

# **Protecting American Citizenship III: Denaturalization and its Constitutional Limits**

## **Senate Committee on the Judiciary Subcommittee on the Constitution**

### **Testimony of George Fishman Senior Legal Fellow Center for Immigration Studies**

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Chairman Schmitt and Ranking Member Welch, I am honored to have the opportunity to testify before you and the other Members of the Subcommittee today regarding denaturalization and its constitutional limits.

### **Naturalization**

The U.S. Constitution provides that Congress has the power to “establish an uniform Rule of Naturalization” and section 1 of the Fourteenth Amendment provides that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside”.<sup>1</sup> One of the Immigration and Nationality Act’s (INA) primary requirements for naturalization is that an applicant “has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.”<sup>2</sup>

Also, as the Supreme Court noted in its 1944 decision in *Baumgartner v. United States*,<sup>3</sup> “[f]rom the earliest days of the Republic, Congress has required as a condition of citizenship that the alien renounce his foreign allegiance and swear allegiance to this country and its Constitution.”<sup>4</sup> Under

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<sup>1</sup> U.S. Const, art. I, § 8, cl. 4; amend. XIV, § 1, available at <https://uscode.house.gov/static/constitution.pdf>.

<sup>2</sup> INA § 316(a)(3) (8 U.S.C. § 1427(a)(3)).

<sup>3</sup> 322 U.S. 665 (1944), available at <https://supreme.justia.com/cases/federal/us/322/665/>.

<sup>4</sup> *Id.* at 672 (citing the Act of January 29, 1795, Pub. L. No. 3-20 (1795), available at <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/1/STATUTE-1-Pg414a.pdf>).

current law (with certain exceptions), a naturalization applicant must take an oath of renunciation and allegiance:

A person who has applied for naturalization shall, in order to be and before being admitted to citizenship, take in a public ceremony ... an oath (1) to support the Constitution of the United States; (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the applicant was before a subject or citizen; (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; (4) to bear true faith and allegiance to the same; and (5)(A) to bear arms on behalf of the United States when required by the law [with alternatives provided for applicants who are opposed to the bearing of arms or who are opposed to any type of service in the Armed Forces of the U.S. by reason of religious training and belief].<sup>5</sup>

On August 15, 2025, U.S. Citizenship and Immigration Services (USCIS) issued a Policy Memorandum stating that “[b]ecoming a naturalized U.S. citizen means being an active and responsible member of society instead of just having a right to live and work” here, and “[n]aturalization is envisioned not simply as a procedural immigration benefit—the greatest of all—but a significant legal transformation, an assimilation to a country that demands both allegiance and character.”<sup>6</sup> This is not so far off from the Ninth Circuit Court of Appeals’ words in its 1992 decision in *Price v. INS*:<sup>7</sup>

[T]he determination of who will become a citizen of the United States is at least as “peculiarly concerned with the political conduct of government,” as the decision of who will be allowed to enter, if not more so. While a resident alien may not participate in the process of governing the country, naturalized citizens may.<sup>8</sup>

According to the Department of Homeland Security (DHS), over the decade from 1910 to 1919, an average of 99,000 aliens (to the nearest thousand) were naturalized each year. Over the 1920-29 period, the average was 178,000; 1930-39: 145,000; 1940-49: 216,000; 1950-59: 114,000; 1960-69: 113,000; 1970-79: 141,000; 1980-89: 205,000; 1990-99: 498,000; 2000-09: 682,000; and 2010-19, 730,000.<sup>9</sup> Thus, the average number of yearly naturalizations increased by 637 percent from the decade of 1910-19 to the decade of 2010-19.

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<sup>5</sup> INA § 327(a) (8 U.S.C. § 1448(a)).

<sup>6</sup> Office of the Director, USCIS, DHS, *Policy Memorandum: Restoring a Rigorous, Holistic, and Comprehensive Good Moral Character Evaluation Standard for Aliens Applying for Naturalization* (2025), available at [https://www.uscis.gov/sites/default/files/document/policy-alerts/08.15.2025-Restoring\\_a\\_Good\\_Moral\\_Character\\_Evaluation\\_Standard\\_for\\_Aliens\\_Applying\\_for\\_Naturalization-Policy\\_Memorandum\\_FINAL.pdf?inline=1](https://www.uscis.gov/sites/default/files/document/policy-alerts/08.15.2025-Restoring_a_Good_Moral_Character_Evaluation_Standard_for_Aliens_Applying_for_Naturalization-Policy_Memorandum_FINAL.pdf?inline=1).

<sup>7</sup> 962 F.2d 836 (9th Cir. 1992), available at <https://law.justia.com/cases/federal/appellate-courts/F2/962/836/91908/>.

<sup>8</sup> *Id.* at 842 (quoting *Galvan v. Press*, 347 U.S. 522, 531 (1954), available at <https://supreme.justia.com/cases/federal/us/347/522/>).

<sup>9</sup> Office of Homeland Security Statistics, DHS, *2022 Yearbook of Immigration Statistics* (table 20) (2023), available at <https://ohss.dhs.gov/topics/immigration/yearbook/2022/table20>.

The Census Bureau estimates that in 2024 there were 25,837,975 naturalized citizens residing in the United States.<sup>10</sup>

## Denaturalization

In its 1912 decision in *Johannessen v. United States*,<sup>11</sup> the Supreme Court stated that “[a]n alien has no moral nor constitutional right to retain the privileges of citizenship if, by false evidence or the like, an imposition has been practiced upon the court without which the certificate of citizenship could not and would not have been issued.”<sup>12</sup> Further, in its 1946 decision in *Knauer v. United States*,<sup>13</sup> the Court explained that:

We have no doubt of the power of Congress to provide for denaturalization on the grounds of fraud. The Constitution grants Congress power “To establish an uniform Rule of Naturalization.”... The power of denaturalization comes from that provision and the “necessary and proper” Clause in Article I, Section 8[. . . cl. 18 – “The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”].<sup>14</sup>

The INA currently provides that:

It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings . . . for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation . . . effective as of the original date of the order and certificate, respectively....<sup>15</sup>

In the Supreme Court’s 1988 decision in *Kungys v. United States*,<sup>16</sup> Justice Antonin Scalia, writing for the majority, explained that this “plainly contains four independent requirements: the naturalized citizen must have misrepresented or concealed some fact, the misrepresentation or concealment must have been willful, the fact must have been material, and the naturalized citizen must have procured citizenship as a result of the misrepresentation or concealment.”<sup>17</sup>

And, regarding the oath, the Court explained in *Knauer* that:

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<sup>10</sup> U.S. Census Bureau, *Selected Characteristics of the Native and Foreign-Born Populations* (American Community Survey, ACS 1-Year Estimates Subject Tables, Table S0501), available at <https://data.census.gov/table/ACSST1Y2024.S0501>.

<sup>11</sup> 225 U.S. 227 (1912), available at <https://supreme.justia.com/cases/federal/us/225/227/>.

<sup>12</sup> *Id.* at 241.

<sup>13</sup> 328 U.S. 654 (1946), available at <https://supreme.justia.com/cases/federal/us/328/654/>.

<sup>14</sup> *Id.* at 673 (citation omitted).

<sup>15</sup> INA § 340(a) (8 U.S.C. § 1451(a)).

<sup>16</sup> 485 U.S. 759 (1988), available at <https://supreme.justia.com/cases/federal/us/485/759/>.

<sup>17</sup> *Id.* at 767.

[I]ssues of fact the establishment of which Congress has made conditions precedent to naturalization.... relate to the past... But the oath is in a different category. It relates to a state of mind, and is a promise of future conduct. It is the final act by which an alien acquires the status of citizen.... The oath being the final step, no evidence is heard at that time. It comes after the matters in issue have been resolved in favor of the applicant for citizenship. Hence, no opportunity exists for the examiner or the judge to determine if what the new citizen swore was true was in fact false. Hence, the issue of fraud in the oath cannot become *res judicata* in the decree sought to be set aside. For fraud in the oath was not in issue in the proceedings, and neither was adjudicated nor could have been adjudicated.

Moreover, when an alien takes the oath with reservations or does not in good faith forswear loyalty and allegiance to the old country, the decree of naturalization is obtained by deceit. The proceeding itself is then founded on fraud. A fraud is perpetrated on the naturalization court.<sup>18</sup>

Federal law provides criminal penalties for:

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

[W]henever, whether for himself or another person not entitled thereto, knowingly issues, procures or obtains or applies for or otherwise attempts to procure or obtain naturalization, or citizenship, or a declaration of intention to become a citizen, or a certificate of arrival or any certificate or evidence of nationalization or citizenship, documentary or otherwise, or duplicates or copies of any of the foregoing....<sup>19</sup>

As for the penalties:

[The person s]hall be fined under ... title [18] or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism ... ), 20 years (if the offense was committed to facilitate a drug trafficking crime ... ), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.<sup>20</sup>

In its 2017 decision in *Maslenjak v. United States*,<sup>21</sup> the Supreme Court concluded that “someone ‘procure[s], contrary to law, naturalization’ when she obtains citizenship illegally”,<sup>22</sup> elaborating that:

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<sup>18</sup> 328 U.S. at 670-71 (footnote omitted).

<sup>19</sup> 18 U.S.C. § 1425(a)-(b).

<sup>20</sup> 18 U.S.C. § 1425.

<sup>21</sup> 582 U.S. 335, available at [https://www.supremecourt.gov/opinions/16pdf/16-309\\_h31i.pdf](https://www.supremecourt.gov/opinions/16pdf/16-309_h31i.pdf).

<sup>22</sup> *Id.* at 342.

The most natural understanding is that the illegal act must have somehow contributed to the obtaining of citizenship.... If whatever illegal conduct occurring within the naturalization process was a causal dead-end—if, so to speak, the ripples from that act could not have reached the decision to award citizenship—then the act cannot support a charge that the applicant obtained naturalization illegally. The conduct, though itself illegal, would not also make the obtaining of citizenship so. To get citizenship unlawfully ... is to get it through an unlawful means— and that is just to say that an illegality played some role in its acquisition.<sup>23</sup>

Denaturalization itself is a civil, not a criminal, procedure, and it does not constitute punishment. It is true that the Supreme Court, in its 1963 decision in *Kennedy v. Mendoza-Martinez*,<sup>24</sup> found unconstitutional two statutory provisions stripping citizens (both native-born and naturalized) of their citizenship who left the U.S. for the purpose of evading compulsory military service because “Congress has plainly employed the sanction of deprivation of nationality as a punishment ... without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments.”<sup>25</sup> The Court explained that:

[T]he legislative history and judicial expression with respect to every congressional enactment relating to the provisions in question dating back to 1865 establish that forfeiture of citizenship is a penalty for the act of leaving or staying outside the country to avoid the draft. This being so, the Fifth and Sixth Amendments mandate that this punishment cannot be imposed without a prior criminal trial and all its incidents.... If the sanction these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking.<sup>26</sup>

However, the U.S. District Court for the District of Maine concluded in its 1985 decision in *United States v. Klimavicius*,<sup>27</sup> that:

Setting aside naturalization for failure to comply with the particular prerequisites to the acquisition of citizenship is not a punishment; it merely represents an undoing of that which should not have been done in the first place. Since the denaturalization is not penal, no jury trial is required under the Sixth Amendment.<sup>28</sup>

As to *Mendoza-Martinez*, the district court explained in *Klimavicius* that:

It is very clear that although the outcome may be the same, a denaturalization proceeding differs significantly from the forfeiture of citizenship found

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<sup>23</sup> *Id.* (footnote omitted).

<sup>24</sup> 372 U.S. 144 (1963), available at <https://supreme.justia.com/cases/federal/us/372/144/>.

<sup>25</sup> *Id.* at 165-66 (footnote omitted).

<sup>26</sup> *Id.* at 167.

<sup>27</sup> 613 F. Supp. 1222 (D. Me. 1985), available at <https://law.justia.com/cases/federal/district-courts/FSupp/613/1222/2156913/>.

<sup>28</sup> *Id.* at 1224.

unconstitutional [in *Mendoza-Martinez*]. While recognizing the seriousness of a deprivation of citizenship, the denaturalization cases

have also recognized that there must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship. Failure to comply with any of these conditions renders the certificate of citizenship “‘illegally procured,’ and naturalization that is unlawfully procured can be set aside.” . . . This judicial insistence on strict compliance with the statutory conditions precedent to naturalization is simply an acknowledgment of the fact that Congress alone has the statutory authority to prescribe rules for naturalization, and the courts’ task is to assure compliance with the particular prerequisites to the acquisition of United States citizenship. [quoting the Supreme Court’s 1981 decision in *Fedorenko v. United States*<sup>29</sup>]<sup>30</sup>

## Naturalization, Denaturalization, and the Federal Courts

### Native-Born vs. Naturalized Citizens

In the Supreme Court’s 1824 decision in *Osborn v. United States Bank*,<sup>31</sup> the Court proclaimed that:

[A naturalized citizen] becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the National Legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it so far as respects the individual. The Constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might sue.<sup>32</sup>

In 1967, the Supreme Court in *Afroyim v. Rusk*<sup>33</sup> pointed to *Osborn*’s language as “declar[ing] in what appears to be a mature and well considered dictum that Congress, once a person becomes a citizen, cannot deprive him of that status”.<sup>34</sup> But Justice John Marshall Harlan II, writing in his dissent (joined by Justice Clark, Stewart and White), stated that:

Th[e majority’s] use of the dictum is entirely unpersuasive.... The central issue before the Court in *Osborn* was the right of the bank to bring its suit for equitable relief in the courts of the United States. In argument, counsel for *Osborn* had

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<sup>29</sup> 449 U.S. 490, 506-07 (1981) (footnote and citations omitted), available at <https://supreme.justia.com/cases/federal/us/449/490/>.

<sup>30</sup> 613 F. Supp. at 1223-24.

<sup>31</sup> 22 U.S. 738 (1824), available at <https://supreme.justia.com/cases/federal/us/22/738/>.

<sup>32</sup> *Id.* at 827.

<sup>33</sup> 387 U.S. 253 (1967), available at <https://supreme.justia.com/cases/federal/us/387/253/>.

<sup>34</sup> *Id.* at 261.

asserted that, although the bank had been created by the laws of the United States, it did not necessarily follow that any cause involving the bank had arisen under those laws. Counsel urged by analogy that the naturalization of an alien might as readily be said to confer upon the new citizen a right to bring all his actions in the federal courts.... Not surprisingly, the Court rejected the analogy, and remarked that an act of naturalization “does not proceed to give, to regulate, or to prescribe his capacities,” since the Constitution demands that a naturalized citizen must in all respects stand “on the footing of a native.”... The Court plainly meant no more than that counsel’s analogy is broken by Congress’ inability to offer a naturalized citizen rights or capacities which differ in any particular from those given to a native-born citizen by birth....

Any wider meaning, so as to reach the questions here [as to whether a citizen can be expatriated against their will], wrenches the dictum from its context and attributes to the Court an observation extraneous even to the analogy before it. Moreover, the construction given to the dictum by the Court today requires the assumption that the Court in *Osborn* meant to decide an issue which had to that moment scarcely been debated, to which counsel in *Osborn* had never referred, and upon which no case had ever reached the Court.... By any standard, the dictum cannot provide material assistance to the Court’s position in the present case [that a citizen cannot be involuntarily expatriated].<sup>35</sup>

Be that as it may, the Supreme Court also quoted *Osborn*’s dictum approvingly in its 1898 decision in *United States v. Wong Kim Ark*<sup>36</sup> -- the well-known Fourteenth Amendment birthright citizenship case. The Court quoted *Osborn*’s language for the proposition that “[t]he power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away”.<sup>37</sup> The Court concluded that “Congress having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, *a fortiori* no act or omission of Congress, as to providing for the naturalization of parents or children of a particular race, can affect citizenship acquired as a birthright, by virtue of the Constitution itself, without any aid of legislation.”<sup>38</sup>

Thus, the Supreme Court utilized *Osborn*’s dictum to craft its own dictum in *Wong Kim Ark* – as that case involved the citizenship status of persons born in the United States. Justice Harlan wrote in his *Afroyim* dissent that:

[T]he Court can obtain little support from its invocation of the dictum from ... *Wong Kim Ark*.... The central issue there was whether a child born of Chinese nationals domiciled in the United States is an American citizen if its birth occurs in this country. The dictum upon which the Court relies, which consists essentially of a reiteration of the dictum from *Osborn*, can therefore scarcely be considered a reasoned consideration of the issues now before the Court. Moreover, the dictum

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<sup>35</sup> *Id.* at 275-77 (citations and footnote omitted).

<sup>36</sup> 169 U.S. 649 (1898), available at <https://supreme.justia.com/cases/federal/us/169/649/#703>.

<sup>37</sup> *Id.* at 703.

<sup>38</sup> *Id.*

could conceivably be read to hold only that no power to expatriate an unwilling citizen was conferred either by the Naturalization Clause or by the Fourteenth Amendment.... [T]he dictum must be read in light of the ... opinion for the Court, written by Mr. Justice McKenna, in [its 1915 decision in] *Mackenzie v. Hare*.<sup>39</sup> Despite counsel's invocation of *Wong Kim Ark* ... the Court held in *Mackenzie* that marriage between an American citizen and an alien, unaccompanied by any intention of the citizen to renounce her citizenship, nonetheless permitted Congress to withdraw her nationality.... It seems that neither Mr. Justice McKenna, who became a member of the Court after the argument but before the decision of *Wong Kim Ark* ... nor Mr. Chief Justice White, who joined the Court's opinions in both *Wong Kim Ark* and *Mackenzie*, thought that *Wong Kim Ark* required the result reached by the Court today. Nor, it must be supposed, did the other six members of the Court who joined *Mackenzie*, despite *Wong Kim Ark*.<sup>40</sup>

Be that as it may, the Supreme Court also quoted or cited *Osborn*'s dictum approvingly in 1913 in *Luria v. United States*<sup>41</sup> and in 1964 in *Schneider v. Rusk*<sup>42</sup>.

The Court in *Schneider* concluded that:

This statute proceeds on the impermissible assumption that naturalized citizens as a class are less reliable, and bear less allegiance to this country than do the native born. This is an assumption that is impossible for us to make. Moreover, while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is "so unjustifiable as to be violative of due process."... A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship. The discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may. It creates indeed a second-class citizenship. Living abroad, whether the citizen be naturalized or native born, is no badge of lack of allegiance, and in no way evidences a voluntary renunciation of nationality and allegiance.<sup>43</sup>

*Schneider* regarded a provision of the INA providing that "[a] person who has become a national by naturalization shall lose his nationality by ... having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated".<sup>44</sup> The Supreme Court "start[ed] from the premise that the rights of citizenship of the native born and of the naturalized person are of the same dignity, and are coextensive" and that "[t]he only difference drawn by the Constitution is that only the 'natural born' citizen is eligible to be President".<sup>45</sup>

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<sup>39</sup> 239 U.S. 299 (1915), available at <https://supreme.justia.com/cases/federal/us/239/299/>.

<sup>40</sup> 387 U.S. at 277 n.17.

<sup>41</sup> 231 U.S. 9, 22 (1913), available at <https://supreme.justia.com/cases/federal/us/231/9/>.

<sup>42</sup> 377 U.S. 163, 166 (1964), available at <https://supreme.justia.com/cases/federal/us/377/163/>.

<sup>43</sup> *Id.* at 168-69 (citation omitted).

<sup>44</sup> *Id.* at 164 (INA § 352(a)(1)) (emphasis omitted).

<sup>45</sup> *Id.* at 165 (citation omitted).

Though the Court did not quote *Osborn* in its 1946 decision in *Knauer*, it concluded in *Knauer* that:

Citizenship obtained through naturalization is not a second-class citizenship.... [I]t is plain that citizenship obtained through naturalization carries with it the privilege of full participation in the affairs of our society, including the right to speak freely, to criticize officials and administrators, and to promote changes in our laws, including the very Charter of our Government. Great tolerance and caution are necessary lest good faith exercise of the rights of citizenship be turned against the naturalized citizen and be used to deprive him of the cherished status.<sup>46</sup>

Taken to the ultimate extreme, the insistence that naturalized citizens can never be treated differently than native-born citizens (thus being relegated to “second-class” citizenship) leads to the conclusion that naturalized citizens can only be expatriated in scenarios in which the citizenship of the native-born is equally at risk.

This was the view held by Supreme Court Justice Wiley Rutledge, Jr. In his dissent in *Knauer*, he wrote that while “[n]aturalized citizens are no more free to become traitors or criminals than [the native-born], and may be punished as they are when they commit the same offense”, “any process which takes away their citizenship for causes or by procedures not applicable to native-born citizens places them in a separate and an inferior class.”<sup>47</sup> As “the power to naturalize is not the power to denaturalize”, “[t]he act of [naturalization] must be taken as final”.<sup>48</sup>

This extreme view has never been held by a majority of the Supreme Court. Even when overturning the denaturalization of communists and Nazis, the Court made clear that the government could successfully denaturalize citizens should it satisfy the appropriate standard of proof.

In *Baumgartner*, the Supreme Court explained that as “[t]here is no ‘right to naturalization unless all statutory requirements are complied with[.]’”,<sup>49</sup> “[i]f a certificate is procured when the prescribed qualifications have no existence in fact, it may be canceled by suit.”<sup>50</sup> In its 1943 decision in *Schneiderman v. United States*<sup>51</sup> (overturning the denaturalization of a communist) the Supreme Court implored that:

This is not a naturalization proceeding in which the Government is being asked to confer the privilege of citizenship upon an applicant. Instead, the Government seeks to turn the clock back twelve years after full citizenship was conferred upon petitioner by a judicial decree, and to deprive him of the priceless benefits that derive from that status. In its consequences, it is more serious than a taking of one’s

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<sup>46</sup> 328 U.S. at 658.

<sup>47</sup> *Id.* at 677.

<sup>48</sup> *Id.*

<sup>49</sup> 322 U.S. at 672 (quoting the Court’s 1917 decision in *United States v. Ginsberg*, 243 U.S. 472, 475 (1917) (“[n]o alien has the **slightest** right to naturalization” (emphasis added)), available at <https://supreme.justia.com/cases/federal/us/243/472/>).

<sup>50</sup> *Id.* (quoting the Court’s 1926 decision in *Tutun v. United States*, 270 U.S. 568, 578 (1926), available at <https://supreme.justia.com/cases/federal/us/270/568/>).

<sup>51</sup> 320 U.S. 118 (1943), available at <https://supreme.justia.com/cases/federal/us/320/118/>.

property, or the imposition of a fine or other penalty. For it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many, it is regarded as the highest hope of civilized men.<sup>52</sup>

But the Court in *Schneiderman* still made clear that “[t]his does not mean that, once granted ... citizenship cannot be revoked or canceled on legal grounds under appropriate proof.”<sup>53</sup>

### *Afroyim v. Rusk*

But, what of *Afroyim v. Rusk*? In this 1967 decision, the Supreme Court held that “the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.”<sup>54</sup>

*Afroyim* involved a citizen who naturalized in 1926 and then in 1951 voted in an election for the Knesset, Israel’s legislature. When he later applied for renewal of his U.S. passport, the State Department refused to grant it on the ground that he had lost his American citizenship by virtue of the Nationality Act of 1940, which provided that a United States citizen shall “lose” his citizenship if he votes “in a political election in a foreign state”.<sup>55</sup>

The Court stated that “[t]he fundamental issue ... here ... is whether Congress can, consistently with the Fourteenth Amendment, enact a law stripping an American of his citizenship which he has never voluntarily renounced or given up.”<sup>56</sup> It explained that:

The majority in [the Court’s 1958 decision in *Perez v. Brownell*<sup>57</sup>] held that Congress could do this [when] withdrawal of citizenship is “reasonably calculated to effect the end that is within the power of Congress to achieve.”... That conclusion was reached by this chain of reasoning: Congress has an implied power to deal with foreign affairs as an indispensable attribute of sovereignty; this implied power, plus the [Constitution’s] Necessary and Proper Clause, empowers Congress to regulate voting by American citizens in foreign elections; involuntary expatriation is within the “ample scope” of “appropriate modes” Congress can adopt to effectuate its general regulatory power. . . . Then, upon summarily concluding that “there is nothing in the . . . Fourteenth Amendment to warrant drawing from it a restriction upon the power otherwise possessed by Congress to withdraw citizenship,” . . . the majority specifically rejected the “notion that the power of Congress to terminate citizenship depends upon the citizen’s assent[.]”<sup>58</sup>

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<sup>52</sup> *Id.* at 122.

<sup>53</sup> *Id.*

<sup>54</sup> 387 U.S. at 268.

<sup>55</sup> Pub. L. No. 76-853, § 401(e), available at <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/54/STATUTE-54-Pg1137.pdf>.

<sup>56</sup> 387 U.S. at 256.

<sup>57</sup> 356 U.S. 44 (1958), available at <https://supreme.justia.com/cases/federal/us/356/44/>.

<sup>58</sup> 387 U.S. at 256-57 (citations omitted).

The *Afroyim* Court concluded that *Perez* needed to be overturned:

Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world -- as a man without a country.... The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship.<sup>59</sup>

But how to justify the rejection of its own precedent? The Court stated that:

[W]e reject the idea expressed in *Perez* that, aside from the Fourteenth Amendment, Congress has any general power, express or implied, to take away an American citizen's citizenship without his assent. This power cannot, as *Perez* indicated, be sustained as an implied attribute of sovereignty possessed by all nations. Other nations are governed by their own constitutions, if any, and we can draw no support from theirs. In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship.<sup>60</sup>

The Court then looked to the Fourteenth Amendment, acknowledging that its “undeniable purpose” was “to make citizenship of Negroes permanent and secure” but contending that this purpose “would be frustrated ... [if] the Government c[ould] rob a citizen of his citizenship without his consent by simply proceeding to act under an implied general power to regulate foreign affairs or some other power generally granted”.<sup>61</sup> The Court also acknowledged that “the framers of the Amendment were not particularly concerned with the problem of expatriation”, but argued that “it seems undeniable from the language they used that they wanted to put citizenship beyond the power of any governmental unit to destroy.”<sup>62</sup> The Court found “no indication in [the Amendment’s] words of a fleeting citizenship, good at the moment it is acquired but subject to destruction by the Government at any time”, concluding rather that the Amendment could “most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it.”<sup>63</sup> The Court reasoned that “[t]o uphold Congress’ power to take away a man’s citizenship because he voted in a foreign election ... would be equivalent to holding that Congress has the power to ‘abridge,’ ‘affect,’ ‘restrict the effect of,’ and ‘take . . . away’ citizenship”,<sup>64</sup> and concluded that “the Fourteenth Amendment prevents Congress from doing any of these things”.<sup>65</sup>

Aram Gavoort, now the Associate Dean for Academic Affairs and Associate Professor of Law at the George Washington University School of Law, and Daniel Miktus, now a partner at the Akerman law firm, have written that “[i]n *Afroyim v. Rusk*, the Supreme Court seemed to indicate

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<sup>59</sup> *Id.* at 267-68.

<sup>60</sup> *Id.* at 257.

<sup>61</sup> *Id.* at 263.

<sup>62</sup> *Id.* at 262.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 267.

<sup>65</sup> *Id.*

that the Fourteenth Amendment precluded the federal government from cancelling a naturalized individual's citizenship".<sup>66</sup> But they explained that "[h]owever, the Supreme Court later read the holding of *Afroyim* narrowly, insisting that this is not the case when citizenship was obtained illegally or by willful misrepresentation of material facts",<sup>67</sup> citing the Court's 1981 decision in *Fedorenko*, in which "the Court explicitly held that 'district courts lack equitable discretion to refrain from entering a judgment of denaturalization against a naturalized citizen whose citizenship was procured illegally or by willful misrepresentation of material facts.'"<sup>68</sup>

Gavoor and Miktus concluded that "[a]ccordingly, obtaining citizenship illegally or by willful misrepresentation appears to be the only grounds upon which naturalization may constitutionally be cancelled."<sup>69</sup> *Fedorenko* seems to bear out their conclusion.

In *Fedorenko*, the Supreme Court explained that:

On the one hand, our decisions have recognized that the right to acquire American citizenship is a precious one, and that, once citizenship has been acquired, its loss can have severe and unsettling consequences. [citing the Court's decisions in *Baumgartner*, *Schneiderman*, and other cases] For these reasons, we have held that the Government "carries a heavy burden of proof in a proceeding to divest a naturalized citizen of his citizenship."<sup>70</sup> ....

At the same time, our cases have also recognized that there must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship. Failure to comply with any of these conditions renders the certificate of citizenship "illegally procured," and naturalization that is unlawfully procured can be set aside.<sup>71</sup>

The Supreme Court in *Fedorenko* quoted language from its decision in *Ginsberg* to the effect that "every certificate of citizenship must be treated as granted upon condition that the government may challenge it . . . and demand its cancellation unless issued in accordance with [statutory] requirements",<sup>72</sup> and explained that:

This judicial insistence on strict compliance with the statutory conditions precedent to naturalization is simply an acknowledgment of the fact that Congress alone has the constitutional authority to prescribe rules for naturalization....

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<sup>66</sup> Aram Gavoor and Daniel Miktus, *Snap: How the Moral Elasticity of the Denaturalization Statute Goes Too Far*, 23 Wm. & Mary Bill Rts. J. 637, 654 (2015), available at <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1729&context=wmborj>.

<sup>67</sup> *Id.* (footnote omitted).

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

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

<sup>70</sup> 449 U.S. at 505 (quoting *Costello v. United States*, 365 U.S. 265, 269 (1961), available at <https://supreme.justia.com/cases/federal/us/365/265/>).

<sup>71</sup> *Id.* at 506 (quoting *Afroyim*, 387 U.S. at 267 n.23, and citing other decisions of the Court).

<sup>72</sup> *Id.* (quoting *Ginsberg*, 243 U.S. at 474-75).

Thus, what may at first glance appear to be two inconsistent lines of cases actually reflect our consistent recognition of the importance of the issues that are at stake -- for the citizen as well as the Government -- in a denaturalization proceeding.<sup>73</sup>

The *Fedorenko* Court then noted that:

In case after case, we have rejected lower court efforts to moderate or otherwise avoid the statutory mandate of Congress in denaturalization proceedings.... We repeat here what we said in [*Ginsberg*]:

“An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon the terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.[”]<sup>74</sup>

### **“Clear, Unequivocal and Convincing” Evidence**

The Supreme Court explained in *Baumgartner* that:

The denial of application for citizenship because the judicial mind has not been satisfied that the test of allegiance has been met presents a problem very different from the revocation of the naturalization certificate once admission to the community of American citizenship has been decreed.... New relations and new interests flow once citizenship has been granted.<sup>75</sup>

The Court concluded that “[a]ll that should not be undone unless the proof is compelling that that which was granted was obtained in defiance of Congressional authority.”<sup>76</sup>

The government must meet a higher standard of proof in denaturalizing a citizen than in rejecting an applicant for naturalization in the first instance – in the words of the Supreme Court in *Costello* and *Fedorenko*, the government “carries a heavy burden of proof in a proceeding to divest a naturalized citizen of his citizenship.”<sup>77</sup> But, what exactly is the burden? And what is the burden when it relates to whether the naturalized citizen was truly attached to the principles of the Constitution when naturalized? As the Supreme Court explained in *Baumgartner*:

Nonfulfillment of specific conditions, like time of residence or the required number of supporting witnesses, are easily established, and, when established, leave no room for discretion, because Congress has left no area of discretion. But, where the

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<sup>73</sup> *Id.* at 506-07.

<sup>74</sup> *Id.* at 517-18 (quoting *Ginsberg*, 243 U.S. at 474-75).

<sup>75</sup> 322 U.S. at 675.

<sup>76</sup> *Id.*

<sup>77</sup> 449 U.S. at 505 (quoting *Costello*, 365 U.S. at 269).

claim of “illegality” really involves issues of belief or fraud, proof is treacherous, and objective judgment, even by the most disciplined minds, precarious.<sup>78</sup>

The Supreme Court in *Schneiderman* set forth the applicable burden. It explained that:

[Naturalization] once conferred should not be taken away without the clearest sort of justification and proof. So, whatever may be the rule in a naturalization proceeding ... in an action instituted ... for the purpose of depriving one of the precious right of citizenship previously conferred, we believe the facts and the law should be construed as far as is reasonably possible in favor of the citizen. Especially is this so when the attack is made long after the time when the certificate of citizenship was granted and the citizen has meanwhile met his obligations and has committed no act of lawlessness.... [The government’s] burden must be met with evidence of a clear and convincing character that, when citizenship was conferred ... it was not done in accordance with strict legal requirements.<sup>79</sup>

The Court noted that:

This is the first case to come before us in which the Government has sought to set aside a naturalization years after it was granted on a charge that the finding of attachment [to the Constitution] was erroneous. [Thus], for the first time, we have had to consider the nature and scope of the Government’s right in a denaturalization proceeding to reexamine a finding and judgment of attachment upon a charge of illegal procurement.<sup>80</sup>

The Court found that:

If a finding of attachment can be so reconsidered in a denaturalization suit, our decisions make it plain that the Government needs more than a bare preponderance of the evidence to prevail.... [The Supreme Court stated in its decision in *Johannessen*] that a certificate of citizenship is “an instrument granting political privileges, and open like other public grants to be revoked if and when it shall be found to have been unlawfully or fraudulently procured. It is in this respect closely analogous to a public grant of land[.]”.... To set aside ... a grant [of land], the evidence must be “clear, unequivocal, and convincing” – “it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt.”<sup>81</sup> This is so because rights once conferred should not be lightly revoked. And more especially is this true when the rights are precious and when they are conferred by solemn adjudication, as is the situation when citizenship is granted.<sup>82</sup>

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<sup>78</sup> 322 U.S. at 675.

<sup>79</sup> 320 U.S. at 122 (citation omitted).

<sup>80</sup> *Id.* at 123-24.

<sup>81</sup> This latter quote is from the Supreme Court’s 1888 decision in *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 300 (1888), available at <https://supreme.justia.com/cases/federal/us/125/273/>, and the Court’s 1887 decision in *Maxwell Land-Grant Case*, 121 U.S. 325, 381 (1887), available at <https://supreme.justia.com/cases/federal/us/121/325/>.

<sup>82</sup> 320 U.S. at 125 (citations omitted).

The Court concluded that the government “must sustain the heavy burden which then rests upon it to prove lack of attachment by ‘clear, unequivocal, and convincing’ evidence which does not leave the issue in doubt.”<sup>83</sup>

The Court in *Baumgartner* justified this standard by stating:

Nothing that we are now deciding is intended to weaken in the slightest the alertness with which admission to American citizenship should be safeguarded. But we must be equally watchful that citizenship, once bestowed, should not be in jeopardy nor in fear of exercising its American freedom through a too easy finding that citizenship was disloyally acquired.<sup>84</sup>

And the Court in *Fedorenko* stated that “[a]ny less exacting standard would be inconsistent with the importance of the right that is at stake in a denaturalization proceeding.”<sup>85</sup> But, in 1980, one year prior to *Fedorenko*, the Supreme Court decided *Vance v. Terrazas*,<sup>86</sup> in which it considered a provision then in the INA that “a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by . . . taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof.”<sup>87</sup> The INA provided that “the burden shall be upon the person or party claiming that such loss [of citizenship] occurred[] to establish such claim by a preponderance of the evidence.”<sup>88</sup>

The *Terrazas* Court had to decide whether the Constitution “permits Congress to legislate with respect to expatriation proceedings by providing [such] standard of proof”.<sup>89</sup> The Court explained that “the Court of Appeals held that Congress was without constitutional authority to prescribe the standard of proof in expatriation proceedings and that the proof in such cases must be by clear and convincing evidence”.<sup>90</sup> As to this, the Court was “in fundamental disagreement” with the court of appeals.<sup>91</sup>

As to the Supreme Court’s 1958 ruling in *Nishikawa v. Dulles*<sup>92</sup> that, as the *Terrazas* Court described it, “proof of a voluntary expatriating act [must be] by clear and convincing evidence”,<sup>93</sup> the *Terrazas* Court explained that *Nishikawa* decision “was not rooted in the Constitution” and that the Court in *Nishikawa* had itself “noted . . . that it was acting in the absence of legislative guidance”.<sup>94</sup> As to *Afroyim*, the Court explained that “we [do not] agree with the Court of Appeals that, because . . . Congress is constitutionally devoid of power to impose expatriation on a citizen,

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<sup>83</sup> *Id.* at 135.

<sup>84</sup> 322 U.S. at 676.

<sup>85</sup> 449 U.S. at 505-06.

<sup>86</sup> 444 U.S. 252 (1980), available at <https://supreme.justia.com/cases/federal/us/444/252/>.

<sup>87</sup> *Id.* at 254 (INA § 349(a)(2), 8 U.S.C. § 1481(a)(2)).

<sup>88</sup> *Id.* at 254 n.1 (INA § 349(c), 8 U.S.C. § 1481(c)).

<sup>89</sup> *Id.* at 255.

<sup>90</sup> *Id.* at 264.

<sup>91</sup> *Id.*

<sup>92</sup> 356 U.S. 129 (1958), available at <https://supreme.justia.com/cases/federal/us/356/129/>.

<sup>93</sup> *Terraras*, 444 U.S. at 264.

<sup>94</sup> *Id.* at 265.

it is also without power to prescribe the evidentiary standards to govern expatriation proceedings.”<sup>95</sup>

The Supreme Court in *Terrazas* wrote that:

We are unable to conclude that the specific evidentiary standard provided by Congress . . . is invalid under either the Citizenship Clause or the Due Process Clause of the Fifth Amendment. . . . [E]xpatriation proceedings are civil in nature and do not threaten a loss of liberty. Moreover, as we have noted, ***Nishikawa* did not purport to be a constitutional ruling, and the same is true of similar rulings in related areas.** None of these cases involved a congressional judgment . . . that the preponderance standard of proof provides sufficient protection for the interest of the individual in retaining his citizenship.<sup>96</sup>

In its reference to “similar rulings in related areas”, the Court cited its decision in *Schneiderman* for the area of “denaturalization”.<sup>97</sup> Was the Court in *Terrazas* telling Congress that it could permissibly lower the government’s standard of proof in denaturalization cases to a preponderance of the evidence? In its 1980 decision in *United States v. Banafshe*,<sup>98</sup> the Ninth Circuit Court of Appeals concluded that the Supreme Court was indeed saying exactly so.

In *Banafshe*, the Ninth Circuit considered a denaturalization provision then in the INA providing in part that:

If a person who shall have been naturalized shall, within five years after such naturalization, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such person to reside permanently in the United States . . . .<sup>99</sup>

The court concluded that “[t]he analysis employed by the Supreme Court in . . . *Terrazas* . . . eliminated any doubt about the validity of” the provision,<sup>100</sup> elaborating that:

Like *Banafshe*, *Terrazas* argued that the standard of proof should be the clear and convincing evidence standard employed by the court in earlier cases . . . . The [Supreme] Court held, however, that even though it had previously held that proof of a voluntary expatriating act should be by clear and convincing evidence, Congress remained free to supplant the Court’s evidentiary standards because those standards were judge-made rules that were not rooted in the Constitution . . . .

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<sup>95</sup> *Id.* (citation omitted).

<sup>96</sup> *Id.* at 266 (citations omitted) (emphasis added).

<sup>97</sup> *Id.*

<sup>98</sup> 616 F.2d 1143 (9th Cir. 1980), available at <https://law.justia.com/cases/federal/appellate-courts/F2/616/1143/299042/>.

<sup>99</sup> *Id.* at 1145 (8 U.S.C. § 1451(d)); Pub. L. No. 59-338, § 15, available at <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/34/STATUTE-34-Pg596.pdf>.

<sup>100</sup> *Id.* at 1146.

In light of this, Banafshe errs in contending that Congress cannot supplant . . . the “clear and convincing” standard announced in [*Schneiderman*]. The [Supreme C]ourt expressly noted in *Terrazas* that *Schneiderman* was an expression of the Court’s own preference for the appropriate standard of proof, and that Congress did not exceed its powers by substituting its own judgment about the proper standard . . .<sup>101</sup>

## Denaturalization Based on Post-Naturalization Behavior

In its 1944 decision in *Orth v. United States*,<sup>102</sup> the Fourth Circuit Court of Appeals provided a perfect lens through which to consider denaturalization based on post-naturalization behavior:

Legal analogies, always dangerous, are yet sometimes quite helpful. A proceeding for denaturalization is more closely related, in the field of marriage, to a proceeding to annul a marriage than to a proceeding for divorce. The denaturalization proceeding deals, as to operative facts, with the situation existing at the time of naturalization, subsequent and supervening acts and conduct can at best rise only to the level of evidential facts.<sup>103</sup>

By such analogizing, the Fourth Circuit in *Orth* brought up the inherent challenge of relying on such post-naturalization evidence: “There would be few divorces if the applicant were required not merely to prove conduct after the ceremony that is in itself a statutory ground for divorce but also to show ‘by clear and unequivocal evidence’ that this conduct proves that the marriage vows, when taken, were not taken in good faith” (*Orth* being decided before the age of no-fault divorce).<sup>104</sup> The challenge lies in part because it is not always appropriate to utilize post-naturalization behavior as evidence of state of mind at the time of naturalization. As the Fourth Circuit noted in its decision, “[m]any a man (even some women) have taken the marriage vows in the utmost good faith and yet, later, have been guilty of adultery, cruelty, desertion, or other statutory ground of divorce”!<sup>105</sup> However, the challenge does not mean that post-naturalization behavior cannot or should not be utilized. As the court concluded in *Orth*, “[n]or is it to be questioned that the actions, statements, writings and other conduct subsequent to naturalization are properly admissible to prove a state of mind at the time of taking the oath of allegiance to the United States, and to show the purpose for which one sought citizenship.”<sup>106</sup>

Gavoor and Mitkus have argued that “[i]n cases where evidence of post-naturalization membership is necessary to prove its case, the non-existence of corroborating evidence should be a strong indication that such membership or advocacy only began after naturalization, and thus, denaturalization is inappropriate”,<sup>107</sup> and in the same piece also advocated the more extreme

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<sup>101</sup> *Id.*

<sup>102</sup> 142 F.2d 969 (4th Cir. 1944), available at <https://www.casemine.com/judgement/us/5914a23eadd7b049346953dc>.

<sup>103</sup> *Id.* at 973.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* (citations omitted).

<sup>107</sup> Gavoor and Mitkus at 660.

position that “a naturalized citizen’s associations after naturalization have no relevant bearing on his frame of mind when he naturalized.”<sup>108</sup>

While the Supreme Court has never gone to this extreme, it has expressed dubiousness as to reliance on post-naturalization behavior. The Court stated in *Baumgartner* that:

[D]enaturalization [when involving issues of belief or fraud, rather than ones such as time of residence or the required number of supporting witnesses] calls for weighty proof, especially when the proof of a false or fraudulent oath rests predominantly not upon contemporaneous evidence, but is established by later expressions of opinion argumentatively projected, and often through the distorting and self-deluding medium of memory, to an earlier year when qualifications for citizenship were claimed, tested and adjudicated.<sup>109</sup>

[T]he weakness of the proof as to Baumgartner’s state of mind at the time he took the oath of allegiance can be removed, if at all, only by a presumption that disqualifying views expressed after naturalization were accurate representations of his views when he took the oath. The logical validity of such a presumption is, at best, dubious . . . .<sup>110</sup>

The Court also expressed its doubts in *Knauer*:

[A]s *Baumgartner* . . . indicates, utterances made in years subsequent to the oath are not readily to be charged against the state of mind existing when the oath was administered . . . . [E]ven political utterances, which might be some evidence of a false oath if they clustered around the date of naturalization, are more and more unreliable as evidence of the perjurious falsity of the oath the further they are removed from the date of naturalization.<sup>111</sup>

[T]he case against Knauer is not constructed solely from his activities subsequent to . . . the date of his naturalization. The evidence prior to his naturalization, that which clusters around that date, and that which follows in the next few years is completely consistent. It conforms to the same pattern. We do not have to guess whether, subsequent to naturalization, he had a change of heart and threw himself wholeheartedly into a new cause. We have clear, convincing, and solid evidence that, at all relevant times, he was a thorough-going Nazi bent on sponsoring Hitler’s cause here.<sup>112</sup>

However, in neither case did the Supreme Court categorically bar denaturalization based on post-naturalization behavior. In fact, Justice Murphy explained in his concurrence in *Baumgartner* that it was simply a matter of a heightened standard of proof:

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<sup>108</sup> *Id.* at 664.

<sup>109</sup> 322 U.S. at 675.

<sup>110</sup> *Id.* at 677.

<sup>111</sup> 328 U.S. at 659-60 (citation omitted).

<sup>112</sup> *Id.* at 668.

It obviously is more difficult to conform to the standard set forth in the *Schneiderman* case by mere proof of a state of mind subsequent to naturalization than by proof of facts existing prior to or at the time of naturalization. But that does not excuse a failure to meet that standard. The naturalized citizen has as much right as the natural born citizen to exercise the cherished freedoms of speech, press, and religion, and, without “clear, unequivocal, and convincing” proof that he did not bear or swear true allegiance to the United States at the time of naturalization, he cannot be denaturalized.<sup>113</sup>

In its 1949 decision in *Bechtel v. United States*,<sup>114</sup> the Ninth Circuit Court of Appeals noted that “[t]he dangers of reliance upon . . . retrospective proof of lack of allegiance at an earlier date were stated in *Baumgartner* . . . and in *Knauer*”,<sup>115</sup> but concluded that whether post-naturalization “membership and activity in the [pro-Nazi German-American] Bund sufficiently evidenced a state of mind at the time his naturalization certificate was issued which was incompatible with his oath and representations of attachment to the United States Constitution depends in part upon the circumstances and conditions of his membership.”<sup>116</sup>

In 1950, the Second Circuit Court of Appeals concluded in *United States v. Eichenlaub*<sup>117</sup> that:

[T]he majority of the Supreme Court in the *Baumgartner* case. . . . did not hold that evidence of subsequent acts would as a matter of law be insufficient proof of an earlier fraudulent intent. Rather, the majority simply held that, on the facts presented, evidence as to *Baumgartner*’s attitude after 1932 afforded “insufficient proof that in 1932 he had knowing reservations in forswearing his allegiance to the Weimar Republic and embracing allegiance to this country.” . . . [It was rather t]he concurring opinion [in *Baumgartner*], expressing the views of four of the Justices, . . . [that] does indeed strongly imply that proof of subsequent statements or attitudes can never support denaturalization on the ground of fraud.<sup>118</sup>

In its 1943 decision in *United States ex rel. Harrington v. Schlotfeldt*,<sup>119</sup> a World War II-era Nazi denaturalization case, the Seventh Circuit Court of Appeals explained why post-naturalization behavior in appropriate instances can and should provide sufficient evidence to meet the government’s burden:

Certainly [the naturalized citizen’s] allegiance to our Government and the principles of its Constitution can not have been very deep or sincere if it could so easily be supplanted within a few years by an ideology which is the complete antithesis of everything for which our Constitution stands. That the conduct and

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<sup>113</sup> 322 U.S. at 679-80.

<sup>114</sup> 176 F.2d 741 (9<sup>th</sup> Cir. 1949), available at <https://www.casemine.com/judgement/us/5914a0feadd7b049346823f7>.

<sup>115</sup> *Id.* at 744.

<sup>116</sup> *Id.*

<sup>117</sup> 180 F.2d 314 (2<sup>nd</sup> Cir. 1950).

<sup>118</sup> *Id.* at 316-17 (citations omitted).

<sup>119</sup> 136 F.2d 935 (7<sup>th</sup> Cir. 1943), available at <https://law.justia.com/cases/federal/appellate-courts/F2/136/935/1511549/>.

expression evidencing such ideology occurred years after the issuance of the certificate of naturalization to appellant is no bar to the cancellation of that certificate. The oath of allegiance and the renunciation of former allegiance must be made without mental reservation. If it appear subsequently that the maker fails in allegiance, fidelity or faith, it may be fairly presumed that he did not absolutely and entirely renounce his former allegiance, and this presumption is all the stronger when the period which has elapsed since the oath is longer. [citing the U.S. District Court for the Southern District of New York's 1943 decision in *United States v. Kuhn*<sup>120</sup>] It is well settled that intent at the time of naturalization may be shown by subsequent acts and declarations.<sup>121</sup>

The Seventh Circuit was approving of the Ninth Circuit's determination in its 1920 decision in *Schurmann v. United States*<sup>122</sup> "that the District Court was justified in holding that a naturalized citizen . . . by reason of his attitude and declarations and expressions in 1916 and 1917 . . . swore falsely in 1904 when he declared that he absolutely and entirely renounced all allegiance to the German government".<sup>123</sup> In *Schurmann*, the Ninth Circuit made the telling observation, quoted extensively in *Schlotfeldt*, that:

Under the circumstances of the case, the only way of arriving at what the fidelity and allegiance of Schurmann were in December, 1904, is by trying out his attitude of mind and heart in the later years of 1916 and 1917, when, under then existing conditions men were **specially aroused to give utterance to their real sentiments and to avow loyalty to one or another of the belligerent nations**. Prior to 1916 his life seems to have been without special event indicative of patriotic feeling. But it was in the crucial times of 1917 that the respondent failed in the fundamental obligation to his oath of true faith and allegiance in 1904 . . . . [A]fter war was declared between the United States and Germany, upon being asked by an American whether it were possible that he would not defend the shores of the United States, [he] replied:

"Well . . . I will tell you. I have sworn allegiance to your flag or country; but I am going to tell you this much. That I didn't swear away my birthright. \* \* \* And this is the crisis where every German . . . this is the time that it is up to him to defend the fatherland."<sup>124</sup>

As the Ninth Circuit explained:

**One who spoke in that way, and whose frequent expressions were so plainly against the United States and in favor of Germany, must have taken the oath of full faith and allegiance with a reserved determination, to be kept down, but**

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<sup>120</sup> 49 F. Supp. 407 (S.D.N.Y. 1943), available at <https://law.justia.com/cases/federal/district-courts/FSupp/49/407/1465906/>.

<sup>121</sup> 136 F.2d at 938 at (footnote omitted) (citing the Supreme Court's 1913 decision in *Luria* and other federal cases).

<sup>122</sup> 264 F. 917 (9<sup>th</sup> Cir. 1920), available at <https://app.midpage.ai/document/schurmann-v-united-states-8815670?refG=true>.

<sup>123</sup> *Id.* at 920.

<sup>124</sup> *Id.* (emphasis added).

**nurtured, until a momentous time might come.** In years, however, the time did come, and the criterion of original fraud must be the later conduct, which, in its relation to the earlier attitude, will furnish safe ground for judgment.<sup>125</sup>

Of course, as a 1951 law student note in the Columbia Law Review pointed out, “although residence or citizenship would ordinarily increase one’s attachment to the Constitution, the possibility of subsequent disaffection should not be disregarded.”<sup>126</sup>

### **Statutory Presumptions that Post-Naturalization Behavior Justifies Denaturalization**

The INA provides that:

If a person ... shall within five years next following ... naturalization become a member of or affiliated with any organization, membership in or affiliation with which at the time of naturalization would have precluded such person from naturalization under the provisions of [INA § 313<sup>127</sup>] ... , it shall be considered prima facie evidence that such person was not attached to the principles of the Constitution of the United States and was not well disposed to the good order and happiness of the United States at the time of naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation....<sup>128</sup>

The INA also provides that:

[R]efusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person has

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<sup>125</sup> *Id.* (emphasis added) (citations omitted).

<sup>126</sup> Note, *The Internal Security Act of 1950*, 51 Colum. L. Rev. 606, 645 (1951).

<sup>127</sup> 8 U.S.C. § 1424. A streamlined list of the types of organizations described in INA § 313 would be inclusive of any Communist party or association or any other totalitarian party, as well as any organization that:

- advocates or teaches opposition to all organized government,
- advocates the economic, international, and governmental doctrines of world communism or the establishment in the U.S. of a totalitarian dictatorship,
- advocates or teaches:
  - the overthrow by force or violence or other unconstitutional means of the U.S. Government or of all forms of law,
  - the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the U.S. Government or of any other organized government because of his or their official character,
  - the unlawful damage, injury, or destruction of property, or
  - sabotage, or
- writes, circulates, distributes, prints, publishes, or displays any written or printed matter advocating or teaching any of the above doctrines.

<sup>128</sup> INA § 340(c) (8 U.S.C. § 1451(c)).

been convicted of contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization . . . as having been procured by concealment of a material fact or by willful misrepresentation.<sup>129</sup>

In 1950, the Senate Judiciary Committee issued a report on *The Immigration and Naturalization Systems of the United States*<sup>130</sup> pursuant to S. Res. 137 from the prior Congress directing the Committee to make a full and complete investigation of the nation's entire immigration system.

The report discussed denaturalization efforts regarding naturalized citizens tied to the German-American Bund, "the principal center of Nazi and Fascist activity in the United States prior to and during World War II" which "had its beginnings in Chicago in 1924" and whose "guiding spirits were Nazis who had come to this country during the severe inflation in Germany which followed World War I."<sup>131</sup> The Bund's "guiding philosophy . . . was a devotion to Germanism; it professed belief in the unity of all Germans in one German blood, under the leadership of Adolf Hitler" and "it appears that the first loyalty of the Bund was to Hitler and Germany."<sup>132</sup>

The report explained that "[d]uring World War II, the Department of Justice embarked upon a full-scale denaturalization program directed principally against naturalized Germans who were affiliated with the German-American Bund."<sup>133</sup> It concluded that "[c]ourt decisions in the large number of denaturalization cases involving members of the Bund demonstrate the incompatibility of [the Bund's] principles with an undivided American allegiance and its fundamental divergence from constitutional principles."<sup>134</sup> Further, "large numbers of Bundists were naturalized, and . . . at least some of them were fully aware of the character of the Bund at the time of naturalization."<sup>135</sup>

The report explained that "[s]ome of the suits were frankly based solely upon utterances made by the defendant after his naturalization".<sup>136</sup> As to how they fared in the federal courts:

At first the courts were disposed to favor the Government; few district courts refused to denaturalize on the basis of fraud when Bund membership and disloyal statements were shown, either before or after naturalization. The courts regarded disloyal acts and statements committed and made after naturalization as a manifestation of "latent" fraud. They considered that, if loyalty was unable to stand the test of an armed conflict against the naturalized person's country of origin, it was absent from the beginning. In most World War II cases in which the naturalized person's naturalization was revoked for fraud, the ground thereof was lack of attachment to the principles of the Constitution of the United States.<sup>137</sup>

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<sup>129</sup> INA § 340 (8 U.S.C. § 1451).

<sup>130</sup> S. Rept. No. 81-1515, part 4 (1950), available at <https://www.ilw.com/immigrationdaily/news/2008,0701-senatereport81-1515part4of5.pdf>.

<sup>131</sup> *Id.* at 723.

<sup>132</sup> *Id.* at 723-24.

<sup>133</sup> *Id.* at 756.

<sup>134</sup> *Id.* at 723-24 (footnote omitted).

<sup>135</sup> *Id.* at 724.

<sup>136</sup> *Id.* at 756.

<sup>137</sup> *Id.* at 756-57.

But the report noted that the government’s “attempt . . . to denaturalize large numbers of Bund members was truncated by the Supreme Court’s [1944] decision in [*Baumgartner*]”, which “held the Government to such a strict standard of proof that it became very difficult to denaturalize a Bundist for fraud or illegality in procuring the certificate of naturalization.”<sup>138</sup>

The Senate Judiciary Committee concluded that while “[n]aturalization . . . [can]not be revoked because of the difficulty of proving the state of mind at the time of naturalization, without material assistance from postnaturalization statements and actions”,<sup>139</sup> post-*Baumgartner*:

The standard of proof demanded in denaturalization proceedings . . . is unrealistically great. It does not accord with the natural inference that one who becomes a member of a subversive organization within a short period after naturalization was not properly “attached” and “disposed” at the time of naturalization. It is clear that many of the Bundists became naturalized in order to join the Bund, or at least intended to join it at the time of naturalization. Joining a subversive organization within a reasonable time after naturalization should be presumptive evidence that naturalization was not obtained in good faith.<sup>140</sup>

Thus, the Committee recommended the creation of new statutory denaturalization provision, to wit:

[J]oining a proscribed organization within 5 years after naturalization shall be presumptive evidence that naturalization was obtained by a willful misrepresentation or by concealment of a material fact; that is, with a lack of the requisite attachment to the principles of the Constitution and favorable disposition to the good order and happiness of the United States. The presumption should attach to the classes of [subversive] organizations proscribed in the proposed bill.<sup>141</sup>

However, the Committee “emphasize[d] that this recommendation is not intended to place a condition subsequent upon naturalization”, but rather “to create a rule of evidence which will have the effect of modifying the present law as interpreted by court decisions.”<sup>142</sup> The Committee recognized, as the Fourth Circuit had concluded in *Orth*, that post-naturalization behavior “can at best rise only to the level of evidential facts”.<sup>143</sup>

Congress included the Committee’s recommended provision in the “Internal Security Act of 1950” (ISA)<sup>144</sup> along with a finding that “[o]ne device for infiltration by Communists is by procuring naturalization for disloyal aliens who use their citizenship as a badge for admission into the fabric of our society.”<sup>145</sup> The ISA provided that:

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<sup>138</sup> *Id.* at 724.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 730 (footnote omitted).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> 142 F. 2d at 973

<sup>144</sup> Pub. L. No. 81-831 (1950), available at <https://loveman.sdsu.edu/docs/1950InternalSecurityAct.pdf>.

<sup>145</sup> *Id.* at § 2(14).

If a person who shall have been naturalized after January 1, 1951, shall within five years next following such naturalization--

(1) become a member of or affiliated with any organization, membership in or affiliation with which at the time of naturalization would have precluded such person from naturalization under the provisions of this section; or

(2) become a member of any organization, membership in which at the time of naturalization would have raised the presumption that such person was not attached to the principles of the Constitution of the United States and not well disposed to the good order and happiness of the United States, under the provisions of this section

it shall be considered prima facie evidence that such person was not attached to the principles of the Constitution of the United States and was not well disposed to the good order and happiness of the United States at the time of naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by fraud or illegal procurement.<sup>146</sup>

On September 22, 1950, during Senate floor consideration of Congress's successful attempt to override President Truman's veto of the ISA, Senator Herbert Lehman (D-N.Y.) stated:

I wonder whether the distinguished Senator [Estes Kefauver (D-Tenn.)] is in agreement with me that, under this bill, if enacted, a man who becomes a citizen by naturalization will be on trial; he will be a second-class citizen, for 5 years. Is it not a fact that during those 5 years that man or woman will be afraid to raise his or her voice, will be afraid to join any organizations[,] will be afraid to take any position on public questions, for fear of off ending some Government official and thus losing the right of citizenship in this country?<sup>147</sup>

Senator Kefauver responded "That is certainly correct. It certainly does make them second-class citizens."<sup>148</sup>

In a similar vein, the law student's note from 1951 concluded that:

[T]he presumption here involved should be most closely scrutinized, for it may operate to abridge the rights of freedom of speech and association. Clearly, naturalized citizens, faced with the threat of loss of citizenship and perhaps deportation, will be hesitant to become affiliated with suspected organizations for five years after naturalization. Furthermore, any attempt to rebut the presumption

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<sup>146</sup> *Id.* at § 25.

<sup>147</sup> 96 Cong. Rec. 15,553 (Sept. 22, 1950), available at <https://www.govinfo.gov/content/pkg/GPO-CRECB-1950-pt11/pdf/GPO-CRECB-1950-pt11-12-1.pdf>.

<sup>148</sup> *Id.*

would be difficult in view of the lack of clarity as to what constitutes attachment to the Constitution; and, even were such an attempt successful, the burdens of litigation and adverse publicity would appear to be great.<sup>149</sup>

In any event, the provision was incorporated into the “Immigration and Nationality Act of 1952” (1952 Act) with some alterations:

If a person who shall have been naturalized after the effective date of this Act shall within five years next following such naturalization become a member of or affiliated with any organization, membership in or affiliation with which at the time of naturalization would have precluded such person from naturalization . . . it shall be considered prima facie evidence that such person was not attached to the principles of the Constitution of the United States and was not well disposed to the good order and happiness of the United States at the time of naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation . . . effective as of the original date of the order and certificate, respectively.<sup>150</sup>

The provision is now located in § 340 of the INA in substantially the same form.

U.S. Representative Adam Clayton Powell, Jr. (D-N.Y.) stated during House floor consideration of the 1952 Act that:

This provision would undoubtedly have the effect of seriously impeding the freedom of speech and thought of recently naturalized citizens for at least a 5-year period, if not more. . . . They will be afraid to express opinions on political matters, for fear that these may be interpreted as indicating affiliation with some subversive group which happens to have expressed similar views. . . . [O]ur new citizens will be frightened from engaging in any intelligent political activity, for fear that they may somehow stumble into some error which will rob them of their newly won and prized citizenship. This is the very kind of silence of fear which we criticize the totalitarian nations for.<sup>151</sup> .

Lois Hambro argued in the Michigan Law Review in 1953 that the presumption was “irrational[]”, that “[i]t does not necessarily follow from one’s affiliation, after naturalization, with an organization which was totalitarian or communistic at the time of naturalization that as long ago

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<sup>149</sup> 51 Colum. L. Rev. at 645-46 (footnotes omitted).

<sup>150</sup> Pub. L. No. 82-414, § 340(c) (1952), available at <https://www.govinfo.gov/content/pkg/STATUTE-66/pdf/STATUTE-66-Pg163.pdf>.

<sup>151</sup> 98 Cong. Rec. 4,437 (April 25, 1952), available at <https://www.govinfo.gov/content/pkg/GPO-CRECB-1952-pt4/pdf/GPO-CRECB-1952-pt4-3-1.pdf>.

as perhaps five years one was not attached to the Constitution and not well disposed to the good order and peace of the United States.”<sup>152</sup>

### **How Have Denaturalization Presumptions Fared in Federal Court?**

Aram Gavoor and Daniel Miktus have concluded that “[i]f the government seeks denaturalization under § [340](c) based solely on actions taken after naturalization that have no bearing on whether that individual engaged in unlawful or fraudulent conduct during the naturalization process”,<sup>153</sup> this would be unconstitutional. While I would agree, they have seemingly constructed a straw man, for the government has never argued that post-naturalization behavior justifying denaturalization need have no such bearing.

Charles Hooker found in 2005 that § 340(c) “has rarely been invoked” and “has never been successfully relied on to denaturalize a citizen.”<sup>154</sup> Gavoor and Miktus concluded more recently that the provision is “not currently use[d] . . . as a basis to denaturalize individuals”.<sup>155</sup>

But we can look for guidance to federal court decisions regarding similar presumptions. In its 1913 decision in *Luria*, the Supreme Court considered the same statute that the Ninth Circuit would later consider in *Banafshe* regarding naturalized citizens who “within five years . . . return to the country of his nativity, or go to any other foreign country, and take permanent residence therein”. The statute provided that such return “shall be considered prima facie evidence of lack of intention . . . to become a permanent citizen . . . at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient . . . to authorize the cancellation of his certificate of citizenship as fraudulent”.<sup>156</sup>

The Supreme Court in *Luria* concluded that:

[T]his provision prescribes a rule of evidence, not of substantive right. It goes no farther than to establish a rebuttable presumption which the possessor of the certificate is free to overcome. If, in truth, it was his intention at the time of his application to reside permanently in the United States, and his subsequent residence in a foreign country was prompted by considerations which were consistent with that intention, he is at liberty to show it. Not only so, but these are matters of which he possesses full, if not special, knowledge. The controlling rule respecting the power of the legislature in establishing such presumptions is comprehensively stated in [the Court’s 1910 decision in] *Mobile, Jackson & Kansas R. Co. v. Turnipseed*<sup>157</sup> . . . as follows:

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<sup>152</sup> Lois Hambro, *Constitutional Law -- Denaturalization Under the Immigration and Nationality Act of 1952*, 51 Mich. L. Rev. 881, 899 (1953), available at <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=8981&context=mlr>.

<sup>153</sup> Gavoor and Miktus at 654.

<sup>154</sup> Charles Hooker, *The Past as Prologue: Schneiderman v. United States and Contemporary Questions of Citizenship and Denaturalization*, 19 Emory Int’l L. Rev. 305, 362 (2005).

<sup>155</sup> Gavoor and Miktus at 655 n.133.

<sup>156</sup> Pub. L. No. 59-338, § 15.

<sup>157</sup> 219 U.S. 35 (1910), available at <https://supreme.justia.com/cases/federal/us/219/35/>.

“Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, national and state, dealing with such methods of proof in both civil and criminal cases, abound, and the decisions upholding them are numerous. . . .

“That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law, or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.

“If a legislative provision not unreasonable in itself, prescribing a rule of evidence in either criminal or civil cases does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.”<sup>158</sup>

As to the presumption at issue in *Luria*, the Court found it certainly to be reasonable:

That the taking up of a permanent residence in a foreign country shortly following naturalization has a bearing upon the purpose with which the latter was sought, and affords some reason for presuming that there was an absence of intention at the time to reside permanently in the United States, is not debatable.<sup>159</sup>

But the Court cautioned that “[n]o doubt the reason for the presumption lessens as the period of time between the two events is lengthened”,<sup>160</sup> elaborating that:

But it is difficult to say at what point the reason so far disappears as to afford no reasonable basis for the presumption. Congress has indicated its opinion that the intervening period may be as much as five years without rendering the presumption baseless. That period seems long, and yet we are not prepared to pronounce it certainly excessive or unreasonable. But we are of opinion that, as the intervening time approaches five years, the presumption necessarily must weaken to such a degree as to require but slight countervailing evidence to overcome it. On the other hand, when the intervening time is so short as it is shown to have been in the present case [leaving the United States four months following naturalization], the presumption cannot be regarded as yielding to anything short of a substantial and

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<sup>158</sup> 231 U.S. at 25-26.

<sup>159</sup> *Id.* at 27.

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

convincing explanation. So construed, we think the provision is not in excess of the power of Congress.<sup>161</sup>

Fast forward seven decades to the Supreme Court's 1980 decision in *Terrazas*, involving a provision of the INA then providing that:

[A]ny person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this chapter or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.<sup>162</sup>

The Court explained that:

In enacting [the provision], Congress did not dispute the holding of [the Court's decision in] *Nishikawa* that the alleged expatriating act . . . must be performed voluntarily, but it did insist that the Government have the benefit of the usual presumption of voluntariness, and that one claiming that his act was involuntary make out his claim of duress by a preponderance of the evidence.

It is important at this juncture to note the scope of the statutory presumption. [The INA] provides that any of the statutory expatriating acts, if proved, are presumed to have been committed voluntarily. It does not also direct a presumption that the act has been performed with the intent to relinquish United States citizenship. That matter remains the burden of the party claiming expatriation to prove by a preponderance of the evidence.<sup>163</sup>

The Court concluded that “[a]s so understood, we cannot invalidate the provision.”<sup>164</sup>

The Court noted regarding the presumption of voluntariness that:

*Nishikawa* referred to the “ordinary rule that duress is a matter of affirmative defense” to be proved by the party claiming the duress. . . . Justices Frankfurter and Burton, concurring in the result, also referred to the “ordinarily controlling principles of evidence [that] would suggest that the individual, who is peculiarly equipped to clarify an ambiguity in the meaning of outward events, should have the burden of proving what his state of mind was.” . . . And Mr. Justice Harlan, in dissent with Mr. Justice Clark, pointed to the “general rule that consciously performed acts are presumed voluntary” and referred to Federal Rule of Civil Procedure 8(c), which treats duress as a matter of affirmative defense. . . . Yet the Court in *Nishikawa*, because it decided that “the consequences of denationalization are so drastic” and because it found nothing indicating a contrary result in the

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<sup>161</sup> *Id.*

<sup>162</sup> 444 U.S. at 267 (8 U.S.C. § 1481(c)).

<sup>163</sup> *Id.* at 267-68.

<sup>164</sup> *Id.* (footnote omitted).

legislative history of the Nationality Act of 1940, held that the Government must carry the burden of proving that the expatriating act was performed voluntarily . . .

[The provision at issue] which was enacted subsequently, and its legislative history . . . make clear that Congress preferred the ordinary rule that voluntariness is presumed and that duress is an affirmative defense . . . .<sup>165</sup>

The Court concluded that the presumption was constitutional in the context of expatriation:

The rationality of the procedural rule with respect to claims of involuntariness in ordinary civil cases cannot be doubted. To invalidate the rule here would be to disagree flatly with Congress on the balance to be struck between the interest in citizenship and the burden the Government must assume in demonstrating expatriating conduct. It would also constitutionalize that disagreement and give the Citizenship Clause of the Fourteenth Amendment far more scope in this context than the relevant circumstances that brought the Amendment into being would suggest appropriate. Thus, we conclude that the presumption of voluntariness included [here] has continuing vitality.<sup>166</sup>

[W]e hold that . . . when one of the statutory expatriating acts is proved, it is constitutional to presume it to have been a voluntary act until and unless proved otherwise by the actor.<sup>167</sup>

The Ninth Circuit Court of Appeals' 1980 decision in *Banafshe* involving essentially the same statutory provision as in *Luria*. The court explained that “Banafshe contends that the statutory presumption is unconstitutional” in part because the presumption “shifts the burden of proof upon him”, but the court concluded “that [it] is a valid exercise of Congress’ authority to enact rules of evidence and procedure”, just as “[i]n *Luria* . . . the Supreme Court upheld the constitutionality of a predecessor statute”.<sup>168</sup>

The Ninth Circuit noted that:

We have found only one reported appellate case involving th[is] presumption. In [the Ninth Circuit’s 1974 decision in] *United States v. Delmendo*,<sup>169</sup> a defendant, whose naturalization was revoked, challenged [its] constitutionality. [But b]ecause the court found that the evidence was insufficient to prove that the defendant had become a permanent foreign resident, it did not have to reach the constitutional issue. In dicta, however, the court noted that the continuity vitality of *Luria* was

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<sup>165</sup> *Id.* at 268-69 (citations and footnote omitted).

<sup>166</sup> *Id.* at 269-70

<sup>167</sup> *Id.* at 270.

<sup>168</sup> 616 F.2d at 1146.

<sup>169</sup> 503 F.2d 98 (9<sup>th</sup> Cir. 1974), available at <https://law.resource.org/pub/us/case/reporter/F2/503/503.F2d.98.73-2707.html>.

dubious in light of [the Supreme Court’s 1969 decision in] *Leary v. United States*<sup>170</sup>  
.... [regarding the legitimacy of presumptions in the context of criminal law]<sup>171</sup>

But the Ninth Circuit in *Banafshe* concluded that “[t]he analysis employed by the Supreme Court in . . . *Terrazas* . . . eliminated any doubt about the validity of” the provision, elaborating that “As for Terrazas’ contention that the use of the presumption was impermissible, the [Supreme] Court held Congress’ use of a rebuttable presumption to establish the voluntariness of the expatriating act was a rational rule that balances the interest of the citizen in retaining citizenship and the interest of the Government in proving expatriating conduct.”<sup>172</sup>

The Ninth Circuit then explained why “Congress’ decision to shift the burden on the defendant to produce countervailing evidence of an intent to reside permanently in the United States is rational”<sup>173</sup>:

The presumption comes into play only after the Government has proven that the defendant established a permanent foreign residence within five years after naturalization. At that point, it is appropriate to require the defendant to produce evidence about his intent at the time of his naturalization petition, since proof of permanent foreign residence is itself substantial evidence of a fraudulent intent and the best source of the defendant’s actual intent is the defendant himself. [citing *Luria*] Any danger that the presumption is too broad is eliminated by *Luria*’s requirement that the strength of the presumption vary with length of time elapsed between naturalization and the establishment of foreign residence. We conclude that [the statute] is a rational exercise of Congressional judgment.<sup>174</sup>

### **What Can the Supreme Court’s View of Presumptions in the Criminal Law Tell Us?**

It is instructive to look at how the Supreme Court has viewed presumptions in the context of criminal law. In 1943, the Supreme Court explained in *Tot v. United States*<sup>175</sup> that:

Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts.<sup>176</sup>

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<sup>170</sup> 395 U.S. 6 (1969), available at <https://supreme.justia.com/cases/federal/us/395/6/>.

<sup>171</sup> 616 F.2d at 1146.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 1147.

<sup>174</sup> *Id.*

<sup>175</sup> 319 U.S. 463 (1943), available at <https://supreme.justia.com/cases/federal/us/319/463/>.

<sup>176</sup> *Id.* at 467-68 (footnotes omitted).

In 1969 in *Leary*, the Supreme Court noted that this “*Tot* rule has been adhered to in the two subsequent cases in which the issue has been presented”<sup>177</sup> and concluded that:

The upshot of *Tot*, [and the Court’s 1965 decisions in *United States v. Gainey*,<sup>178</sup> and [*United States v. Romano*]<sup>179</sup> is, we think, that a criminal statutory presumption must be regarded as “irrational” or “arbitrary,” and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.<sup>180</sup>

Of course, that is very similar to what the Supreme Court has concluded about denaturalization presumptions.

But in its 1979 decision in *County Court v. Allen*,<sup>181</sup> the Supreme Court stated that:

A mandatory presumption is a [very] troublesome evidentiary device. For it may affect not only the strength of the “no reasonable doubt” burden but also the placement of that burden; it tells the trier that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts.<sup>182</sup>

The Court in *Allen* concluded in the context of “a mandatory presumption which the jury must accept even if it is the sole evidence of an element of the offense”, that “since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt”.<sup>183</sup>

However, in its 1989 decision in *Carella v. California*,<sup>184</sup> the Court concluded that such presumptions can be considered “harmless error”,<sup>185</sup> as the Court explained in its 1986 decision in *Rose v. Clark*.<sup>186</sup>

In many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not intend to cause injury. . . . In that event the erroneous instruction is simply superfluous: the jury has found . . . “every fact necessary” to establish every element of the offense beyond a reasonable doubt.<sup>187</sup>

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<sup>177</sup> 395 U.S. at 33.

<sup>178</sup> 380 U.S. 63 (1965), available at <https://supreme.justia.com/cases/federal/us/380/63/>.

<sup>179</sup> 382 U.S. 136 (1965), available at <https://supreme.justia.com/cases/federal/us/382/136/>.

<sup>180</sup> 395 U.S. at 36 (footnote omitted).

<sup>181</sup> 442 U.S. 140 (1979), available at <https://supreme.justia.com/cases/federal/us/442/140/>.

<sup>182</sup> *Id.* at 157 (citation omitted).

<sup>183</sup> *Id.* at 166-67 (footnote omitted).

<sup>184</sup> 491 U.S. 263 (1989), available at <https://supreme.justia.com/cases/federal/us/491/263/>.

<sup>185</sup> *Id.* at 266-67.

<sup>186</sup> 478 U.S. 570 (1986), available at <https://supreme.justia.com/cases/federal/us/478/570/>.

<sup>187</sup> *Id.* at 580-81 (citations omitted) (quoting *In re Winship*, 397 U.S. 358, 364 (1970), available at <https://supreme.justia.com/cases/federal/us/397/358/>).

In any event, it is important to point out that § 340(c)'s denaturalization presumption is not mandatory. The ISA's conference report explained that "it shall be prima facie evidence of disloyalty and, in the absence of countervailing evidence, the order admitting him to citizenship **may** be set aside",<sup>188</sup> indicating that it would still be within a court's discretion, despite the presumptive evidence, as to whether to set aside a naturalization order.

## **Conclusion**

The government can constitutionally utilize evidence of post-naturalization behavior/beliefs in order to demonstrate that a citizen had unlawfully procured naturalization, and thus to revoke their citizenship, but only as "evidential facts" as to the citizen's behavior/beliefs at the time of naturalization. It is also constitutional for Congress to create prima facie evidence/countervailing evidence presumptions – as long as there is a rational connection between the proscribed post-naturalization act and the citizen's state of mind at the time of naturalization. However, the longer the length of time between naturalization and the commission of the proscribed act, the less convincing evidence the citizen has to provide to defeat the presumption.

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<sup>188</sup> H.R. Rep. No. 81-3112 at 61 (1950) (emphasis added).