

FROM JUDICIAL TO ADMINISTRATIVE DENATURALIZATION: FOR BETTER OR FOR WORSE?

VININEATH NUON GOPAL

INTRODUCTION

The word “citizenship,” simply defined, means no more than “[t]he status of being a citizen.”¹ The concept of citizenship, however, is quite a different matter. According to one modern writer:

Citizenship is a universal and distinctive feature of the modern political landscape. Every modern state formally defines its citizenry, publically identifying a set of persons as its members and residually designating all others as non-citizens, or aliens. Every state attaches certain rights and obligations to the status of citizenship. These rights and obligations define a region of legal equality—what T.H. Marshall called the “basic human equality associated with . . . full membership of a community.”²

The United States is no exception. For as long as the United States has been a nation-state, it has drawn a clear and unmistakable distinction between citizens and noncitizens. The former category is associated with “insiders” who are defined by their status as “members” of American society, privy to all sorts of rights and privileges. The latter category is associated with “outsiders” who do not have such membership rights—those noncitizens to whom society refers as “aliens.”

This separation of citizens from noncitizens is such an important feature of the American political landscape that it is specifically delineated in the United States Constitution. “All persons born or naturalized in the United States, and subject

1. BLACK'S LAW DICTIONARY 237 (7th ed. 1999).

2. Rogers Brubaker, *Citizenship as Social Closure*, in IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 2 (Thomas Alexander Aleinikoff et al. eds., 4th ed. 1998) [hereinafter IMMIGRATION AND CITIZENSHIP].

to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."³

Although citizenship by birth can never be taken away from someone involuntarily, citizenship by naturalization is an alienable right that is subject to revocation on certain grounds. The process by which citizenship is revoked from a naturalized citizen is called denaturalization.

Prior to 1990, the courts had exclusive control over naturalization and denaturalization proceedings. This changed when the Immigration Act of 1990 ("the 1990 Act")⁴ was passed to transfer naturalization authority from the courts to the Attorney General.⁵ Now, administrative denaturalization has replaced judicial denaturalization, the system that was in place for two hundred years. Thus, pursuant to the 1990 Act, rather than having their day in court to contest any charges of illegal procurement of naturalization, naturalized citizens must answer to the Attorney General, who delegates much of his or her authority to the Immigration and Naturalization Service (INS).

This comment analyzes the procedural as well as substantive changes that have arisen as a result of the transition from judicial to administrative denaturalization. It argues that the transfer of denaturalization authority away from the courts adversely affects the rights of naturalized citizens in that it affords them less procedural protections and leaves them more vulnerable to the possibility of the loss of citizenship. It attempts to demonstrate that the current administrative procedures make it easier to divest a naturalized citizen of his citizenship status because only minimal proof is required to summarily revoke naturalization orders.⁶

Part I of this comment briefly addresses the concept of citizenship in general. Part II discusses the naturalization power—the sole basis for the denaturalization power. Part III describes the stringent standards imposed by the courts under

3. U.S. CONST. amend. XIV, § 1.

4. See Immigration Act of 1990, 8 U.S.C. § 1101 et seq. (1994).

5. The Immigration Act of 1990 amended certain provisions of the Immigration and Nationality Act of 1952 ("INA"). See Act of June 27, 1952, ch. 477, § 101, 66 Stat. 166 (1952) (current version at 8 U.S.C. § 1101 (1994)).

6. Much of the information for this discussion comes from Daniel Levy, *Administrative Denaturalization: Practical Issues Under New Standards*, 74 INTERPRETER RELEASES 1701 (1997) (arguing that administrative denaturalization, unlike judicial denaturalization, offers naturalized citizens few procedural protections).

judicial denaturalization, which provided adequate procedural protections for the naturalized citizen and made it more difficult for the government to denaturalize a naturalized citizen. Part IV discusses the new standards under administrative denaturalization, comparing them to the standards under judicial denaturalization. Part V considers the controversy surrounding administrative denaturalization, focusing on the recent Ninth Circuit decision, *Gorbach v. Reno*,⁷ which holds that the Attorney General lacks statutory authority to revoke citizenship through administrative denaturalization proceedings. This comment ends by concluding that the efficient administration of denaturalization that the government hoped to gain by implementing administrative denaturalization has come at the cost of adequate procedural protections for naturalized citizens.

I. CITIZENSHIP AND THE LOSS OF CITIZENSHIP IN GENERAL

The common law principles of *jus soli* ("law of the soil") and *jus sanguinis* ("law of right of blood") express the concept of citizenship by birth. The principle of *jus soli* entitles a person who is born in the United States to become an automatic United States citizen.⁸ The principle of *jus sanguinis* entitles a person who is born outside the United States to at least one American citizen parent to become an automatic United States citizen, as long as the citizen parent meets certain residency requirements.⁹

7. 219 F.3d 1087 (9th Cir. 2000).

8. See 8 U.S.C. § 1401(a)-(b) (1994). This principle applies regardless of either parent's alienage or nationality. See also *Weedin v. Chin Bow*, 274 U.S. 657 (1927) (defining the principle of *jus sanguinis*); *Wong Kim Ark v. United States*, 169 U.S. 649 (1898) (defining the common law rule of *jus soli*).

9. See 8 U.S.C. § 1401(c)-(d), (g) (1994). The requirement for residence in the United States is more lenient when a child is born to two citizen parents than when a child is born to a citizen parent and a noncitizen parent. In the former, one of the parents must have resided in the United States at some time prior to the child's birth. In the latter, the citizen parent must have been physically present in the United States (or any of its territories) for a continuous period of one year prior to the birth of the child. See *id.* § 1401(c)-(d). Furthermore, if a child is born outside the geographical limits of the United States to one parent who is a citizen and one parent who is an alien, the residency requirement is even more stringent. In such a case, the citizen parent, before the birth of the child, must have been physically present in the United States (or any of its territories) for a total of at least five years. Additionally, two of the five years spent in the United States must have been after the age of fourteen. See *id.* § 1401(g).

To be a citizen of the United States by naturalization, a person must meet all of the following criteria. First, she must have entered the United States lawfully (making her a legal permanent resident),¹⁰ and she must have been a legal permanent resident for at least five years.¹¹ Second, she must understand the English language, including the ability to read, write, and speak words in ordinary usage.¹² Moreover, she must have a knowledge and understanding of the fundamentals of the history of the United States, as well as its principles and form of government.¹³ Third, she must neither oppose American government or law nor favor totalitarian forms of government.¹⁴ Fourth, she must not have deserted service in the armed forces, or been relieved of service in the armed forces because of alienage.¹⁵ Lastly, she must demonstrate that she is a person of good moral character.¹⁶

Citizenship by naturalization can be affected in other ways. For example, spouses of American citizens can naturalize after three years instead of the usual five.¹⁷ Children who immigrate with their parents can be naturalized automatically when their parents naturalize.¹⁸ Children born outside of the United States who are later adopted by at least one United States citizen parent can also become naturalized citizens.¹⁹

Whether by birth or by naturalization, citizenship confers upon an individual certain exclusive rights that separate that individual from a noncitizen. These include the right to vote,

10. *See id.* § 1429.

11. *See id.* § 1427.

12. *See id.* § 1423.

13. *See id.* Special exceptions are made for people who have certain physical or mental disabilities or who are over the age of fifty and have met certain residency requirements. *See id.* § 1423(b).

14. *See id.* § 1424.

15. *See id.* §§ 1425, 1426.

16. Although the INA does not define "good moral character," it does define what is *not* "good moral character." *See id.* § 1101(f)(1)-(8). For example, a person is not of good moral character if he is "a habitual drunkard"; his "income is derived principally from illegal gambling activities"; he "has been convicted of multiple gambling offenses"; he "has given false testimony for the purpose of obtaining any benefits" under the immigration laws; and he has been convicted of an aggravated felony at any time. *Id.* This list is not exhaustive, so the fact that a person is not within any of these enumerated classes "shall not preclude a finding that for other reasons such person is or was not of good moral character." *Id.*

17. *See id.* § 1430(a).

18. *See id.* §§ 1431, 1432.

19. *See id.* § 1433(c).

the right to run for and be appointed to certain high elective offices, and the right to serve on federal and state juries.²⁰ Furthermore, citizens may sponsor an unlimited number of immediate relatives as immigrants,²¹ while noncitizens may sponsor only spouses and unmarried children, subject to numerical quotas.²² In addition, citizens are not at risk of being deported or removed from the United States, while noncitizens are.²³

Chief Justice Warren wrote that “[t]his [g]overnment was born of its citizens.”²⁴ He described citizenship as “man’s basic right for it is nothing less than the right to have rights.”²⁵ Warren continued:

Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen. He has no lawful claim to protection from any nation, and no nation may assert rights on his behalf. His very existence is at the sufferance of the state within whose borders he happens to be.²⁶

In short, citizenship is “that status which alone assures the full enjoyment of the precious rights conferred by our Constitution.”²⁷ The Supreme Court has stated that “[i]t would be difficult to exaggerate [the] value and importance [of American citizenship]. By many it is regarded as the highest hope of civilized men.”²⁸

20. See Peter E. Schuck, *The Re-Evaluation of American Citizenship*, 12 GEO. IMMIGR. L.J. 1, 13 (1997).

21. *Id.* at 14. See 8 U.S.C. § 1151(b)(2)(A)(i) (1994). Immediate relatives include parents, spouses, and children who are 21 years of age or younger. *Id.* Citizens may also sponsor siblings and adult children, but these family members are subjected to a numerical quota system. *Id.* at § 1153(a)(3)-(4).

22. Schuck, *supra* note 20, at 14. See 8 U.S.C. § 1153(a)(2). Brothers and sisters of noncitizens are given no preference under the immigrant visa allocation system of the INA. *Id.*

23. See 8 U.S.C. § 1227 (1994). See also IMMIGRATION AND CITIZENSHIP, *supra* note 2, at 3 (Citizens “enjoy an unconditional right to remain and reside in the territory of a state, including the right to reenter should they leave for any reason. The territory of the state is their territory, and they can plan their lives accordingly.”) *Id.*

24. *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Schneiderman v. United States*, 320 U.S. 118, 122 (1943).

Several cases have laid the groundwork for holding that citizenship is a precious right not to be taken (or taken away) lightly. For example, in *Trop v. Dulles*,²⁹ the Supreme Court held that deprivation of citizenship "is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development."³⁰ Thus, because American citizenship confers so many important legal, political, and social rights, the loss of citizenship by denaturalization is especially difficult—unlike expatriation (whereby a citizen voluntarily abandons or renounces his country to become the citizen of another), the act is neither voluntary nor desired.

II. THE NATURALIZATION AND DENATURALIZATION POWERS

As early as 1790, Congress adopted legislation providing for the naturalization of aliens in the United States and the citizenship of children born outside the United States to United States citizens.³¹ Congress's power to naturalize comes from the United States Constitution, which expressly provides that Congress shall "establish an uniform Rule of Naturalization."³² Congress did just that when it passed the Naturalization Act of June 29, 1906.³³ The Act also created a procedure whereby citizenship could be revoked if a later judicial proceeding revealed that naturalization had been illegally or fraudulently procured.³⁴ The rationale for denaturalization comes from the notion that "[c]itizenship is a legal construct, an abstraction, a theory. No matter what the safeguards, it is at best something given, and given to some and not to others, and it can be taken away."³⁵

29. 356 U.S. 86 (1958).

30. *See id.* at 101.

31. *See* IMMIGRATION AND CITIZENSHIP, *supra* note 2, at 9.

32. U.S. CONST. art. I, § 8, cl. 4.

33. *See* IMMIGRATION AND CITIZENSHIP, *supra* note 2, at 45.

34. *See id.* at 94.

35. *See* Alexander M. Bickel, *Citizen or Person?: What Is Not Granted Cannot Be Taken Away*, in IMMIGRATION AND CITIZENSHIP, *supra* note 2, at 11, 18. *See also* *Schneiderman v. United States*, 320 U.S. 118, 131 (1943) (stating that "naturalization is a privilege, to be given or withheld on such conditions as Congress sees fit.").

A. *The Switch from Judicial Naturalization to Administrative Naturalization*

Before 1990, the power to naturalize and denaturalize American citizens rested exclusively with the federal district courts.³⁶ Under the system in place then, the role of the INS was limited to processing naturalization applications and interviewing candidates, and recommending to the court whether an applicant should be granted or denied citizenship.³⁷ The INS itself had no authority to grant or deny naturalization.³⁸ If the INS later wanted to reopen a naturalization proceeding, it had to file a motion with the court to do so. This two-tiered system changed with the passage of the Immigration Act of 1990.

The 1990 Act transferred jurisdiction over naturalization from the courts to the Attorney General, thereby transforming naturalization into an administrative proceeding.³⁹ The provision that effects this transfer of power is 8 U.S.C. § 1421(a), which states that “[t]he sole authority to naturalize persons as citizens of the United States is conferred upon the Attorney General.”⁴⁰ Pursuant to this power, the Attorney General may delegate to the INS the authority “to perform such acts as are necessary and proper to implement the Attorney General’s authority [under § 1421].”⁴¹

To facilitate the transfer of power from the courts to the Attorney General, the 1990 Act amended § 1451 of the Immi-

36. See generally Levy, *supra* note 6.

37. See Arnold Rochvarg, *Report to the Administrative Conference—Reforming the Administrative Naturalization Process: Reducing Delays While Increasing Fairness*, 9 GEO. IMMIGR. L.J. 397, 398 (1995).

38. See *id.*

39. See 8 U.S.C. § 1421(a) (1994). The change from judicial naturalization to administrative naturalization came about as a result of the recognition that “the role of the court [in granting or denying naturalization petitions was] almost exclusively ceremonial and that the recommendations of the Attorney General [were] rarely over-turned by the court.” See 133 CONG. REC. H6165 (daily ed. Jul. 13, 1987) (statement of Rep. Rodino). For example, in 1985, only sixty-four out of 245,000 applications were turned down by the courts. See *House Approves Administrative Naturalization Bill*, 64 INTERPRETER RELEASES 847, 847 (1987). Therefore, the change from judicial naturalization to administrative naturalization was made to “redress the burdens associated with this two-tiered process by letting an applicant for naturalization commence and culminate the act of becoming a citizen within one branch of the government.” *Id.*

40. Immigration Act of 1990 § 310(a), 8 U.S.C. § 1421(a) (1994).

41. See 8 C.F.R. § 310.1(b) (2000).

gration and Nationality Act of 1952 to bring it into conformity with the change to administrative naturalization.⁴² Thus, § 1451(j)⁴³—which had given the courts the power to modify or vacate their own judgments—was changed to § 1451(h) to transfer the power to the Attorney General: “Nothing contained in this section shall be regarded as limiting, denying, or restricting the power of the Attorney General to correct, reopen, alter, modify, or vacate an order naturalizing a person.”⁴⁴ This clause, which is seen as having “saved” the above powers for the Attorney General, is now the mechanism by which administrative denaturalization is effected. Thus, in instituting an administrative process of naturalization that makes it easier for a naturalization applicant to “commence and culminate the act of becoming a citizen,”⁴⁵ the Immigration Act of 1990, by way of the savings clause, also makes it easier summarily to divest a naturalized citizen of his citizenship.

B. Scope of the Attorney General's Power to Naturalize

Although the 1990 Act conferred upon the Attorney General the power to naturalize, it never explicitly conferred upon the Attorney General the power to *denaturalize*. Nor is the denaturalization power mentioned or alluded to anywhere in the Immigration and Nationality Act of 1952 (“INA”) or its legislative history. In fact, one provision of the INA would seem to imply that the Attorney General has no such denaturalization power. 8 U.S.C. § 1453 provides in relevant part:

The Attorney General is authorized to cancel any certificate of citizenship [or] certificate of naturalization . . . if it shall appear to [his] satisfaction that such document or record was illegally or fraudulently obtained from, or was created through illegality or by fraud practiced upon, [him]. . . . [Such] cancellation . . . shall affect only the *document* and

42. See 8 U.S.C. § 1451 (1994) (originally enacted as Act of June 27, 1952, ch. 477, § 340, 66 Stat. 166, 260).

43. Section 1451(j) was subsequently re-designated as § 1451(i) before Congress amended the INA in 1990. See Immigration and Nationality Technical Corrections Act of 1994 (“INTCA”), Pub. L. No. 103-416, § 104(c)(1), 108 Stat. 4305 (codified as amended in scattered sections of 8 U.S.C.). To avoid confusion, I will refer to these earlier designations simply as the predecessor to § 1451(h).

44. 8 U.S.C. § 1451(h) (1994).

45. See *supra* note 39.

not the citizenship *status* of the person in whose name the document was issued.⁴⁶

By distinguishing between “document” and “status,” § 1453 seems to say that canceling a certificate of citizenship and revoking citizenship are two completely different acts. Thus, interpreted literally, § 1453 supports the result that the Attorney General has no power to actually denaturalize a person. At least one circuit agrees, holding that the Attorney General lacks the statutory authority to revoke citizenship through administrative denaturalization proceedings.⁴⁷ If there is no express transfer of denaturalization power from the courts to the Attorney General, then, from where does that power come?

In 1996, the INS proposed regulations to clarify and implement the Attorney General’s power under the new administrative denaturalization scheme.⁴⁸ The scope of the Attorney General’s power under the 1990 Act is explained as follows in the proposed regulations:

Congress had amended [the predecessor to § 1451(h)] . . . to provide the Attorney General with the reopening power previously held by the courts. In fact, the amendment to [§ 1451(h)] of the Act simply replaces the court’s jurisdiction with that of the Attorney General, leaving the authority described in that statute unchanged.⁴⁹

Therefore, the INS interpretation of § 1451(h) indicates that the Attorney General’s power to reopen or vacate a naturalization order is analogous to the former power of the courts to reopen or vacate *their* naturalization decisions. The courts’ power, in turn, was derived from the power granted to the courts under Federal Rule of Civil Procedure 60(b) to reopen a prior judgment.⁵⁰ Naturalization courts had always interpreted their power under F.R.C.P. 60(b) to include a power to denatu-

46. 8 U.S.C. § 1453 (1994) (emphasis added).

47. See *Gorbach v. Reno*, 219 F.3d 1087 (9th Cir. 2000). See also discussion *infra* Part V.

48. See 61 Fed. Reg. 55,550 (1996) (later codified at 8 C.F.R. § 340) (1996).

49. *Id.* at 55,551.

50. See FED. R. CIV. P. 60(b). Under this rule, a court may reopen a judgment for, *inter alia*, “mistake, inadvertence, surprise, or excusable neglect”; “fraud”; “newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)”, or if “the judgment is void.” *Id.*

ralize. The rationale was that if they could grant something, they could take it back. The Attorney General's power to denaturalize under the new administrative naturalization scheme is explained along the same lines: what the Attorney General gives by summary procedure (naturalization), she can take away by summary procedure (denaturalization).

If amended § 1451(h) raises any doubts about the Attorney General's power—and by delegation, the INS' power—to administratively revoke citizenship, that doubt is dispelled in 8 C.F.R. § 340.1, which supplements the Attorney General's power in § 1451(h).⁵¹ The regulation, finalized and issued in late 1996, authorizes the INS to initiate and conduct administrative denaturalization proceedings. The language of the regulation provides that “[o]n its own motion, the [INS] may reopen a naturalization proceeding and revoke naturalization . . . if the [INS] obtains credible and probative evidence” that the naturalized citizen should not have been granted citizenship in the first place.⁵²

Several grounds are specified for reopening naturalization proceedings under 8 C.F.R. § 340.1. These grounds must be met by “credible and probative” evidence. The first ground for reopening is that the INS granted the naturalization application by mistake.⁵³ The second ground has multiple prongs: if the “credible and probative evidence” that the INS has obtained was not known to the INS during the original naturalization proceeding, a naturalization proceeding may be reopened if either of two conditions is met. The first condition is that such evidence, if known at the time of the original proceeding, would have had a material effect on the disposition of the naturalization proceeding, *and* would have proven that the naturalized citizen's “application was based on fraud or misrepresentation or concealment of a material fact.”⁵⁴ The second condition is that such evidence, if known at the time of the original proceeding, would have had a material effect on the disposition of the naturalization proceeding, *and* would have proven that the naturalized citizen, as an applicant, “was not, in fact, eligible for naturalization.”⁵⁵

51. See 8 C.F.R. § 340.1 (1996).

52. 8 C.F.R. § 340.1(a) (1996).

53. See *id.* at § 340.1(a)(1). “Mistake” is not defined in the regulations.

54. See *id.* at § 340.1(a)(2)(i)-(a)(2)(ii)(A).

55. *Id.* at § 340.1(a)(2)(i)-(a)(2)(ii)(B).

The circumstances enumerated in the regulations for initiating an administrative denaturalization proceeding under § 1451(h) are analogous to and overlap with the circumstances enumerated in 8 U.S.C. § 1451(a), which governs judicial denaturalization.⁵⁶ The text of § 1451(a) provides in relevant part:

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 misrepresentation⁵⁷

Under the new administrative scheme, judicial denaturalization is not obsolete. Section 1451(a) remains available as a means to revoke citizenship based on illegal procurement or procurement by concealment of material evidence or willful misrepresentation. However, with the issuance of 8 C.F.R. § 340.1 to clarify the scope of the Attorney General's power in § 1451(h), the effectiveness of § 1451(a) as a means of revoking citizenship is questionable. Given the choice between summarily revoking citizenship by way of § 1451(h) and judicially revoking citizenship the old-fashioned way under § 1451(a), the obvious choice for the INS would be § 1451(h). Thus, administrative denaturalization has replaced judicial denaturalization. Gone is the system that secured the procedural rights of every naturalized citizen accused of acquiring citizenship fraudulently. In its place is a regime whereby the INS, with one fell swoop, can change the life of a naturalized citizen forever.

56. See 8 U.S.C. § 1451(a) (1994). When Congress amended the INA in 1990, it left this provision untouched.

57. *Id.*

III. STANDARDS UNDER JUDICIAL DENATURALIZATION

Under the statutory framework in place before the 1990 Act, there were two ways to effect denaturalization, both involving the courts. The first method, pursuant to 8 U.S.C. § 1451(a), required United States attorneys to institute actions to revoke citizenship in federal district courts, upon a showing of good cause that the order had been procured by illegal means, by concealing a material fact, or by willful misrepresentation.⁵⁸ The second method of denaturalization, pursuant to the predecessor to 8 U.S.C. § 1451(h), provided for a more summary proceeding, whereby the court could revoke citizenship based on its power to reopen and vacate its own orders of naturalization.⁵⁹ Although the two methods differed in that the first was a plenary method⁶⁰ and the second a summary proceeding, the fact that both methods required the involvement of the court ensured that the naturalized citizen was adequately protected against procedural deficiencies.

A. *Revoking Citizenship Under § 1451(a)*

If a lawsuit was filed under the strict judicial denaturalization scheme of § 1451(a), it had to be accompanied by an affidavit showing good cause.⁶¹ The naturalized citizen being sued would then be entitled to a plenary proceeding and allowed to call and cross-examine witnesses.⁶² The burden of proof was strict: the government had to prove its case by clear, unequivocal

58. See 8 U.S.C. § 1451(a) (1970).

59. See, e.g., 8 U.S.C. § 1451(i) (1988), which provided that "[n]othing contained in this section shall be regarded as limiting, denying or restricting the power of any naturalization court . . . to correct, reopen, alter, modify, or vacate its judgment or decree naturalizing [a] person"

60. I borrow the term "plenary" from the courts to mean a method that provides full procedural protections to the naturalized citizen, such as cross-examination and calling witnesses. See, e.g., *Gorbach v. Reno*, 181 F.R.D. 642, 649 (W.D. Wash. 1998).

61. See *Gorbach*, 181 F.R.D. at 649. As previously mentioned above, § 1451(a) remains intact as the provision governing judicial denaturalization. Therefore, the standards imposed under § 1451(a) are still relevant and applicable today. Thus, I use the past tense in this discussion because the context warrants such usage—not because these principles no longer apply.

62. See *id.*

cal, and convincing evidence.⁶³ This standard continues to govern all judicial denaturalization cases brought under § 1451(a).

1. *Schneiderman v. United States*⁶⁴

In 1943, the Supreme Court decided for the first time the issue of whether a naturalization decree could be set aside on the ground of illegal procurement years after it was granted.⁶⁵ In *Schneiderman*, the petitioner belonged to certain organizations that advocated the overthrow of the American government by force and violence.⁶⁶ In seeking to set aside his naturalization certificate on the ground of illegal procurement, the government claimed that the petitioner had “concealed his Communist affiliation from the naturalization court.”⁶⁷ The government had the burden of proving that the petitioner lacked the necessary attachment to the United States by “clear, unequivocal, and convincing evidence which [did] not leave the issue in doubt.”⁶⁸

Concluding that the government had not met its burden of proof, the Court found in favor of the petitioner. Describing the government’s action as an attempt “to deprive [petitioner] of the priceless benefits that derive from [his citizenship] status,”⁶⁹ the Court observed:

In its consequences it is more serious than a taking of one’s property, or the imposition of a fine or other penalty. For it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many it is regarded as the highest hope of civilized men. This does not mean that once granted to an alien, citizenship cannot be revoked or cancelled on legal grounds under appropriate proof. But *such a right once conferred should not be taken away without the*

63. See *In re Cardines*, 366 F. Supp. 700, 702 (D. Guam App. Div. 1973).

64. 320 U.S. 118 (1943).

65. See *id.* at 119.

66. See *id.* at 121–22. Petitioner was a member of and believed in the principles of the Workers (Communist) Party of America and the Young Workers (Communist) League of America, whose principles were opposed to the principles of the United States Constitution. See *id.*

67. *Id.* at 122.

68. *Id.* at 135.

69. *Id.* at 122.

clearest sort of justification and proof. So whatever may be the rule in a naturalization proceeding, . . . in an action instituted . . . for the purpose of depriving one of the precious right of citizenship previously conferred we believe the facts and the law should be construed as far as is reasonably possible in favor of the citizen.⁷⁰

In a concurring opinion, Justice Rutledge expressed his concern that if denaturalization could be effectuated by “nothing more than reexamination upon the merits of the very facts the judgment established, no naturalized person’s citizenship is or can be secure.”⁷¹ He added:

No citizen with such a threat hanging over his head could be free. If he belonged to “off-color” organizations or held too radical or, perhaps, too reactionary views, for some segment of the judicial palate, when his admission took place, he could not open his mouth without fear his words would be held against him. For whatever he might say or whatever any such organization might advocate could be hauled forth at any time to show “continuity” of belief from the day of his admission, or “concealment” at that time . . . His best course would be silence or hypocrisy. This is not citizenship. Nor is it adjudication.⁷²

Thus, the *Scheiderman* Court held that because citizenship is so precious, the government cannot take it away “without the clearest sort of justification and proof.”⁷³ The Court held the government to a “clear, unequivocal, and convincing” standard.⁷⁴

2. *Baumgartner v. United States*⁷⁵

Baumgartner v. United States, decided one year later, picked up where *Schneiderman* left off. In *Baumgartner*, the government sought to set aside a naturalization decree on the ground that the petitioner “did not truly and fully renounce his allegiance to Germany [and that he] did not in fact intend to

70. *Id.* (emphasis added) (internal citation omitted).

71. *Id.* at 166.

72. *Id.* at 167.

73. *Id.* at 122.

74. *Id.* at 135.

75. 322 U.S. 665 (1944).

support the Constitution and laws of the United States.”⁷⁶ The issue was whether the government presented sufficient proof to justify denaturalization.

Applying the *Schneiderman* standard of clear, unequivocal, and convincing proof, the Court held that the government lacked “that solidity of proof which leaves no troubling doubt in deciding a question of such gravity as is implied in an attempt to reduce a person to the status of alien from that of citizen.”⁷⁷ Recognizing that “[u]nder our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects save that of eligibility to the Presidency,”⁷⁸ the Court warned that “we must be equally watchful that citizenship once bestowed should not be in jeopardy nor in fear of exercising its American freedom through a too easy finding that citizenship was disloyally acquired.”⁷⁹ Justice Murphy concurred:

American citizenship is not a right granted on a condition subsequent that the naturalized citizen refrain in the future from uttering any remark or adopting an attitude favorable to his original homeland or those there in power, no matter how distasteful such conduct may be to most of us. . . . The naturalized citizen has as much right as the natural-born citizen to exercise the cherished freedoms of speech, press, and religion, and without “clear, unequivocal, and convincing” proof that he did not bear or swear true allegiance to the United States at the time of naturalization he cannot be denaturalized.⁸⁰

Like *Schneiderman*, *Baumgartner* recognized the importance of citizenship and held that the government had to present “clear, unequivocal, and convincing” proof before it could divest a person of citizenship.

3. *Chaunt v. United States*⁸¹

Similar issues recurred in *Chaunt v. United States*. In *Chaunt*, the petitioner was a native of Hungary who had failed

76. *Id.* at 666.

77. *Id.* at 670.

78. *Id.* at 673 (quoting *Luria v. United States*, 231 U.S. 9, 22 (1913)).

79. *Id.* at 676.

80. *Id.* at 679–80.

81. 364 U.S. 350 (1960).

to disclose in his naturalization petition, *inter alia*, that he was a member of the Communist Party.⁸² Pursuant to 8 U.S.C. § 1451(a), the government sought to revoke his naturalization order on the ground that it had been procured "by concealment of a material fact or by willful misrepresentation."⁸³ The district court, finding that he had misrepresented three matters—his arrests, his membership in the Communist Party, and his allegiance—cancelled his naturalization.⁸⁴ The Court of Appeals affirmed on the question of concealing the arrests.⁸⁵

The Supreme Court reversed and remanded, holding that the government failed to show by "clear, unequivocal, and convincing" evidence that disclosure of the concealed facts would have warranted denial of citizenship. The test that the Court applied to the "clear, unequivocal, and convincing standard" was whether certain facts were suppressed, which, if known, would have justified denying citizenship, or whether disclosure of those facts "might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship."⁸⁶

In reaching its conclusion, the Court acknowledged both the government's interest in getting truthful responses to its citizenship questionnaires and the immigrant's interest in acquiring citizenship. On the one hand, explained the court, "[a]cquisition of American citizenship is a solemn affair, [and] [f]ull and truthful response[s] to all relevant questions . . . is . . . to be exacted."⁸⁷ On the other hand, "in view of the grave consequences to the citizen, naturalization decrees are not lightly to be set aside—the evidence must indeed be 'clear, unequivocal, and convincing' and not leave 'the issue . . . in doubt.'"⁸⁸ Because the totality of the circumstances surrounding the offenses charged rendered them of little consequence, the Court concluded that it was unlikely that disclosure of them would have disqualified the petitioner from citizenship.⁸⁹ As the Court itself explained:

82. *Id.*

83. *Id.* at 351.

84. *See id.*

85. *See id.*

86. *Id.* at 355.

87. *Id.* at 352.

88. *Id.* at 353 (quoting *Schneiderman*, 320 U.S. at 125).

89. *See id.* at 354.

Had [the offenses] involved moral turpitude or acts directed at the Government, had they involved conduct which even peripherally touched types of activity which might disqualify one from citizenship, a different case would be presented. [However,] [o]n this record the nature of these arrests, the crimes charged, and the disposition of the cases do not bring them, inherently, even close to the requirement of 'clear, unequivocal, and convincing' evidence that naturalization was illegally procured. . . .⁹⁰

Thus, the *Chaunt* Court modified the "clear, unequivocal, and convincing" standard to incorporate a materiality element where the issue was concealment of a material fact.⁹¹ Under this revised standard, if the government wanted to bring a denaturalization proceeding under § 1451(a) for concealment of a material fact, it had to prove by clear, unequivocal, and convincing evidence that either (1) facts were suppressed, which, if known, would have warranted denial of citizenship, or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship.⁹²

4. *Kungys v. United States*⁹³

A 1988 Supreme Court decision, *Kungys v. United States*, substantially revised the standard to be applied in judicial denaturalization proceedings.⁹⁴ In *Kungys*, the primary issue was whether the applicant's misrepresentations about his date and place of birth constituted "concealment of a material fact"⁹⁵ which, if known, would have presumably disqualified him from citizenship. Sustaining the "clear, unequivocal, and convincing" standard of proof on the part of the government but acknowledging the lack of a clear standard for determining materiality, the Court announced a new test for materiality.⁹⁶

90. *Id.*

91. Although the materiality standard was applied only to the "concealment of a material fact" prong of § 1451(a) here, later cases would apply the standard to the "willful misrepresentation" prong as well. *See infra* discussion of *Kungys v. United States* accompanying note 98.

92. *Id.* at 355.

93. 485 U.S. 759 (1988).

94. *See id.*

95. *Id.* at 775-76.

96. *See id.* at 772.

The Court held that the test of whether a naturalization applicant's concealment or misrepresentations were material is whether the misrepresentation or concealment was "predictably capable of affecting, i.e., had a natural tendency to affect, the official [INS] decision."⁹⁷ In determining whether a misrepresentation had a natural tendency to influence the decisions of the INS, the Court emphasized that the relevant consideration was "what would have ensued from official knowledge of the misrepresented fact (in this case, Kungys' true date and place of birth), not what would have ensued from official knowledge of inconsistency between a posited assertion of the truth and an earlier assertion of falsehood."⁹⁸ With these standards in place and noting the importance of the rights at issue, the Court remanded the case back to the Circuit Court to allow the naturalized citizen to refute the disqualification by a preponderance of the evidence.⁹⁹

Thus, under the *Kungys* Court's revised standard, the test of whether concealments or misrepresentations made by an applicant for naturalization are "material" within the meaning of § 1451(a) is whether the concealments or misrepresentations are shown by clear, unequivocal, and convincing evidence to have a natural tendency to produce the conclusion by the INS that the applicant was qualified for citizenship. This standard, which remains the law for judicial denaturalization proceedings filed under § 1451(a), ensures that the naturalized citizen will be given a fair trial because of the heavier burden of proof that it imposes on the government in order for it to prevail.

B. Courts' Power to Reopen Their Own Judgments Under the Predecessor to § 1451(h)

Under the judicial denaturalization scheme in place prior to the 1990 Act, the predecessor to § 1451(h)¹⁰⁰ provided the means by which courts could revoke citizenship summarily, rather than judicially.¹⁰¹ The government had no power to re-

97. *Id.* at 771-72.

98. *Id.* at 775.

99. *See id.* at 777-83.

100. *See supra* note 43.

101. *See, e.g.*, 8 U.S.C. § 1451(i) (1988), which provided that "[n]othing contained in this section shall be regarded as limiting, denying or restricting the

open a naturalization proceeding. If it wished to do so, it had to file a motion to reopen under the predecessor to 8 U.S.C. § 1451(h).

Depending on the basis for such motion, the government's burden varied.¹⁰² "If the motion was brought based on fraud, the government was required to prove fraud by clear and convincing evidence."¹⁰³ If the motion was brought on the basis of newly discovered evidence, the government was required to meet four separate conditions.¹⁰⁴ The first condition was that it had "discovered the evidence after the respondent was naturalized."¹⁰⁵ The second was that the government "could not have discovered the information through due diligence in time to deny naturalization."¹⁰⁶ The third was that the evidence was not "merely cumulative or impeaching."¹⁰⁷ The fourth condition that the government had to meet in order to prevail on the motion to reopen was that the evidence "would have been likely to change the disposition of the case."¹⁰⁸ If the court found that the government had met its burden of proof, the court would grant the motion to reopen naturalization proceedings under its authority to revisit a final judgment pursuant to Federal Rule of Civil Procedure 60(b).¹⁰⁹

In *Bindzyck v. Finucane*,¹¹⁰ the Supreme Court held that the naturalizing court could reopen proceedings to revoke citizenship on grounds of fraudulent or illegal procurement only if such revocation was based on evidence that was already contained in the record.¹¹¹ If the court wanted to revoke citizenship on grounds of fraud or illegality based on evidence outside the record, it had to do so exclusively through the judicial denaturalization scheme prescribed in § 1451(a).¹¹² This proce-

power of any naturalization court . . . to correct, reopen, alter, modify, or vacate its judgment or decree naturalizing [a] person"

102. See *Gorbach*, 181 F.R.D. at 649.

103. See *id.* (quoting *England v. Doyle*, 281 F.2d 304, 309 (9th Cir. 1960)).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* (quoting *Jones v. Aero/Chem. Corp.*, 921 F. 2d 875, 878 (9th Cir. 1990)).

109. See FED. R. CIV. P. 60(b).

110. 342 U.S. 76 (1951).

111. See *id.* at 79.

112. See *id.* When this case was decided, the applicable provision was § 338 of the Nationality Act of 1940. See 8 U.S.C. § 738 (1940) (amending Act of June 29, 1906, 34 Stat. 596, 601).

ture, according to the Court, strikes the right balance between the government's interest in preventing fraudulent citizenship and the citizen's interest in being provided with adequate procedural safeguards. The Court emphasized that it would be irrational for Congress to enact such an elaborate judicial denaturalization scheme if it allowed courts to reopen their own proceedings in such a summary fashion.¹¹³

Similarly, in 1964, the Second Circuit held in *In Re Campbell*¹¹⁴ that the government should normally seek to revoke citizenship in a "plenary suit," rather than summarily by the procedure that allows the court to reopen its own judgment.¹¹⁵ The *Campbell* court explained the difference between the two methods. If the INS filed a motion to reopen proceedings under the predecessor to § 1451(h),¹¹⁶ and the motion was granted by the court, "the parties would be placed in their relative positions just prior to the granting of the order or judgment of naturalization."¹¹⁷ The burden would then shift to the applicant to prove his qualifications for citizenship.¹¹⁸ However, if the government were to proceed under § 1451(a), the initial burden would be on the government to prove the fraud it alleges by clear, unequivocal and convincing proof.¹¹⁹ According to *Campbell*, "the value of American citizenship should not be debased by summary suspension."¹²⁰

By 1973, courts had developed a test to determine when the INS could move to reopen naturalization proceedings under the predecessor to § 1451(h). This test was first articulated in *Petition of Cardines*.¹²¹ According to the *Cardines* court, when moving to reopen a naturalization order on the basis of newly discovered evidence, the INS must show the following four elements: (1) that the alleged newly discovered evidence was discovered since the order granting the petitioner to citizenship; (2) facts from which the court may infer reasonable diligence on the part of the INS; (3) that the evidence is not merely

113. See *Levy*, *supra* note 6, at 1702.

114. 326 F.2d 101 (2d Cir. 1964).

115. See *id.* at 102.

116. See *Bindzyck v. Finucane*, 342 U.S. 76 (1971).

117. *In re Campbell*, 326 F.2d at 102.

118. *Id.*

119. See *id.*

120. *Id.*

121. 366 F. Supp. 700 (D. Guam App. Div. 1973).

cumulative or impeaching; and (4) that the evidence is of such a character that it will probably produce a different result in a new "trial."¹²²

In *In re Tabilos*,¹²³ the INS had moved to reopen the petitioner's naturalization order on the ground that she "willfully concealed the fact of her first marriage"¹²⁴ at her naturalization application hearing. The issue was whether the court should grant the INS's motion to reopen the naturalization order under the predecessor to § 1451(h), or whether the INS had to bring denaturalization proceedings under § 1451(a).¹²⁵ The court found that there were ambiguities appearing on the face of the application that should have given the INS reason to investigate further the petitioner's background.¹²⁶ Despite the ambiguities in the application, the INS chose to proceed with recommending naturalization. Applying the *Cardines* test, the *Tabilos* court found that the INS did not exercise due diligence in interviewing the petitioner, and therefore did not make the necessary showing to warrant reopening under the predecessor to § 1451(h).¹²⁷ Citing *Chaunt v. United States*,¹²⁸ the *Tabilos* court concluded that "American citizenship is a precious right,' and the government must carry its burden in a proceeding to divest a naturalized citizen of his or her citizenship."¹²⁹ Furthermore, continued the court, "[o]nce citizenship has been granted, a naturalized American may not be deprived of her status without the due process" provided by the plenary procedure of § 1451(a) or the summary procedure provided for the courts in the predecessor to § 1451(h).¹³⁰

C. Recap of Judicial Denaturalization Standards

Under the strict judicial denaturalization scheme, before citizenship could be revoked on the basis of any ground enumerated in § 1451(a), the government had to meet its burden of

122. See *id.* at 707.

123. 637 F. Supp. 969 (N.D. Cal. 1986).

124. *Id.* at 971.

125. See *id.*

126. See *id.* at 972.

127. See *id.*

128. 364 U.S. 350 (1960). See discussion *supra* Part III.A.3.

129. *In re Tabilos*, 637 F. Supp. at 972.

130. *Id.*

proof by presenting clear, unequivocal, and convincing evidence. The naturalized citizen had a lower standard of proof, in that he only had to meet the “preponderance of the evidence” standard to rebut the government’s allegations. Furthermore, the government could move to reopen or revoke a naturalization order by invoking the predecessor to § 1451(h), but only the court had the power to denaturalize. If such a motion to reopen was granted by the court, the burden of proof would shift from the government to the citizen to prove his fitness for citizenship.

Under strict judicial denaturalization, not only were due process protections a primary concern, but the recognition of naturalized citizens as being equal to native citizens in all respects helped judges to inject humanitarian considerations into denaturalization decisions. Because such decisions were made on a case-by-case basis requiring a demanding burden of proof on the part of the government, naturalized citizens had a good chance of retaining their citizenship status, and thus, a good chance of living normal, uninterrupted lives as United States citizens. They could walk freely among native-born citizens without having to worry about the threat of loss of citizenship hanging over their heads. American citizenship was considered to be a precious right that could not be taken away without due process safeguards.

IV. STANDARDS UNDER ADMINISTRATIVE DENATURALIZATION

With the passage of the Immigration Act of 1990 and its implementing regulations in 1996, what was once a strictly judicial proceeding is now a summary administrative proceeding conducted without the involvement of the courts. Under the administrative denaturalization scheme now in place, revoking the citizenship of a naturalized citizen is easier than it has ever been and leaves few, if any, procedural safeguards intact for the naturalized citizen.

A. *The Attorney General’s Power to Reopen Naturalization Proceedings Under § 1451(h)*

Section 1451(h) of the INA, when amended in 1990 to transfer the naturalization power from the courts to the Attorney General, heralded a new era of administrative naturaliza-

tion.¹³¹ Moreover, 8 C.F.R. § 340.1, issued in 1996, went even further and ushered in an era of administrative denaturalization.¹³² These implementing regulations authorize the INS to reopen naturalization proceedings and revoke naturalization on its own motion when it believes it has credible and probative evidence of any of the following: (1) that the citizenship was granted by mistake; (2) that the INS has obtained information that was unknown to it at the time of the original proceeding, and such information would have had a material effect on the outcome of the original proceeding in that the information would have shown that the applicant had obtained citizenship by fraud or misrepresentation; or (3) same as (2) above but which information, if known at the time of the original proceeding, would have proven that the applicant was not, in fact, eligible for naturalization.¹³³

Simply put, this means that the INS can institute an administrative denaturalization proceeding if it believes it has credible and probative evidence that naturalization was granted by mistake or obtained through some illegal means such as fraud, misrepresentation, or concealment of a material fact.¹³⁴ Furthermore, any newly discovered evidence that tends to prove that the applicant may not have deserved his citizenship will suffice, not just evidence that the government should have discovered by due diligence.¹³⁵ All that the government has to show is that the information was not known to it during the original naturalization proceeding. Moreover, although the evidence still has to be material, it does not have to appear on the face of the record; the evidence can be cumulative.¹³⁶

Thus, the implementing regulations are problematic in several ways.¹³⁷ First, they provide fewer procedural safeguards than the INS regulations governing administrative cancellation of citizenship-related documents, where citizenship

131. See 8 U.S.C. § 1451(h) (1994). It provides: "Nothing contained in this section shall be regarded as limiting, denying, or restricting the power of the Attorney General to correct, reopen, alter, modify, or vacate an order naturalizing the person."

132. See 8 C.F.R. § 340.1 (2000).

133. See 8 C.F.R. § 340.1(a) (2000).

134. See *id.* See also *Gorbach*, 181 F.R.D. at 649.

135. See *Levy*, *supra* note 6, at 1706; *Gorbach*, 181 F.R.D. at 649.

136. See *Levy*, *supra* note 6, at 1706.

137. See *id.* at 1705.

may not be divested.¹³⁸ For instance, in certificate cancellation proceedings, the examiner administers oaths, issues subpoenas, takes depositions or interrogatories, grants continuances, and rules on objections to the introduction of evidence.¹³⁹ Moreover, the only real protection the regulations provide for is the right to counsel.¹⁴⁰

The second way in which the regulations are problematic is that "the source of the Attorney General's authority to revoke naturalization administratively remains unclear."¹⁴¹ Third, "the regulations allow for revocation for reasons that go beyond what the Supreme Court considered acceptable bases for courts to reopen their own decisions."¹⁴² For example, in *Bindcyck v. Finucane*,¹⁴³ the Supreme Court held that the plenary procedure prescribed in § 338—the equivalent of what is now § 1451(a)—was to be the exclusive procedure for revoking citizenship on grounds of fraudulent or illegal procurement based on evidence outside the record. The court could utilize the summary method—revoking citizenship by reopening a naturalization order—only if fraud or illegality was based on evidence appearing on the face of the record.¹⁴⁴

The fourth reason the regulations are problematic is that they provide inadequate due process protections—protections that are explicitly guaranteed under the Fourteenth Amendment.¹⁴⁵ For instance, naturalized citizens do not have the right of cross-examination.¹⁴⁶ Further, they bear the burden of

138. *See id.* at 1708.

139. *See id.*

140. *See* 8 C.F.R. § 340.1(b)(5) (2000).

141. *Levy, supra* note 6, at 1705.

142. *Id.*

143. 342 U.S. 76, 79 (1951). *See also Levy, supra* note 6, at 1702.

144. *See Bindcyck*, 342 U.S. at 79, 83; *Levy, supra* note 6, at 1702.

145. *See Levy, supra* note 6, at 1705. The Fourteenth Amendment provides: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

146. *See* 8 C.F.R. § 340.1(c), which states that the record of the proceedings shall include the citizen's application for naturalization; the INS' notice of intent to reopen with proof of service to the applicant; "all evidence forming the basis for reopening the naturalization application;" the applicant's statement in response to

proving that they were eligible for citizenship at the time of the naturalization application.¹⁴⁷ Because they provide reduced procedural protections and shift the burden of proof to the citizen, these regulations are particularly problematic in light of the fact that the government in the past has failed to make exculpatory evidence available to the courts.¹⁴⁸

B. Administrative Denaturalization Procedures

To reopen a naturalization proceeding, the INS district director files a written notice of intent to reopen a naturalization proceeding and to revoke naturalization (NOIR), which must be served upon the applicant within two years after the effective date of the naturalization order.¹⁴⁹ Such notice must describe in "clear and detailed language" the grounds upon which the district director intends to reopen the proceeding.¹⁵⁰ After the applicant has been personally served, he has sixty days to submit a response.¹⁵¹ Alternatively, the applicant may request a hearing on the NOIR before an immigration officer authorized to review such applications.¹⁵² The applicant must submit a written request for such a hearing within sixty days of service of the notice of intent.¹⁵³ If the applicant fails to respond to the notice of intent to reopen and revoke within the sixty-day period, such failure to respond "will be deemed an admission of the grounds for reopening and revoking naturalization."¹⁵⁴ Upon being served with the notice of intent to reopen and revoke, the applicant bears the burden of persuading the district director that he was eligible for naturalization at the original

the INS' notice, as well as any evidence in support of the application; and the record of the hearing, if one was held. The regulation does not provide for an automatic right to cross-examination. The only opportunity for cross-examination is if the applicant's request for a hearing is granted, and even that is within the full discretion of the INS. *See id.* at § 340.1(b)(3)(ii).

147. *See* 8 C.F.R. § 340.1(b)(6), which provides that "the applicant bears the burden of persuading the district director that . . . the applicant was eligible for naturalization at the time of the order purporting to admit the applicant to citizenship." *See Levy, supra* note 6, at 1709.

148. *See Levy, supra* note 6, at 1705.

149. *See* 8 C.F.R. § 340.1(b) (2000).

150. *Id.* at § 340.1(b)(2).

151. *See id.* at § 340.1(b)(3).

152. *See id.* at § 340.1(b)(3)(ii).

153. *See id.*

154. *Id.* at § 340.1(b)(4)(ii).

proceeding.¹⁵⁵ Within 180 days of service of the notice of intent to reopen and revoke, the district director issues a decision that serves as a "final determination on the naturalization application."¹⁵⁶

If, afterwards, the applicant wishes to appeal the district director's decision, he must do so to the INS' Administrative Appeals Unit (AAU) within thirty days.¹⁵⁷ It is only if he wishes to appeal an adverse decision of the AAU that the applicant may then proceed to court to seek judicial review.¹⁵⁸

There are two situations in which the district director must refer the case for judicial denaturalization under §1451(a). The first is "where the citizen's answer to the NOIR raises a genuine factual issue about the propriety of the applicant's naturalization, so that resolution of the factual issue will depend on the credibility of witnesses testifying under oath and subject to cross-examination."¹⁵⁹ The second situation is when the district director determines that the applicant has adequately rebutted the allegations made in the NOIR, but he thereafter obtains additional evidence to support a reopening and revocation of the naturalization order.¹⁶⁰

These administrative denaturalization procedures invoke important considerations regarding justice and fundamental fairness. For example, why is it that the INS has two years within which to seek reopening or revocation, while the naturalized citizen has sixty days to submit a response, and only thirty days to appeal a decision of the Administrative Appeals Unit?¹⁶¹ Furthermore, why did the INS get one year, under the judicial denaturalization scheme, within which to seek the court's permission to reopen a naturalization order, while it now gets two years to reopen a naturalization order on its own motion?¹⁶² Why must the applicant's failure to respond to the

155. See *id.* at § 340.1(b)(6).

156. *Id.* at § 340.1(d)(1).

157. See *id.* at § 340.1(e).

158. See *id.* at § 340.1(f).

159. *Court Enjoins INS From Initiating or Continuing Administrative Denaturalization Proceedings, Grants Class Certification*, 75 INTERPRETER RELEASES 1109, 1110 (1998).

160. See *id.*

161. See 61 Fed. Reg. 55,550, 55,551-52 (1996).

162. See *id.* at 55,551. The INS justifies its two-year period for reopening a naturalization order on the ground that "the [one]-year period for reopening . . . and filing a notice of intent to revoke naturalization does not provide sufficient

allegations in the NOIR constitute admission of the grounds on which revocation of his citizenship is sought?¹⁶³ It may be that treating such defaults as admissions is not unknown to the law, but must it be treated this way in immigration law? These considerations force one to wonder whether these administrative procedures are geared more towards promoting the convenience of the INS rather than giving the applicant notice and opportunity to be heard.¹⁶⁴

C. Comparison of Procedural Protections Under Judicial Denaturalization and Administrative Denaturalization

The threshold to revoke citizenship under the new administrative regime is considerably lower than under the pure judicial system. As discussed above, requirements for reopening a naturalization order under judicial denaturalization were stringent: due diligence was imposed on the INS; evidence could not be merely cumulative or impeaching; and evidence had to be of such character that it would likely produce a different result in a new proceeding.¹⁶⁵ In contrast, to reopen a naturalization order under the current administrative scheme, any new evidence tending to justify a reopening will do; no due diligence requirement is imposed on the INS; and even evidence not appearing on the record can serve as the basis for reopening.¹⁶⁶

Under the strict judicial naturalization scheme, the government had a heavy burden of proof: it had to prove its case by clear, unequivocal, and convincing evidence.¹⁶⁷ Under the current administrative system, the burden is on the citizen to prove that his citizenship should not be revoked.¹⁶⁸

time if the applicant's fraudulent means of securing naturalization becomes apparent more than 1 year after being naturalized." *Id.*

163. *See id.* at 55,553. According to the INS, "[T]reating a default as an admission is not unknown to the law." *Id.* (quoting Fed. R. Civ. P. 55). Thus, "[s]o long as the individual has notice of the allegations, and of the consequences of a failure to respond," there are no due process problems with such a deemed admission. *Id.*

164. *See id.* at 55,552.

165. *See* discussion *supra* Part III.

166. *See* discussion *supra* Part IV.A.

167. *See* discussion *supra* Part III.

168. *See supra* note 129 and accompanying text.

V. *GORBACH V. RENO*

In 2000, the Ninth Circuit's *en banc* decision in *Gorbach v. Reno*¹⁶⁹ held that the Attorney General lacks statutory authority to revoke citizenship through administrative denaturalization proceedings. This decision was a drastic turnabout for the Ninth Circuit, which had issued an opinion just a year and a half earlier, holding that the Attorney General "does not lack statutory authority to reopen and reconsider her own orders of naturalization."¹⁷⁰

A. *Lower Court's Decision*

In *Gorbach v. Reno*,¹⁷¹ the plaintiffs were naturalized citizens who had been served with notices of intent to revoke naturalization (NOIR) by the INS. The INS sought to revoke their citizenship on the ground that they had failed to reveal their criminal record when applying for naturalization.¹⁷² The plaintiffs brought the action to challenge the validity of administrative denaturalization proceedings and to enjoin the INS from initiating or continuing denaturalization proceedings under §1451(h).¹⁷³ In a short opinion, Judge Rothstein laid out three main points. First:

[G]iven the significant differences between administrative denaturalization proceedings and judicial denaturalization proceedings, it is difficult to reconcile the content and scope of the regulation with the INS' acknowledgment that its power to denaturalize citizens under the current version of section [1451(h)] is the same as that previously possessed by the federal district courts¹⁷⁴

Second, while Congress "clearly and unequivocally" intended to transfer the power to naturalize from the courts to the Attorney General, §1451(h) "could not be read to confer power on the INS to institute an administrative denaturalization procedure that departs so drastically from the judicial de-

169. 219 F.3d 1087 (9th Cir. 2000).

170. 179 F. 3d 1111 (9th Cir. 1999).

171. 181 F.R.D. 642 (W.D. Wash. 1998).

172. *See id.* at 645.

173. *See id.*

174. *Id.* at 649-50.

naturalization procedures previously authorized under [§ 1451(a)].¹⁷⁵

Third, the INS' basis for revoking the plaintiffs' citizenship—misrepresentation and concealing their criminal backgrounds—is also covered by §1451(a), “which requires United States attorneys to institute denaturalization proceedings if they have good cause for showing that the naturalization was ‘procured by concealment of a material fact or by willful misrepresentation.’”¹⁷⁶ Thus, if the INS was correct that it could institute proceedings where it believed a citizen had concealed or misrepresented his background, § 1451(a) would be “rendered superfluous.”¹⁷⁷ As such, Judge Rothstein denied the INS' motion to dismiss and granted the plaintiffs' motion for a preliminary injunction.¹⁷⁸

B. Ninth Circuit Decisions

A year later, however, the Ninth Circuit Court of Appeals reversed Judge Rothstein's order, holding that the INS “can revoke citizenship of naturalized immigrants through closed administrative hearings outside the court system.”¹⁷⁹ The court's decision was disappointing to the many immigration attorneys representing the thousands of newly naturalized clients. According to one attorney for the plaintiffs, “[c]itizenship is among a person's most cherished rights, and this is the first time any court has ever held that the INS may take that right away on its own without going before a judge.”¹⁸⁰ The plaintiffs' attorneys said that “the new program violated their clients' constitutional right not to testify against themselves and in numerous instances unfairly targeted people for innocent or minor mistakes.”¹⁸¹ The INS “had instituted 2722 denaturalization proceedings under the new program and revoked the citizenship of sixteen people at the time [the] U. S. District

175. *Id.* at 650.

176. *Id.* (quoting 8 C.F.R. § 1451(a) (2000)).

177. *Gorbach*, 181 F.R.D. at 150.

178. *See id.*

179. *Gorbach v. Reno*, 179 F.3d 1111, 1114 (9th Cir. 1999).

180. Henry Weinstein, *INS Can Void Citizenship, Court Says Ruling: Panel Backs Agency's Process of Revoking Naturalization Through Hearings Outside the Judicial System*, L.A. TIMES, June 15, 1999, at A1.

181. *Id.* at A16.

Court Judge . . . issued her injunction."¹⁸² In addition, "[t]he agency had 1900 more cases under review at that time."¹⁸³

Relying on the fact that no provision in the INA expressly gives the INS the power to denaturalize a naturalized citizen, Gorbach argued that the 1990 Act governs only judicial denaturalization and "prohibits the Attorney General from affecting the citizenship of any individual."¹⁸⁴ Gorbach further contended that the INS's "inherent power to reopen, to the extent that it exists at all, is limited to correcting ministerial errors and does not extend to revoking naturalization."¹⁸⁵

In response, Attorney General Reno argued that the naturalization power granted to her by the 1990 Act "inherently authorizes [her] to reopen and revoke naturalization orders because she has the overall responsibility of administering the Act," and that such responsibility includes the "power to promulgate regulations necessary to implementing her authority."¹⁸⁶ In the Attorney General's view, Congress explicitly recognized this when it acknowledged that "[n]othing contained in this section shall be regarded as limiting, denying, or restricting the power of the Attorney General to correct, reopen, alter, modify, or vacate an order naturalizing the person."¹⁸⁷ In conclusion, the Attorney General contended "that when Congress transferred the power to naturalize to the Attorney General, it intentionally eliminated the reference to court term and rules in the savings clause that formerly governed the courts' summary reopening procedure."¹⁸⁸ Thus, "this reflects congressional intent to leave her with the same power to reopen as the courts had before."¹⁸⁹

Before rendering its decision, the court looked to five general guiding principles. First, where the

empowering provision of a statute states simply that the . . . [INS] may 'make . . . such rules and regulations as may be necessary to carry out the provisions of this Act,' . . . a

182. *Id.*

183. *Id.*

184. *Gorbach*, 179 F.3d at 1119. *See also* 8 U.S.C. § 1453 (1994), *supra* note 46.

185. *Gorbach*, 179 F.3d at 1120.

186. *Id.*

187. *Id.* (quoting 8 U.S.C. § 1451(h) (1994)).

188. *Gorbach*, 179 F.3d at 1120.

189. *Id.*

regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'¹⁹⁰

"Second, because American citizenship is such a precious right, summary revocation procedures are disfavored."¹⁹¹ For this reason, the court explained, there should be "notice and opportunity to be heard before naturalization can be revoked, and exceptional grounds such as fraud or misrepresentation . . . [should] exist before the authority to revoke citizenship is exercised."¹⁹²

The third guiding principle the court utilized was the fact that we must be especially "sensitive to the citizen's rights where the proceeding is nonjudicial because of '[t]he difference in security of judicial over administrative action."¹⁹³ The court admitted that there should be judicial adjudication of the issue of citizenship and a heavy criterion of proof by the government before decreeing denaturalization, "unless by appropriate explicitness the lawmakers make them inapplicable."¹⁹⁴ The fourth element that guided the court was that "[e]very tribunal, judicial or administrative, has some power to correct its own errors or otherwise appropriately to modify its judgment, decree or error."¹⁹⁵ Finally, the court considered that "[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."¹⁹⁶ After considering all five of the guiding principles, the court held "that the Attorney General did not lack statutory authority to reopen and reconsider her own orders of naturalization."¹⁹⁷

The court's opinion is significant for its reference to the general principles that must guide a determination of adminis-

190. *Id.* (citations omitted) (quoting *Balelo v. Baldrige*, 724 F.2d 753, 760 (9th Cir. 1984)).

191. *Gorbach*, 179 F.3d at 1120.

192. *Id.* (citation omitted).

193. *Id.* (citation omitted) (quoting *United States v. Minker*, 350 U.S. 179, 188 (1955)).

194. *Gorbach*, 179 F.3d at 1120 (quoting *Minker*, 350 U.S. at 188).

195. *Gorbach*, 179 F.3d at 1120-21 (citation omitted) (quoting *Alberta Gas Chems., Ltd. v. Celanese Corp.*, 650 F.2d 9, 13 (2d Cir. 1981)).

196. *Gorbach*, 179 F.3d at 1121 (quoting *Stone v. INS*, 514 U.S. 386, 397 (1995) (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979), which stated the proposition that the court must construe a statute to give effect, if possible, to every provision)).

197. *Gorbach*, 179 F.3d at 1114.

trative denaturalization proceedings.¹⁹⁸ The court recognized that American citizenship is a precious right, and that summary revocation procedures are disfavored.¹⁹⁹ Furthermore, it warned that courts should be especially sensitive to citizens' rights where the proceeding is nonjudicial because of the difference in procedural safeguards.²⁰⁰

Judge Andrew J. Kleinfeld, dissenting, was reluctant to embrace the Attorney General's implicit power to denaturalize. He took the position that the power to denaturalize is so important that it should not be inferred from delegation of the power to naturalize.²⁰¹ According to Judge Kleinfeld, "[t]he only express provision from which the attorney general infers a power to denaturalize is a saving clause."²⁰² However, this clause "does not create anything; it merely preserves what is already there from repeal."²⁰³ Furthermore, continued the dissenting judge, "[u]nder the saving clause, what authority the attorney general has, she keeps, but it does not give her more."²⁰⁴ Judge Kleinfeld distinguished the Attorney General's power to naturalize from the courts' former power to naturalize.²⁰⁵ The courts' power to naturalize—on which they relied to vacate their own judgments—at least had been expressly granted and approved by Congress.²⁰⁶

In Judge Kleinfeld's opinion, there is no reason that "an analogous power in the [A]ttorney [G]eneral should be inferred from Congressional silence."²⁰⁷ Judge Kleinfeld based his reasoning on *Bindczyck v. Finucane*,²⁰⁸ which rejected the argument that a court's inherent power to vacate its own judgments necessarily includes the power to denaturalize.²⁰⁹ *Bindczyck* held that the statute giving the Attorney General the duty to

198. *See id.* at 1126.

199. *See Grobach*, 181 F.R.D. at 649–50.

200. *See id.* at 650 (quoting 8 C.F.R. § 1451(a)).

201. *See Grobach*, 179 F.3d at 1127 (Kleinfeld, J., dissenting).

202. *Id.* at 1126 (citing 8 U.S.C. § 1451(h) (1994)).

203. *Gorbach*, 179 F.3d at 1127.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. 342 U.S. 76 (1951).

209. *Kungys v. United States*, 485 U.S. 759 (1988).

institute denaturalization proceedings in designated courts was a “carefully safeguarded method for denaturalization.”²¹⁰

In coming to his conclusion, Judge Kleinfeld applied the principle of *United States v. Minker*,²¹¹ which held that “where there is doubt it must be resolved in the citizen’s favor.”²¹² The *Minker* Court equated denaturalization to the “loss of both property and life; or of all that makes life worth living.”²¹³ In Judge Kleinfeld’s view, if there is “doubt [as to] whether the statute confers the power on the [A]ttorney [G]eneral to denaturalize, or [whether it] leaves . . . [the power] exclusively in the district courts, the doubt must be resolved against the [A]ttorney [G]eneral.”²¹⁴ Judge Kleinfeld had this to say about the Attorney General’s implicit power to denaturalize:

The [A]ttorney [G]eneral not only grabbed the ball on denaturalization, but ran out of bounds with it. The regulation reverses the ordinary burden of proof Taking over denaturalization proceedings, shifting the burden of proof from the government to the citizen, and imposing two layers of administrative proceedings before the naturalized citizen can get to court, is all quite a lot of power to infer from [congressional] silence. Unless Congress changes the statute or the Supreme Court changes the rules of construction, I do not think we can sustain the [A]ttorney [G]eneral’s claim of authority, in the face of the express statutory procedure for denaturalizations to be prosecuted in federal district courts, and the absence of any express grant of authority to the [A]ttorney [G]eneral.²¹⁵

In July of 2000, the Ninth Circuit handed down another decision that replaced its previous one.²¹⁶ This time, the court took a 180-degree turn and ruled that the power conferred upon the Attorney General to naturalize does not necessarily include the power to denaturalize.²¹⁷ Thus, the regulation pro-

210. *Gorbach*, 179 F.3d at 1128 (quoting *Bindzyck*, 342 U.S. at 81).

211. 350 U.S. 179 (1955).

212. *Gorbach*, 179 F.3d at 1129.

213. *Minker*, 350 U.S. at 188.

214. *Gorbach*, 179 F.3d at 1129.

215. *Id.* at 1130–31.

216. *See Gorbach v. Reno*, 219 F.3d 1087 (9th Cir. 2000).

217. *See id.* at 1089.

viding for administrative denaturalization is void because of the "absence of statutory authority for it."²¹⁸

Judge Kleinfeld, writing the opinion for the panel majority, provided the same rationales that he provided in his dissent in the previous Ninth Circuit decision. He reasoned that "the power to denaturalize is so important" and so different from the power to naturalize that Congress's silence should not be inferred to be a grant of power.²¹⁹ Furthermore, the express statutory procedure in place for denaturalization "plainly and unambiguously gives the Attorney General the power to naturalize citizens and cancel certificates of citizenship but not the citizenship itself, and plainly and unambiguously gives to district courts the power to denaturalize citizens."²²⁰ In addition, the savings clause from which the Attorney General infers a power to denaturalize "does not amount to a creation of some new power."²²¹ Moreover, "[i]mplying new denaturalization power from the savings clause would also be inconsistent with the history and structure of immigration law."²²² According to the court, "[b]ecause exclusive jurisdiction over a [§ 1451] proceeding is vested in the courts, that power could not have been transferred to the Attorney General by the new saving clause."²²³ The court concluded its opinion with the following observation:

Citizenship in the United States is among our most valuable rights. For many of us, it is all that protects our life, liberty, and property from arbitrary deprivation. The world is full of miserable governments that protect none of these rights. Many of us would be dead or never conceived in wretched places in other countries, had we or our ancestors not obtained American citizenship. The opportunities that we want to pass on to our children depend on their secure rights to stay in this country and enjoy its guarantees of life, liberty, and property, and the domestic peace and prosperity that flow from those guarantees. An executive department cannot simply decide, without express statutory authorization, to create an internal executive procedure to deprive people of those rights without even going to court.

218. *Id.* at 1091.

219. *Id.*

220. *Id.* at 1094.

221. *Id.*

222. *Id.* at 1101.

223. *Id.*

For the Attorney General to gain the terrible power to take citizenship away without going to court, she needs Congress to say so.²²⁴

It remains to be seen what impact *Gorbach v. Reno* will have on administrative denaturalization challenges brought in other circuits. However, it is at least clear that in the Ninth Circuit, the Attorney General—and by association, the INS—has no post-citizenship denaturalization authority.²²⁵ Such authority must come from a governing statute.²²⁶ Thus, under the *Gorbach* decision, “[o]nce the Attorney General has granted citizenship, she has no residual right under the statute to revoke it. Rather, post-naturalization citizenship revocation remedies are limited under the statute to the ‘exclusive, self-contained’ [§ 1451(a)] proceeding.”²²⁷

VI. THE INS’ RESPONSE TO ADMINISTRATIVE DENATURALIZATION

The INS has spoken in defense of the shift from judicial denaturalization to administrative denaturalization.²²⁸ In a statement made before the United States House of Representatives, Doris Meissner, the Commissioner of the INS at the time, stated that “[b]y aggressively pursuing administrative revocation in appropriate cases, and particularly by denying naturalization to new applicants who provide false oral testimony, we are sending a clear message that only truly deserving individuals will be granted citizenship.”²²⁹

According to the Commissioner, the INS has pursued administrative denaturalization proceedings in the following situations:

[(1)] where the naturalized citizen did not meet the requisite residency or physical presence requirements to natural-

224. *Id.* at 1098–99.

225. *Id.* at 1102 (Thomas, J., concurring).

226. *Id.*

227. *Id.* at 1102–03.

228. See generally 61 Fed. Reg. 55,550 (1996).

229. *Oversight of Naturalization Process: Hearing Before the Subcomm. on Immigration and Claims of the H.R. Comm. on the Judiciary* (1997) (statement of Doris Meissner, Comm’r, Immigration and Naturalization Service), available in 1997 WL 10570739.

ize . . . ; (2) where individuals were later found to be statutorily ineligible to naturalize because of criminal convictions. . . ; (3) where the INS has determined that the individual provided false testimony during the course of his or her naturalization interview. . . ; and (4) where there was a pending or final order of deportation against the individual at the time of naturalization.²³⁰

However, the INS has also initiated administrative denaturalization proceedings "in less conducive cases where the facts are nonetheless compelling."²³¹ These cases, according to the Commissioner, would be of the sort where ineligibility for naturalization is "based solely on misrepresentation of facts which in themselves do not statutorily disqualify the applicants, including cases based solely on false testimony."²³² However, since these types of cases "involve a particularly unsettled area of the law that presents unique obstacles to administrative revocation,"²³³ the Commissioner stated, the INS would plan to pursue administrative denaturalization only "where the concealed information relates to felony arrest," so that this may "foster the development of favorable case law."²³⁴

Other proponents of the new administrative procedures have even recommended reforming the regulations in order to extend the statute of limitations for the government to denaturalize from two to five years.²³⁵ According to one supporter:

I would hope, in the vast majority of cases, the INS would act to revoke citizenship within two years. However, events of the past year and a half have demonstrated that the INS is unable to move quickly on denaturalization cases when it has a backlog of thousands of such cases. For those wrongly naturalized in late 1995, the current two-year statute of limitations has already expired. Such individuals against whom the INS has not initiated administrative denaturalization proceedings have successfully defrauded the system,

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. See *Naturalization Process Revisions: Hearing Regarding H.R. 2837, The Naturalization Reform Act of 1988, Before the Subcomm. on Immigration and Claims of the H.R. Comm. on the Judiciary* (1998) (statement of Rosemary Jenks, Senior Fellow, Center for Immigration Studies, Washington, D.C.), available at 1998 WL 8993958.

unless a decision is made to initiate the more costly and drawn-out judicial denaturalization proceedings.²³⁶

CONCLUSION

Although efficiency, expedience, and prevention of fraudulent citizenship are reasons advanced in favor of the shift from judicial to administrative denaturalization, such a movement away from the judicial system comes with many costs to the naturalized citizen. He is no longer guaranteed the right to call and cross-examine witnesses. Now he must go “through two layers of administrative agency proceedings before getting to the court.”²³⁷ Furthermore, he must now bear the burden of proving, by a preponderance of the evidence, his eligibility for citizenship, whereas under the strict judicial denaturalization standards, he had only to rebut the charges of the government.

Because the 1990 Immigration Act, along with its implementing regulations, allow the INS to deprive a naturalized citizen of citizenship in a summary fashion with minimal proof, the temptation to divest unworthy people of citizenship status, just because the INS feels like it—instead of for valid reasons—could very well be a reality. In the words of an immigration attorney, “the denaturalization provisions give INS a frightening and unprecedented level of authority which would be basically unchecked by due process.”²³⁸

236. *Id.*

237. See *Gorbach v. Reno*, 179 F.3d 1111, 1130 (9th Cir. 1999) (Kleinfeld, J., dissenting).

238. *Naturalization Process Revisions: Hearing Regarding H.R. 2837, The Naturalization Reform Act of 1988, Before the Subcomm. on Immigration and Claims of the H.R. Comm. on the Judiciary* (1998) (statement of Mark Hetfield), available at 1998 WL 8993446.

