



DENATURALIZATION

Understanding the Process and Recent Increases in Denaturalization Efforts

By Nikki Marquez and Eric Cohen

I. Introduction¹

United States citizenship is not absolute—it may be “lost” in either of two ways: 1) Any citizen, by birth or naturalization, may choose to abandon it voluntarily; or 2) if acquired through naturalization, the government may revoke citizenship if they can prove a person obtained citizenship illegally. Expatriation is the voluntary abandonment of citizenship, while denaturalization is the revocation of naturalization and citizenship by the government.

Denaturalization applies only to people who became citizens through the naturalization process. The rationale for denaturalization is that the individual should not have been granted naturalization in the first place. Therefore, the government may revoke citizenship if the individual illegally procured or procured citizenship by “concealment of a material fact or by willful misrepresentation.”² Once citizenship is lost, the person reverts back to their pre-naturalization status.³

In the past, denaturalization proceedings were rare and usually brought only against alleged war criminals and in other extreme cases. However, continuing their assault on immigrants, families, and communities of color, the Trump administration has increased resources dedicated to pursuing denaturalization in an effort to strip citizenship from naturalized citizens. While this increase in denaturalization cases is significant, in absolute terms the number of people who have their citizenship taken away remains small. Yet, there is concern that this administration will significantly increase the number of denaturalization cases in the future. Additionally, there are fears that these efforts will have a chilling effect on the number of legal permanent residents applying for U.S. citizenship⁴ and will further burden a system that is already delayed in adjudicating and granting immigration benefits, including naturalization cases.

¹ For an overview of current denaturalization efforts, see ILRC’s resource *The Trump Administrations Plan to Strip Citizenship from Thousands of Americans*, available at <https://www.ilrc.org/trump-administrations-plan-strip-citizenship-thousands-americans>. For a more in-depth discussion of the legal process for denaturalization, see Chapter 15 in ILRC’s manual *Naturalization and U.S. Citizenship: The Essential Legal Guide*.

² INA § 340(a).

³ *Costello v. INS*, 376 U.S. 120 (1964). See also 12 USCIS-PM L.3(A). For more extensive discussions on the loss of citizenship, see Gordon, Mailman and Yale-Loehr, *Immigration Law and Procedure* v 7 (Mathew Bender 2015); Daniel Levy, *U.S. Citizenship and Naturalization Handbook* (Thomson Reuters 2018-2019).

⁴ Carlotta Mohamed, *LIC clinic helps immigrants apply for citizenship*, TIMES LEDGER (Aug. 8, 2018), https://www.timesledger.com/stories/2018/31/naturalizationclinic_2018_08_03_q.html.

This practice advisory⁵ briefly describes recent efforts to increase denaturalizations, the legal grounds and process for denaturalizing a citizen, and the consequences of denaturalization.

NOTE: Relatively few immigrants will face denaturalization. However, the new focus on denaturalization highlights why thorough and accurate red flag screening is important during the naturalization process. ILRC has a number of tools available to help you ensure the initial grant of citizenship was correct.

See ILRC's *Naturalization and U.S. Citizenship, The Essential Legal Guide*, available at <https://www.ilrc.org/naturalization-and-us-citizenship>, and the New Americans Campaign's *Best Practices Toolkit: Prescreening and Red Flag Review*, available at <http://newamericanscampaign.org/about/best-practices-in-naturalization/#pre-screening-and-red-flags>.

Visit ILRC's Citizenship and Naturalization page for new and additional resources: <https://www.ilrc.org/citizenship-and-naturalization>.

II. Recent Government Efforts to Identify and Pursue More Cases for Denaturalization

Historically, the U.S. government pursued denaturalization in very small numbers, averaging approximately eleven cases per year between 1990 and 2017.⁶ However, under the Trump administration there has been a dramatic increase in the number of denaturalization cases the government is pursuing and a corresponding increase in resources dedicated to this effort.

In 2009, during the Obama Administration, the Department of Homeland Security (DHS) launched Operation Janus to continue this denaturalization work and expand DHS' efforts to identify individuals with a final deportation order who naturalized or obtained legal permanent residence status under a different identity.⁷ A 2016 DHS Office of the Inspector General (OIG) report determined that there were 1,029 such cases and identified the lack of digital fingerprint records as the main cause of the problem.⁸ DHS identified another 953 cases of naturalized citizens with prior deportation orders under other identities.⁹ The OIG report also noted that fingerprint records were lacking in approximately 315,000 cases of non-citizens with final deportation orders or criminal convictions and that in about 148,000 cases ICE had not yet reviewed and tried to retrieve and digitize old fingerprint cards.¹⁰ Despite these large numbers, the OIG report states that as of September 2016, U.S. Attorney's Offices had accepted two Operation Janus cases for criminal prosecution and declined twenty-six others.¹¹

⁵ ILRC would like to thank ILRC 2016 summer law fellow Derin McLeod for his help with this practice advisory.

⁶ Patricia Mazzei, *Congratulations, You Are Now a U.S. Citizen. Unless Someone Decides Later You're Not*. THE NEW YORK TIMES (July 23, 2018), available at <https://www.nytimes.com/2018/07/23/us/denaturalize-citizen-immigration.html>.

⁷ Department of Homeland Security, Office of the Inspector General, *Potentially Ineligible Individuals Have Been Granted U.S. Citizenship Because of Incomplete Fingerprint Records* 1 (Sept. 8, 2016), <https://www.oig.dhs.gov/assets/Mgmt/2016/OIG-16-130-Sep16.pdf>. "Special interest countries" are those countries of concern to the national security of the United States; the class includes Afghanistan, Algeria, Bahrain, Bangladesh, Djibouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Lebanon, Libya, Malaysia, Mauritania, Morocco, North Korea, Oman, Pakistan, Philippines, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tajikistan, Thailand, Tunisia, Turkey, Turkmenistan, United Arab Emirates, Uzbekistan, Yemen, and Gaza and the West Bank. See Memorandum: Arrests of Aliens from Special Interest Countries, from David V. Aguilar, Chief of U.S. Border Patrol, to All Sector Chief Patrol Agents (Nov. 1, 2004), OBP 50/8b-P, <https://cryptome.org/obp-50-8b-p.pdf>.

⁸ *Id.*

⁹ *Id.* at 1 n.3.

¹⁰ *Id.* at 4.

¹¹ *Id.* at 6-7. Historically, U. S. Attorney's Offices had declined to criminally prosecute similar cases, however, starting in 2015, they agreed at ICE's urging to prosecute individuals with TSA credentials, security clearances, positions of public trust, or criminal histories. *Id.* at 7.

In addition to Operation Janus, news reports suggest that since 2016, the government has brought approximately seventy-five denaturalization cases in total.¹² In addition, the government has increased its capacity to pursue denaturalization cases. USCIS is hiring more agents¹³ and opening up new offices to review more cases of individuals who naturalized after receiving final deportation orders under Operation Second Look, which is a program to address leads received from Operation Janus.¹⁴

III. Legal Grounds and Process for Denaturalizing a Citizen

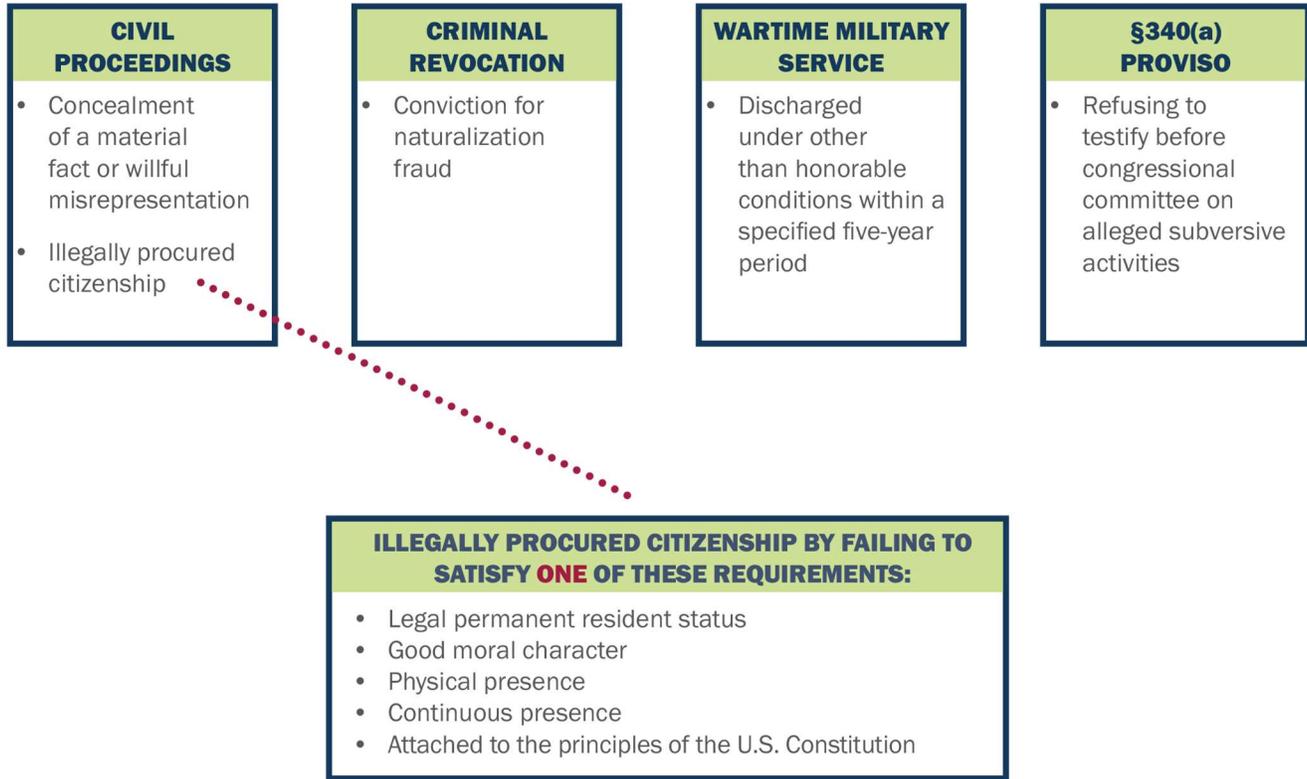
A naturalized U.S. citizen can have their status taken away if the federal government proves by clear, convincing, and unequivocal evidence in a civil federal court proceeding, or satisfies the beyond a reasonable doubt standard in a comparable criminal case, that the citizen was not qualified for naturalization at the time it was mistakenly granted. The denaturalization process is governed by these provisions of law:

- **Illegal procurement, or concealment or willful misrepresentation (INA § 340(a)):** Naturalization may be revoked in civil proceedings for having “illegally procured” citizenship or by “concealment of a material fact or by willful misrepresentation.
- **Denaturalization for convictions for naturalization fraud (criminal revocation) (18 USC § 1425):** Naturalization may be revoked by conviction for procuring or attempting to procure the naturalization of anyone contrary to the law.
- **Wartime military service (INA § 329(c)):** Naturalization through wartime military service under § 329(a) may be revoked if the citizen was subsequently discharged under other than honorable conditions within a specified five-year period.
- **The proviso to § 340(a):** A remnant of the Cold War, but still valid law, naturalization may be revoked for refusing under specified circumstances to testify before a congressional committee on alleged subversive activities.

¹² Adiel Kaplan, *Miami Grandma Targeted as U.S. Takes Aim at Naturalized Immigrants with Prior Offenses*, MIAMI HERALD (July 9, 2018), <https://hrlid.us/2ulBCOp>.

¹³ *Id.*

¹⁴ Amy Taxin, *U.S. Launches Bid to Find Citizenship Cheaters*, AP (Jun. 12, 2018), <https://apnews.com/1da389a535684a5f9d0da74081c242f3>. Prior to 2016, the government mostly brought denaturalization cases against those alleged to have concealed their involvement with war crimes, terrorism, or immigration fraud. For example, the government has brought denaturalization cases against individuals alleged to have been involved in crimes in Bosnia and Herzegovina for misrepresenting their involvement with those crimes at the time they applied for refugee status. The current rates for bringing these types of cases have remained steady with pre-2016 rates. See Complaint to Revoke Naturalization, *United States v. Yetisen*, No. 18-570 (D. Or. Apr. 4, 2018); Complaint to Revoke Naturalization, *United States v. Dzeko*, No. 18-579 (D.D.C. Apr. 4, 2018); Judgment, *United States v. Kneginich*, No. 16-238 (W.D. Mich. November 14, 2017).



A. Illegal Procurement, or Concealment or Willful Misrepresentation

Illegal procurement does not require a concealment or misrepresentation of any kind.¹⁵ Rather, the issue is whether the applicant satisfied all of the specific naturalization requirements found in INA § 316(a), which include:¹⁶

- (1) the applicant resided continuously in the U.S. as a lawful permanent resident for the five-year period (or three-year period if applying as the spouse of a United States citizen) immediately preceding the date of filing and up to the time of naturalization;
- (2) the applicant was physically present in the U.S. as a lawful permanent resident for at least half of the five-year period (or at least half of the three-year period if applying as the spouse of a United States citizen) immediately preceding the date of filing for naturalization;
- (3) the applicant was a person of good moral character during all of the five (or three) year period and continues to have good moral character through the application, adjudication, and oath process;
- (4) during the five- or three-year period the applicant was “attached to the principles of the Constitution of the United States, and well-disposed to the good order and happiness of the United States.”

Note: This is not the comprehensive list of requirements for naturalization. Rather it is the subset of requirements found in INA § 316(a) that serves as the basis for denaturalization under INA § 340(a). For additional information on the comprehensive list of eligibility requirements for naturalization, please see the ILRC’s manual entitled, *Naturalization and U.S. Citizenship: The Essential Legal Guide*.

¹⁵ See, e.g., *U.S. v. Jean-Baptiste*, 395 F.3d 1190, 1193 (11th Cir. 2005); *U.S. v. Dang*, 488 F.3d 1135 (9th Cir. 2007).

¹⁶ A person may also be able to naturalize through their service in the military and/or during active duty during certain hostilities. Those requirements can be found at INA §§ 328, 329.

Additionally, naturalization of a U.S. citizen may be revoked if it was procured “by concealment of a material fact or by willful misrepresentation.”¹⁷ Largely, the illegal procurement and concealment provisions overlap for the simple reason that procuring naturalization by concealment or willful misrepresentation is also procuring it illegally.

1. Lawful Permanent Resident Status

One place that illegal procurement can potentially arise is in determining whether the naturalized citizen legally obtained the lawful permanent resident status that qualified them for naturalization. In many, if not most, cases, the underlying issue will be whether the applicant obtained lawful permanent resident status through fraud or willful misrepresentation of a material fact, which often overlaps with the concealment provision for revocation of naturalization because the applicant will probably have concealed the same fact on their naturalization application. Still, there are cases where permanent resident status may have been obtained unlawfully in the absence of misrepresentation; e.g., where an ineligible applicant is issued a visa in error, and that visa ultimately leads to permanent residency.¹⁸ Whether legal residence was obtained in error or through fraud or willful misrepresentation, the eventual citizenship status can still be taken away.

2. Good Moral Character

A large number of illegal procurement cases involve the charge that the citizen was not a person of good moral character during the requisite period prior to their naturalization. More specifically, the government discovers a fact, which would have precluded a finding of good moral character had it been known to the government prior to naturalization. This includes certain acts committed prior to naturalization but for which charges and convictions occurred after the granting of citizenship.¹⁹ A finding of good moral character is precluded if the applicant fell within one of the statutory bars of INA § 101(f). Moreover, in a catchall concluding paragraph, the statute permits the government to find a lack of good moral character for other reasons on a case-by-case basis.²⁰ Of course, willful concealment of the pertinent fact would provide grounds for revocation under the concealment provision (discussed below). But, for example, misrepresentation or concealment of a non-material fact can still raise questions about a person’s good moral character on the principle that one should not lie to the government (the false testimony statutory bar to good moral character) even if the truth would not have disqualified the applicant from naturalization, such as an arrest without conviction or conviction for a petty offense or other misconduct that preceded the qualifying period of residence.²¹

3. Continuous Residence

The naturalization applicant must have resided “continuously” within the United States during the requisite continuous residence period, generally five years (or three years if married to a U.S. citizen), and from the date of application until admission to citizenship.²² Any single absence of one year or more within the continuous residence period breaks the continuity of such residence. An absence of more than six months but less than one year also breaks the continuity of

¹⁷ INA § 340(a).

¹⁸ See, e.g., *U.S. v. Kaur*, 2014 WL 285077 (E.D. Pa 2014) (revoking naturalization where the court concluded that derivative asylum status and adjustment were not lawfully obtained for a derivative asylee when principal’s asylum grant was not valid); *U.S. v. Szehinskyj*, 277 F.3d 331 (3d Cir. 2002) (revoking citizenship where individual received a visa under Displaced Persons Act, for which he was later found to be ineligible for having assisted in persecution); *Turfah v. USCIS*, 845 F. 3d 668 (6th Cir 2017) (revoking citizenship where individual received his legal permanent resident status by mistake by the government, even though the individual did not commit any fraud in obtaining his status).

¹⁹ See, e.g., *U.S. v. Jean-Baptiste*, 395 F.3d 1190 (11th Cir. 2005); *U.S. v. Dang, supra*; *U.S. v. Suarez*, 664 F.3d 655 (7th Cir. 2011); *U.S. v. Teng Jiao Zhou*, 815 F.3d 639 (9th Cir. 2016).

²⁰ INA § 101(f); 8 U.S.C. § 1101(f). See, e.g., *U.S. v. Xunmei Li*, 2014 WL 880418 (DC AZ 2014).

²¹ *Kungys v. U.S.*, 485 U.S. 759, 779 (1988).

²² INA § 316(a).

residence unless the applicant can show that she did not in fact break her continuous residence.²³ Residence in this context is defined by statute as a person's principal, actual dwelling place without regard to intent.²⁴

If someone lied about, or simply omitted, a trip that was one year or more during the continuous residence period, they could be denaturalized as they were not eligible for naturalization.

4. Physical Presence

A naturalization applicant also must show that they were physically present for half of the previous five years (or half of the previous three years if applying as the spouse of a U.S. citizen).²⁵ If someone misrepresented or omitted a trip that would have made them ineligible to meet this requirement, they could be denaturalized as they were not eligible for naturalization.

5. Attachment to the Principles and Good Order of the United States

Enacted during the Cold War, INA § 340(c) creates a rebuttable presumption that someone who was naturalized after December 24, 1952 “was not attached to the principles of the Constitution...and was not well disposed to the good order and happiness of the U.S. at the time of naturalization” and was therefore ineligible for naturalization if, within five years of being naturalized, they join or become affiliated with an organization that would have precluded naturalization under INA § 313. These organizations include becoming a member of or affiliated with the Communist party, other totalitarian party, or terrorist organization. Likewise, INA § 340(a) provides for the denaturalization for concealment of a material fact of a person convicted of contempt of Congress for refusing to testify within ten years of naturalization.

Note: For additional information regarding eligibility for naturalization, please see the ILRC's manual entitled, *Naturalization and U.S. Citizenship: The Essential Legal Guide*.

6. Concealment and Willful Misrepresentation

Naturalization may be revoked if it was procured by “concealment of a material fact or by willful misrepresentation.”²⁶ The plain language seems to indicate that the concealment does not have to be willful; and a willful misrepresentation does not have to be material.²⁷ Nonetheless, the courts have held in civil cases that the concealment of a material fact must be willful, and that a willful misrepresentation must be of a material fact.²⁸ In *U.S. v. Kungys*, the Supreme Court addressed both. Concealing or misrepresenting a fact is material if it had a “natural tendency” to mislead the government official; and such a statement is said to have such a natural tendency if honest representations would have disclosed facts relevant to the applicant's eligibility.²⁹ According to the USCIS Policy Manual, the Court in *Kungys* does not mean that the information, if disclosed, would have prevented the applicant from naturalizing.³⁰ Additionally, the misrepresentation or concealment must have been material and have procured naturalization. A material misrepresentation creates a presumption that it “procured” naturalization only if the record creates a “fair inference” that a ground of ineligibility actually existed. Consequently, a naturalized citizen could rebut that presumption and thereby

²³ INA § 316(b).

²⁴ INA § 101(a)(33).

²⁵ INA § 316(a).

²⁶ INA § 340(a).

²⁷ Contrast the language in this provision with INA § 212(a)(6)(C)(i), which bars admission to the United States of someone seeking admission by “willfully misrepresenting a material fact.”

²⁸ *Fedorenko v. U.S.*, 449 U.S. 490, 507 n.28 (1981) (referring to *Costello v. U.S.*, 365 U.S. 265, 271-72, n.3 (1961)). See also *United States v. Reve*, 241 F. Supp.2d 470 (D. N.J. 2003); *United States v. Ekipin*, 214 F. Supp.2d 707 (S.D. Tex. 2002); *United States v. Tarango-Pena*, 173 F. Supp.2d 588 (E.D. Tex. 2001).

²⁹ *Kungys v. U.S.*, 485 U.S. 759 (1988).

³⁰ 12 USCIS-PM L.2(B)(1) (citing *Kungys v. U.S.*, 485 U.S. 759, 767 (1988)).

save their citizenship by showing by a preponderance of the evidence that no such ground actually existed, presumably meaning that they were eligible for naturalization despite the concealment or misrepresentation of a material fact. Note that in such a situation, they would have to show that they did not commit false testimony (a bar to good moral character) in their misrepresentation in order to show that they were nevertheless eligible for naturalization.

The four requirements required to show that naturalization was procured by concealment of a material fact or willful misrepresentation are that the applicant must have made a 1) willful, 2) concealment or misrepresentation, 3) of a material fact, 4) to procure naturalization.³¹

Concealment includes swearing under oath that a person does not possess a criminal record or has not committed crimes for which they were not arrested³² and misstatements that conceal information that the applicant does not want the government to discover.³³ Concealment usually arises out of incomplete or false answers.³⁴ The determination of whether a naturalization applicant's response is deemed to have been concealment or willful misrepresentation is a very fact-dependent analysis, and will depend both on the response given as well as the questions asked. The Supreme Court has held that if the question was ambiguous and could have been interpreted by the applicant in a way in which their response would not have been a concealment or misrepresentation, the applicant cannot be considered to have fraudulently procured naturalization.³⁵ Note that USCIS's position is that concealment of a material fact can also include omissions.³⁶

7. Denaturalization Process

The denaturalization process is initiated by filing a complaint in U.S. district court alleging, "upon affidavit showing good cause," that the defendant's naturalization was either procured illegally or by concealment of a material fact or by willful misrepresentation.³⁷ Jurisdiction is in the district court of the defendant's current residence.³⁸ The process begins with a USCIS district director having jurisdiction over the citizen's residence making a recommendation to revoke citizenship, which then is forwarded to the regional director and then on to the Department of Justice.³⁹

Given the precious nature of U.S. citizenship, the government must prove its case by clear, unequivocal, and convincing evidence.⁴⁰ Facts should be construed as far as is reasonably possible in favor of the citizen.⁴¹

B. Denaturalization for Convictions for Naturalization Fraud (Criminal Revocation)

The INA mandates that courts revoke citizenship of naturalized citizens when they are convicted for certain types of naturalization fraud under 18 USC § 1425.⁴² These include knowing, unlawful procurement or attempts to procure naturalization, or documentary evidence of naturalization for any person. The statute also provides sentencing guidelines for naturalization fraud convictions that are tied to terrorism and drug trafficking.⁴³ Like all criminal cases, the

³¹ *Id.* See also *Matter of D-R*, 27 I&N Dec. 105 (BIA 2017) (modifying the *Kungys* analysis to exclude the "fair inference" aspect of that decision when applied to applications for LPR status).

³² *U.S. v. Oddo*, 314 F.2d 115, 116 (2d Cir. 1963); *U.S. v. Ekpin*, 214 F.Supp.2d 707, 715-717 (S.D. Tex. 2002).

³³ *U.S. v. Kowalchuk*, 773 F.2d 488, 492 (3d Cir. 1985) (*en banc*); *U.S. v. Dailide*, 227 F.3d 385 (6th Cir. 2000).

³⁴ See, e.g., *U.S. v. Accardo*, 113 F.Supp. 783, 784 (D. NJ 1953).

³⁵ *Nowak v. U.S.*, 356 U.S. 660, 663-65 (1958).

³⁶ 12 USCIS-PM L.2(B)(1).

³⁷ INA § 340(a).

³⁸ *Id.*

³⁹ 8 CFR § 340.2; USCIS Operating Instructions OI 340.1-2.

⁴⁰ See *Baumgartner v. United States*, 322 U.S. 665 (1944); *Schneiderman v. United States*, 320 U.S. 118 (1943); *but see, Mondaca-Vega v. Lynch*, 808 F.3d 413, 420 (9th Cir. 2015) (holding that the language "clear, unequivocal, and convincing" does not evince a higher evidentiary standard than the "clear and convincing" standard).

⁴¹ *Schneiderman v. U.S.*, 320 U.S. 118, 122 (1943).

⁴² INA § 340(e).

⁴³ 18 USC § 1425(b).

government bears the burden of proof beyond a reasonable doubt.⁴⁴ There is a ten-year statute of limitations for prosecutions under 18 U.S.C. § 1425.⁴⁵

Presumably, “contrary to law” means the same “illegally procured” or concealment or misrepresentation of a material fact as in civil charges under INA § 340(a). If the allegation for denaturalization is lack of good moral character based on false testimony, the testimony need not be material in the sense that if the truth had been known it would have blocked naturalization. But neither would it call for denaturalization if the false testimony had nothing to do with eligibility at all. Rather, the testimony had to have “played a role” in the acquisition of naturalization.⁴⁶

Whereas naturalized citizens are provided notice and an opportunity to be heard when complaints are brought against them for illegal procurement or concealment and misrepresentation, there is no required notice or right to be heard for revocation of citizenship after criminal convictions for fraudulent naturalization.⁴⁷ Instead, courts have interpreted the statute as requiring automatic denaturalization after the conviction,⁴⁸ regardless of whether lengthy periods of time transpire between conviction and revocation.⁴⁹

The government also may bring criminal charges under 18 U.S.C. § 1425 for knowing, unlawful procurement or attempted procurement of naturalization or documentary evidence of naturalization for any person.⁵⁰

C. Wartime Military Service

A citizen can become a U.S. citizen as a result of their service in US armed forces during wartime under INA § 329(a). However, their naturalization may be revoked if they were discharged for other than honorable reasons before having served an aggregate of five years.⁵¹

This provision calls for a constitutional challenge. If citizenship was not acquired unlawfully, they are a U.S. citizen just like anyone else who, under the 14th Amendment, was “naturalized in the United States.” As a result, citizenship should not be taken away absent their voluntary relinquishment.⁵²

D. The § 340(a) Proviso

The proviso to INA § 340(a) says naturalization may be revoked if, within the 10 years following naturalization, the citizen refuses to testify before a congressional committee on “subversive activities” and as a result is convicted of contempt. While this proviso is likely a remnant of the Cold War, it is still a ground for revocation of naturalization. Such events, the proviso continues, demonstrate that citizenship was acquired by “concealment of a material fact or willful

⁴⁴ 12 USCIS-PM L.1(A).

⁴⁵ 18 U.S.C. § 3291.

⁴⁶ *Maslenjak v. U.S.*, 137 S. Ct. 1918 (2017).

⁴⁷ *U.S. v. Inocencio*, 328 F.3d 1207, 1211 (9th Cir. 2003).

⁴⁸ I.N.A. § 340(e); *U.S. v. Damrah*, 412 F.3d 618 (6th Cir. 2005); *United States v. Latchin*, 554 F.3d 709, 715-16 (7th Cir. 2009).

⁴⁹ *U.S. v. Inocencio*, 328 F.3d. 1207, 1210-11 (9th Cir. 2003).

⁵⁰ At least one federal court of appeals has held, on the basis of the Supreme Court’s opinion in *Maslenjak v. United States*, 137 S. Ct. 1918 (2017), that an alternate ground of eligibility at the time of naturalization is a complete defense to a prosecution under § 1425(b); one district court in a different circuit has disagreed. Compare *United States v. Allouche*, 703 Fed. App’x 241 (5th Cir. 2017), with *United States v. Alindor*, No. 17-270, 2018 WL 1705647 (M.D. Fla. Apr. 9, 2018).

⁵¹ INA § 329(c). Note this ground of revocation of naturalization does not apply to individuals who naturalized through their military service in accordance with INA § 328.

⁵² See *Afroyim v. Rusk*, 387 U.S. 253 (1967) (stating that “people are sovereign, and the Government cannot sever its relationship to the people by taking away their citizenship”). However, some military naturalizations do take place abroad which raises questions about the applicability of the 14th amendment. Yet such “conditions subsequent,” meaning acts that would revoke naturalization for acts occurring after naturalization, were dropped from the INA long ago in the aftermath of *Afroyim*.

misrepresentation,” with the assumption that the citizen was not attached to the “principles of the Constitution” at the time of naturalization.

As with military discharge cases, the proviso raises several constitutional questions. It constitutes disfavored revocation for “conditions subsequent” to naturalization. It is irrational to presume that an applicant concealed or misrepresented acts occurring as much as ten years later. Lacking a rational basis is a denial of equal protection by imposing a drastic penalty on the naturalized citizen.

Administrative Denaturalization Enjoined

INA § 340(h) provides 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.” From this section, the legacy Immigration and Naturalization Service (INS) imputed the power to revoke citizenship and publish regulations governing denaturalization. However, a Ninth Circuit decision held that the INS only had the power to cancel certificates of naturalization in limited circumstances without affecting the citizenship status of those affected.⁵³ The Court affirmed a preliminary injunction on administrative denaturalization, which became permanent in 2001.⁵⁴ As of that point in time, revocation of naturalization can only occur in federal courts.⁵⁵ USCIS can only cancel the certification of naturalization, but cannot revoke the underlying status.⁵⁶

IV. Consequences of Denaturalization

Once citizenship is lost, the person reverts back to their pre-naturalization status.⁵⁷ Naturalization and the certificate of citizenship are revoked “as of the original date” of admission to citizenship.⁵⁸ This “relation-back” means that a person reverts to their pre-naturalization, immigrant status for the time spanning conferment of citizenship and denaturalization. For example, Maya became a legal permanent resident in May of 2008 and then naturalized in May of 2015. She was denaturalized in December of 2018.



⁵³ *Gorbach v. Reno*, 219 F.3d 1087, 1094 (9th Cir. 2000).

⁵⁴ *Gorbach v. Reno*, 2001 WL 34145464 (W.D. Wash. Feb. 14, 2001) (enjoined permanently from applying and executing regulations found at 8 CFR § 340.1).

⁵⁵ 12 USCIS-PM L.1(A).

⁵⁶ INA § 342. See also 12 USCIS-PM L.1(C) (“The main difference between cancellation and revocation proceedings is that cancellation only affects the document, not the person’s underlying status”).

⁵⁷ *Costello v. INS*, 376 U.S. 120 (1964). See also 12 USCIS-PM L.3(A). For more extensive discussions of the loss of citizenship, see Gordon, Mailman and Yale-Loehr, *Immigration Law and Procedure* v 7 (Mathew Bender 2015); Daniel Levy, *U.S. Citizenship and Naturalization Handbook* (Thomson Reuters 2018-2019).

⁵⁸ See, e.g., *Costello v. INS*, 376 U.S. 120 (1964). See also 12 USCIS-PM L.3(A).

Once she is denaturalized, she reverts back to her LPR status, so moving forward she is an LPR. For the period between May 2015 (when she was naturalized) up until December 2018, she is now considered to have LPR status.



It is not clear that all actions taken, such as immigrant visa petitions, during the period between naturalization and revocation are necessarily void or illegal.

Moreover, the U.S. Supreme Court clarified that the relation-back does not apply to general deportation provisions,⁵⁹ so deportable crimes committed after an unlawfully obtained naturalization cannot be grounds for deportation after a citizen is denaturalized.⁶⁰ Crimes committed before or after naturalizing, however, may be grounds for an adverse finding as to good moral character if reapplying for naturalization, and crimes committed before naturalizing may be grounds for deportation. The recent USCIS Policy Memorandum updating guidance for referral of cases for removal proceedings explicitly addresses unsuccessful citizenship applications but does not explicitly mention whether denaturalized individuals will automatically be referred to removal proceedings.⁶¹ In some cases, after a conviction for violating 18 U.S.C. § 1425 and denaturalization, where the conviction is based on fraudulent procurement of legal permanent resident status, the government may move the district court directly for an order of judicial removal pursuant to I.N.A. § 238(c), 8 U.S.C. § 1228(c).⁶²

A. Impact on Derivative Citizens

Under INA § 340(d), derivatives may lose their citizenship if they “claimed” it through a parent or spouse, depending on why the parent was denaturalized, how the derivatives claimed the citizenship, and where they were when it happened.

If the parents’ naturalization is revoked because of concealment or misrepresentation,⁶³ any children who acquired or derived citizenship from that parent will lose citizenship. This “applies regardless of whether the spouse or child is residing in the United States or abroad at the time of the revocation of the naturalization.”⁶⁴ Courts have tied this rule to the relation-back doctrine, explaining that since denaturalization revokes citizenship as of the time it was granted, it must also void any intervening derivative claims.⁶⁵ The statute’s reference to spouses and children of denaturalized principals

⁵⁹ *Costello*, 376 U.S. at 128–132.

⁶⁰ *Id.*

⁶¹ U.S. Citizenship and Immigration Services, Policy Memorandum 602-0050.1, Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens (June 28, 2018). See also, e.g., Judgment, *United States v. Chowdhury*, No. 17-20721 (E.D. Mich. June 21, 2018). For more information on representing naturalization clients in light of this USCIS Policy Memo, see ILRC’s *Representing Naturalization Clients in the Wake of USCIS’s New NTA Memo*, available at <https://www.ilrc.org/representing-naturalization-clients-wake-usciss-new-nta-memo>.

⁶² See, e.g., Order of Judicial Removal, *United States v. Osemwenkhae*, No. 17-20010 (S.D. Fla. Dec. 12, 2017).

⁶³ INA § 340(d).

⁶⁴ 12 USCIS-PM L.3(C)(2).

⁶⁵ *Battaglino v. Marshall*, 172 F.2d 979 (2d Cir. 1949).

suggests that the rule is limited to cases involving acquired or derived citizenship, a notion supported by the USCIS Policy Manual.⁶⁶ While only children of citizens can acquire or derive their citizenship through citizen parents today, spouses were also eligible for derived citizenship up until 1922,⁶⁷ making it likely that the language is a remnant of a bygone era.

Alternatively, the language never specifies acquisition or derivation, but instead asserts that revocations will apply to persons who “claim” their citizenship from a naturalized parent or spouse. The ILRC reads this to mean only one who obtains citizenship through acquisition or derivation can have their citizenship revoked through the parent(s)’ loss of citizenship. Yet, read another way, one could argue that the rule additionally applies to persons who obtained citizenship in any of several ways through a spouse or parent’s naturalization. This would include, for example, a spouse who obtained lawful permanent residency through a visa petition, and subsequently naturalized. It is difficult to determine if the law recognizes this distinction due to a scarcity of recent cases on the topic. In 1932, the Third Circuit found that a fraudulently obtained naturalization conferred no citizenship rights to a spouse who had petitioned to intervene in proceedings against her husband.⁶⁸ However, the spouse in this case had probably derived her citizenship from her husband’s naturalization prior to 1922. Similarly in 1943, the Seventh Circuit opined “that *any* derivative rights [in a wife or minor child] stemming from the certificate of naturalization involved, must rise or fall solely on the basis of the rights of the husband or parent from whom they stem.”⁶⁹ As definitively as the language indicates any or all derivative claims, practitioners having to argue against this position are advised to point out that the case involved a minor child who had derived citizenship from his father’s naturalization, and that the opinion is limited to this context.

Derivatives will not lose citizenship if the parent or spouse’s naturalization is revoked because of illegal procurement of naturalization.⁷⁰

Derivatives may lose their citizenship if the spouse or parent through whom they claimed it is denaturalized under one of the presumptions for denaturalization, including having joined the Communist or other subversive party, or having been separated from the Armed Forces under dishonorable circumstances before serving five years.⁷¹ However, derivative relatives will not lose their citizenship if their parents were denaturalized in this manner if the derivatives were residing in the United States at the time of the principal’s denaturalization.⁷²

Grounds for Principal’s Revocation	Derivatives Lose their Status?
Illegal procurement	Living in the U.S.: No Living outside the U.S.: No
Concealment of a material fact or willful Misrepresentation	Living in the U.S.: Yes Living outside the U.S.: Yes
Other grounds such as military service or membership in subversive party	Living in the U.S.: No Living outside the U.S.: Yes

⁶⁶ See 12 USCIS-PM L.3(C)(1).

⁶⁷ INS Interpretation 341.1: Derivation through Marriage.

⁶⁸ *Rosenberg v. U.S.*, 60 F.2d 475 (3d Cir. 1932).

⁶⁹ *U.S. ex rel. Harrington v. Schlotfeldt*, 136 F.2d 935, 940 (7th Cir. 1943) (emphasis added).

⁷⁰ INA § 340(d); 12 USCIS-PM L.3(C)(1)-(2).

⁷¹ *Id.*

⁷² INA § 340(d).

V. Recommendations for Noncitizens Considering Applying for Naturalization and for Naturalized Citizens Facing Denaturalization

A. Applying for Naturalization

Just as in any application that brings a client into contact with immigration authorities, it is important to check if a client may be deportable, to determine if any form of relief from deportation is available, and to assess the risks of applying for naturalization. The government's increased aggressiveness in seeking removal means the risks of coming into contact with immigration authorities have increased and should be a part of that risk assessment.

PRACTICE TIP: While helping someone apply to naturalize, it is vital to make sure that no red flags, such as prior criminal conduct even if not charged, apply. See further ILRC's manual, *Naturalization and Citizenship: The Essential Legal Guide* (www.ilrc.org).

- If there is a red flag, determine whether it would also make your client deportable. If so, the client should make any decision about how to proceed with the knowledge that a denial of an application for naturalization may lead to a referral for removal proceedings in accord with the new USCIS Notice to Appear (NTA) Policy Memorandum.⁷³
- It is important to make sure that your client is in fact eligible for naturalization and answers every question on the naturalization application truthfully. Clients should be informed that failing to answer questions truthfully may be grounds for denial or subsequent denaturalization even if the application is granted. Furthermore, if a naturalization application is denied, misrepresentations in the application may be grounds for criminal prosecution under 18 U.S.C. § 1425 for attempted naturalization fraud. A conviction under 18 U.S.C. § 1425 may have immigration consequences.
- Clients should be made aware that an application for naturalization provides DHS the opportunity to review applicants' entire history and glean lots of information that, even if not used as a basis for denying the application, may be used later to seek denaturalization.

B. Naturalized Citizens Facing Denaturalization

- Anyone facing civil or criminal denaturalization should seek legal counsel immediately after receiving notice.
- In some cases, brought under 18 U.S.C. § 1425, defendants have been able to plead just to a violation of 18 U.S.C. § 1015, which does not carry mandatory denaturalization consequences.⁷⁴
- Because denaturalized citizens revert back to their prior immigration status, usually lawful permanent residence, attorneys should determine if their clients would be deportable. If so, they should determine whether their clients qualify for any form of relief and, if relief is available, should begin developing a case.

⁷³ At the time of writing, the new NTA Policy Memo is being rolled-out. ILRC is creating a number of resources to help advocates respond to the changes in the policy memo, including *Annotated Notes and Practice Pointers: USCIS Teleconference on Notice to Appear (NTA) Updated Policy Guidance*, available at <https://www.ilrc.org/annotated-notes-and-practice-pointers-uscis-teleconference-notice-appear-nta-updated-policy-guidance>. For current U.S. citizenship and naturalization resources, visit <https://www.ilrc.org/citizenship-and-naturalization>.

⁷⁴ See Judgment, *United States v. Sargent*, No. 17-20831 (S.D. Fla. May 25, 2018) (dismissing § 1425 charge and convicting of § 1015 false statement charge); Judgment, *United States v. Aoun*, No. 17-20822 (S.D. Fla. Feb. 22, 2018) (same); Judgment, *United States v. Arraiz*, No. 17-20710 (S.D. Fla. Jan. 18, 2018) (same).

VI. Conclusion

The increase in denaturalization cases since 2016 is alarming and fits with a larger, misguided effort by the present federal administration to discourage people from coming to and making a home for themselves in the United States. People seeking to become citizens should be cognizant of the administration's focus on prior undisclosed applications for immigration benefits and on prior criminal conduct, even if that conduct has not been prosecuted. Individuals facing denaturalization should retain experienced counsel. Counsel may find it helpful to consider recent cases where the government has not been successful in obtaining denaturalization. Even while recognizing the alarming upward trend in denaturalization prosecutions, it is important to bear in mind that the numbers have been and are likely to remain relatively small. In 2016, tens of people were denaturalized, while hundreds of thousands of people were naturalized.⁷⁵ But, we do not know exactly where the increased emphasis on denaturalization will lead us, and advocates must be vigilant in protecting their naturalized clients.

⁷⁵ See U.S. Citizenship and Immigration Services, Naturalization Fact Sheet (May 19, 2017), <https://www.uscis.gov/news/fact-sheets/naturalization-fact-sheet>.



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About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.