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REVOKING YOUR CITIZENSHIP: MINIMIZING THE LIKELIHOOD OF ADMINISTRATIVE ERROR

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In 1996, against a backdrop of partisan criticism of its Citizenship USA naturalization campaign, the Immigration and Naturalization Service promulgated regulations implementing, for the first time, an administrative procedure to revoke citizenship of naturalized citizens. Prior to this, naturalization could be revoked through judicial proceedings only. The 1996 system of administrative denaturalization, amended in 2000, provided significantly fewer procedural safeguards to protect against mistaken revocations of citizenship. Fortunately, the Ninth Circuit invalidated the regulations on the narrow ground of statutory interpretation. However, the threat of a reinstitution of administrative denaturalization persists. This Note sets forth the procedural protections that must accompany any future system of administrative denaturalization: the provision of competent and impartial decisionmakers and a strict burden of proof. The Note argues that, if we are to tolerate administrative denaturalization at all, these safeguards are necessary to minimize the likelihood of administrative error and to safeguard the fundamental right of citizenship.

INTRODUCTION

> To take away a man's citizenship deprives him of a right no less precious than life or liberty . . . .[1]

Few would question that naturalization entitles an individual to the full panoply of rights enjoyed by fellow citizens. Yet, despite our notions of equality, a dual system of citizenship exists today. For individuals born in the United States, the government may not revoke citizenship against an individual's will: expatriation of these individuals must be voluntary.[2] In contrast, for those who acquire citizenship through naturalization, Congress may revoke citizenship against their will in exercising its constitutional authority to "establish an uniform Rule of Naturalization."[3] The disparity in the treatment of these two groups of citizens is in danger of becoming even more pronounced in the future in the event of the reintroduction of administrative denaturalization proceedings.

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1. Klapprott v. United States, 335 U.S. 601, 616 (1949) (Rutledge, J., concurring).

2. In 1967, the Supreme Court in Afroyim v. Rusk, 387 U.S. 253, 267–68 (1967), held that a native-born individual could not be expatriated by Congress involuntarily. Overruling a prior decision in Perez v. Brownell, 356 U.S. 44 (1958), the Court affirmed a "constitutional right to remain a citizen . . . unless [the citizen] voluntarily relinquishes that citizenship." 387 U.S. at 268.

3. U.S. Const. art. 1, § 8, cl. 4; see also, e.g., Knauer v. United States, 328 U.S. 654, 673–74 (1946) (upholding constitutionality of denaturalization proceedings on the ground of fraud).

For naturalized citizens, Congress has historically delegated the power to revoke citizenship exclusively to the judiciary; denaturalization has traditionally occurred through judicial proceedings only.[4] Those threatened with denaturalization have remained entitled to the procedural safeguards attendant to civil trials heard in federal court.[5]

In 1996, however, the Immigration and Naturalization Service (INS) came under political attack. Republicans accused the INS's Citizenship USA campaign—a program conducted from September 1995 to October 1996, which expedited the naturalization process for 1.1 million aliens—of improperly granting citizenship to ineligible aliens in order to create voters for the Democratic Party. In the face of these pressures, on October 28, 1996, the INS promulgated rules that established, for the first time, an *administrative* procedure to denaturalize citizens.[6] These rules afforded substantially fewer procedural protections for the individual threatened with denaturalization.

In March 2000, probably in response to a pending class action lawsuit challenging the validity of the new rules, the INS amended its regulations and provided limited additional safeguards to the administrative denaturalization process.[7] Nevertheless, in *Gorbach v. Reno,* the Ninth Circuit invalidated the regulations and affirmed an order granting a preliminary injunction against administrative denaturalization proceedings, relying on the narrow ground of statutory construction and finding that the INS lacked the statutory authority to institute such proceedings.[8] The decision did not, however, resolve the further questions of whether administrative denaturalization would be constitutional, and if so, what the minimum procedural safeguards required of such a regime would be.

The INS did not petition for certiorari in the *Gorbach* decision, and while Congress has yet to authorize administrative denaturalization through statutory action,[9] the possibility of its reinstitution persists. In

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4. For historical accounts of judicial denaturalization and its origins, see Bindczyck v. Finucane, 342 U.S. 76, 79–83 (1951); Gerald Neuman, Federal Courts Issues in Immigration Law, 78 Tex. L. Rev. 1661, 1694–1701 (2000) [hereinafter Neuman, Federal Courts Issues].

5. See, e.g., Paul R. Verkuil, A Study of Immigration Procedures, 31 UCLA L. Rev. 1141, 1166 (1984) ("Denaturalization offers the maximum process available—a civil trial in the federal district court."). In fact, in terms of the placement of the burden of persuasion and the burden of proof, the individual threatened with denaturalization enjoys procedural protections above and beyond those afforded to defendants in ordinary civil proceedings. See infra Part I.A.

6. Revocation of Naturalization, 61 Fed. Reg. 55,550 (Oct. 28, 1996) (codified as amended at 8 C.F.R. § 340.1 (2001)).

7. Revoking Grants of Naturalization, 65 Fed. Reg. 17,127 (Mar, 31, 2000) (codified at 8 C.F.R. § 340.1 (2001)).

8. 219 F.3d 1087, 1098–99 (9th Cir. 2000) (en banc).

9. In 1998, Lamar Smith, Chairman of the House Judiciary Subcommittee on Immigration, proposed a bill to provide explicit statutory authority for the administrative denaturalization of citizens. Ruth Ellen Wasem, Naturalization Trends, Issues, and Legislation, Committee for the National Institute for the Environment (June 24, 1998), at

the future, political momentum in support of streamlining denaturalization procedures may arise from allegations of noncitizen voter fraud. Calls for administrative denaturalization may also arise, ironically, from the unlikely camp of human rights activists, who may seek to streamline the denaturalization process for alleged human rights abusers.

This Note argues that if we are to tolerate a system of administrative denaturalization at all, it must provide a set of procedural safeguards to protect the individual's right to an impartial and competent decisionmaker and to minimize the likelihood that citizenship will be revoked in error. Part I describes the current system of judicial denaturalization and compares it to the administrative denaturalization regime adopted by the INS in 1996 and 2000. Part II discusses the threats associated with administrative denaturalization, outlining the reasons cautioning against such proceedings. Part III contemplates the possible reinstitution of an administrative denaturalization regime, and proposes a system providing the procedural safeguards of impartial decisionmakers and strict burdens of proof to minimize the harms associated with it.

I. DENATURALIZATION PROCEEDINGS

A. *The Current Regime of Judicial Denaturalization and Its Procedural Requirements*

The Immigration and Nationality Act (INA) provides three grounds on which the citizenship of a naturalized individual may be revoked. First, section 340(a) authorizes the government to revoke a grant of citizenship that was "illegally procured or . . . procured by concealment of a material fact or by willful misrepresentation."[10] Second, section 340(e) requires courts to set aside an individual's grant of naturalization upon a criminal conviction for knowingly committing naturalization fraud under 18 U.S.C. § 1425.[11] Third, prior to 1990, section 340(j) preserved the

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http://www.cnie.org/nle/pop-3.html (on file with the *Columbia Law Review*) (referring to H.R. 2837, 105th Cong. § 9 (1997)). This bill was ultimately defeated. Id.

10. Immigration and Nationality Act of 1952 § 340, 8 U.S.C. § 1451(a) (1994). Denaturalization under this provision on the grounds of "concealment" or "misrepresentation" requires a showing of both willfulness and materiality. Kungys v. United States, 485 U.S. 759, 767 (1988). In contrast, denaturalization under this provision on the ground of being "illegally procured" requires neither a showing of materiality, id. at 779–80, nor a showing of willfulness. See, e.g., United States v. Cloutier, 87 F. Supp. 848, 851–52 (E.D. Mich. 1949) (finding that "illegally procured" as used in a predecessor statute includes an unintentional failure to satisfy the requirements to obtain citizenship). Rather, a court must revoke citizenship as "illegally procured" upon finding that the applicant failed to satisfy each of the statutory requirements for obtaining citizenship when naturalization was granted. Fedorenko v. United States, 449 U.S. 490, 515 n.38 (1981) ("Citizenship is illegally procured if 'some statutory requirement which is a condition precedent to naturalization is absent at the time the petition [for naturalization is] granted.'") (quoting H.R. Rep. No. 87-1086 at 39 (1961)).

11. Immigration and Nationality Act of 1952 § 340, 8 U.S.C. § 1451(e). This subsection provides:

courts' background power to "correct, reopen, alter, modify, or vacate" its own orders,[12] and some courts interpreted this provision to preserve the government's ability to reopen proceedings under Federal Rule of Civil Procedure 60(b).[13]

As the law stands today, administrative denaturalization is prohibited, and the courts retain the sole authority to revoke an individual's citizenship.[14] Consequently, an individual who is confronted with the government's threat to revoke citizenship is entitled to an extensive set of procedural safeguards designed to ensure that citizenship is not improperly revoked. This section provides an overview of judicial denaturalization proceedings, highlighting some of the key procedural safeguards and explaining the rationales justifying them.

Typically, any facts suggesting that naturalization was improperly procured are reported to the INS district director.[15] District directors

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When a person shall be convicted under section 1425 of title 18 of knowingly procuring naturalization in violation of law, the court in which such conviction is had shall thereupon revoke, set aside, and declare void the final order admitting such person to citizenship, and shall declare the certificate of naturalization of such person to be canceled. Jurisdiction is conferred on the courts having jurisdiction of the trial of such offense to make such adjudication.

12. Immigration and Nationality Act of 1952 tit. III, ch. 2, § 340(j), 66 Stat. 163, 262 (1952) (current version at 8 U.S.C. § 1451(h) (1994)). The former clause provided:

Nothing in this section shall be regarded as limiting, denying, or restricting the power of any naturalization court, by or in which a person has been naturalized, to correct, reopen, alter, modify, or vacate its judgement or decree naturalizing such person, during the term of such court or within the time prescribed by the rules of procedure or statutes governing the jurisdiction of the court to take such action.

Id. at 262–63. However, in 1990, Congress transferred the "sole authority" to naturalize aliens from the courts to the Attorney General. In conformity with this transfer of the naturalization authority, Congress redesignated this subsection and amended it to read: "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." Immigration Act of 1990 § 407(d)(18)(D), 8 U.S.C. § 1451(h) (1994). The extent to which this amendment alters the former judicial power to reopen proceedings remains unclear. However, it is unlikely that this amendment alters the judicial power to reopen its own proceedings at all, because the former section was not a statutory grant of power, but rather a mere savings clause protecting any already existing power from implied repeal. *Gorbach*, 219 F.3d at 1094. Under this theory, the amendment of this subsection would not alter the pre-existing background power of the courts to reopen their own proceedings.

13. See Neuman, Federal Courts Issues, supra note 4, at 1699 n.214 (documenting conflicts in case law regarding scope of background power to revoke naturalization, noting some cases that assumed courts could reopen naturalization grants for any reason under 60(b), and others that argued that this would debase value of citizenship). Federal Rule of Civil Procedure 60(b) permits a court to relieve a party from a final judgment, order, or proceeding, in certain circumstances of mistake, inadvertence, excusable neglect, newly discovered evidence, or fraud. Fed. R. Civ. P. 60(b).

14. See *Gorbach*, 219 F.3d at 1099 (enjoining INS from conducting administrative denaturalization proceedings).

15. See Revocation of Naturalization, 8 C.F.R. § 340.2(a) (2001).

oversee the nation's thirty-three INS district offices and maintain primary responsibility for prosecutorial and enforcement roles.[16] If the district director is satisfied that a prima facie case exists for revocation, she refers the case up to the regional commissioner, with a recommendation to institute judicial revocation proceedings.[17] Then, if the regional commissioner determines that revocation is warranted, the assistant regional commissioner of inspections and adjudications prepares and executes an affidavit of good cause for the revocation.[18] The recommendation for revocation then proceeds through several levels of approval, until it reaches the Litigation Department in the Civil Division of the Department of Justice, which initiates proceedings in federal district court.[19]

Once the suit is initiated, it is treated as an ordinary civil suit in equity in many respects.[20] Consequently, the procedural safeguards of the Federal Rules of Civil Procedure apply.[21] The government must provide personal notice of the suit to the individual,[22] who is then entitled to provide answers to the government's allegations of illegal procurement within sixty days of receipt of notice.[23] The individual is also entitled to confrontation, oral argument, oral evidence, cross-examination, disclosure of opposing evidence, retention of counsel, a determination on the record, a statement of reasons for the decision, and an impartial decisionmaker in the form of a federal district judge.[24] This appointment of

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16. Thomas Alexander Aleinikoff et al., Immigration and Citizenship 249 (4th ed. 1998).

17. 8 C.F.R. § 340.2(a). See also Immigration and Naturalization Serv., Operations Instructions 340.1: Revocation Reports, at http://www.ins.usdoj.gov/cgi-bin/folioisa.dll/lawbooks.nfo/query=jump!3A!27oi3401!27]/doc/{@55687}?/ (last visited Aug. 15, 2001) (on file with the *Columbia Law Review*) [hereinafter INS, Operations Instructions 340.1] (describing revocation procedure).

18. Immigration and Naturalization Serv., Operations Instructions 340.2: Recommendation for Revocation, at http://www.ins.usdoj.gov/cgi-bin/folioisa.dll/lawbooks.nfo/query=[jump!3A!27oi3402!27]/doc/{@55711}? (last visited Aug. 15, 2001) (on file with the *Columbia Law Review*) (describing procedure for recommending revocation).

19. Id. (listing the immigration officers to whom the record and recommendation are forwarded); see also Immigration and Nationality Act of 1952 § 340, 8 U.S.C. § 1451(a) (1994) ("It shall be the duty of the United States attorneys for the respective districts . . . to institute proceedings in any district court of the United States . . . .").

20. See, e.g., Fedorenko v. United States, 449 U.S. 490, 516–17 (1981) (affirming that a denaturalization action is a suit in equity); Knauer v. United States, 328 U.S. 654, 671 (1946) (same); Luria v. United States, 231 U.S. 9, 27–28 (1913) (same).

21. Verkuil, supra note 5, at 1156–57 (noting that denaturalization cases are generally entitled to the procedural protections afforded in civil trials in federal district court); Immigration and Naturalization Serv., Interpretation 340.4: Revocation Procedure, at http://www.ins.usdoj.gov/cgi-bin/folioisa.dll/lawbooks.nfo/query=jump!3A!27interp340!2E4!27]/doc/{@61508}? (last visited Aug. 2, 2001) (on file with the *Columbia Law Review*) [hereinafter INS, Interpretation 340.4] (discussing revocation procedure and the applicability of the Federal Rules of Civil Procedure).

22. Immigration and Nationality Act of 1952 § 340, 8 U.S.C. § 1451(b).

23. Id.

24. See Verkuil, supra note 5, at 1165.

a federal district judge to render the decision helps to ensure a fair proceeding. With tenure and salary protection mandated by the Constitution, federal district judges enjoy a degree of political independence unavailable to other adjudicators, such as elected state judges or administrative adjudicators.[25]

Additionally, in recognition of the importance of citizenship, judicial denaturalization proceedings provide two additional safeguards that are not provided in ordinary civil trials: a higher burden of proof and the availability of heightened appellate review. First, although the moving party—the government—is required to bear the burden of proof, as in other civil cases, the standard of proof is stricter in denaturalization cases. Rather than requiring the government to prove its case by a mere preponderance of evidence, the law requires "'clear, unequivocal, and convincing' evidence which does not leave the issue in doubt."[26] The Supreme Court in *Schneiderman v. United States* imposed this heavy burden of proof on the grounds that citizenship is a "precious" right that should not be "lightly revoked."[27] The court reasoned: "Were the law otherwise, valuable rights would rest upon a slender reed, and the security of the status of our naturalized citizens might depend in considerable degree upon the political temper of majority thought and the stresses of the times."[28]

Second, while appellate courts in ordinary civil cases review the factual findings of a lower court with substantial deference under the "clearly erroneous" standard, appellate courts reviewing a denaturalization proceeding will not accord this level of deference.[29] In *Baumgartner v. United States,* the Supreme Court reasoned that reviewing courts remain

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25. See U.S. Const. art. III, § 1 (providing that "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."); see also The Federalist No. 78, at 500 (Alexander Hamilton) (Robert Scigliano ed., 2000) (stating that tenure protection contributes to federal judicial independence); The Federalist No. 79, at 505 (Alexander Hamilton) (Robert Scigliano ed., 2000) (describing federal judges' salary protection, "together with the permanent tenure of their offices," as affording "a better prospect of their independence than is discoverable in the constitutions of any States in regard to their own judges.").

26. Schneiderman v. United States, 320 U.S. 118, 135 (1943) (citations omitted).

27. Id. at 122, 125.

28. Id. at 159.

29. See Baumgartner v. United States, 322 U.S. 665, 671 (1944) (stating that traditional deference accorded to factual findings of lower court does not preclude reviewing court's reexamination of foundation for factual findings in denaturalization case); see also, e.g., Cufari v. United States, 217 F.2d 404, 408 (1st Cir. 1954) (interpreting Baumgartner to hold that although a reviewing court should not hear a denaturalization appeal de novo, its review of factual determinations should be somewhat broader than in other civil cases); INS, Interpretation 340.4, supra note 21 (interpreting Baumgartner to hold that the Supreme Court may "reexamine the findings of fact in the lower courts and make an independent determination as to whether the evidence satisfied the requisite high standard" of clear and unequivocal evidence for denaturalization). Although Baumgartner failed to articulate the precise standard an appellate court should apply to review a district court's factual findings in denaturalization cases, it is clear that the

bound to reexamine the foundation for factual findings in denaturalization cases because of the "gravity" of these cases and because denaturalization cases involve "broadly social judgments—judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship."[30]

B. *INS Implementation of Administrative Denaturalization Proceedings in 1996*

In the Immigration Act of 1990, Congress for the first time delegated to the executive branch, rather than the judicial, the authority to *grant* citizenship to aliens.[31] To conform to this new delegation of the naturalization authority, Congress replaced the former provision preserving the courts' power to reopen its proceedings[32] with the new section 340(h), providing: "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."[33] Six years later, against a backdrop of partisan accusations of improper grants of citizenship,[34] the INS interpreted this provision to authorize adminis-

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standard requires more careful scrutiny than the "clearly erroneous" standard accorded in ordinary civil trials.

30. *Baumgartner*, 322 U.S. at 671.

31. Immigration Act of 1990 § 401(a), 8 U.S.C. § 1421(a) (1994) ("The sole authority to naturalize persons as citizens of the United States is conferred upon the Attorney General.").

32. See supra notes 11–12.

33. Immigration Act of 1990 § 407(d)(18)(D), 8 U.S.C. § 1451(h) (1994) (emphasis added).

34. House Policy Committee, Policy Perspective, Clinton Administration's Own Verdict: Damage from "Citizenship USA" Can Never Be Undone (May 12, 1997) (on file with the *Columbia Law Review*) [hereinafter House Policy Committee, Policy Perspective] (criticizing the Citizenship USA campaign); see also Ruth Larson, INS Halts Rush to Citizenship After Election, FBI Clearance Now Comes First, Wash. Times, Dec. 4, 1996, at A1 (reporting harsh criticism of Citizenship USA by Republican lawmakers and governors, who claimed that "the INS allowed convicted felons to become citizens in a rush to naturalize more than a million potential voters before the election," and that the INS would use administrative denaturalization to correct any wrongdoing associated with the campaign); Valerie Alvord, San Diego Residents Will be First to Lose Citizenship Under New Law, Copley News Service, Dec. 15, 1996, LEXIS, News Library, COPNWS File (reporting that the INS implemented administrative denaturalization to "stem problems associated with Citizenship USA").

While many reports characterize the INS's institution of administrative denaturalization as a defensive response to criticism regarding Citizenship USA, it should be noted that the INS contemplated such proceedings as early as May 1996, before Citizenship USA was even completed. See Revocation of Naturalization, 61 Fed. Reg. 23,205, 23,209–10 (May 13, 1996) (codified at 8 C.F.R. § 340 (2001)) (announcing INS intent to specify an administrative process by which the Attorney General may reopen naturalization applications). Yet, although the INS may have conceived the idea for administrative denaturalization prior to the public outcry over Citizenship USA, it is likely that public criticism of Citizenship USA significantly facilitated the final passage of the administrative denaturalization scheme.

trative *revocation* of citizenship.[35] Accordingly, it issued final regulations establishing administrative denaturalization procedures on October 28, 1996.[36]

The final regulations promulgated in 1996 authorized the INS district director with jurisdiction over the place of the individual's last known residence to "reopen" naturalization proceedings within two years after the grant of citizenship.[37] If the INS sought to denaturalize an individual after two years of the original grant of citizenship, it would proceed through a judicial determination under INA section 340(a) or (e) as described above.[38] If, however, the INS sought to denaturalize an individual within two years of the original grant of citizenship, the district director could initiate administrative revocation proceedings upon obtaining "credible and probative" evidence that the naturalization application had been granted by mistake, or that was not known to the original naturalizing officer and would have had a material effect on the outcome of the original decision to grant citizenship and would have proven either that the application was based on fraud, misrepresentation, or concealment of a material fact, or that the applicant was ineligible for naturalization.[39]

Although not evident from the regulations, the district director would in practice delegate responsibility to other staff members at the district office.[40] Examinations officers, district counsels, and staff attorneys working under the district counsels became responsible for identifying and reviewing cases in which citizenship might have been improperly granted.[41] Still, the district director would ultimately be required to sign off on any decisions to revoke citizenship.[42] Examinations officers report to the district director and are charged with various adjudicatory duties including the approval of naturalization applications.[43] District counsels and their staff attorneys serve as legal advisers to the district offices, and district counsels represent the INS in various administrative proceedings before immigration judges.[44] Consequently, they serve a prosecutorial role. Unlike examinations officers, district counsels and their staff attorneys do not report to the district director.[45] Instead, they report to the

35. Revocation of Naturalization, 61 Fed. Reg. 55,550, 55,550–51 (Oct. 28, 1996) (codified as amended at 8 C.F.R. § 340.1 (2001)) (interpreting the Immigration Act of 1990 as authorizing the Attorney General to correct, reopen, alter, modify, or vacate grants of naturalization, a power which had previously rested exclusively within the discretion of the courts).

36. Id.

37. Id. at 55,553.

38. Id. at 55,551.

39. Id. at 55,553.

40. Telephone Interview with David Martin, former INS General Counsel from 1995—1997 (Sept. 6, 2001).

41. Id.

42. Id.

43. Id.

44. Id.

45. Id.

INS General Counsel and are thus in a chain of command distinct from that of the district director.[46] However, district counsels, their staff attorneys, district directors, and examinations officers are all members of the INS and therefore lie directly in the chain of command of the INS Commissioner.[47]

If the district director (or the examinations officers and staff attorneys) determined that evidence existed to warrant revocation, she would prepare a written notice of intent to revoke naturalization.[48] This notice would include all of the evidence supporting revocation; it would also inform the individual of his right to submit a response and request a hearing.[49] The individual would receive the notice by personal service, and would be required to respond and/or request a hearing within sixty days; failure to respond would be considered admission of the grounds for reopening.[50]

According to the regulations, the district director would then render a written decision on the naturalization application, consisting of findings of fact and law.[51] If the district director issued an adverse decision, the individual would retain the right to appeal to the Office of Examinations, Administrative Appeals Unit (AAU) within thirty days.[52] The AAU constitutes part of the INS and issues decisions through a single appellate examiner, who is usually not an attorney.[53] Appellate examiners conduct their own research, with no legal staff support.[54] If the AAU issued another adverse decision, the individual could seek judicial review; the reviewing district court would review the issues of law and fact de novo.[55] The rules also provided that an individual retained citizenship until a final adverse decision was rendered and all appeals had been declined or exhausted.[56]

The INS Statistical Yearbook does not provide the number of denaturalizations per year.[57] However, investigations into Citizenship USA indi-

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46. Id.

47. Id.

48. Revocation of Naturalization, 8 C.F.R. § 340.1(b)(2) (2001).

49. Id.

50. Id. § 340.1(b)(4).

51. Id. § 340.1(d)(1).

52. Id. § 340.1(e)(1).

53. Aleinikoff et al., supra note 16, at 259; Stephen H. Legomsky, Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process, 71 Iowa L. Rev. 1297, 1317–18 (1986).

54. Legomsky, supra note 53, at 1317.

55. 8 C.F.R. § 340.1(f) (providing for judicial review in accordance with 8 U.S.C. § 1421(c)).

56. Id. § 340.1(g). But see infra notes 156–158 and accompanying text (suggesting the possibility that an individual would not be entitled to retain citizenship until judicial review in a federal district court) .

57. U.S. Immigration and Naturalization Serv., 1998 Statistical Yearbook of the Immigration and Naturalization Service, at 168–98 (Nov. 2000), available at http://www.ins.usdoj.gov/graphics/aboutins/statistics/1998yb.pdf.

cate that out of the nearly 1.1 million individuals naturalized during that campaign, the INS sought to revoke the citizenship of 369 individuals allegedly convicted of a felony or a crime of moral turpitude.[58] The investigations also determined that an additional 5,954 failed to reveal arrests and would be subject to further review by the INS Office of General Counsel for possible revocation.[59] As of January 1, 1998, the INS had reviewed 2,158 of these cases, and determined that 1,481 of those individuals would be served with a notice of intent to revoke naturalization.[60] These revocations would be conducted through administrative proceedings.[61]

Some distinctions between the 1996 administrative procedure and the former judicial procedures are worth emphasizing. First, under the 1996 system, the INS district director, rather than a federal district judge, would decide initially whether to revoke citizenship.[62] Second, the 1996 administrative system would place the burden of proof on the individual, rather than on the government; also, citizenship could be revoked upon the showing of mere "credible and probative" evidence that the grant of naturalization was improper.[63] In contrast, under the judicial denaturalization regime, the government bore the burden to provide "clear, unequivocal, and convincing" evidence that the individual was not eligible for naturalization at the time when citizenship was granted.[64]

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58. Immigration and Naturalization Serv., Press Release, INS and KPMG Complete Review of August, 1995–September, 1996 Naturalizations (Feb. 9, 1998), at http://www.usdoj.gov/opa/pr/1998/February/052.htm.html (on file with the *Columbia Law Review*).

59. Id.

60. Immigration and Naturalization Serv., Fact Sheet: Process for Citizenship Revocation (Feb. 9, 1998), available at http://www.usembassy-israel.org.il/publish/press/ins/ins1211.htm (on file with the *Columbia Law Review*).

61. Memorandum from Dawn E. Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, to the General Counsel, Immigration and Naturalization Serv. (Mar. 3, 1997), at http://www.usdoj.gov/olc/ina340.htm (on file with the *Columbia Law Review*) ("We understand that, if the INS institutes denaturalization proceedings with regard to any of the naturalization cases approved between September 1995 and September 1996 that are currently the subject of congressional investigation [i.e. cases approved during Citizenship USA campaign], those proceedings will ordinarily be administrative.").

62. Revocation of Naturalization, 8 C.F.R. § 340.1(d)(1) (2001) ("The *district director* shall render . . . a written decision on the reopened naturalization application . . . .") (emphasis added).

63. Revocation of Naturalization, 61 Fed. Reg. 55,550, 55,554 (Oct. 28, 1996) (codified as amended at 8 C.F.R. § 340.1 (2001)) (requiring that "the applicant bear the burden of persuading the district director that, notwithstanding the evidence described in the notice, the applicant was eligible for naturalization at the time of the order purporting to admit the applicant to citizenship").

64. Schneiderman v. United States, 320 U.S. 118, 135 (1943); see also supra text accompanying note 26.

C. Gorbach v. Reno *and 2000 Amendments*

In 1998, a group of plaintiffs brought a nationwide class action suit in federal district court challenging the validity of the 1996 regulations, arguing that the INS did not possess the statutory authority to institute denaturalization proceedings.[65] Presumably in response to this pending lawsuit, in March 2000 the INS issued interim rules amending the 1996 procedures for administrative denaturalization. Most significantly, these amendments shifted the burden of persuasion from the individual back to the government, and raised the burden of proof from "credible and probative evidence" to "clear, unequivocal, and convincing evidence."[66] In this way, the 2000 rules for administrative denaturalization attempted to conform to the judicial denaturalization requirement under *Schneiderman*. However, the other departures from procedural norms in judicial denaturalization cases remained.

Despite this amendment, the Ninth Circuit sitting en banc affirmed the preliminary injunction against administrative denaturalization, finding that as a matter of statutory interpretation, the Immigration Act of 1990 did not authorize the INS to issue regulations establishing administrative denaturalization proceedings.[67] As the law stands today, the INS does not possess the statutory authority to denaturalize aliens; the power to revoke citizenship remains solely within the judiciary.

The INS did not petition for certiorari, and to date, Congress has not issued the express statutory authority required to overcome the *Gorbach* decision and institute administrative denaturalization proceedings.[68] Yet, the possibility that it will do so in the future persists. Allegations of noncitizen voter fraud may provide the political momentum to denaturalize citizens administratively. For example, the narrow congressional victory of Democrat Loretta Sanchez, who won the House seat representing the 46th District of California over Republican Robert Dornan by a close margin of 984 votes, fueled Republican allegations that Sanchez's victory was attributable to voting by ineligible noncitizens.[69] Similarly, in Dallas, federal officials conducted an investigation to determine whether ineligible

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65. Gorbach v. Reno, 181 F.R.D. 642, 650 (W.D. Wash. 1998) (granting plaintiffs' motion for preliminary injunction to prevent INS from conducting administrative denaturalization proceedings), aff'd en banc, 219 F.3d 1087, 1099 (9th Cir. 2000).

66. Revoking Grants of Naturalization, 65 Fed. Reg. 17,127 (Mar. 31, 2000) (codified at 8 C.F.R. § 340.1 (2001)).

67. *Gorbach*, 219 F.3d at 1091. For a thoughtful treatment of the factual background to *Gorbach* and the court's statutory analysis, see Jon B. Hultman, Note, Administrative Denaturalization: Is There "Nothing You Can Do That Can't Be [Un]Done?", 34 Loy. L.A. L. Rev. 895 (2001).

68. Although Congress proposed such a bill, it was ultimately defeated. See supra note 9.

69. Lizette Alvarez, Gingrich Intimates Growing Fraud in Sanchez Probe, L.A. Daily News, Sept. 26, 1997, 1997 WL 4054227; Associated Press, Democrats Plan Filibuster to Protest Sanchez Probe, L.A. Daily News, Oct. 25, 1997, 1997 WL 4057228.

aliens cast ballots in the 1996 election.[70] The same contentious political climate inciting this suspicion is likely to give rise as well to suspicion that aliens improperly obtain citizenship. Accusations of voting irregularities are likely to fuel calls for an expedited procedure to revoke improper grants of citizenship in the future.

Human rights activists may also, ironically, provide the political impetus to streamline denaturalization procedures. For example, the organization International Educational Missions, Inc. (IEM) seeks to identify and expel alleged foreign torturers and war criminals hiding in the United States. Laudable and often successful, the group maintains a list of 800 alleged human rights abusers currently living in the United States. But from IEM's perspective the right to citizenship is not sacrosanct: the "toughest issue is trying to revoke U.S. citizenship once it has been granted."[71] Richard Krieger, IEM's president, cites the case of Eriberto Mederos, accused of committing human rights abuses while in Cuba in the 1970's.[72] Human rights advocates pressured the government to deport him, but stumbled into procedural barricades.[73] In light of the frustration engendered by the continuing presence of such individuals, it will not be surprising if human rights activists campaign for a streamlined process to denaturalize human rights abusers.

II. Threats Associated with Administrative Denaturalization

There has not been any significant debate on the benefits and costs of administrative denaturalization. When the INS promulgated the 1996 rules instituting administrative denaturalization, it offered no substantive justification for its action; instead, it mechanically suggested that the 1990 change in statutory language required this action. However, as the Ninth Circuit found in *Gorbach*, Congressional records from the 1990 amendment remain silent on the issue of whether administrative denaturalization would or should be permitted.[74] Consequently, neither the administrative notice and comment rulemaking procedure, nor congressional records, provide any arguments in support of or against administrative denaturalization.

Due to the absence of materials on the issue, we are left to speculate why the INS, or anyone else for that matter, would favor the institution of

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70. Frank Trejo & David LaGesse, Vote-Fraud Inquiry Triggers Controversy: Immigrant Backers Charge Intimidation, but Others Defend Investigation at SMU, Dallas Morning News, June 17, 1997, 1997 WL 11498396; see also Ruth Larson, Dallas Voter-Fraud Probe Taken Out of Control of INS: Agency Had Halted Inquiry into Noncitizen Registration, Wash. Times, June 10, 1997, at A3 (describing federal investigation to determine whether noncitizens voted in Dallas elections).

71. Joseph Contreras, Looking for Bad Guys, Newsweek, Apr. 16, 2001, at 41; see also US-Cuba Human Rights Group Wants to Strip Cuban of U.S. Citizenship, EFE News Service, Inc., Apr. 2, 2001, LEXIS, News Library, GNW File.

72. Contreras, supra note 71, at 41.

73. Id.

74. Gorbach v. Reno, 219 F.3d 1087, 1098 (9th Cir. 2000) (en banc).

administrative denaturalization to supplement or supplant the current system. Possible arguments in support of administrative denaturalization may be drawn, however, from well established principles of administrative law. First, one might favor administrative denaturalization because it enables the agency to protect the integrity of its proceedings and correct its mistakes.[75] Because the INS now has the authority to grant citizenship,[76] it arguably must also have the power to revoke it when improperly granted.

Second, traditional concerns for efficiency might counsel for a system of administrative denaturalization. It is generally accepted that administrative proceedings tend to be less expensive and time consuming than litigation. In particular, agency reversals may be more efficient than judicial reversals because the agency is already intimately familiar with the record of the proceeding, has expertise in the field, and is better situated than the judiciary to determine whether it would have reached a different conclusion but for the alleged grounds for revocation.[77]

Finally, the INS may have preferred proceeding administratively because it viewed the procedural guarantees of judicial suits as excessive for actions to correct mistaken grants of citizenship.[78] This position draws some support from the Supreme Court's opinion in *United States v. Ginsberg*, which stated: "No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the Govern-

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75. Dun & Bradstreet v. United States Postal Serv., 946 F.2d 189, 193 (2nd Cir. 1991) ("It is widely accepted that an agency may, on its own initiative, reconsider its interim or even its final decisions, regardless of whether the applicable statute and agency regulations expressly provide for such review."); Trujillo v. Gen. Elec. Co., 621 F.2d 1084, 1086 (10th Cir. 1980) ("Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider."); United States v. Sioux Tribe, 616 F.2d 485, 493 (Ct. Cl. 1980) ("It is a well established principle that an administrative agency may reconsider its own decisions. 'The power to reconsider is inherent in the power to decide.'" (citations omitted)); 2 K. Davis, Administrative Law Treatise § 18.09 (1958) ("Every tribunal, judicial or administrative, has some power to correct its own errors or otherwise appropriately to modify its judgment, decree, or order.").

76. Immigration Act of 1990, 8 U.S.C. § 1421(a) (1994) (conferring the authority to grant citizenship on the Attorney General, who acts through the INS); see also Revocation of Naturalization, 61 Fed. Reg. 55,550 (Oct. 28, 1996) (codified as amended at 8 C.F.R. § 340.1 (2001)) (interpreting the Immigration Act of 1990 to authorize the INS to grant citizenship).

77. See Alberta Gas Chems., Ltd. v. Celanese Corp., 650 F.2d 9, 12 (2d Cir. 1981) (describing pragmatic argument to permit administrative agency, rather than a federal court, to reverse its own decision).

78. In support of this position, see Safeguarding the Integrity of the Naturalization Process: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary, 105th Cong. 40–41 (1997) [hereinafter Hearing] (statement of Doris Meissner, Commissioner, INS) (describing new administrative denaturalization procedures as permitting "INS to avoid sometimes cumbersome judicial denaturalization procedures").

ment may challenge it . . . and demand its cancellation unless issued in accordance with such requirements."[79] Perhaps the INS's policy is that no fundamental rights are at stake when the government seeks to revoke something that it deems to have been granted in error. Therefore, fewer procedural protections are required than those guaranteed in a judicial proceeding.

While the precise motivations behind the 1996/2000 regulations establishing administrative denaturalization procedures remain unclear, generally accepted principles of administrative law provide some arguments in support of the proposed system. Yet, without an adequate opportunity for debate, the substantial *threats* posed by administrative denaturalization have remained unvoiced. The following sections present these arguments as a caution against administrative denaturalization.

Although proponents of administrative denaturalization may identify some benefits to the system, this procedure raises its own problems. One scholar criticizes administrative denaturalization as a threat to equal protection, due process, and separation of powers.[80] He cites structural weaknesses of the agencies, such as their vulnerability to political influence, to counsel against administrative denaturalization proceedings altogether.[81] In a similar vein, this section identifies several factors warranting caution against administrative denaturalization: (1) the risk of improper blending of prosecutorial and adjudicatory functions; (2) the risk that individual cases will improperly be used to advance broader policy goals; (3) the political vulnerability of administrative officials; and (4) the lack of expertise and resources available to administrative bodies adjudicating fundamental rights. Each of these factors increases the likelihood that an administrative revocation of citizenship will be in error, and limits the individual's access to an impartial and competent decisionmaker.

A. *Improper Blending of Functions*

First, administrative denaturalization poses the risk that the prosecutorial and adjudicatory functions will be improperly blended if INS personnel retain responsibility for both functions. When a single body performs both adjudicative and prosecutorial functions, conflicts of interest that undermine the impartiality of decisions may arise and increase the likelihood of mistaken findings of fact and law.[82] However, defenders of administrative adjudication point out that this conflict of interest can be reduced if the system separates functions at the level of *individuals*. Separation of functions at the *agency* level may be unneces-

79. 243 U.S. 472, 475 (1917) (setting aside a certificate of citizenship because it was not issued upon a final hearing in open court as required by Congress).

80. Hultman, supra note 67, at 898.

81. Id. at 931.

82. See 2 Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 9.9 (3d ed. 1994).

sary.[83] This suggests that the INS should be able to perform impartially both prosecutorial and adjudicative roles involving denaturalization—as long as different individuals perform these roles. Yet, the procedural regime implemented by the 1996 rules (and left unchanged by the 2000 rules) failed to separate these functions even at the individual level. Although denaturalization decisions were ultimately approved by the district director,[84] the district counsels and their staff attorneys, who ordinarily perform prosecutorial duties, played a primary role in advising the district director on these adjudicatory decisions to denaturalize.[85]

Past prosecutorial behavior in the denaturalization context demonstrates how a blending of prosecutorial and adjudicatory functions could undermine the impartiality of the decisionmaker. In 1981 a case was brought to denaturalize and extradite John Demjanjuk, alleged to be "Ivan the Terrible," a notorious concentration camp guard.[86] In 1993, an appellate court found that the Justice Department's prosecution withheld evidence that directly contradicted the testimony of its key witness.[87] The court vacated the denaturalization and extradition judgments on the ground of "prosecutorial misconduct that constituted fraud on the court."[88] One judge even rebuked the prosecutors for "reckless disregard for their duty."[89] The overzealous behavior of this prosecutor casts doubt that this same individual could have acted as a neutral adjudicator in the same case. To ensure an impartial decisionmaker in a denaturalization suit, the prosecutorial functions must be separated from the adjudicative functions.

B. *Opportunistic Attempts to Further Policy Goals*

Second, administrative denaturalization may provide an imprudent opportunity for agency decisions to be guided by broader policy objectives, at the expense of the appropriate legal disposition of an individual case. This in turn increases the likelihood of improper revocations of citizenship. Describing the tension between adjudication and administra-

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83. Id.

84. See supra text accompanying note 42.

85. See supra text accompanying note 41.

86. Demjanjuk v. Petrovsky, 10 F.3d 338, 339 (6th Cir. 1993); 135 Cong. Rec. 18,193 (1989) (statement of Hon. James A. Traficant, Jr.).

87. *Demjanjuk*, 10 F.3d at 342–44, 351.

88. Id. at 356. According to one report, the prosecution dumped the evidence in a garbage can on K Street in Washington, D.C. 135 Cong. Rec. 18,193 (statement of Hon. James A. Traficant, Jr.).

89. Robert L. Jackson, U.S. Renews Legal Fight to Deport Demjanjuk, L.A. Times, May 20, 1999, at A5. It is interesting to note that in 1999, the INS reopened the case to denaturalize Mr. Demjanjuk, alleging he was a concentration camp guard, albeit not "Ivan the Terrible". Dep't of Justice, Press Release, Justice Department Refiles Denaturalization Case Against Accused Nazi Death Camp Guard John Demjanjuk (May 19, 1999), at http://www.usdoj.gov/opa/pr/1999/May/195crm.htm (on file with the *Columbia Law Review*).

tion, one scholar writes: "Administrators are concerned with general administrative programs, not with particularized inquiries."[90]

In fact, the INS's implementation of administrative denaturalization demonstrates that it fell prey to this precise tension—it utilized the regime as a vehicle to advance policy goals. Initially, the INS established a policy limiting administrative denaturalization to clear cases in which factual disputes did not arise.[91] Later, however, while testifying before members of Congress shortly after the Citizenship USA debacle, then-INS Commissioner Doris Meissner stated that the INS initiated and would continue to initiate "revocation proceedings in less conclusive cases."[92] While conceding that administrative revocation in these cases presented "unique obstacles" and "involve[d] a particularly unsettled area of law," Meissner testified that the INS would proceed with administrative revocation "in order to foster the development of favorable case law."[93] Similarly, she described the policy goals underlying administrative denaturalization: "By aggressively pursuing administrative revocation in appropriate cases, . . . we are sending a clear message that only truly deserving individuals will be granted citizenship."[94] This evidence underscores the risk that administrative denaturalization will be used to advance broad policy goals, undermining the impartiality of decisions in individual cases.

C. *Vulnerability to Political Influence*

Third, and related to the risk that they will be used as vehicles to further policy goals, administrative proceedings threaten to politicize the denaturalization process, increasing the likelihood that the individual's citizenship will be revoked in error.[95] Because agency officials rely on the executive and legislative branches for job security and funding, they re-

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90. Jerry L. Mashaw, Organizing Adjudication: Reflections on the Prospect for Artisans in the Age of Robots, 39 UCLA L. Rev. 1055, 1056 (1992).

91. INS Finalizes Naturalization Revocation Regulations, 73 Interpreter Releases 1537, 1537–38 (Nov. 4, 1996) (quoting a cable sent by the INS to all its field offices (file CO HQ 70/36) following the publication of the final rule); see also Immigration and Naturalization Serv., Standards for Issuance of Notice of Intent to Reopen Naturalization Proceedings and to Revoke Naturalization, reproduced in 74 Interpreter Releases 555, 555 (Mar. 28, 1997) ("In sum, administrative revocation is primarily designed for clear cases where the individual was statutorily ineligible to naturalize and where the factual basis for that finding does not depend on credibility determinations of witnesses testifying under oath and subject to cross-examination."). In cases where factual disputes did arise, the regulations directed the district director to proceed with judicial denaturalization instead. Id. at 556 ("Where the applicant's answer to the notice . . . raise[s] a genuine factual issue . . . so that the resolution . . . will depend on the credibility of witnesses . . ., the district director must terminate the administrative revocation proceedings and determine whether to refer the case for judicial revocation proceedings . . . .").

92. Hearing, supra note 78, at 41.

93. Id.

94. Id.

95. Hultman, supra note 67, at 931 (noting INS's susceptibility to political pressure).

main vulnerable to political influence.[96] In contrast, federal judges maintain a degree of political independence with salary and tenure protection.[97] Therefore, administrative adjudication poses the risk that improper political considerations will enter the calculus for determinations of citizenship revocation. This potential for political influence in administrative decisions undermines the objective neutrality necessary to afford the individual a fair procedure. In fact, politics has often driven movements to denaturalize unpopular groups. Since the 1980s, most of the high profile denaturalization cases have involved suspected Nazi war criminals.[98] Similarly, in prior eras, cases to revoke citizenship on the basis of Communist or Nazi sympathies or affiliations were not uncommon.[99] In light of this track record, it would not be surprising if denaturalization were used in the future to target other politically disfavored minority groups. This potential for politicization demonstrates the need for a politically independent decisionmaker in denaturalization cases.

One might counter that this risk of political influence argues against all administrative adjudication, yet we continue to tolerate administrative decisionmaking in many other contexts. Nevertheless, the power to denaturalize remains uniquely vulnerable to political influence—the power to denaturalize determines who will vote in elections. In *Bindczyck v. Finucane*, the Supreme Court described this inextricable relationship between denaturalization and politics.[100] First, the Court discussed the origins of the Act of 1906 codifying the government's power to denaturalize aliens, noting that Congress formulated a "carefully safeguarded method" to

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96. See, e.g., Peter L. Strauss et al., Gellhorn & Byse's Administrative Law 193 (9th ed. 1995) ("Indeed, Congress and the President provide the primary direct check on the daily conduct of federal administrative agencies. . . . Presidents and legislators can administer systematic rewards and penalties; courts rarely can."); Gerald L. Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961, 1023 (1998) ("Administrators are often subject to political oversight, pressuring them to produce desired results at the risk of their budgets or their jobs.").

97. See supra note 25.

98. See, e.g., Kungys v. United States, 485 U.S. 759, 763–64 (1988) (involving an attempt to denaturalize an alleged Nazi war criminal); Fedorenko v. United States, 449 U.S. 490, 493 (1981) (same); United States v. Sprogis, 763 F.2d 115, 116–17 (2nd Cir. 1985) (same); United States v. Demjanjuk, 518 F. Supp. 1362, 1363 (N.D. Ohio 1981) (same).

99. See, e.g., Chaunt v. United States, 364 U.S. 350, 354–55 (1960) (rejecting government attempt to revoke citizenship on the basis of failure to disclose Communist party affiliation); Nowak v. United States, 356 U.S. 660, 668 (1958) (rejecting government attempt to revoke citizenship on the basis of Communist party affiliation); Knauer v. United States, 328 U.S. 654, 668 (1946) (affirming circuit and district courts' revocation of citizenship based on fraudulent information provided regarding Nazi affiliation); Baumgartner v. United States, 322 U.S. 665, 677 (1944) (rejecting government's attempt to denaturalize citizen accused of sympathizing with Nazis); Schneiderman v. United States, 320 U.S. 118, 158 (1943) (rejecting government attempt to revoke citizenship on the basis of failure to disclose Communist party affiliation).

100. 342 U.S. 76, 81–82 (1951).

minimize the risk of improper political motivations to denaturalize aliens.[101] Then, it went on to state:

> Indeed, the history of the Act of 1906 makes clear that elections could be influenced by irregular denaturalizations as well as by fraudulent naturalizations. The only instance in the extensive legislative materials of vacation of naturalization orders by what appears to have been the procedure urged by the Government in this case involved just such a situation. A judge who had naturalized seven aliens on the supposition that they were members of his own political party promptly vacated his order when this supposition was corrected.[102]

To offset this risk of politicization, the Court held that state courts could not revoke orders granting citizenship.[103] Unlike federal judges, many state judges are popularly elected and are thus subject to political pressures similar to those imposed on agency officials. For the same reasons that the Supreme Court denied state judges the authority to adjudicate claims of citizenship, we should also be wary of permitting politically vulnerable agency officials to adjudicate these claims.

The potential role of politics in motions to revoke citizenship becomes particularly apparent when considering the circumstances surrounding the establishment of administrative denaturalization in 1996. While the INS never officially articulated its motivation for establishing a system of administrative denaturalization, one might fairly speculate that the final decision to implement it can be at least partially attributed to the political maelstrom surrounding the Citizenship USA campaign and the 1996 elections.[104]

Citizenship USA was an INS initiative to streamline the application process and reduce backlogs of pending naturalization applications; it succeeded in naturalizing 1.1 million aliens from September 1995 to October 1996. However, Republican opponents to the campaign accused the Democratic administration of improperly naturalizing ineligible aliens solely to create voters to support Democratic candidates. For example, in a policy statement issued by the House Policy Committee, Chairman Christopher Cox called the campaign "a blatant attempt to naturalize a million prospective Clinton voters before the Presidential election."[105] One newspaper account even suggested that the INS was explicitly aware that ineligible aliens had become naturalized during the Citizenship USA campaign, and that the INS retaliated against INS employees who objected to this practice.[106] An investigation conducted by the Department of Justice Office of the Inspector General acknowledged

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101. Id. at 81.

102. Id. at 82–83

103. Id. at 85–88.

104. See supra note 34 and accompanying text.

105. House Policy Committee, Policy Perspective, supra note 34.

106. Ruth Larson, Noncitizens Signed Up to Vote, Two Say: Workers Accuse INS of Inaction, Wash. Times, Jan. 22, 1997, at A4. The article includes an INS employee's

that the program "fueled speculation and media stories that the rush to naturalize approximately one million applicants during fiscal year 1996 was an attempt to swell voting rolls with new citizens who were anticipated to vote for Democratic candidates . . . ."[107] Although the report concluded that Citizenship USA was not guided by electoral considerations,[108] these statements indicate the political assault to which the INS was subject during this period.

Simultaneously, Republicans led by House Speaker Newt Gingrich blamed Democrat Loretta Sanchez's narrow congressional victory over incumbent Robert Dornan on voting by noncitizens.[109] After initiating an investigation into these allegations of voter fraud, Republicans in the House accused the INS of "stalling the investigation by failing to turn over its records in a timely and complete fashion."[110] Although the INS conceived of the idea of administrative denaturalization prior to these events,[111] the scathing criticism it received in connection with Citizenship USA and allegations of voter fraud in the 1996 elections likely provided political will within the INS for final passage of the regulation instituting administrative denaturalization. These events not only reveal the INS's sensitivity to political criticism, but also its willingness to change its policies under political pressure. This vulnerability undermines the impartiality required by a fair adjudicatory proceeding.

D. *Fundamental Right at Stake*

Fourth, another factor unique to the denaturalization context that renders administrative denaturalization particularly unwise is that agencies are ill-equipped to render determinations to revoke fundamental rights.

Citizenship, once attained, constitutes a fundamental right. First, citizenship is fundamental in the sense that it is important and highly re-

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accusation that outreach agencies filled out voter registration cards for noncitizen resident aliens, and states:

> When [the INS employee] objected, INS managers encouraged the outreach agencies to 'make unwarranted complaints against [her]' . . . . She was branded a 'rude and disgruntled employee' and removed from the outreach program, 'thereby allowing and encouraging the practice of these outreach agencies to continue and showing all others what would happen to them if they objected to the practice.'

Id.

107. Office of the Inspector Gen., Dep't of Justice, An Investigation of the Immigration and Naturalization Service's Citizenship USA Initiative, Executive Summary 2 (July 31, 2000), available at http://www.usdoj.gov/oig/cusarpt/execsum.pdf (on file with the *Columbia Law Review*).

108. Id. at 10.

109. See supra note 69 and accompanying text.

110. See Alvarez, supra note 69.

111. Revocation of Naturalization, 61 Fed. Reg. 23,205, 23,209–10 (May 13, 1996) (codified as amended at 8 C.F.R. § 340 (2001)) (stating INS's intent to specify a process of administrative denaturalization).

garded. The Supreme Court has often noted this, and recognized the severe consequences of its revocation: "In its consequences it [denaturalization] is more serious than a taking of one's property, or the imposition of a fine or other penalty. . . . It would be difficult to exaggerate its value and importance."[112]

The right to citizenship is also fundamental in another sense—it provides the foundation from which other rights arise. In 1958, Chief Justice Warren wrote: "Citizenship *is* man's basic right for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen."[113] In 1981 Justice Blackmun similarly characterized citizenship as "a right conferring benefits of inestimable value upon those who possess it."[114] For example, noncitizens remain ineligible to vote in federal and most state and local elections.[115] In addition, noncitizens remain vulnerable to being deported at any moment by congressional or executive fiat under the plenary power doctrine.[116] For these reasons, citizenship has consistently been recognized as a fundamental right.

Unfortunately, administrative agencies are ill-equipped to provide the requisite procedural safeguards to protect this fundamental right, a fact given credence by the Supreme Court. In *United States v. Minker*, the INS attempted to subpoena naturalized individuals to testify in administrative hearings to determine whether the INS would institute judicial denaturalization proceedings against them.[117] The Supreme Court held that the INS did not possess the authority for these subpoenas, stating:

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112. Schneiderman v. United States, 320 U.S. 118, 122 (1943); see also Klapprott v. United States, 335 U.S. 601, 612 (1949) ("This Court has long recognized the plain fact that to deprive a person of his American citizenship is an extraordinarily severe penalty.").

113. Perez v. Brownell, 356 U.S. 44, 64–65 (1958) (Warren, C.J., dissenting).

114. Fedorenko v. United States, 449 U.S. 490, 522 (1981) (Blackmun, J., concurring); see also Harisiades v. Shaughnessy, 342 U.S. 580, 586 n.10 (1952) (describing absence of "legal parity" between citizens and aliens, and pointing to aliens' ineligibility to "stand for election to many public offices" and restrictions on aliens' right to travel); cf. Maney v. United States, 278 U.S. 17, 22 (1928) (comparing naturalization to "other instances of Government gifts" in that it is revocable); Tutun v. United States, 270 U.S. 568, 578 (1926) (comparing naturalization to a public land grant or a patent); United States v. Ginsberg, 243 U.S. 472, 475 (1917) (holding that "every certificate of citizenship must be treated as granted upon the condition that the Government may challenge it," and is revocable if it is found that the individual in question did not fulfill the requirements for citizenship); Alexander M. Bickel, Citizen or Person?: What is Not Granted Cannot Be Taken Away, in The Morality of Consent 33, 33 (1975) ("Remarkably enough . . . the concept of citizenship plays only the most minimal role in the American constitutional scheme.").

115. See generally, Virginia Harper-Ho, Non-Citizen Voting Rights: The History, Law, and Current Prospects for Change, 18 Law & Ineq. 271 (2001) (analyzing history of noncitizen suffrage in the United States).

116. *Harisiades*, 342 U.S. at 586–89 (confirming that an alien, even one who has resided in the United States for many years, continues to remain vulnerable to expulsion, and finding decisions to deport "largely immune" from judicial review).

117. 350 U.S. 179, 181 (1956).

"It does not bespeak deprecation of official zeal, nor does it bring into question disinterestedness, to conclude that compulsory *ex parte* administrative examinations, untrammelled by the safeguards of a public adversary judicial proceeding, afford too ready opportunities for unhappy consequences to prospective defendants in denaturalization suits."[118]

Similarly, in *Ng Fung Ho v. White*, the INS attempted to deport individuals who claimed United States citizenship.[119] The Supreme Court held, however, that the INS did not possess the authority to deport individuals who are U.S. citizens and that the individuals were entitled to a judicial determination of their citizenship claims before they could be deported.[120] In reaching its decision that an administrative attempt to deport an individual could not be effected without a judicial determination of the citizenship claim, it relied on "[t]he difference in security of judicial over administrative action."[121]

More recently, in *Gorbach v. Reno*, the Ninth Circuit sitting en banc held that the INS did not possess the authority to denaturalize individuals in cases in which the propriety of the original grant of citizenship was disputed, reasoning:

> An administrative agency is useful for performing large numbers of repetitive, routine tasks . . . such as naturalization, that do not take away important liberties from individuals. But administrative agencies, accustomed to treating a case as "one unit in a mass of related cases," are dubious instruments for performing relatively rare acts catastrophic to the interests of the individuals on whom they are performed.[122]

These statements express doubt that administrative proceedings can provide adequate safeguards to protect sufficiently the fundamental right to citizenship in cases in which that right is disputed.

Not only have courts exhibited suspicion regarding the level of procedural protection that can be afforded in administrative proceedings, they have also held that the procedural protections afforded in ordinary *judicial* proceedings prove inadequate to protect this fundamental right. On several occasions, the Supreme Court has imposed procedural protections in denaturalization proceedings above and beyond the normal requirements in civil suits. For example, in *Schneiderman v. United States*, the Supreme Court held that the preponderance of evidence standard used in ordinary civil trials would not suffice in denaturalization suits.[123] Rather, the Court imposed on the government the strict burden to show

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118. Id. at 188.

119. 259 U.S. 276, 282 (1922).

120. Id. at 284–85.

121. Id.

122. 219 F.3d 1087, 1095 (9th Cir. 2000) (en banc) (citation omitted).

123. 320 U.S. 118, 125 (1943). For a discussion of *Schneiderman*, see also supra notes 26–28 and accompanying text.

through "clear, unequivocal, and convincing" evidence that the individual was improperly naturalized.[124]

Similarly, in *Klapprott v. United States*, the Court prohibited default judgments in denaturalization cases although they are routinely permitted in other civil cases.[125] The government instituted a suit to denaturalize the petitioner and when the petitioner failed to answer the complaint, a federal district court entered a default judgment revoking citizenship. However, the Supreme Court set aside this default judgment, holding that default judgments would not be permitted for denaturalization cases.[126] In reaching this conclusion, the Court reasoned that the significance of the right to citizenship requires procedural protections above and beyond those provided in ordinary civil trials: "Denaturalization consequences may be more grave than consequences that flow from conviction for crimes. . . . Because denaturalization proceedings have not fallen within the technical classification of crimes is hardly a satisfactory reason for allowing denaturalization without proof while requiring proof to support a mere money fine or a short imprisonment."[127] Justice Rutledge's concurrence in the same case went even further to suggest that the full range of procedural protections required in criminal trials should apply to actions to revoke citizenship.[128]

These opinions adopt the position that the fundamental nature of the right to citizenship, and the severity of its revocation, require procedural safeguards above and beyond those provided in ordinary civil suits. If the procedural requirements of civil actions prove too inadequate to safeguard the right to citizenship, then the procedural requirements of administrative proceedings will likely prove even less adequate.

Each of these risks—the improper blending of prosecutorial and adjudicatory functions, the improper consideration of broad policy goals at

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124. 320 U.S. at 125 (citation omitted).

125. 335 U.S. 601, 610–12 (1949).

126. Id. at 615.

127. Id. at 611–12.

128. Id. at 616–17, 619 (Rutledge, J., concurring). In his opinion, Justice Rutledge notes the connection between denaturalization and "banishment" or "exile." Id. at 616–17 ("Yet by the device or label of a civil suit, carried forward with none of the safeguards of criminal procedure . . . , this most comprehensive and basic right of all, so it has been held, can be taken away and in its wake may follow the most cruel penalty of banishment."). Although denaturalization does not necessarily lead to deportation, it appears likely that in practice the INS will exercise its prosecutorial discretion to bring suit only in those cases in which the alien will finally be deported. See, e.g., Immigration and Naturalization Serv., Fact Sheet: Prosecutorial Discretion Guidelines 2 (Nov. 28, 2000), at http://www.ins.usdoj.gov/graphics/publicaffairs/factsheets/Prosecut.htm (on file with the *Columbia Law Review*) (listing "[l]ikelihood of ultimately removing the alien" as one factor to use in determining whether to exercise prosecutorial discretion); INS, Operations Instructions 340.1, supra note 17 (stating that the INS will not seek to revoke citizenship if it is satisfied that "if denaturalized the person would not become deportable and that a new petition for naturalization would be granted"). These sources suggest that any action for denaturalization will always be followed by an action for deportation.

the expense of consideration of a fair disposition in the individual case, vulnerability to politicization, and the fundamental nature of citizenship—counsels against administrative revocation of citizenship. The next section proposes minimum procedural requirements that seek to mitigate some of these risks associated with administrative denaturalization, arguing that these safeguards must be provided if we are to tolerate administrative denaturalization at all.

III. Safety Valve—A Prescription for Procedurally Sound Administrative Denaturalization

This Note counsels against any system of administrative denaturalization. Yet, the reinstitution of administrative denaturalization remains a distinct possibility.[129] In apprehension of such a situation, this section proposes a set of procedural safeguards to minimize the risks associated with these proceedings. Administrative denaturalization must provide for impartial adjudicators. In the first instance, immigration judges, rather than district directors, should render denaturalization decisions. In the second instance, the Board of Immigration Appeals (BIA) rather than the Administrative Appeals Unit (AAU) should review denaturalization decisions on appeal. Finally, a federal district judge should review de novo an adverse decision by the BIA. In addition to providing for an impartial decisionmaker, administrative denaturalization proceedings must impose a strict burden of proof on the government. These procedural mechanisms will reduce the likelihood of a mistaken revocation of citizenship.

A. *Impartial Decisionmakers*

1. *District Directors Versus Immigration Judges.* — Some of the risks associated with administrative denaturalization could be mitigated by delegating the authority to denaturalize individuals in the first instance to immigration judges rather than INS officials. The 1996/2000 regime of administrative denaturalization delegated the denaturalization authority to render these decisions to the district director, who would in turn delegate to examinations officers and district counsels and their staff attorneys the duty of identifying and reviewing suspect cases.[130]

The designation of these officials, rather than some other administrative official such as an immigration judge, to make these decisions compromises the impartiality of the decisionmaking process in two substantial ways. First, district counsels and their staff attorneys maintain both *adjudicative* and *prosecutorial* functions for any given denaturalization case, an improper blending of functions.[131] Second, because the district directors, examinations officers, and district counsels and their staff attorneys are all part of the INS, there is an increased likelihood that they will

129. See supra notes 9, 68–73 and accompanying text.

130. See supra notes 40–42 and accompanying text.

131. See supra notes 82–89 and accompanying text.

be guided by broader policy goals of the agency at the expense of the appropriate legal disposition in the given case. In fact, as noted above, this is precisely what occurred shortly after the Citizenship USA campaign—the INS intentionally adjudicated cases in which the law was unclear in order to push the law in a direction favoring agency policy goals.[132] For these reasons, the designation of these officials to determine whether an individual's citizenship will be revoked undermines the impartiality of the decisionmaker.

Delegation of the denaturalization authority to another administrative official—an immigration judge—would improve the impartiality of the decisionmaking process. First, this situation would not pose the problem of improper blending of functions. Immigration judges, unlike district directors and district counsels and staff attorneys, perform only adjudicative and no enforcement or prosecutorial functions. If the system assigned the adjudicatory denaturalization function to an immigration judge, then the individual who renders the decision on denaturalization (immigration judge) would be different from the individuals who enforce and prosecute (district director, district counsels, and staff attorneys). This in turn would reduce the conflict of interest that arises when the same person is responsible for both prosecuting and adjudicating a single case, improving the decisionmaker's impartiality.

Second, this would reduce the risk that individual cases would be improperly used to advance broader policy goals. Immigration judges are subject to a chain of command separate from the INS—they are accountable to the Executive Office for Immigration Review (EOIR). In 1983, the Justice Department removed immigration judges from the purview of the INS and placed them in the newly created EOIR to ensure that adjudicatory decisions by these individuals were insulated from the enforcement pressures of the INS.[133] Although both the INS and the EOIR are ultimately accountable to the Attorney General, the separation of the EOIR from the INS insulates it from the direct policy pressures confronting the INS.

Therefore, to ensure the adequate separation of prosecutorial and adjudicative functions and to reduce the risk that individual decisions will be improperly used to advance broader policy goals, any system of administrative denaturalization should permit immigration judges, rather than INS officials, to render decisions in the first instance. However, while delegating decisions to immigration judges presents an improvement from delegating them to INS officials, the case should not be overstated; immigration judges are still not totally independent, especially since they lack the tenure and salary protection of Article III judges.

2. *Administrative Appeals Unit Versus Board of Immigration Appeals.* — The 1996 and 2000 systems of administrative denaturalization granted in-

132. See supra notes 91–94 and accompanying text.

133. Aleinikoff et al., supra note 16, at 256.

dividuals a right to appeal an initial adverse decision to the AAU. However, the AAU is ill-equipped to make determinations regarding the revocation of fundamental rights such as citizenship. With little legal background, no legal staff support, and a single examiner deciding cases,[134] AAU decisions are particularly vulnerable to mistakes of law which would prove devastating to the individual who would be denaturalized. Another problem presented by assigning the appellate authority to the AAU is that appellate examiners are housed within the INS itself, increasing the likelihood that they will commit errors of law in the interest of furthering broader policy goals of the INS.[135] For these reasons, delegating the appellate denaturalization power to the AAU confronts at least two of the threats associated with administrative denaturalization.

One solution that might reduce these negative effects would be to grant appellate jurisdiction over denaturalization cases to the BIA rather than the AAU. Both the BIA and the AAU determine appeals in the immigration and naturalization context.[136] However, unlike decisions rendered by the AAU, BIA cases are determined by a three-member panel of attorneys.[137] Also, members of the BIA are assisted by a staff of twenty-four attorneys.[138] These characteristics suggest that the quality of opinions rendered by the BIA is superior to those rendered by the AAU.[139] Appointing the BIA to exercise appellate power in denaturalization cases would thus improve the legal competence of the decisionmaking body rendering determinations regarding this fundamental right.

Appointing the BIA rather than the AAU to exercise appellate authority will also reduce the likelihood that individual decisions will be improperly used to advance broader policy goals without regard for the legal merits of the given case. The BIA, unlike the AAU, but like immigration judges, is housed within the EOIR rather than the INS. Consequently, members of the BIA are less susceptible to the policy pressures of the INS. Their decisions are therefore less likely to contain mistakes of law in the interest of pursuing broader policy goals.

Each of these characteristics suggests that delegating the appellate denaturalization authority to the BIA, rather than the AAU, will help ensure that the case is reviewed by a competent and relatively impartial decisionmaker. Of course, like immigration judges, members of the BIA, without tenure and salary protection, are not as independent as Article

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134. See supra notes 53–54 and accompanying text.

135. See supra note 53 and accompanying text. It should be noted, however, that the appellate examiners enjoy one advantage over district counsels and staff attorneys, who advise the district director—appellate examiners do not prosecute the cases they adjudicate. Therefore, there is a reduced risk of an improper blending of functions.

136. Aleinikoff et al., supra note 16, at 259.

137. Id. at 258; see also Legomsky, supra note 53, at 1317.

138. Legomsky, supra note 53, at 1317.

139. Id. at 1318.

III judges. Still, the replacement of the AAU with the BIA in a system of administrative denaturalization would constitute an improvement.

Skeptics might point to the increasing caseload of the BIA to object to this proposal. In 1984, the Board received fewer than 3,000 new appeals and motions. In 1998, however, over 28,000 new appeals and motions were filed.[140] Since 1984, the number of BIA members has increased from five to the current nineteen board members, with accompanying staff increases.[141] It nevertheless remains possible that this board member increase will prove insufficient to accommodate BIA review of denaturalization appeals. Yet, even if this is the case, the fundamental nature of citizenship counsels for a further increase in the number of BIA members, rather than the removal of denaturalization appeals from BIA review.

Another potential problem with BIA review of denaturalization appeals arises from the recent decision to streamline the BIA appellate review procedure. In October 1999, the Department of Justice issued a final rule permitting a single BIA member to summarily affirm the decision of an immigration judge in certain circumstances without issuing a written opinion.[142] This may undermine some of the benefits of BIA review: The replacement of the three-member panel with a single decisionmaker and the absence of a reasoned opinion may compromise the quality of BIA decisions.[143] In light of the increased risk of error, this Note proposes that appeals from denaturalization orders be exempt from the new BIA streamlined procedures and instead remain subject to the standard three-member panel written opinion.[144]

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140. Executive Office for Immigration Review, Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135, 56,136 (Oct. 18, 1999) (codified at 8 C.F.R. § 3.1 (2001)).

141. Id. at 56,139.

142. Id. at 56,136.

143. See Philip G. Schrag, The Summary Affirmance Proposal of the Board of Immigration Appeals, 12 Geo. Immigr. L.J. 531, 534 (1998) (arguing that the absence of written opinions will compromise the quality of BIA decisions); see also Executive Office for Immigration Review, Board of Immigration Appeals: Streamlining, 64 Fed. Reg. at 56,137–39 (describing criticisms of one-member summary affirmances and noting due process concerns raised by this change).

144. Even if denaturalization appeals were not exempt from the streamlined procedures, the extent to which these appeals would actually be summarily affirmed remains unclear. Under the new rule, the streamlined one-member summary affirmance is used only where:

> (1) the result reached in the decision under review was correct; (2) any errors in the decision under review were harmless or nonmaterial; and (3) either (a) the issue on appeal was squarely controlled by existing Board or federal court precedent and did not involve the application of such precedent to a novel fact situation; or (b) the factual and legal questions raised on appeal were so insubstantial that three-Member review was not warranted.

Executive Office of Immigration Review, Board of Immigration Appeals: Streamlining, 64 Fed. Reg. at 56,136. Further, even if this summary affirmance were actually applied to a denaturalization appeal and would reduce the increased procedural safeguards that

3. *De Novo Judicial Review.* — While delegating decisionmaking to an immigration judge in the first instance and the BIA in the second instance reduces the risk of political influence, it does not eliminate the threat completely. Although immigration judges and the BIA are separated from the chain of command of the INS, as executive officials they still ultimately remain subject to the attorney general's authority. Indeed, they also receive their funding from the executive branch.[145] Therefore, as suggested above, while immigration judges and members of the BIA may not be vulnerable to the political pressure directed at the INS specifically, they may still face political pressure directed at the executive and legislative branches more generally.

A procedural safeguard, however, could remedy this weakness—the provision of de novo judicial review. Without this provision, a federal district court reviewing an agency decision would probably be required to accord deference to the administrative findings of fact and law.[146] This, however, would expose the process to the risk that findings of fact and law, which may have been unduly influenced by political considerations, will be affirmed without adequate reconsideration. With de novo judicial review, however, the final decisionmaker would be an Article III judge with salary and tenure protection. This independent decisionmaker would not need to defer to the agency's potentially biased findings, but would rather determine the case as though it had never been presented before another body.

In fact, the Constitution, while somewhat unclear on this point, may require a provision for de novo judicial review.[147] In *Ng Fung Ho v. White*, the government attempted to deport five individuals, two of whom claimed United States citizenship, through executive proceedings under the Chinese Exclusion Act.[148] In a unanimous opinion the Supreme Court held that the two individuals were entitled to a judicial determination of their citizenship claim before the government could deport them. The Court suggested that the Due Process Clause requires this judicial determination, noting the "difference in security of judicial over administrative action."[149] Concededly, this case involved a governmental attempt

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characterize BIA appeals, it would not eviscerate them completely, because the BIA member would still have the advantage of being an attorney with staff support. See supra notes 137–138 and accompanying text.

145. Aleinikoff et al., supra note 16, at 256–57.

146. See Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842–43 (1984) (holding that in cases of ambiguity, agency interpretations of law may be granted deference by the reviewing court); see also Allentown Mack Sales & Serv. Inc. v. NLRB, 522 U.S. 359, 366 (1998) (affirming use of deferential substantial evidence test to agency findings of fact).

147. See, e.g., Verkuil, supra note 5, at 1166 (arguing that in consideration of the fundamental nature of the right to citizenship, due process requires maximum procedural protections, and stating that "[a] federal district court trial, conducted by a judge of unquestioned impartiality . . . may be a constitutional necessity").

148. 259 U.S. 276, 277–82 (1922).

149. Id. at 284–85.

to *deport* an individual, not an attempt to *denaturalize* one. Nevertheless, this rationale to require a judicial determination of citizenship prior to an administrative deportation could be applied by analogy to argue that all determinations of citizenship must be subject to de novo judicial review.[150]

Still, one might argue that even if some degree of judicial review is required, de novo review is not; perhaps a "substantial justification" standard of review of agency findings of fact and law would suffice. In *Ng Fung Ho*, however, the Court did not hold that a reviewing court could defer to the agency's determination of noncitizenship implicit in the administrative decision to deport. Rather, the Supreme Court required the reviewing court to make determinations on its own.[151]

Arguably, the provision of de novo review undermines one of the presumed purposes of administrative denaturalization—efficiency—and imposes an additional step in the procedure to revoke an individual's citizenship. This might waste judicial resources by encouraging meritless appeals, which would provide the individual with "another bite at the apple," and extend the length of her citizenship. However, the argument that individuals will appeal meritless claims may overstate the case. For example, disciplinary measures exist to sanction attorneys or unrepresented parties who bring frivolous claims.[152] Further, the risk of meritless appeals is insufficient to outweigh the severe consequences of a mistaken revocation of citizenship, the high risk of politicized agency decisions, and the constitutional concerns raised by the absence of de novo judicial review.[153] Therefore, any system of administrative denaturalization should provide for de novo judicial review of agency decisions to revoke citizenship.[154]

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150. In fact, the INS's stated policy to pursue denaturalization only in those cases where the individual will likely be deported, supra note 128, underscores the strength of this analogy.

151. *Ng Fung Ho*, 259 U.S. at 284–85.

152. See, e.g., Fed. R. Civ. P. 11 (providing for sanctions against attorneys or unrepresented parties who present frivolous arguments before a court).

153. See, e.g., Hultman, supra note 66, at 898, 930–35 (identifying due process, equal protection and separation of powers concerns raised by administrative denaturalization); see also supra notes 147–149 and accompanying text.

154. The "constitutional fact review" doctrine may also provide an argument by analogy in favor of de novo review. This doctrine authorizes independent appellate review of facts implicating certain constitutional rights. See, e.g., Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 501–11 (1984) (requiring independent review of mixed questions of law and fact in the context of the First Amendment); Crowell v. Benson, 285 U.S. 22, 60 (1932) (requiring de novo review of "jurisdictional facts"); Henry P. Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 237–39 (1985) ("Constitutional fact review presupposes that appellate courts will render independent judgments on any issues of constitutional 'law' presented. Its distinctive feature is a requirement of similar independent judicial judgment on issues of constitutional law 'application.'"); Judah H. Schechter, Note, De Novo Judicial Review of Administrative Agency Factual Determinations Implicating Constitutional Rights, 88 Colum. L. Rev. 1483, 1484 (1988) (discussing the requirement for independent appellate review of constitutional facts).

Accepting the necessity of de novo review, one might still argue that this guarantee of de novo review obviates the need for the immigration judge and the BIA in the denaturalization process. Under this view, even if the district director and the AAU are susceptible to making mistakes, these mistakes become harmless because they will eventually be corrected by a district court. However, this position relies on two questionable assumptions.

First, it assumes that individuals in the process of denaturalization suffer no harm until their citizenship is actually revoked. In fact, in the interim between receipt of a notice of intent to denaturalize and the de novo district court trial, the individual is likely to undergo great stress and inconvenience. Further, an initial decision to denaturalize injures an individual's dignity. At worst, it brands the individual as a fraud; at best, it sends a message of exclusion, characterized by a "you are not worthy of being one of us" mentality. In *United States v. Zucca*, the Supreme Court recognized: "The mere filing of a proceeding for denaturalization results in serious consequences to a defendant. Even if his citizenship is not cancelled, his reputation is tarnished and his standing in the community damaged."[155] A correct decision, prior to a district court hearing, relieves the individual of these adverse effects.

Second, the position assumes that the individual retains citizenship until a final adverse decision by an Article III district court. However, it was unclear whether this was in fact the case under the 1996/2000 regime. The regulations did provide that the individual retained citizenship until a final adverse decision was rendered and all appeals had been declined or exhausted.[156] However, the regulations could not authorize district court jurisdiction to review the case *prior* to the revocation of citizenship because only Congress, not agencies, possesses the power to authorize jurisdiction.[157] Congress, however, failed to authorize federal courts to exercise jurisdiction over administrative "reopenings" of applications to naturalize.[158] This failure suggests that district courts do not retain jurisdiction to review administrative revocations of naturalization

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Unlike citizenship acquired through birth on United States soil, citizenship acquired by naturalization does not technically present a constitutional right because it is granted through statute, not by the Constitution. Still, the fundamental nature of this right, recognized by the judiciary, suggests that courts reviewing denaturalization decisions should impose the same degree of scrutiny as is imposed in cases implicating constitutional rights such as the First Amendment.

155. 351 U.S. 91, 99–100 (1956).

156. Revocation of Naturalization, 8 C.F.R. § 340.1(g)(2), (4) (2001).

157. Richard H. Fallon et al., Hart & Wechsler's The Federal Courts and The Federal System 348–49 (4th ed. 1996) (describing exclusive authority of Congress to apportion jurisdiction of Article III lower federal courts).

158. Rather, the relevant section of the statute suggests that courts only retain jurisdiction to revoke and set aside a grant of citizenship on the grounds of illegal procurement or concealment of a material fact or willful misrepresentation, Immigration and Nationality Act of 1952 § 340(a), 8 U.S.C. § 1451(a) (1994), or to revoke, set aside, and declare void a grant of citizenship upon the individual's conviction under section 1425

while the individual still retains citizenship. This interpretation underscores the need for an accurate decision at the administrative level *prior* to revocation, which is only subsequently subject to judicial review on specific grounds.[159]

B. *Strict Burden of Proof on the Government*

Finally, to reduce the likelihood of error in determinations to revoke citizenship, any system of administrative denaturalization must continue to place the burden of persuasion on the government. The government, in turn, must be required to provide evidence that satisfies a "clear, unequivocal, and convincing" standard, as dictated by *Schneiderman.*[160] As discussed above, the Supreme Court reasoned that this strict burden of proof was required to protect the fundamental right to citizenship.[161] Indeed, because administrative decisionmakers are more vulnerable to political pressures than judges, the possibility that the "political temper of majority thought and the stresses of the times"[162] will improperly influence the disposition of denaturalization cases is even greater in the administrative context. Therefore, the requirements for a strict standard of proof and the imposition of the burden of persuasion on the government are even more necessary in the context of administrative denaturalization than they are in the context of judicial denaturalization.

This strict burden of proof on the government is related to the requirement for de novo judicial review; both mechanisms mitigate the risk that citizenship will be revoked in error. The requirement for a strict burden of proof diminishes the likelihood that the agency, faced with political and institutional pressures, will denaturalize too eagerly with inadequate proof. The requirement of de novo judicial review ensures that if the agency does denaturalize without adequate proof, then the relatively independent judiciary can correct this mistake.

CONCLUSION

As public suspicion surrounding new citizens continues, legislators, courts, and administrative agencies must confront the possibility of implementing a system of administrative denaturalization. Such a system

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of Title 18 for knowingly procuring naturalization in violation of law. Id. § 340(e), 8 U.S.C. § 1451(e).

159. The INS did attempt to provide for judicial de novo review in the 1996 and 2000 systems of administrative denaturalization. If a new system of administrative denaturalization is introduced, Congress must explicitly provide for this procedural protection.

160. Schneiderman v. United States, 320 U.S. 118, 135 (1943). It should be noted that this standard of proof and persuasion provides even stricter protection for the individual than that required in most civil proceedings; in fact, it approximates the standard required in criminal proceedings.

161. See supra notes 26–28 and accompanying text.

162. *Scheiderman*, 320 U.S. at 159.

would present a dramatic break from long standing tradition, permitting INS officials—bureaucrats—to revoke an individual's citizenship.

This Note urges those who will be confronted with the decision to consider the factors counseling against administrative denaturalization. Such a system would present the risks that the adjudicatory and prosecutorial/enforcement functions are improperly blended; that administrative officials will view the individual case as an opportunity to further broader policy goals at the expense of the individual's legal rights in a given case; that the decision will be unduly influenced by political considerations; and that the system will be ill-equipped to make determinations regarding the fundamental right of citizenship. If we are to accept such an administrative proceeding at all, we must ensure that procedural safeguards are in place, sufficient to protect the interests of the individuals subject to such proceedings. These minimum requirements include: the right to an impartial decisionmaker and competent appellate body; the right to de novo appeal before a federal district court; and the placement of a "clear, unequivocal, and convincing" burden of proof on the government. These safeguards will enhance the protection of citizens who are subjected to administrative denaturalization procedures and, in the process, they will protect the sanctity of citizenship for all of us.