas v. Johnson* test is satisfied.

Second, there is a great likelihood that others would understand what message an individual is attempting to convey when he joins an organization. Typically when one learns that an individual is involved with an organization, one naturally assumes that the individual is intending to further the message of such organization.<sup>158</sup> Thus, the second prong is also satisfied. Because membership in, and advocacy for, the groups described in § 1424(a) satisfies the *Texas v. Johnson* test, § 1451(c) serves as a conduct regulation that is subject to First Amendment strict scrutiny.

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<sup>153</sup> Lizabeth N. De Vries, *Guilt By Association: Proposition 21's Gang Conspiracy Law Will Increase Youth Violence in California*, 37 U.S.F. L. REV. 191, 203 (2002).

<sup>154</sup> *Johnson*, 491 U.S. at 404 (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)) (alteration in original).

<sup>155</sup> 414 U.S. 51 (1973).

<sup>156</sup> *Id.* at 56–57.

<sup>157</sup> Joshua Waldman, Note, *Symbolic Speech and Social Meaning*, 97 COLUM. L. REV. 1844, 1849 (1997).

<sup>158</sup> See Blake E. Ashforth & Fred Mael, *Social Identity Theory and the Organization*, 14 ACAD. OF MGMT. REV. 20, 21–22 (1989).

*b. The Prohibitions in § 1451(c) Do Not Survive First Amendment Strict Scrutiny*

*i. The Asserted Governmental Interests Behind § 1451(c) Are Not Compelling*

Section 1451(c) codifies civil penalties for group membership in particular organizations or advocacy of certain viewpoints during the five-year period after naturalization, and states that such membership or advocacy is prima facie evidence that the individual was unfit for citizenship.<sup>159</sup> Only a compelling governmental interest could possibly justify this restraint on speech, conduct, and association. Because the panoply of possible governmental interests behind § 1451(c) are not compelling, § 1451(c) fails strict scrutiny and is an unlawful conduct regulation under the First Amendment.

From the terms of § 1451(c) (and by implication, § 1424), two governmental interests appear to be at the forefront: prevention of naturalization fraud and preventing affiliation with, or advocacy for, certain groups.<sup>160</sup> The federal government likely has a compelling interest in preventing naturalization fraud, as it similarly does in preventing advocacy for the overthrow of the U.S. government by force, the unlawful assault or killing of United States officers, unlawful destruction of property, and sabotage.<sup>161</sup> However, a court is unlikely to hold that preventing advocacy for communist or totalitarian teachings, or opposition to organized government, are compelling governmental interests.<sup>162</sup>

Minimizing the spread of communist and totalitarian views is likely not a compelling interest like it may have been during the Cold War when § 1451(c) and § 1424(a) were enacted.<sup>163</sup> Accordingly, suppression of the views named in § 1424(a)(1)–(3) does not present a compelling governmental interest that can justify the § 1451(c) group membership presumption. Because these interests are not compelling, the government may not restrain freedom of speech or association to combat these statutorily designated evils. Even assuming suppression of the views and conduct listed in § 1424(a)(4)–(6) and the prevention of naturalization fraud are compelling governmental interests,

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<sup>159</sup> 8 U.S.C. § 1451(c) (2012).

<sup>160</sup> *Id.*

<sup>161</sup> 8 U.S.C. § 1424(a)(4)–(6) (2012). For purposes of this Article, we assume that such advocacy would violate the test set forth for speech advocating violence or unlawful action, although that point may be debated. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

<sup>162</sup> 8 U.S.C. § 1424(a)(1)–(3) (2012).

<sup>163</sup> STEEL, *supra* note 46, at § 1:2 (The Immigration and Nationality Act, “and others enacted in the same time period, reflected the times, and particularly incorporated the fear and threat of Communism.”). *See, e.g., Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961) (describing the government’s interest in preventing advocacy for communist groups).



§ 1451(c)'s restraint on speech and association is not unrelated to the suppression of ideas and can be achieved through means significantly less restrictive.

ii. Section 1451(c)'s Restraint on Speech and Expressive Association Is Not Unrelated to the Suppression of Ideas

The Supreme Court stated in *Roberts v. U.S. Jaycees*<sup>164</sup> that such a regulation on speech or association must be “unrelated to the suppression of ideas.”<sup>165</sup> On its face, § 1451(c), by incorporating § 1424(a), is intended to suppress ideas.<sup>166</sup> Section 1424(a) suppresses teachings of totalitarianism, communism, and governmental overthrow, among other ideas.<sup>167</sup> Solely for this reason then, § 1451(c) fails First Amendment strict scrutiny. Moreover, § 1451(c) cannot survive constitutional muster because it is wholly intended to suppress ideas.

iii. Any Asserted Governmental Interest Can Be Achieved Through Significantly Less Restrictive Means

Lastly, § 1451(c) fails First Amendment strict scrutiny because significantly less restrictive means exist to further any arguably compelling governmental interest. Section 1451(c) acts as a presumption that if, within five years after attaining citizenship, a person becomes a member in a group in which previous membership would have precluded him from naturalizing when he was a legal permanent resident, such membership would show that the person “was not attached to the principles of the Constitution of the United States . . . .”<sup>168</sup> The U.S. government could then pursue denaturalization solely on that basis.<sup>169</sup> Aside from the inherent fallacy of this argument, such a presumption would obviously not be *necessary* in the large majority of cases to show that an individual lacked attachment to the U.S. Constitution *at the time of naturalization*. In cases where evidence of post-naturalization membership is necessary to prove its case, the non-existence of corroborating evidence should be a strong indication that such membership or advocacy only began after naturalization, and thus, denaturalization is inappropriate.

While the § 1451(c) presumption certainly makes the government's task of denaturalizing some individuals easier, “the First Amendment does not permit the

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<sup>164</sup> 468 U.S. 609 (1984).

<sup>165</sup> *Id.* at 623.

<sup>166</sup> 8 U.S.C. §§ 1451(c), 1424(a) (2012) (providing civil penalties for anyone “who advocates or teaches, or who is a member of or affiliated with any organization that advocates or teaches, opposition to all organized government; or [numerous other organizations],” and also for anyone who “advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship”).

<sup>167</sup> 8 U.S.C. § 1424(a) (2012).

<sup>168</sup> 8 U.S.C. § 1451(c) (2012).

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

State to sacrifice speech for efficiency,<sup>170</sup> nor should it excuse investigatorial laziness. The government possesses several mechanisms to prevent naturalization fraud and to prevent advocacy of ideas the government has a compelling interest in silencing. For example, U.S. Citizenship and Immigration Services (USCIS) could further investigate whether a candidate for citizenship is actually attached to the principles of the United States Constitution before it grants citizenship.<sup>171</sup>

The government could also use all the other civil litigation tools it normally has in its arsenal, including discovery, to satisfy its evidentiary burden for denaturalization. There is at least one other substantial means of furthering its interest—initiating denaturalization under § 1451(a), which has no statute of limitations.<sup>172</sup> Relying on § 1451(c) membership is surplusage to § 1451(a), because § 1451(c)'s presumption is just evidence of fraud. Instead of exploring significantly less restrictive alternatives (one of which would reduce naturalization fraud in the first place and decrease the need for denaturalization altogether; another of which the government has relied on countless times to denaturalize citizens),<sup>173</sup> the government has sacrificed First Amendment protection in the name of expedience. For this reason alone, § 1451(c) fails strict scrutiny.

Finally, § 1451(c) is overbroad in that it incorporates § 1424(a)'s listed groups and ideologies, which is fatal under the First Amendment. The Supreme Court has held that regulation on free speech, even in areas subject to government regulation, “may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.”<sup>174</sup> The government may not use an overbroad regulation “when the end can be more narrowly achieved.”<sup>175</sup> A regulation will not be found unconstitutionally overbroad unless it is real and substantial.<sup>176</sup> Section 1451(c) is both. By incorporating the prohibitions in § 1424(a), an individual could face civil liability for *any* level of membership or affiliation with groups such as a communist or totalitarian party.<sup>177</sup> Such a prohibition would seemingly include anyone who is involved with

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<sup>170</sup> Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795 (1988).

<sup>171</sup> Note, however, that USCIS's investigatory arm, the Fraud Detection and National Security Directorate, is a fees-based agency, so any increased investigation during the naturalization process will likely lead to an increased N-400 Application for Naturalization fee, which currently costs \$595. See *Form N-400: Instructions for Application for Naturalization*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, [http://www.uscis.gov/sites/default/files/files/form/n-400\\_instr.pdf](http://www.uscis.gov/sites/default/files/files/form/n-400_instr.pdf). Therefore, any increase in pre-naturalization investigation may require further congressional appropriations.

<sup>172</sup> 8 U.S.C. § 1451(a) (2012); see also *Revocation of Citizenship*, 21 U.S. Op. Off. Legal Counsel 44 (O.L.C.), 1997 WL 33101204.

<sup>173</sup> See *Detroit Area Man Who Shot Jews While Serving as Nazi Policeman Ordered Removed from the United States*, *supra* note 7.

<sup>174</sup> NAACP v. Alabama *ex rel.* Patterson, 377 U.S. 288, 307 (1964).

<sup>175</sup> *Id.* at 307–08 (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

<sup>176</sup> Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

<sup>177</sup> 8 U.S.C. §§ 1451(c), 1424(a) (2012).

such organizations in any way. This would include individuals involved with the organization who do not actually support the organization's viewpoint.<sup>178</sup> These regulations do nothing to distinguish between individuals who are involved with advocating these groups' core message, and those who are not. Because it leads to potentially widespread and arbitrary liability, § 1451(c) is unconstitutionally overbroad under the First Amendment.

The passage of § 1451(c) predates any Supreme Court jurisprudence regarding freedom of expressive association, and is in serious conflict with those holdings.<sup>179</sup> While § 1451(c) is arguably designed to serve compelling governmental interests, its restrictions on expressive association are wholly aimed at the suppression of ideas, and the government can further its interests through other significantly less restrictive means. For these reasons, the government's use of § 1451(c) to interfere with an individual's rights to free speech and expressive association does not survive strict scrutiny under the First Amendment.

## 2. Section 1451(c) Violates the Equal Protection Component of the Fifth Amendment's Due Process Clause

8 U.S.C. § 1451(c) trips on the equal protection component of the Fifth Amendment's Due Process Clause because it divides U.S. citizens into classes based on national origin and provides unequal protection for recently naturalized citizens. By subjecting some citizens to a different law, and potentially massive civil penalties that U.S. citizens by birth do not face, § 1451(c) deprives naturalized citizens of equal protection of the law. Because § 1451(c) cannot survive strict scrutiny under the Fifth Amendment's equal protection component, it is facially unconstitutional under the Fifth Amendment of the United States Constitution.

"[T]he Constitution 'neither knows nor tolerates classes among citizens.'<sup>180</sup> Of particular importance, the Supreme Court has repeatedly stated that, aside from the constitutionally proscribed eligibility to be President, "rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive."<sup>181</sup>

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<sup>178</sup> However, some argue that because "this evidence will only result in denaturalization 'in the absence of countervailing evidence' . . . [§ 1451(c)] does not, therefore, chill association that legitimately arises after naturalization." *Price v. INS*, 941 F.2d 878, 885 n.8 (9th Cir. 1991) (this opinion was later withdrawn and superseded). *But see* *Hooker*, *supra* note 44, at 378 ("To the extent § 1451(c) chills free speech for those recently naturalized, it makes naturalized citizens into second class citizens and is therefore potentially unconstitutional.").

<sup>179</sup> Compare 8 U.S.C. § 1451(c) (2012) (enacted in 1952), with *Patterson*, 357 U.S. 449 (1958) (decided in 1958). The Supreme Court later added to its expressive association jurisprudence. See generally *Texas v. Johnson*, 491 U.S. 397, 404 (1989); *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988); *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

<sup>180</sup> *Romer v. Evans*, 517 U.S. 620, 623 (1996) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

<sup>181</sup> *Schneider v. Rusk*, 377 U.S. 163, 165 (1964); *Luria v. United States*, 231 U.S. 9, 22

Because § 1451(c) divides U.S. citizens into classes and provides unequal protection among those classes, this provision is unconstitutional under existing Supreme Court equal protection analysis.

Unlike the Fourteenth Amendment which is applicable to the states, the Fifth Amendment does not expressly contain an Equal Protection Clause that is applicable to federal government action.<sup>182</sup> However, the Supreme Court has applied a theory of “reverse incorporation” to hold that the Fifth Amendment’s Due Process Clause contains an “equal protection component” that prevents the federal government from discriminating between individuals or groups.<sup>183</sup> Equal protection analysis is the same under the Fifth and Fourteenth Amendments.<sup>184</sup>

The portions of equal protection analysis that are relevant here are as follows—generally, legislation is presumed valid if rationally related to a legitimate state interest.<sup>185</sup> “The general rule gives way, however, when a statute classifies by race, alienage, or national origin.”<sup>186</sup> Because such laws are considered to reflect “prejudice and antipathy,” and are “seldom relevant to the achievement of any legitimate state interest,” they are subject to strict scrutiny.<sup>187</sup> Similar to First Amendment strict scrutiny, such laws “are given the most exacting scrutiny,” and the burden falls on the government to show that its laws “are narrowly tailored measures that further compelling governmental interests.”<sup>188</sup> Because § 1451(c) classifies citizens by national origin, it is subject to strict scrutiny, and since it is not narrowly tailored to serve a compelling governmental interest, it is unconstitutional under the Fifth Amendment.

Section 1451(c) necessarily classifies citizens on the basis of national origin. The provision creates two classes of citizens: those who originated in the United States, and those who did not.<sup>189</sup> Naturalized citizens are relegated to second-class citizenship.<sup>190</sup>

(1913); *see also* *Rogers v. Bellei*, 401 U.S. 815, 834–35 (1971) (quoting *Schneider v. Rusk*, but noting that “naturalization, when unlawfully procured, may be set aside”).

<sup>182</sup> U.S. CONST. amends. V, XIV, § 1.

<sup>183</sup> *Washington v. Davis*, 426 U.S. 229, 239 (1976). *See generally* Bradford Russell Clark, Note, *Judicial Review of Congressional Section Five Action: The Fallacy of Reverse Incorporation*, 84 COLUM. L. REV. 1969 (1984).

<sup>184</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217 (1995); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

<sup>185</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* (“[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 subjected to strict scrutiny . . .”).

<sup>188</sup> *Johnson v. California*, 543 U.S. 499, 505 (2005); *see also* *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Cleburne*, 473 U.S. at 440.

<sup>189</sup> 8 U.S.C. § 1451(c) (2012).

<sup>190</sup> *See* Hooker, *supra* note 44, at 377 (noting that § 1451(c) chills speech for those recently naturalized and thereby creates second-class citizenship). Some believe that the threat of

For those citizens that did not originate in the United States—naturalized citizens—the law provides for a potential civil penalty for certain forms of speech and association within five years of naturalization. Conversely, U.S. citizens who were born into their citizenship are free to engage in that same speech and association without a similar risk.<sup>191</sup> Though the Supreme Court has never explicitly held that naturalized citizens are a suspect class, the Court has held that nationality is a suspect class.<sup>192</sup> On its face, § 1451(c) classifies U.S. citizens based on original national origin and discriminates against those citizens who originated outside the United States. Therefore, unless this provision is narrowly tailored to further a compelling governmental interest, it is unconstitutional under the Fifth Amendment.<sup>193</sup>

As explained above in Part II.A.1.b, some of the governmental interests behind § 1451(c), and by incorporation, § 1424(a), are not compelling. The federal government has no interest, let alone a compelling interest, in suppressing free speech, conduct, and association in groups that advocate unpopular views. Such goals cannot support the dual classifications created by § 1451(c). And though the government may have a compelling interest in preventing naturalization fraud and in preventing the types of advocacy described in § 1424(a)(4)–(6), the statutory basis chosen to further those interests are not narrowly tailored and necessary to achieve these goals.

Section 1451(c) is not likely to prevent the advocacy of certain views contained in § 1424(a)(4)–(6). The Supreme Court has held that a regulation subject to strict scrutiny will not be upheld if it “could have been achieved by less restrictive means.”<sup>194</sup> As described in Part II.A.1.b.iii, if the government truly wanted to prevent naturalization fraud, it could be more diligent in its pre-naturalization investigation and screening processes. This would lower the incidence of naturalization fraud and reduce the need for denaturalization in the first place. The government is also free to use every other tool in its civil litigation arsenal to meet its burden of proof. The government may not sacrifice constitutional freedoms simply because using other methods to build a strong case may be more difficult.<sup>195</sup> Because a naturalized citizen’s associations after naturalization have no relevant bearing on his frame of mind when he naturalized, this measure is not likely to serve the intended end. Accordingly, § 1451(c) is not necessary,

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denaturalization generally makes naturalized citizens into second-class citizens. *See Knauer v. United States*, 328 U.S. 654, 676 (1946) (Rutledge, J., dissenting); WEIL, *supra* note 78, at 158; Jon B. Hultman, Note, *Administrative Denaturalization: Is There “Nothing You Can Do That Can’t be [Un]done”?*, 34 LOY. L.A. L. REV. 895, 926 (2001).

<sup>191</sup> *Knauer*, 328 U.S. at 676 (Rutledge, J., dissenting).

<sup>192</sup> *See Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); *Graham v. Richardson*, 403 U.S. 365 (1971); Hultman, *supra* note 190, at 926.

<sup>193</sup> *See Cleburne*, 473 U.S. at 440 (holding that “when a statute classifies by race, alienage, or *national origin*,” it is “subjected to strict scrutiny and will be sustained only if [it is] suitably tailored to serve a compelling state interest” (emphasis added)).

<sup>194</sup> *City of Mobile v. Bolden*, 446 U.S. 55, 117–18 n.15 (1980).

<sup>195</sup> *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988).

or even likely, to prevent naturalization fraud. Rather, it remains a dangerous vestigial statute from the Cold War era.

Next, under the Equal Protection Clause, a statutory classification must not be arbitrary.<sup>196</sup> Section 1451(c) is arbitrary in at least two ways. First, it sets an arbitrary limit of five years after naturalization as the cutoff point where naturalized citizens may engage in the proscribed conduct without fear of a presumption of detachment to the principles of the U.S. Constitution at the time of naturalization. If a naturalized citizen espouses communist views four years and eleven months after gaining citizenship, that conduct is prima facie evidence that he was not attached to the principles of the U.S. Constitution when he naturalized.<sup>197</sup> If another naturalized citizen engages in the same conduct five years and one day after naturalization, no prima facie case is established.<sup>198</sup> Thus, absent any other evidence, the former individual could be denaturalized while the latter would not be denaturalized, even if the latter was the only one of the two individuals to have actually obtained his citizenship unlawfully. Such a five-year limit creates an arbitrary presumption, and is unconstitutional.

Section 1451(c) arbitrarily determines that the proscribed conduct is only severe enough to subject a certain class of U.S. citizens to potential civil penalties. “Yet, practically and constitutionally, naturalized citizens as a class are not less trustworthy or reliable than the native-born.”<sup>199</sup> If this is the case, then § 1451(c)’s distinction between naturalized citizens and U.S.-born citizens must be deemed arbitrary. The statute creates an unlawful arbitrary distinction between classes and is therefore unconstitutional under equal protection analysis.

Section 1451(c) divides U.S. citizens into two classes and provides unequal protection for recently naturalized U.S. citizens. Such a distinction is subject to the most exacting form of review possible, and § 1451(c) is unable to survive strict scrutiny under the equal protection component of the Fifth Amendment’s Due Process Clause. Because the regulation is not narrowly tailored or necessary to serve a compelling governmental interest and is arbitrary, it is unconstitutional under the Fifth Amendment.

### 3. Section 1451(c) Is a Classic Example of Over-Penalization of Innocent Conduct

Although denaturalization under 8 U.S.C. § 1451 is a civil cause of action,<sup>200</sup> it bears much resemblance to a criminal proceeding. In addition to the heightened evidentiary burden (“clear, unequivocal, and convincing”),<sup>201</sup> which the Seventh Circuit Court

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<sup>196</sup> Reed v. Reed, 404 U.S. 71, 76 (1971).

<sup>197</sup> 8 U.S.C. § 1451(c) (2012).

<sup>198</sup> *Id.*

<sup>199</sup> Fedorenko v. United States, 449 U.S. 490, 525 n.14 (1981) (Blackmun, J., concurring).

<sup>200</sup> United States v. Kairys, 782 F.2d 1374, 1382 (7th Cir. 1986) (“Denaturalization is a civil rather than criminal proceeding.”); Jay L. Chavkin, Note and Comment, *The Man Without a Country: The Just Deserts of John Demjanjuk*, 28 LOY. L.A. L. REV. 769, 770 (1995) (“A denaturalization proceeding is a civil hearing in equity . . .”).

<sup>201</sup> Schneiderman v. United States, 320 U.S. 118, 125 (1943).

of Appeals described as contemplating “a higher standard of materiality . . . than does the criminal law generally,”<sup>202</sup> denaturalization, which likely leads to removal proceedings, has a retributive element to it that tracks closely with the criminal law.<sup>203</sup> So, while not technically criminal, denaturalization proceedings under § 1451(c) provide such a steep penalty for violation that they may fairly be analogized to criminal proceedings.<sup>204</sup> Just as some criminal laws tend to overcriminalize lawful conduct, § 1451(c) similarly tends to over-penalize otherwise innocent conduct.

When critics of a criminal law argue that it overcriminalizes certain conduct, they tend to argue three points: first, that there is a lack of enforcement which signals that the conduct is not actually condemned; second, that because there is a lack of enforcement, there arises a substantial possibility of discriminatory enforcement; and third, that law enforcement resources are diverted from more important goals in order to criminalize innocent conduct. Section 1451(c) carries with it all of these familiar characteristics, and therefore should be eliminated from the current immigration law.<sup>205</sup>

Section 1451(c) suffers from a near total lack of enforcement. Denaturalizations are rare in general, and denaturalization under § 1451(c) is almost never implemented.<sup>206</sup> This can cause confusion as to whether the conduct is actually considered unlawful. In fact, “the moral message communicated by the law is contradicted by the total absence of enforcement; for while the public sees the conduct condemned in words, it also sees in the dramatic absence of prosecutions that it is not condemned in deed.”<sup>207</sup>

<sup>202</sup> *United States v. Alferahin*, 433 F.3d 1148, 1155 (9th Cir. 2006) (quoting *United States v. Puerta*, 982 F.2d 1297, 1305 (9th Cir. 1992)).

<sup>203</sup> John William Heath, Jr., Note, *Journey Over “Strange Ground”: From Demjanjuk to the International Criminal Court Regime*, 13 GEO. IMMIGR. L.J. 383, 385 (1999) (discussing the “blurring of the distinctions between the civil and criminal systems in denaturalization”); Chavkin, *supra* note 200, at 792 n.201 (stripping an individual of citizenship, “deporting him to an unfamiliar country, and causing him to lose daily contact with his family and friends seems retributive enough to be considered punishment . . .”).

<sup>204</sup> *Schneiderman*, 320 U.S. at 160 (“A denaturalization suit is not a criminal proceeding. But neither is it an ordinary civil action since it involves an important adjudication of status.”).

<sup>205</sup> See, e.g., Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U.L. REV. 747, 766–67 (2005); Sanford H. Kadish, *The Crisis of Overcriminalization*, 7 AM. CRIM. L.Q. 17 (1968); Jeffrey S. Parker, *Developing Consensus on Solutions to Overcriminalization Problems: The Way Ahead*, 7 J.L. ECON. & POL’Y 725, 726 (2011); see also *Romer v. Evans*, 517 U.S. 620, 645 (1996) (describing anti-sodomy statutes as overcriminalization, the Court opined that enforcement could be accomplished only by the most “wasteful allocation of law enforcement resources”).

<sup>206</sup> Hooker, *supra* note 44, at 343, 362 (“Since *Price*, appellate courts have not heard any cases in which § 1451(c) has been at issue. . . . Section 1451(c) has rarely been invoked. It has never been successfully relied on to denaturalize a citizen.”); see also Elizabeth Keys, *Defining American: The Dream Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101, 155 (2013); Arnold Rochvarg, *Report to the Administrative Conference—Reforming the Administrative Naturalization Process: Reducing Delays While Increasing Fairness*, 9 GEO. IMMIGR. L.J. 397, 446 (1995).

<sup>207</sup> Kadish, *supra* note 205, at 20.

Such confusion can lead to an actual impairment of individual security, which is precisely the opposite of what the law is supposed to accomplish.<sup>208</sup> Further, “deployment of the criminal sanction for behavior that seems harmless or unworthy of public censure tends to weaken the moral force of criminal law.”<sup>209</sup> By retaining the power to enforce where no enforcement actually occurs, the state keeps individuals in a state of insecurity that tends to deprive the law of its normal force.

Next, the near total lack of enforcement under § 1451(c) leads to an unacceptably high risk of discriminatory enforcement. There is serious “potential for corruption and discrimination when the criminal law exceeds its limits.”<sup>210</sup> Section 1451(c) leaves total discretion to U.S. Attorneys to initiate denaturalization, and invites “discriminatory enforcement against persons selected for prosecution on grounds unrelated to the evil against which these laws are purportedly addressed.”<sup>211</sup> It is easy to imagine a U.S. Attorney targeting certain individuals for membership in a group with which he disagrees, or even simply using the provisions of § 1451(c) to initiate denaturalization proceedings for reasons entirely unrelated to association with that group. Another risk includes the “enhanced opportunities created for extortionary threats of exposure and prosecution.”<sup>212</sup> The better course would be to eliminate the possibility of this increased risk of extortion and discrimination.

Third, § 1451(c) may divert law enforcement resources from other more important government objectives. “Society’s interest in effective law enforcement suffers if the government channels its resources on the basis of prejudice or other improper motives.”<sup>213</sup> Section 1451(c) could potentially divert substantial resources “from areas that may prove to be tomorrow’s problems.”<sup>214</sup> By focusing police attention on whether recently naturalized citizens are members of certain groups, § 1451(c) sidetracks law enforcement officials from other tasks, including ensuring that naturalization fraud is not occurring prior to naturalization. “[T]he decision to criminalize any particular behavior must follow only after an assessment and balancing of gains and losses.”<sup>215</sup> When the government’s costs and benefits are weighed, it becomes clear that § 1451(c) does not pass such a balancing test.

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<sup>208</sup> *Id.* at 20 (“Dead letter laws, far from promoting a sense of security, which is the main function of the penal law, actually impair that security by holding the threat of prosecution over the heads of people whom we have no intention to punish.” (quoting MODEL PENAL CODE § 207.11, comments at 151 (Tent. Draft No. 9, 1959))).

<sup>209</sup> Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 729 (2005).

<sup>210</sup> Douglas N. Husak, *The Nature and Justifiability of Nonconsummate Offenses*, 37 ARIZ. L. REV. 151, 152 (1995).

<sup>211</sup> Kadish, *supra* note 205, at 21.

<sup>212</sup> *Id.*

<sup>213</sup> Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After United States v. Armstrong*, 34 AM. CRIM. L. REV. 1071, 1088 (1997).

<sup>214</sup> Ellen S. Podgor, *White Collar Crime and the Recession: Was the Chicken or the Egg First?*, 2010 U. CHI. LEGAL F. 205, 222 (2010).

<sup>215</sup> Kadish, *supra* note 205, at 33.



Although a civil law proceeding, denaturalization under 8 U.S.C. § 1451 bears many similarities to criminal law proceedings. In addition to requiring a heightened evidentiary showing and providing for the devastating penalty of loss of citizenship, denaturalization under § 1451(c) possesses many of the same characteristics of criminal laws that tend to overcriminalize behavior.<sup>216</sup> § 1451(c) is a classic example of a law that “overcriminalizes” conduct because it suffers from a near-total lack of enforcement, tends to encourage discriminatory enforcement, and diverts scarce government resources. For these reasons alone, Congress should excise 8 U.S.C. § 1451(c) from immigration law.

### *B. Procedural Areas for Amendment of the Denaturalization Statute*

The substantive concerns of the denaturalization process are significant, but procedural concerns in the statute also deserve legislative attention. Congress should act to consolidate the sole power to initiate denaturalization proceedings with the Attorney General, and also codify the evidentiary burden required for denaturalization.

#### 1. Power to the Attorney General

One major procedural flaw in the current denaturalization procedure is the division of authority in the United States government for initiating a denaturalization proceeding. As the historical development of denaturalization proceedings which eventually led to 8 U.S.C. § 1451 shows, Congress changed the operating procedure more than once.<sup>217</sup> There is an inconsistency in the proper division of authority between the Attorney General and the numerous United States Attorneys spread out across the country.<sup>218</sup>

In the initial development of United States Attorneys, Assistant U.S. Attorneys, while appointed by the Attorney General, were not under his direct control.<sup>219</sup> Beginning in 1966, 28 U.S.C. § 519 provided the Attorney General the responsibility to “direct all United States attorneys [and] assistant United States attorneys . . . in the discharge of their respective duties.”<sup>220</sup> Additionally, 28 U.S.C. § 516 provides that

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<sup>216</sup> *Id.* at 19–21, 30.

<sup>217</sup> WEIL, *supra* note 78, at 41 (noting that between 1922 and 1926, a compromise was reached that vested denaturalization power in the Department of Justice, although denaturalizations would be handled exclusively by U.S. Attorneys, subject to DOJ approval).

<sup>218</sup> U.S. ATTORNEYS’ MANUAL § 3-2.400 (1997), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title3/2musa.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title3/2musa.htm) (“The division of responsibility in the Department of Justice between the offices of the United States Attorneys and the legal divisions is determined by statutes, Code of Federal Regulations provisions, Attorney General and Deputy Attorney General directives, and actual practice. It is also extensively discussed in the Manual’s various titles.”); see also *Koolstra v. Sullivan*, 128 F.R.D. 672, 673 (D. Colo. 1989).

<sup>219</sup> *Koolstra*, 128 F.R.D. at 673.

<sup>220</sup> 28 U.S.C. § 519 (2012).

“the conduct of litigation in which the United States . . . is a party . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General.”<sup>221</sup> Even though this language seems to provide a clear direction that the Attorney General shall direct the conduct of all U.S. Attorneys and Assistant U.S. Attorneys, there are still areas of the law in which the division of authority is not particularly clear.<sup>222</sup>

In the context of *naturalization*, 8 U.S.C. § 1421 provides direct control and sole authority to the Attorney General.<sup>223</sup> For example, § 1421(a) provides that “[t]he sole authority to naturalize persons as citizens of the United States is conferred upon the Attorney General.”<sup>224</sup> This power includes the ability to issue certificates of naturalization<sup>225</sup> and to forward information to the court “necessary to administer the oath of allegiance.”<sup>226</sup> These provisions provide the Attorney General clear and exclusive authority over naturalization proceedings.

Yet once an individual is potentially subject to *denaturalization*, the Attorney General and U.S. Attorneys’ roles and authority become less clear. Under 8 U.S.C. § 1451(a), United States Attorneys have a duty, upon a finding of good cause to believe that an order of naturalization “and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation,” to provide an affidavit to a district court which will initiate revocation of the order granting naturalization and lead to cancellation of the individual’s certificate of naturalization.<sup>227</sup> However, 8 U.S.C. § 1451(h) provides the Attorney General with the power “to correct, reopen, alter, modify, or vacate an order naturalizing the person.”<sup>228</sup> The result appears to be that United States Attorneys have individual authority, concurrent with that of the Attorney General, to pursue actions of denaturalization without explicit direction from the Attorney General.

And as noted in Part I.A, 8 U.S.C. § 1451(c) provides that membership or affiliation in the proscribed groups within five years of naturalization is sufficient to form a *prima facie* case of denaturalization “in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment

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<sup>221</sup> 28 U.S.C. § 516 (2012); *see also* *Thomas v. INS*, 35 F.3d 1332, 1340–41 (9th Cir. 1994) (“Except as otherwise authorized by law, the Attorney General of the United States supervises all litigation to which the United States or an agency thereof is a party.”).

<sup>222</sup> *Koolstra*, 128 F.R.D. at 673 (“The division of labor between attorneys in the Department of Justice and U.S. Attorneys is not altogether clear.”).

<sup>223</sup> 8 U.S.C. § 1421 (2012). Note that this authority has been delegated to the Department of Homeland Security in the Homeland Security Act of 2002, as amended. *See* Homeland Security Act of 2002, Pub. L. No. 107-296 §§ 441, 451 (codified at 6 U.S.C. §§ 251, 271 (2012)).

<sup>224</sup> 8 U.S.C. § 1421(a) (2012).

<sup>225</sup> 8 U.S.C. § 1421(b)(4) (2012).

<sup>226</sup> 8 U.S.C. § 1421(b)(2)(A)(ii)(i) (2012).

<sup>227</sup> 8 U.S.C. § 1451(a) (2012).

<sup>228</sup> 8 U.S.C. § 1451(h) (2012).

of a material fact or by willful misrepresentation.”<sup>229</sup> “[I]n the proper proceeding” would seem to include denaturalization actions initiated by the Attorney General under § 1451(h) and by U.S. Attorneys under § 1451(a). As in all denaturalization proceedings, but particularly in § 1451(c) proceedings, a “zealous” U.S. Attorney may use his power in ways not contemplated or intended by the law.<sup>230</sup> Instead of centralizing the power structure under the Attorney General to develop a consistent and evenhanded application of denaturalization laws, Congress, by developing the procedure for denaturalization proceedings over the span of 100-plus years, has haphazardly left open the question of the proper division of authority for initiating denaturalization between the Attorney General and U.S. Attorneys.

In *Thomas v. INS*,<sup>231</sup> the Ninth Circuit expressed its view on the existing division of authority in denaturalization proceedings.<sup>232</sup> In a case regarding whether a plea bargain promised by an Assistant U.S. Attorney bound the United States even though the Assistant U.S. Attorney had no such explicit power, the court noted that “Congress expressly assigned overlapping authority to both the Attorney General and to United States Attorneys.”<sup>233</sup> The court further noted that “Congress has spread out power instead of concentrating it all at the center.”<sup>234</sup> *Thomas* demonstrates the fact that, not only are courts unclear on the proper division of authority between the Attorney General and U.S. Attorneys in denaturalization proceedings, but the U.S. Attorneys themselves may also be confused as to their roles and powers.

The proper solution is to centralize all power to initiate denaturalization proceedings in the Attorney General. Providing the Attorney General the sole authority to commence such proceedings would serve at least three important goals: clarifying for U.S. Attorneys, judges, and the public who exactly is responsible for initiating denaturalization actions; making the Attorney General actually responsible for the conduct of U.S. Attorneys, as outlined in 28 U.S.C. §§ 516 and 519; and ensuring that denaturalization proceedings are only initiated in cases where cause is clearly shown, which will reduce the risk of erroneous deprivation of U.S. citizens’ rights.

*Thomas* demonstrates that U.S. Attorneys, courts, and individuals subject to denaturalization proceedings are unclear on the proper scope of authority of U.S. Attorneys in denaturalization proceedings.<sup>235</sup> In *Thomas*, the U.S. Attorney believed he was authorized to make such a plea bargain, the naturalized individual relied on that assertion, and the Ninth Circuit expressed its confusion as to whether the U.S. Attorney

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<sup>229</sup> 8 U.S.C. § 1451(c) (2012).

<sup>230</sup> *FEC v. Hall-Tyner Election Campaign Comm’n*, 678 F.2d 416, 422 n.15 (2d Cir. 1982) (Many of the denaturalization statutes “may be used in the future by a zealous prosecutor.”).

<sup>231</sup> 35 F.3d 1332 (9th Cir. 1994).

<sup>232</sup> *Thomas* dealt with criminal denaturalization statutes, but the court’s analysis remains relevant.

<sup>233</sup> *Thomas*, 35 F.3d at 1339.

<sup>234</sup> *Id.*

<sup>235</sup> *See id.*

had that authority.<sup>236</sup> Centralizing power in the Attorney General to make all decisions regarding the initiation of denaturalization proceedings will substantially eliminate confusion in this area of immigration law.

Codifying exclusive authority to initiate denaturalizing proceedings with the Attorney General will also further the mandates set out for the Attorney General in 28 U.S.C. §§ 516 and 519. These sections state that the Attorney General must “direct all United States attorneys . . . in the discharge of their respective duties,”<sup>237</sup> and the provisions ensure that all conduct during litigation in which the U.S. is a party is “under the direction of the Attorney General.”<sup>238</sup> The current division of power, in effect, disobeys these commands. Providing the Attorney General with exclusive authority in this area will ensure that he remains in control of the conduct of all U.S. Attorneys during litigation.

Finally, placing exclusive power to initiate denaturalization proceedings in the hands of the Attorney General will serve as an important check on use of the extraordinary remedy of denaturalization. As the Second Circuit has noted, a “zealous prosecutor” could use the existing balance of power to trample on the rights of U.S. citizens.<sup>239</sup> The Supreme Court has stated that the rights of naturalized citizens are coequal with those of natural-born citizens.<sup>240</sup> Congress should be hesitant to retain the current division of authority that provides U.S. Attorneys clear opportunity to violate the fundamental rights of naturalized citizens, especially when the potential result is a loss of the right to citizenship itself. By centralizing the decision to denaturalize an individual with the Attorney General, naturalized citizens will be more secure in their rights and will likely face a lower risk of having their rights arbitrarily deprived.

The existing division of power in the denaturalization context creates confusion, removes exclusive authority and responsibility for the conduct of U.S. Attorneys from the hands of the Attorney General, and provides too large a possibility that U.S. citizens’ rights will be arbitrarily violated. To counter these evils and meaningfully protect the fundamental rights of all U.S. citizens, Congress should amend the denaturalization law to provide sole authority to initiate denaturalization proceedings with the Attorney General.

## 2. Codifying the Evidentiary Burden Required for Denaturalization

In 1943, the Supreme Court determined in *Schneiderman* that a certificate of citizenship may not be revoked unless the evidence supporting such denaturalization

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

<sup>237</sup> 28 U.S.C. § 519 (1948).

<sup>238</sup> 28 U.S.C. § 516 (1948).

<sup>239</sup> *FEC v. Hall-Tyner Election Campaign Comm’n*, 678 F.2d 416, 422 n.15 (2d Cir. 1982).

<sup>240</sup> *Knauer v. United States*, 328 U.S. 654, 658 (1946) (noting that citizenship by naturalization “carries with it all of the rights and prerogatives of citizenship obtained by birth in this country.”).

is “clear, unequivocal, and convincing.”<sup>241</sup> It determined that a certificate of citizenship is “an instrument granting political privileges, and open like other public grants to be revoked if and when it shall be found to have been unlawfully or fraudulently procured.”<sup>242</sup> The Court noted that a certificate of citizenship is similar to a public grant of land, and therefore revocation of citizenship, like revocation of other public grants, could not be accomplished by a preponderance of the evidence, or upon evidence “which leaves the issue in doubt.”<sup>243</sup>

Although the Supreme Court issued the *Schneiderman* decision before Congress enacted the Immigration and Nationality Act of 1952, Congress did not codify the common law standard of “clear, unequivocal, and convincing” into the INA,<sup>244</sup> nor did it codify any evidentiary burden for denaturalization proceedings.<sup>245</sup> The Supreme Court continues to use the “clear, unequivocal, and convincing” standard.<sup>246</sup> This is an appropriate standard, given the fundamental individual rights that may be adjudicated in a denaturalization proceeding, and the lack of familiarity a judge may have with a denaturalization proceeding.<sup>247</sup> To provide legislative clarity, Congress should codify the Supreme Court’s evidentiary standard of “clear, unequivocal, and convincing.”

Failure to codify this standard could have two negative effects. First, a district court judge may inadvertently apply a lower evidentiary standard, leading to an erroneous denaturalization and needless appellate review. The tremendous hardship an incorrect adjudication would cause a denaturalized citizen justifies codification of the standard. Next, if Congress were to codify an evidentiary burden lower than “clear, unequivocal, and convincing,” such a standard could present confusion in the lower courts and would likely be held unconstitutional under existing precedent. Therefore, to provide judicial clarity and minimize the possibility of a denaturalization proceeding occurring under a lower evidentiary burden, Congress should codify the “clear, unequivocal, and convincing” evidentiary standard for denaturalization proceedings.

#### CONCLUSION

The fundamentals of civil denaturalization balance two propositions. One proposition suggests that the government must hold all naturalized persons accountable for their pre-naturalization character and actions. It is on this basis that the government may

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<sup>241</sup> *Schneiderman v. United States*, 320 U.S. 118, 125 (1943).

<sup>242</sup> *Id.* (quoting *Johannessen v. United States*, 225 U.S. 227, 238 (1912)).

<sup>243</sup> *Id.* (quoting *United States v. Maxwell Land-Grant Co.*, 121 U.S. 325, 381 (1887)).

<sup>244</sup> *See* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952).

<sup>245</sup> *See id.*

<sup>246</sup> *See* *Maisenberg v. United States*, 356 U.S. 670, 673 (1958) (using the *Schneiderman* evidentiary standard just four years after enactment of the INA of 1952); *see also* *Kungys v. United States*, 485 U.S. 759 (1988); Mary C. Stakun, *Materiality in the Denaturalization Context: Kungys v. United States*, 23 CORNELL INT’L L.J. 161, 163–64 (1990).

<sup>247</sup> *See* Keys, *supra* note 206, at 155; Rochvarg, *supra* note 206, at 446.

lawfully revoke citizenship unlawfully procured. The second proposition is that citizens, whether naturalized or by birth, are entitled to equivalent rights and treatment because the rights of naturalized citizens are coequal with those of natural-born citizens.<sup>248</sup> The second proposition is discarded by § 1451(c)'s five-year period after naturalization during which a person must not affiliate with certain groups, under threat of potentially losing his citizenship. Such a probationary period flies against the freedoms that *every* U.S. citizen is entitled to under the United States Constitution.

Many aspects of the current denaturalization law are in dire need of amendment. 8 U.S.C. § 1451(c) should be stricken entirely from immigration law, the Attorney General should be vested with the exclusive power to initiate denaturalization proceedings, and the evidentiary burden to revoke citizenship should be codified. Failure to address these three topics will encourage confusion in the law and facilitate potential future constitutional violations.

Section 1451(c)'s group membership provision trips upon the constitutional rights of naturalized citizens in two ways: by violating their fundamental rights of freedom of speech and association under the First Amendment and by depriving them of equal protection of the law under the Fifth Amendment's Due Process Clause. Moreover, § 1451(c) offends public policy by over-penalizing innocent conduct, thereby making naturalized citizens less secure than other American citizens.

The Attorney General and United States Attorneys appear to have equal individual authority to initiate denaturalization proceedings.<sup>249</sup> This creates confusion among U.S. Attorneys, judges, and individuals. Also, the current division of authority allows for discriminatory enforcement of denaturalization laws and makes it so that the Attorney General is not actually responsible for the conduct of all U.S. Attorneys. Accordingly, Congress should consolidate exclusive authority to initiate denaturalization proceedings in the Attorney General.

Finally, Congress should act to codify the common law evidentiary burden required to revoke an individual's citizenship. The Supreme Court has consistently used the "clear, unequivocal, and convincing" evidence standard since 1943, but Congress has never acted to codify that standard.<sup>250</sup> By doing so, Congress would make the evidentiary burden clearer for individuals and judges, and remove any possibility of courts inadvertently using a lower standard. Given the fundamental rights at stake in a denaturalization proceeding, Congress should act swiftly to provide clarity in this area of the law.

Legislative history leads to the conclusion that Congress did not comprehend the scope of denaturalization proceedings or the procedures used. Most proposed

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<sup>248</sup> *Knauer v. United States*, 328 U.S. 654, 658 (1946) (noting that citizenship by naturalization "carries with it all of the rights and prerogatives of citizenship obtained by birth in this country").

<sup>249</sup> *Thomas v. INS*, 35 F.3d 1332, 1339 (9th Cir. 1994).

<sup>250</sup> *Schneiderman v. United States*, 320 U.S. 118, 125 (1943).

legislation regarding immigration reform is focused on topics such as reducing the number of persons entering the country without admission or parole, whether to provide amnesty to those who have already done so, and whether to apply stricter penalties on businesses that hire undocumented workers. However, when Congress emerges from its torpor and does act, it should revisit the three areas of the law outlined in this Article—§ 1451(c), sole authority to initiate denaturalization with the Attorney General, and codifying the evidentiary burden for denaturalization. Denaturalization is a small part of the comprehensive immigration laws, but it has significant consequences for the individual involved because its successful invocation can undo a lifetime of work and shatter the American dream.