Loyola of Los Angeles Law Review

Volume 34
Number 2 *Symposium—The Rampart Scandal: Policing the Criminal Justice System*

Article 16

1-1-2001

Administrative Denaturalization: Is There Nothing You Can Do That Can't Be [Un]Done

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ADMINISTRATIVE DENATURALIZATION[1]: IS THERE "NOTHING YOU CAN DO THAT CAN'T BE [UN]DONE"?[2]

Whether the attorney general can undo what she has the power to do, naturalize citizens, depends on whether Congress said she could.[3]

I. INTRODUCTION

In August 1995, Doris Meissner, Commissioner of the Immigration and Naturalization Service (INS), unveiled the most ambitious naturalization campaign in the history of the United States.[4] Called "Citizenship U.S.A.," the campaign was designed to enable the INS to process over one million applications for naturalization in the course of just one year.[5] For many immigrants, this represented a

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1. The term "administrative denaturalization" refers to a procedure created by the INS for the purpose of stripping naturalized citizens of their citizenship without having to sue them in a federal district court. *See infra* Part III.B.

2. THE BEATLES, *All You Need is Love*, *on* MAGICAL MYSTERY TOUR (EMI/Capitol Records 1967). The author's slight alteration of the original lyric was suggested by Judge Kleinfeld's opinion in *Gorbach v. Reno*, 219 F.3d 1087 (9th Cir. 2000) (*Gorbach II*) (en banc), which pokes fun at the underlying logic of the appellant Attorney General's argument:

> The heart of the Attorney General's argument is that the power to denaturalize is "inherent" in the power to naturalize. There is no reason why that should be so. There is no general principle that what one can do, one can undo. It sounds good, just as the Beatles' lyrics "Nothing you can know that isn't known/ Nothing you can see that isn't shown/ Nowhere you can be that isn't where you're meant to be,"—sound good. But as Sportin' Life said, "It ain't necessarily so."

Id. at 1095 (citations omitted).

3. Gorbach v. Reno, 179 F.3d 1111, 1127 (9th Cir. 1999) (*Gorbach I*) (Kleinfeld, J., dissenting).

4. *See U.S. to Speed Process of Becoming a Citizen*, N.Y. TIMES, Sept. 2, 1995, § 1, at 8.

5. *See* Memorandum on Naturalization, 32 WEEKLY COMP. PRES. DOC. 1495 (Aug. 22, 1996). President Clinton expressed the goals of the Citizenship U.S.A. program as follows:

new hope of attaining their cherished dream of becoming naturalized citizens.

United States citizenship has been described in such lofty terms as "the highest hope of civilized men."[6] For many immigrants, it represents the end of the long and winding road through the bureaucratic maze of the INS.[7] However, just when many new citizens think they have finally been accepted into the general community and are no longer at the mercy of the agency, they may find themselves haled back into administrative hearings to have their naturalization revoked.

The awesome power to strip immigrants of their United States citizenship has, until recently, been held exclusively by the courts.[8] However, when Congress transferred the naturalization power from federal and state courts to the Attorney General in 1990,[9] it also

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> This Administration's target is to process and swear-in within 6 months of application all individuals eligible for citizenship. As we meet this target, more than one million newcomers will become citizens by the end of this year. After that, INS shall maintain those reforms necessary to stay current with the demand of new citizen applicants.
>
> Using all of the tools at your disposal, I ask you to ensure that policies and practices necessary to accomplish these targets of one million new citizens sworn-in and the elimination of the waiting list are implemented.

Id.

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

7. In the words of Lennon and McCartney, this road "will never disappear," THE BEATLES, *The Long and Winding Road, on* LET IT BE (EMI/Capitol Records 1970), at least while one remains an alien living in the United States. While it cannot be demonstrated conclusively that Lennon and McCartney were writing about their immigration troubles in this song, they certainly had firsthand experience with the bureaucracy of the INS. For an account of the deportation proceedings brought against John Lennon by the INS, and the novel legal strategy used to keep him in the United States, see Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 SAN DIEGO L. REV. 42, 42-49 (1976).

8. Before 1990, the Immigration and Nationality Act provided three routes for revocation of naturalization, all of which involved court proceedings. *See infra* Part III.A for a brief history of denaturalization proceedings before the Immigration Act of 1990.

9. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 401, 104 Stat. 4978 (amending Immigration and Nationality Act § 310(a)).

changed the wording of a provision that allowed courts to use their already existing powers to reopen their own judgments to overturn their own grants of naturalization.[10] The Attorney General used this provision to authorize the INS to create its own procedure for administrative denaturalization.[11]

While the promulgation of the new administrative denaturalization regulations attracted little attention outside the immigration bar,[12] it became front-page news when hundreds of new citizens received Notices of Intent to Revoke Naturalization.[13] Many of these immigrants had been naturalized as part of the Citizenship U.S.A. program and had benefited from efficiencies made possible by the transfer of the naturalization power from federal and state courts to the Attorney General.[14] This "denaturalization" campaign was the dark flip-side of Citizenship U.S.A. The logic behind it was compelling—if naturalization could be accomplished more speedily through administrative proceedings than through court proceedings, then surely it must make sense that denaturalization could also be accomplished more speedily through the INS. However, the campaign raised serious doubts about the value of U.S. citizenship, and what it really means to be a citizen, if citizenship can be taken away without the procedural protections offered by the court system.[15]

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10. *See id.* § 407(d)(18)(D) (amending INA § 340(i)). Section 340(i) was renumbered as Section 340(h) by the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 104(c)(1), 108 Stat. 4305.

11. *See infra* Part III.B for a history of the transfer of the naturalization power and the purported transfer of the denaturalization power to the INS.

12. The new administrative denaturalization proceedings did, however, become a great cause for concern among practitioners of immigration law, due to the poor procedural protections offered in administrative denaturalization proceedings. *See, e.g.*, Daniel Levy, *Administrative Denaturalization: Practical Issues Under New Standards*, 74 INTERPRETER RELEASES 1701 (1997).

13. *See, e.g.*, Patrick J. McDonnell, *Battling to Save Their Citizenship*, L.A. TIMES, Mar. 8, 1998, at A1.

14. The INS is able to process applications for naturalization more efficiently than courts both because it is encumbered by fewer procedural constraints and because it has the case histories of each potential applicant already in its possession. *See* S. REP. NO. 101-55, at 3 (1989) (explaining that concerns of efficiency and speed motivated Congress to transfer the naturalization power from the courts to the INS).

15. *See* United States v. Minker, 350 U.S. 179, 188 (1956) (insisting on a "heavy criterion of proof . . . before decreeing denaturalization").

This Note examines a recent decision of the en banc Court of Appeals for the Ninth Circuit, which held that the Attorney General lacks statutory authority to institute denaturalization proceedings conducted within the INS—proceedings for which there was never an explicit grant of authority by Congress.[16] The purpose of this Note is to place this case within the larger context of administrative law decisions where the authority of executive branch officials to interpret the laws they have been charged with implementing has been limited when the rights of individuals are threatened. In particular, this Note will scrutinize the *Gorbach* decision for its effect on the equal treatment of naturalized citizens and for the propriety of its methods of statutory construction when important rights are threatened. Finally, this Note will offer a brief sketch of a just and workable system of naturalization and denaturalization and explain why the system proposed by the INS is inconsistent with the principles of equal protection, procedural due process, and separation of powers.

II. DOES U.S. CITIZENSHIP MATTER?

Before one can address the question of the procedures that can and should be used for granting and revoking U.S. citizenship, the threshold question must be answered: what *is* citizenship, and is it an important right? There has been considerable difference of opinion through the years on the value and importance of U.S. citizenship, largely due to the Constitution's ambivalence on the subject.[17] Many prominent scholars and members of the judiciary, noting that the Bill of Rights focuses its protections on "persons" rather than "citizens,"[18] have argued that the distinction between U.S.

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

17. *See infra* notes 18-20 and accompanying text.

18. The Bill of Rights does not contain anywhere in its text the word "citizen," but rather it makes guaranties of liberty to "the people" or "persons." *See, e.g.*, U.S. CONST. amend. I ("the right of *the people* peaceably to assemble") (emphasis added); U.S. CONST. amend II ("the right of *the people* to keep and bear Arms") (emphasis added); U.S. CONST. amend. IV ("[t]he right of *the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures") (emphasis added); U.S. CONST. amend. V ("[n]o *person* shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury") (emphasis

citizens and noncitizens is of little practical importance.[19] An opposing school of thought, seizing upon constitutional[20] and

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added); U.S. CONST. amend. IX ("[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by *the people*") (emphasis added); U.S. CONST. amend. X ("[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to *the people*") (emphasis added).

The only use of the word "citizen" in the pre-Civil War amendments occurs in the Eleventh Amendment; however, it refers only to "[c]itizens of another State" and "[c]itizens . . . of any Foreign State" and not to U.S. citizenship. Perhaps most surprising to the modern reader, even the Twelfth Amendment, describing the Byzantine mechanism for election of the President, nowhere mentions the word "citizen."

19. *See, e.g.*, Alexander M. Bickel, *Citizen or Person? What is Not Granted Cannot Be Taken Away*, *in* THE MORALITY OF CONSENT ch. 2, at 33 (1975) ("[r]emarkably enough—and as I will suggest, happily—the concept of citizenship plays only the most minimal role in the American constitutional scheme").

20. *See, e.g.*, U.S. CONST. amend. XIV, § 1 ("[n]o State shall make or enforce any law which shall abridge the privileges or immunities of *citizens of the United States*") (emphasis added); U.S. CONST. art. I, § 2, cl. 2 (U.S. Representatives must be "seven Years a *Citizen of the United States*") (emphasis added); U.S. CONST. art. I, § 3, cl. 3 (U.S. Senators must be "nine Years a *Citizen of the United States*") (emphasis added); U.S. CONST. art. II, § 1, cl. 5 (the President must be not only a citizen, but a "natural born Citizen" of the United States); U.S. CONST. art. III, § 2, cl. 1 (creating alienage jurisdiction in Federal Court for cases involving U.S. citizens and "foreign . . . [c]itizens"); U.S. CONST. amend. XV, § 1 ("[t]he right of *citizens of the United States* to vote shall not be denied or abridged . . . on account of race") (emphasis added); U.S. CONST. amend. XIX, cl. 1 ("[t]he right of *citizens of the United States* to vote shall not be denied or abridged . . . on account of sex") (emphasis added); U.S. CONST. amend. XXIV, § 1 ("[t]he right of *citizens of the United States* to vote in any primary or other election . . . shall not be denied or abridged . . . by reason of failure to pay any poll tax or other tax") (emphasis added); U.S. CONST. amend. XXVI, § 1 ("[t]he right of *citizens of the United States*, who are eighteen years of age or older, to vote shall not be denied or abridged . . . on account of age) (emphasis added).

In addition to rights that the literal language of the Constitution limits to citizens, the Supreme Court has interpreted certain rights granted to "the people" so as not to protect, with their full force, the rights of aliens. *See, e.g.*, Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 491-92 (1999) (stating in dicta by Justice Scalia that the government does not offend an illegal alien's First Amendment right to freedom of association "by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity"); United States v. Verdugo-Urquidez, 494 U.S. 259, 269-71 (1990) (holding that a search and seizure by U.S. agents of a non-

extraconstitutional[21] rights made explicitly dependent on U.S. citizenship, has characterized citizenship as "nothing less than the right to have rights."[22]

In spite of the dubious intellectual lineage of the latter school of thought,[23] and whatever significance or lack thereof U.S. citizenship may have held at the time of the framing of the Constitution, it is clear that the distinction has acquired critical importance through successive acts of Congress and Supreme Court rulings in the twentieth century.[24] Under modern immigration law, many rights are made explicitly dependent on U.S. citizenship, despite the identification of alienage as a "suspect class" for purposes of constitutional scrutiny in many matters not relating to immigration law.[25] Arguably most

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resident alien's property, located in another country, was not covered by the Fourth Amendment because the alien was not one of "the people" protected from unreasonable searches and seizures).

21. Particularly in the context of modern U.S. immigration law, there is a tremendous gap between statutory and regulatory rights of U.S. citizens and noncitizens. For example, U.S. citizens have the right to immigrate immediate relatives, such as spouses and minor children, without being subject to the per-country yearly immigration ceilings that apply when a U.S. permanent resident wishes to do the same. *See* Immigration and Nationality Act § 201(b)(2)(A), 8 U.S.C. § 1151(b)(2)(A) (1994). Citizens can also petition to immigrate brothers and sisters, as well as married sons and daughters, which permanent residents cannot. *See* Immigration and Nationality Act § 203(a), 8 U.S.C. § 1153(a) (1994). In addition to the immigration law benefits of citizenship, the case has been made by commentators that one of the major reasons behind the naturalization backlog that preceded the Citizenship U.S.A. program was Congress's passage of bills that made certain welfare benefits explicitly dependent on U.S. citizenship. *See, e.g.*, David S. North, *Two Perspectives on Naturalization Policy*, 20 IN DEF. OF ALIENS 229 (1998).

22. Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting); *see also* Afroyim v. Rusk, 387 U.S. 253 (1967) (noting at length Justice Harlan's views about preciousness of U.S. citizenship); *cf.* Sugarman v. Dougall, 413 U.S. 634, 651 (1973) (Rehnquist, J., dissenting) (noting that "the Constitution itself recognizes a basic difference between citizens and aliens. That distinction is constitutionally important in no less than 11 instances in a political document noted for its brevity").

23. Some scholars have traced the origins of the distinction between constitutional "persons" and "citizens" back to the infamous *Dred Scott* decision by Chief Justice Taney. *See* Bickel, *supra* note 19, at 36-42.

24. *See infra* notes 25-30 and accompanying text.

25. *See, e.g.*, Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (overturning the U.S. Civil Service Commission's policy of excluding aliens from most civil service positions, in spite of the federal power over immigration); Graham v.

important among these is the right not to be deported. Though aliens are entitled to certain due process rights in deportation proceedings,[26] they have no substantive due process right to remain in this country. United States citizens, on the other hand, cannot constitutionally be deported.[27] This is so because, in the area of immigration law, a sharp distinction has been drawn between citizens, who are entitled to the full panoply of procedural and substantive due process rights, and aliens, who are subject to the plenary power of Congress.[28] Because deportation, a process to which only aliens are subject, can result in "loss of both property and life, or of all that makes life worth living,"[29] any argument that citizenship is unimportant can only be sustained on a theoretical level completely divorced from modern realities.

Indeed, the argument that citizenship is unimportant can be easily refuted by the waves created by the Citizenship U.S.A. naturalization program. If citizenship is not important, why was there such a backlog in citizenship applications before the program began? And why did over a million people, not even counting those that applied and were denied, obtain citizenship through the program? And why has the program created such a political firestorm in its wake? Clearly, whatever significance the concept may have had when the Constitution was framed, history and politics have invested U.S. citizenship with considerable importance and made it a right that is eminently worthy of protection.[30]

Richardson, 403 U.S. 365, 372 (1971) (disallowing states from discriminating on the basis of alienage in the distribution of welfare benefits because aliens are a "discreet and insular" minority for whom "heightened judicial solicitude is appropriate").

26. *See, e.g.*, Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 101 (1903).

27. *See* Ng Fung Ho v. White, 259 U.S. 276, 284 (1922). This inconvenient fact has not, however, always stopped the INS from attempting to deport U.S. citizens. *See, e.g.*, Ian James, *INS Sued Over U.S. Woman Agents Shackled, Called Liar and Deported*, L.A. TIMES, Sept. 9, 2000, at A17.

28. *See* Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 603 (1889).

29. *Ng Fung Ho*, 259 U.S. at 284.

30. U.S. citizenship qualifies as a property interest as that term was defined in *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970), because it is available to anyone who meets the statutory criteria—and is not barred by any of the prohibitions—set forth in the Immigration and Nationality Act §§ 312-331, 8 U.S.C.

III. HISTORICAL FRAMEWORK

In order to understand the significance of the transfer to the executive branch of the power to naturalize and, arguably, to denaturalize, one must look to the statutory history of denaturalization under the Immigration and Nationality Act and the caselaw that interpreted it. Toward this end, a brief sketch of this history is offered below.

A. The Statutory History of Naturalization and Denaturalization in U.S. District Courts and State "Courts of Record"

Until 1990, the Immigration and Nationality Act gave United States District Courts and "all courts of record in any State or Territory" the exclusive power to naturalize citizens.[31] Due to concerns about fraudulently obtained citizenship,[32] the Act also included a provision under which U.S. Attorneys could institute proceedings in any of the above-mentioned courts to revoke citizenship "upon affidavit showing good cause therefor . . . on the ground that [citizenship was] illegally procured or [was] procured by concealment of a material fact or by willful misrepresentation . . . ."[33] This provision, which has generated substantial litigation that has attempted to

§§ 1423-1442 (1994). Though "the burden is on the alien applicant to show his eligibility for citizenship in every respect," Berenyi v. Dist. Dir., 385 U.S. 630 (1967), the statutory provisions governing naturalization do not afford the Attorney General the discretion to deny an application if this burden is met. Indeed, a certificate of citizenship has been analogized to a public land grant—the quintessential example of a property interest conferred on individuals by the government. *See* Schneiderman v. United States, 320 U.S. 118, 125 (1943) (citing Johannessen v. United States, 225 U.S. 227, 238 (1912)). U.S. citizenship can also be thought of as a type of "meta-property interest," because other statutory entitlements, *see infra* note 21, and constitutional rights, *see infra* notes 20, 25-28, 52, are dependent on it.

31. Immigration and Nationality Act § 310(a), 8 U.S.C. § 1421(a) (1988) (amended 1990).

32. One of the most important uses of the formal statutory procedure allowing denaturalization was the problem presented by former Nazis who had entered the United States following World War II. By misrepresenting their past, some war criminals had eventually gone on to obtain citizenship. Though the INA made such individuals deportable, *see* Immigration and Nationality Act § 237(a)(4)(D), 8 U.S.C. § 1227(a)(4)(D) (1994), the government was faced with the reality that U.S. citizens are not subject to deportation. Hence, such individuals must first be denaturalized before they can be deported.

33. Immigration and Nationality Act, § 340(a), 8 U.S.C. § 1451(a) (1994).

define the types of "misrepresentation" and "concealment" that rise to the level of justifying denaturalization,[34] remains, with minor amendments, in force to the present day.[35]

The procedure authorized by section 340(a) is substantially similar to older statutory procedures for denaturalization on account of fraud or misrepresentation outside the record.[36] However, when Congress passed the Immigration and Nationality Act in 1952,[37] it added an alternative avenue for revocation of naturalization using a different underlying procedural mechanism—allowing the court that originally granted naturalization to reopen and revoke its original grant on the motion of the INS, rather than requiring the institution of a new action to revoke naturalization.[38] This provision was added by Congress most likely in reaction to a 1951 Supreme Court decision, *Bindczyck v. Finucane*.[39] The *Bindczyck* Court held that the exclusive procedure for denaturalization based on evidence of fraud

34. *See, e.g.*, Kungys v. United States, 485 U.S. 759 (1988); Chaunt v. United States, 364 U.S. 350 (1960).

35. *See* Immigration and Nationality Act § 340(a), 8 U.S.C. § 1451(a).

36. The predecessor of section 340 was section 338 of the Nationality Act, the statutory scheme that governed naturalization before the enactment of the Immigration and Nationality Act. *See* Nationality Act of 1940, Pub. L. No. 76-853, § 338, 54 Stat. 1137.

37. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

38. *See id.* § 340(j) (redesignated as § 340(i) by Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 9(dd)(3), 102 Stat. 2609, 2621, amended to substitute administrative authority for judicial authority by Immigration Act of 1990, Pub. L. No. 101-649, § 407(d)(18)(D), 104 Stat. 4978, 5046, and redesignated as § 340(h) by Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 104(c)(1), 108 Stat. 4305, 4308. Immediately prior to the enactment of the current version at issue in the *Gorbach* litigation, the subsection read:

> POWER OF COURT TO CORRECT, REOPEN, ALTER, MODIFY OR VACATE JUDGMENT OR DECREE
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> Nothing contained in this section shall be regarded as limiting, denying or restricting the power of any naturalization court, by or in which a person has been naturalized, to correct, reopen, alter, modify, or vacate its judgment or decree naturalizing such person, during the term of such court or within the time prescribed by the rules of procedure or statutes governing the jurisdiction of the court to take such action.

Immigration and Nationality Act § 340(i), 8 U.S.C. § 1451(i) (1988) (amended 1990).

39. 342 U.S. 76 (1951).

outside the record was to institute new proceedings in a district court.[40] By so holding, the Court prohibited a practice that had developed of state and federal courts reopening and vacating their own naturalization orders.[41]

B. The Transfer of the Naturalization Power to the Attorney General and the Birth of Administrative Denaturalization

The entire landscape of naturalization law was changed by the passage of the Immigration Act of 1990,[42] which transferred the power to naturalize from state and federal courts to the Attorney General.[43] With the power to naturalize no longer vested in the court system, the old provision regarding the power of a court to reopen and revoke its orders of naturalization was rendered meaningless. Thus, a conforming amendment was passed[44] that changed the language of the provision to read:

> **Power to correct, reopen, alter, modify, or vacate order**
>
> Nothing contained in this section shall be regarded as limiting, denying, or restricting the power of the Attorney General to correct, reopen, alter, modify, or vacate an order naturalizing the person.[45]

Interpreting this section as a grant of power to create denaturalization proceedings conducted by the INS, the Attorney General delegated her authority to the INS, which promulgated Regulation 340.1, the regulation at issue in *Gorbach v. Reno*.[46]

The new regulations created immediate concern among practitioners of immigration law because, unlike the judicial

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40. *See id.*

41. *See id.* at 85-86. The statutory revocation proceedings in force at the time of *Bindczyck*—under § 338 of the Nationality Act of 1940—were the predecessor of the modern proceedings under INA § 340(a). *See supra* note 36.

42. Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.).

43. *See id.* § 401 (amending Immigration and Nationality Act § 310(a), 8 U.S.C. § 1421(a), to read: "[t]he sole authority to naturalize persons as citizens of the United States is conferred upon the Attorney General").

44. *See id.* § 407(d)(18)(D).

45. Immigration and Nationality Act § 340(h), 8 U.S.C. § 1451(h) (1994).

46. *See* Revocation of Naturalization, 61 Fed. Reg. 55,550 (Oct. 28, 1996) (codified at 8 C.F.R. § 340.1).

denaturalization procedures which were previously the exclusive route for revocation of citizenship, these new procedures allowed the INS to rescind citizenship in a comparatively summary fashion.[47] One of the most alarming features of the new regulations was the shift in the burden of proof. Whereas Supreme Court caselaw had previously put a heavy burden on the government to prove fraud in obtaining naturalization,[48] the new regulations put the burden of proof squarely on the naturalized citizen.[49]

In addition to the obvious due process concerns raised by the regulations, it is interesting to note that the individual haled into these administrative proceedings is referred to repeatedly as an "applicant" for naturalization, rather than as a "citizen"[50]—even though naturalization has already been granted. The INS thus constructively places the individual into the position of an alien and not a U.S. citizen, thereby placing the individual within the plenary power of

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47. *See, e.g.*, Levy, *supra* note 12, at 1701.

48. *See* Schneiderman v. United States, 320 U.S. 118, 125 (1943) ("To set aside . . . a grant [of citizenship] the evidence must be clear, unequivocal, and convincing—it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt" (internal quotations omitted)).

49. *See* 8 C.F.R. § 340.1(b)(6) (2000) (stating that "the applicant bears the burden of persuading the district director that, notwithstanding the evidence described in the notice, the applicant was eligible for naturalization at the time of the order purporting to admit the applicant to citizenship"). The INS has since changed this burden of proof. An interim rule published in the Federal Register on March 31, 2000—little more than a week after oral arguments were heard for the en banc decision in *Gorbach*—moved the burden to the INS to prove by "clear, convincing, and unequivocal evidence that the grounds for reopening and revoking [citizenship] . . . have been met." Revoking Grants of Naturalization, 65 Fed. Reg. 17,127, 17,128 (Mar. 31, 2000) (amending 8 C.F.R. § 340.1(b)(6)). This amendment brings the evidentiary burden in line with the "clear, unequivocal, and convincing" standard set forth in *Schneiderman*, 320 U.S. at 125.

50. For further discussion on the possible significance of this distinction, see discussion *infra* Part V.A.1. At the very least, this may explain why the INS put the burden of proof on the citizen, rather than on the government, in the regulations as originally promulgated. *Compare* Berenyi v. Dist. Dir., 385 U.S. 630, 637 (1967) (stating that when seeking citizenship, "the burden is on the alien applicant to show his eligibility . . . in every respect," and all doubts "should be resolved in favor of [the government]"), *with Schneiderman*, 320 U.S. at 125 (stating that in judicial denaturalization proceedings, the burden is on the government to prove fraud by "clear, unequivocal, and convincing" evidence once citizenship has been granted).

Congress to control decisions relating to immigration.[51] If the individual is merely an "applicant," it is clear that no rights have vested as a result of the initial grant of citizenship, and therefore the due process rights possessed by the individual are the same as those of an alien. This linguistic trick accomplishes a great deal in the way of escaping the demands of due process and equal protection, since the Supreme Court has historically upheld immigration laws that would not pass constitutional muster if applied to U.S. citizens.[52]

This conceptual shift—treating a naturalized citizen as a mere "applicant" for citizenship—is a dangerous legal fiction that erodes the value of citizenship for all Americans and creates a type of de facto second-class citizenship for naturalized aliens. The statutory authority of the Attorney General to promulgate the regulations at issue in *Gorbach v. Reno* rests on such a fiction, because while aliens applying for citizenship are clearly subject to the Attorney General's power to administer the federal immigration and naturalization laws,[53] it is almost equally clear that U.S. citizens are not.[54] A narrow reading of the statutes governing the Attorney General's authority is appropriate in these circumstances, as Supreme Court precedent

51. *See supra* note 28 and accompanying text.

52. Particularly in the context of the rights of aliens to enter the United States, the Supreme Court has given deference to the political branches of the government that borders on claiming a lack of jurisdiction to entertain questions of the aliens' rights. *See, e.g.*, Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542-44 (1950) ("When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power. . . . Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."). The procedures at issue in both *Knauff* and *Mezei* allowed the Attorney General to detain an alien indefinitely on the basis of confidential information that was not released to the alien. Though the Court has insisted on higher standards of due process in other contexts, such as the deportation of aliens already admitted to the United States, it has never granted aliens the full panoply of due process rights accorded to U.S. citizens. *See supra* Part II.

53. *See infra* Part V.A.1 for discussion of the Attorney General's unique powers over aliens in the United States.

54. "The Attorney General shall be charged with the administration and enforcement of [the Immigration and Nationality Act] and all other laws relating to the immigration and naturalization *of aliens*." Immigration and Nationality Act § 103(a), 8 U.S.C. § 1103(a) (1994) (emphasis added).

has consistently demanded a narrow reading of statutes when a broad reading would threaten the process due a U.S. citizen in a denaturalization action.[55] Such a narrow construction is typical not only in denaturalization cases, but also in other cases where a broad reading either implicates a basic right,[56] or otherwise seems to give an agency overly broad power.[57] Regulation 340.1, were it upheld, would allow the INS to extricate itself from the political debacle of Citizenship U.S.A. at the expense of freshly sworn-in citizens. Thus, the Ninth Circuit, by striking it down, has upheld the rights of these citizens as equal members of the American community.

IV. CASE BACKGROUND

A. Facts

From August 1995 to September 1996, the Clinton administration's Citizenship U.S.A. program resulted in an unprecedented 1,049,867 new U.S. citizens.[58] However, in its rush to offer citizenship to those qualified to receive it, the INS was estimated to have naturalized over 6000 persons who may not have been qualified, including many who allegedly failed to disclose criminal backgrounds.[59] This created enormous political pressure on the INS to rescind the citizenship of those who were improperly naturalized.[60]

One of the most striking aspects of this denaturalization campaign was the type of people targeted. In the past, perhaps because the procedures for denaturalization were more cumbersome, the INS

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55. *See, e.g.*, United States v. Minker, 350 U.S. 179, 187 (1956) (finding due process concerns to be "relevant to construction" of subpoena power conferred by ambiguously worded statute where proceedings were "calculated to bring about the denaturalization of citizens").

56. *See, e.g.*, Kent v. Dulles, 357 U.S. 116, 125-30 (1958) (involving use of narrow construction of statute where liberal construction would give Secretary of State overly broad discretion to limit the fundamental right to travel).

57. *See, e.g.*, Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst. (The Benzene Case), 448 U.S. 607 (1980).

58. *See* Miguel Perez, *Who's to Blame for Crisis Over Immigration?*, RECORD, Apr. 10, 1998, at L11.

59. *See* McDonnell, *supra* note 13. Many of the facts that follow are taken from McDonnell's article for the purpose of adding color and a human dimension to the fairly narrow and technical legal question at issue in *Gorbach*.

60. *See infra* notes 181-86 and accompanying text.

had focused its efforts on only the most egregious cases of fraudulently obtained citizenship. The most celebrated cases involved Nazi war criminals who lied about their past in an effort to become U.S. citizens.[61] In stark contrast to these headline-grabbing cases, many of the individuals targeted for administrative denaturalization were ordinary, law-abiding persons who were accused of misrepresentations on their applications for naturalization that would probably strike most people as minor.[62]

Irina Gorbach, the first named plaintiff in *Gorbach v. Reno*, was hardly the type of person one might have expected to be targeted for so extreme a process as denaturalization. A software engineer at Microsoft, Gorbach was accused of lying on her naturalization application about her place of residence, though she claimed to have informed the INS that she moved while her application was still pending.[63]

Another new citizen, Agueda Escalante, was targeted for denaturalization on the grounds that she had willfully concealed a past arrest on her application for naturalization.[64] The allegation stemmed from a surreal run-in with the police, who appeared at her house ostensibly in response to a 911 call.[65] After confirming that there was no emergency, the officers looked around Escalante's home and discovered a common houseplant that they mistook for marijuana.[66] Though Escalante was never formally charged with any crime, she was handcuffed and taken to the police station, and her plant was seized.[67] Because no charges were filed once the police discovered their mistake, Escalante did not consider herself to have been "arrested," and consequently did not report the incident on her application for naturalization.[68] On the basis of this incident, the INS

61. *See, e.g.*, GREAT AMERICAN TRIALS 709-11 (Edward W. Knappman ed., 1994) (describing the celebrated denaturalization trial of John Demjanjuk, a naturalized U.S. citizen who was identified by Holocaust survivors as "Ivan the Terrible," a notorious Nazi prison official).

62. *See generally* McDonnell, *supra* note 13 (describing three such minor misrepresentations).

63. *See id.*

64. *See id.*

65. *See id.*

66. *See id.*

67. *See id.*

68. *See id.*

told Escalante, in her Notice of Intent to Revoke Naturalization (hereinafter "NOIR"),[69] that "[y]ou were not a person of good moral character when you took the oath of allegiance," and that the INS would therefore seek to revoke her citizenship.[70]

Gorbach, Escalante, and eight other named plaintiffs who were served with NOIRs filed a class action lawsuit against the INS, seeking to enjoin the agency from conducting denaturalization proceedings under regulations they believed were promulgated without a proper grant of authority from Congress.[71]

B. District Court Proceedings

On July 9, 1998, Judge Barbara Rothstein of the U.S. District Court for the Western District of Washington granted the plaintiffs' motion for a preliminary injunction to prevent the INS from conducting administrative denaturalization pending resolution of the legality of the regulations and denied the Attorney General's motion to dismiss.[72] After ruling that the plaintiffs had standing to sue[73] and that their claims were ripe,[74] Judge Rothstein found that the plaintiffs had raised questions about the Attorney General's authority to promulgate the regulations that were sufficiently serious to justify the requested preliminary injunction.[75]

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69. This Note adopts the abbreviation used in the three-judge panel opinion, which does not indicate why it refers to the notice as a "NOIR" rather than the more obvious acronym "NIRN." *See* Gorbach v. Reno, 179 F.3d 1111, 1116 (9th Cir. 1999) (*Gorbach I*). Admittedly, the former has a more poetic quality than the latter and has the added advantage of suggesting the dark tone of the proceedings into which it hales the new citizen.

70. McDonnell, *supra* note 13. In addition to the indignity she suffered at the hands of the INS, McDonnell reports that Escalante "never did get her plant back." *Id.*

71. *See* Gorbach v. Reno, 219 F.3d 1087, 1087-88 (9th Cir. 2000) (*Gorbach II*).

72. *See* Gorbach v. Reno, 181 F.R.D. 642, 645 (W.D. Wash. 1998).

73. *See id.* at 647-48.

74. *See id.* at 648.

75. *See id.* at 648-50. Because Judge Rothstein found that the plaintiffs had raised a sufficiently serious question about the Attorney General's authority to promulgate the regulations, she did not address their two alternative arguments: that the regulations violated due process and the Administrative Procedure Act. *See id.* at 648.

On August 7, 1998, Judge Rothstein adopted a magistrate judge's recommendation for class certification, thereby allowing certain plaintiffs to serve as class representatives whose claims would otherwise be moot because the INS had dropped the proceedings against them.[76]

C. *Ninth Circuit Court of Appeals - The Divided Three-Judge Panel*

Judge Pamela A. Rymer, writing for a divided three-judge panel of the Court of Appeals for the Ninth Circuit,[77] held that the Attorney General possessed statutory authority to promulgate Regulation 340.1 and therefore vacated the district court's preliminary injunction as moot.[78]

The majority opinion identified five guiding principles used in formulating its decision, though it stated that the decision regarding the Attorney General's authority to denaturalize "ultimately turn[s] on the statutory scheme itself . . . ."[79] First, according to the court, when a statute gives an agency the power to promulgate "'such rules and regulations as may be necessary to carry out [its provisions]' . . . a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'"[80] Second, because a "precious right" is at risk in denaturalization proceedings, the court stated that "summary revocation procedures are disfavored."[81] Third, because administrative agencies do not tend to guard individual rights as jealously as Article III courts, the court

76. *See id.* at 644-45 (adopting magistrate judge's recommendation for class certification in Gorbach v. Reno, No. C98-278R, 1998 U.S. Dist. LEXIS 11850 (W.D. Wash. July 17, 1998)).

77. Judge Arthur Alarcon joined the opinion of the court, and Judge Andrew Kleinfeld filed a dissenting opinion. *See* Gorbach v. Reno, 179 F.3d 1111, 1113 (9th Cir. 1999) (*Gorbach I*).

78. *See id.* at 1113-14.

79. *Id.* at 1120.

80. *Id.* (citing Balelo v. Baldridge, 724 F.2d 753, 760 (9th Cir. 1984) (en banc) (quoting Mourning v. Family Publ'ns Serv. Inc., 411 U.S. 356, 369 (1973))).

81. *Id.* (citing Magnuson v. Baker, 911 F.2d 330, 335 n.11 (9th Cir. 1990)). The court elaborated that "we expect notice and opportunity to be heard before naturalization can be revoked, and exceptional grounds such as fraud or misrepresentation to exist before the authority to revoke a citizenship judgment is exercised." *Id.*

assumed that "there should be judicial adjudication of the issue of citizenship and a heavy criterion of proof by the government before decreeing denaturalization 'unless by appropriate explicitness the lawmakers make them inapplicable.'"[82] Fourth, the court asserted that "[e]very tribunal, judicial or administrative, has some power to correct its own errors or otherwise appropriately to modify its judgment, decree, or error."[83] Fifth, and finally, the court presumed that Congress intends its statutory amendments to have "real and substantial effect."[84] The opinion does not note how each of these five factors are to be balanced relative to one another, and it seems to rely most heavily on the fourth and fifth factors, while paying only lip service to the second and third.

The majority conceded that section 340 "nowhere says, in so many words, that the Attorney General *shall* have the authority to reopen" orders of naturalization.[85] Nevertheless, the court decided that the lack of explicit congressional authorization did not undermine her[86] authority to create administrative denaturalization procedures.[87]

On October 19, 1999, the Ninth Circuit Court of Appeals voted to rehear the case en banc, thereby withdrawing the original three-judge panel opinion.[88]

D. The Ninth Circuit's En Banc Decision

On July 20, 2000, the en banc Court of Appeals for the Ninth Circuit[89] unanimously reversed the decision of the three-judge panel

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82. *Id.* (citing United States v. Minker, 350 U.S. 179, 188 (1956) (quoting Ng Fung Ho v. White, 259 U.S. 276, 285 (1922))).

83. *Id.* at 1120-21 (citing Alberta Gas Chems., Ltd. v. Celanese Corp., 650 F.2d 9, 13 (2d Cir. 1981) (quoting 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 18.09, at 606 (1958))).

84. *Id.* at 1121 (citing Stone v. INS, 514 U.S. 386, 397 (1995)).

85. *Id.* at 1119 (emphasis in original).

86. In order to minimize the use of the awkward term "his/her," this Note adopts the convention of referring to all executive branch officers by the gender of the officeholder at the time when the *Gorbach* litigation arose.

87. *See id.* at 1121.

88. Gorbach v. Reno, 192 F.3d 1329 (9th Cir. 1999) (granting rehearing en banc without published opinion).

89. The Court of Appeals for the Ninth Circuit hears "en banc" cases in panels of eleven judges, selected more or less at random from among the over forty judges that make up the appellate court. *See* FED. R. APP. P. 35; 9TH CIR. R. 35-3, *available at* http://www.ca9.uscourts.gov/ca9/documents.

and upheld the district court's injunction.[90] In an opinion by Judge Andrew J. Kleinfeld, the author of the dissenting opinion on the original three-judge panel,[91] the court held that the power to denaturalize U.S. citizens could not be implied from the powers that Congress had explicitly granted to the Attorney General in the area of naturalization.[92] After deciding that the case was ripe for review[93] and that the trial court had not abused its discretion in granting the preliminary injunction,[94] the court proceeded to address the merits of the case.

The Attorney General purported to find her power to denaturalize in a statutory subsection that the court called the "saving clause,"[95] which states that "[n]othing contained in this section shall be regarded as limiting, denying, or restricting the power of the Attorney General to correct, reopen, alter, modify, or vacate an order naturalizing the person."[96] The Attorney General argued that, under *Chevron v. Natural Resources Defense Council*,[97] her interpretation of the saving clause as a grant of authority to denaturalize was "entitled to considerable deference."[98] The court decided that the Attorney General's *Chevron* analysis was flawed because *Chevron* only counsels deference to agency interpretations of law when a statute, read in context, does not clearly answer the legal question being

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nsf/Local+Rules?OpenView. The panel that heard *Gorbach II* consisted of Judge Andrew J. Kleinfeld, who wrote the lead opinion, Chief Judge Procter Hug, Jr., and Circuit Judges James R. Browning, Mary M. Schroeder, Diarmuid F. O'Scannlain, Thomas G. Nelson, Michael Daly Hawkins, A. Wallace Tashima, Sidney R. Thomas, Susan P. Graber, and Kim McLane Wardlaw. *See* Gorbach v. Reno, 219 F.3d 1087, 1089 (9th Cir. 2000) (*Gorbach II*) (en banc).

90. *See Gorbach II*, 219 F.3d at 1087-88.

91. *See* Gorbach v. Reno, 179 F.3d 1111, 1127 (9th Cir. 1999) (Kleinfeld, J., dissenting). The majority opinion in *Gorbach II* is an expanded version of Judge Kleinfeld's dissenting opinion in *Gorbach I*, with additional citations to authority, several new arguments, and stirring language about the value of U.S. citizenship thrown in for good measure.

92. *See Gorbach II*, 219 F.3d at 1089.

93. *See id.* at 1091-92.

94. *See id.* at 1092.

95. *Id.* at 1094.

96. *Id.* (citing Immigration and Nationality Act § 340(h), 8 U.S.C. § 1451(h) (1994)).

97. 467 U.S. 837 (1984).

98. *Gorbach II*, 219 F.3d at 1093.

interpreted.[99] The court, reading the particular statutory subsection at issue within the context of its history and its place within the larger statutory scheme of naturalization and denaturalization, decided that Congress was unambiguous in *not* conferring on the Attorney General the power to denaturalize.[100] Because "[a]n agency may not confer power upon itself,"[101] Congress's failure to confer this power would leave the Attorney General without authority to promulgate the regulations at issue in the *Gorbach* litigation.

The court acknowledged that Congress had explicitly granted the Attorney General the power to naturalize citizens.[102] However, it noted that she had been given only very circumscribed powers to undo her actions in this area. For example, the court noted that the Attorney General has the power to cancel certificates of naturalization, but that such cancellations do not affect the underlying citizenship of an individual whose certificate has been cancelled.[103] The court also observed that, in addition to withholding power from the Attorney General to effect denaturalization through cancellation of certificates, Congress also created an elaborate statutory procedure for stripping an individual of his or her citizenship through an action brought in district court by a U.S. Attorney.[104] By looking at the saving clause in the context of other provisions of the Immigration and Nationality Act dealing with denaturalization and related issues, the court concluded that the negatively worded saving clause could not be construed as a positive grant of authority to denaturalize.[105]

The court went on to point out that it is not even clear that the Attorney General ever issues an "order" of naturalization that is separate from the certificate of naturalization itself, as the

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99. *See id.* (citing Chevron v. Natural Res. Def. Council, 467 U.S. 837 (1984)).

100. *See id.*

101. *Id.* at 1092-93 (quoting Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986)).

102. *See id.* at 1093.

103. *See id.* at 1093-94. Ironically, proceedings to revoke certificates of citizenship, where the underlying status is not at stake, are subject to greater procedural protections than those set forth in Regulation 340.1, where citizenship is at stake. *See* Levy, *supra* note 12, at 1708-09.

104. *See Gorbach II*, 219 F.3d at 1093-94.

105. *See id.* at 1094.

naturalization courts had previously done.[106] If she does not, then the saving clause, which only specifically allows the Attorney General to "reopen . . . or vacate an *order*,"[107] has, as Judge Kleinfeld points out, "nothing to save."[108]

Because the statute, literally read, does not preserve any power that the Attorney General actually possessed to begin with, Judge Kleinfeld observed that the heart of her argument "is that the power to denaturalize is 'inherent' in the power to naturalize."[109] Judge Kleinfeld pondered the merits of this argument with a healthy dose of wit:

> There is no reason why that should be so. There is no general principle that what one can do, one can undo. It sounds good, just as the Beatles' lyrics "Nothing you can know that isn't known/ Nothing you can see that isn't shown/ Nowhere you can be that isn't where you're meant to be,"—sound good. But as Sportin' Life said, "It ain't necessarily so."[110]

Having dismissed the strains of hippie jurisprudence underlying the Attorney General's central argument, Judge Kleinfeld then gave examples of situations where what one can do, one cannot legally undo:

> A person can give a gift, but cannot take it back. A minister, priest, or rabbi can marry people, but cannot grant divorces or annulments for civil purposes. A jury can acquit, but cannot revoke its acquittal and convict. Whether the Attorney General can undo what she has the power to do, naturalize citizens, depends on whether Congress said she could.[111]

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106. *See id.*

107. Immigration and Nationality Act § 340(h), 8 U.S.C. § 1451(h) (1994) (emphasis added).

108. *Gorbach II*, 219 F.3d at 1095.

109. *Id.*

110. *Id.* (citing THE BEATLES, *All You Need is Love, on* MAGICAL MYSTERY TOUR (EMI/Capitol Records 1967); GEORGE GERSHWIN & IRA GERSHWIN, PORGY AND BESS (1934)).

111. *Id.* Another good illustration of the principle invoked by Judge Kleinfeld can be found in the recent controversy involving refugees from Haiti seeking asylum in the United States. In 1981, the Reagan administration

The opinion goes on to point out that a valid inference might be made that Congress had intended the power to naturalize to include the power to denaturalize, if practicality required that both powers be exercised by the same governmental entity.[112] However, as Judge Kleinfeld explained, this is not the case. Because the INS can process a vastly greater volume of cases than the courts, Judge Kleinfeld observed that it makes sense to give the agency the responsibility of handling the vast numbers of naturalization applications that are filed each year.[113] Denaturalization, on the other hand, is a process best handled by the court system, with its emphasis on case-by-case adjudication and protection of individual rights. As Judge Kleinfeld observed, "administrative agencies . . . are dubious instruments for performing relatively rare acts catastrophic to the interests of the individuals on whom they are performed."[114] Because of the relative strengths of administrative and judicial action, Judge Kleinfeld observed that it is reasonable to assume that Congress "would delegate the power to naturalize to an administrative agency, and lodge the power to denaturalize in district courts, based on the number of cases and the relative risks to individual liberty in the two kinds of cases . . . ."[115]

The opinion next explains how the court's reading of the statute harmonizes the *Gorbach* case with precedent Supreme Court

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adopted a policy—continued by the Bush and Clinton administrations—of interdicting Haitian refugees at sea before they could reach U.S. shores. *See generally* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP, PROCESS AND POLICY 1158-61 (4th ed. 1998) (giving history of the policy and criticisms leveled against it). The refugees interdicted at sea did not have a right to have their asylum claims heard. *See id.* However, any refugees who arrived on U.S. soil acquired a vested right to have their asylum claim heard before they could legally be deported. *See id.* at 1028 n.22 (describing the procedure of expedited removal of undocumented aliens and the use of asylum claims as a defense to removal). The act of reaching U.S. soil therefore gave these individuals a right that could not be summarily revoked, even though the government could validly have avoided the right from vesting in the first place.

112. *See Gorbach II*, 219 F.3d at 1095.

113. *See id.* at 1095-96. The legislative history of section 340(h) reveals that fast, efficient processing of naturalization applications was a motivating factor in Congress's decision to make naturalization an administrative matter. *See* S. Rep. No. 55, at 3 (1989).

114. *Gorbach II*, 219 F.3d at 1095.

115. *Id.* at 1096.

decisions that gave narrow construction to statutes touching on denaturalization. For example, in *Bindczyck v. Finucane*,[116] the Supreme Court rejected the notion that naturalization is akin to an ordinary judgment which courts can undo in the same manner in which they might vacate other judgments based on their own local rules regarding reopening of judgments.[117] The Court held that the route to denaturalization that Congress had created in the predecessor to the current section 340(a) of the Immigration and Nationality Act was "the exclusive procedure for canceling citizenship on the score of fraudulent or illegal procurement based on evidence outside the record."[118] This holding was based on the legislative history of the denaturalization procedure created by Congress, the distinctive qualities of a naturalization judgment as opposed to other types of judgments, and the danger of having a status of national significance be subject to local rules of courts governing the finality of judgments.[119]

Justice Frankfurter found that the denaturalization provision at issue in *Bindczyck* was "the culmination of half a century's agitation directed at naturalization frauds, particularly in their bearing upon the suffrage"[120] and noted congressional concern that "elections could be influenced by irregular denaturalizations as well as by fraudulent naturalizations."[121]

Though the result of *Bindczyck* was abrogated when Congress enacted the predecessor to Immigration and Nationality Act section 340(h),[122] which expressly permitted courts to use rules of procedure to overturn their own judgments of naturalization, the Supreme Court has emphatically stated that "[t]he underlying philosophy of

116. 342 U.S. 76 (1951).
117. *See id.*
118. *Id.* at 79.
119. *See id.*
120. *Id.*
121. *Id.* at 82. The fallout from the Citizenship U.S.A. program provides a perfect illustration of why denaturalization should not be left to the vagaries of the political branches of government. As will be discussed below in Part V.B, vesting the denaturalization power exclusively in the court system solves many potential due process abuses that political considerations might introduce into the process.
122. *See* Immigration and Nationality Act, Pub. L. No. 82-414, § 340, 66 Stat. 163 (1952).

Bindczyck remains intact."[123] As Judge Kleinfeld correctly asserted, "[t]hat philosophy emphasizes the importance of citizenship and the safeguards against taking it away."[124] In this case, the philosophy mandates that no inherent power to denaturalize should be read into a statute that does not explicitly grant such a power.

Kleinfeld found further support for this proposition in *United States v. Minker*.[125] The *Minker* Court demanded a narrow reading of a statute defining the powers of immigration officers in denaturalization proceedings.[126] This principle of statutory construction, wrote Kleinfeld, "means that, if there is doubt whether the statute confers the power on the Attorney General to denaturalize . . . the doubt must be resolved against the Attorney General."[127]

In light of these Supreme Court precedents, the majority opinion concludes that the power to denaturalize cannot be read into a statutory provision that merely preserves the Attorney General's preexisting powers from implied repeal.[128] The court rejected the Attorney General's argument that such a narrow reading would effectively render section 340(h) meaningless by giving the saving clause nothing to save.[129] The court responded that the section was probably meant to save other, more limited powers for the Attorney General, such as the power to reopen a case in order to correct clerical errors and spelling mistakes.[130]

Judge Kleinfeld concluded the majority opinion with an explanation of why citizenship is a right worthy of the highest level of protection by Article III courts, and why courts should be wary of administrative attempts to usurp the power to take it away:

> Citizenship in the United States of America is among our most valuable rights. For many of us, it is all that protects our life, liberty, and property from arbitrary deprivation. The world is full of miserable governments that protect none of these rights. Many of us would be dead or never

123. United States v. Zucca, 351 U.S. 91, 95 n.8 (1956).
124. *Gorbach II*, 219 F.3d at 1097.
125. 350 U.S. 179 (1956).
126. *See id.* at 186-90.
127. *Gorbach II*, 219 F.3d at 1097.
128. *See id.* at 1098.
129. *See id.*
130. *See id.*

> conceived in wretched places in other countries, had we or our ancestors not obtained American citizenship. The opportunities that we want to pass on to our children depend on their secure rights to stay in this country and enjoy its guarantees of life, liberty, and property, and the domestic peace and prosperity that flow from these guarantees. An executive department cannot simply decide, without express statutory authorization, to create an internal executive procedure to deprive people of those rights without even going to court.[131]

In other words, it is the duty of the courts, as the protector of individual rights, to narrowly construe statutes when a broad reading would give an administrative agency the power to strip U.S. citizens of their citizenship. "For the Attorney General to gain the terrible power to take citizenship away without going to court," concluded Kleinfeld, "she needs Congress to say so"[132]—and to "say so" in no uncertain terms.

V. ANALYSIS

The en banc decision in *Gorbach v. Reno* is a major step forward for the federal courts in defending the equal treatment of naturalized citizens and in curbing the potential abuse of authority that might ensue from giving the executive branch authority to denaturalize American citizens. Moreover, the decision reaches this result without offending the deference that is due to federal agencies in their interpretation of the laws they have been charged with enforcing.

A. Why Chevron *Deference Is Inappropriate*

Both the majority and the concurring opinions recognize that *Chevron U.S.A., Inc. v. Natural Resources Defense Council*[133] is the starting point for any analysis of an agency's power to interpret the laws that it is charged with enforcing.[134] In *Chevron*, the Supreme

131. *Id.* at 1098-99.
132. *Id.* at 1099.
133. 467 U.S. 837 (1984).
134. *See* FDA v. Brown & Williamson Tobacco Corp., 120 S. Ct. 1291, 1294 (2000) ("Because this case involves an [administrative] agency's con-

Court, in reaction to the lower courts' practice of substituting their own reading of statutes for agency interpretations, imposed a more deferential standard of review for agency interpretations of law. *Chevron* effectively mandates deference to an agency's reasonable interpretation of a statute when the statute itself does not answer the legal question.[135]

The Attorney General purported to find her power to institute administrative denaturalization proceedings in section 340(h) of the Immigration and Nationality Act, which provides that "[n]othing contained in this section shall be regarded as limiting, denying, or restricting the power of the Attorney General to correct, reopen, alter, modify, or vacate an order naturalizing the person."[136] Standing alone, this statutory provision does not clearly answer the legal question of whether the Attorney General possesses the power to denaturalize outside of the federal court system. However, *Chevron* does not ask courts to adhere blindly to the literal language of an isolated subsection of the *United States Code* to determine whether or not the statute speaks clearly on the issue. *Chevron* itself explicitly directs courts to use the overall structure of the statute, its legislative history, and traditional tools of statutory construction to determine the clear meaning of the statute.[137] Circuit court cases that

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struction of a statute it administers, [our] analysis is governed by [*Chevron*]."). The majority opinion gives little weight to the Attorney General's argument that the courts should defer to her interpretation of the statutes that give her authority in the area of naturalization. Judge Kleinfeld simply notes that the Attorney General "makes a cursory reference to [*Chevron*] for the proposition that her action in promulgating the regulation at issue is 'entitled to considerable deference,' but does not develop the argument beyond that." *Gorbach II*, 219 F.3d at 1093. Kleinfeld largely bypasses the *Chevron* issues lurking in the case and bases his conclusions primarily on the idea that the power to denaturalize—a procedure with catastrophic effects on the rights of individual citizens—cannot be inferred from the power to naturalize, but must be granted explicitly by statute. *See id.* at 1091. The concurring opinion by Judge Sidney R. Thomas focuses more closely on the *Chevron* issues underlying the case, particularly in light of the Supreme Court's recent gloss on *Chevron* in *Brown & Williamson*. *See id.* at 1099.

135. *See Chevron*, 467 U.S. at 842-44.

136. Immigration and Nationality Act § 340(h), 8 U.S.C. § 1451(h) (1994).

137. *See Chevron*, 467 U.S. at 843 n.9, 845. Though legislative history is often used to shed light on the meaning of statutes, both sides in the *Gorbach* case agreed that there was no legislative history to show one way or the other whether Congress intended section 340(h) to give the Attorney General the

have followed *Chevron* have made ample use of these interpretive tools.[138] When section 340(h) is viewed within the overall scheme of the Immigration and Nationality Act, and seen in the light of controlling Supreme Court precedent and traditional canons of construction, it becomes clear that, even under the deferential *Chevron* test, the Attorney General does not possess the power to denaturalize U.S. citizens.

1. Viewing section 340(h) in the context of the larger statutory scheme

One of the most useful tools for determining the meaning of a particular subsection of a statute is to look at it in the context of the overall statutory scheme of which it is a part.[139] The need to examine section 340(h) in the overall context of the Immigration and Nationality Act is particularly strong, as the provision is merely negative and does not affirmatively grant any kind of power. Judge Kleinfeld construed this provision as a "saving clause" that merely preserves whatever power the Attorney General might already possess.[140] The provision was inserted, he argued, in order to make clear that the other portions of the denaturalization statute should not be interpreted as divesting the Attorney General of her preexisting powers.[141] In order to determine what these preexisting powers might be, we must look elsewhere in the Immigration and Nationality Act.

The *Gorbach* decision mentions some of the "preexisting powers" of the Attorney General, including the power to grant naturalization and the more limited power to cancel certificates of naturalization without affecting the underlying status of the individual.[142] In addition to these specific grants of power and limits on the power of

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power to denaturalize U.S. citizens. *See* Gorbach v. Reno, 181 F.R.D. 642, 648 (W.D. Wash. 1998).

138. William Eskridge has compiled a diverse collection of the often conflicting traditional canons of statutory construction used by the Rehnquist Court. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 323-33 (1994).

139. *See Brown & Williamson*, 120 S. Ct. at 1300-01 (stating that words must be placed in context).

140. *See Gorbach II*, 219 F.3d at 1094.

141. *See id.*

142. *See id.*

the Attorney General in the area of naturalization, there is another reason why Congress could not have meant to "preserve" the Attorney General's purported power to denaturalize, and it is basic to the very nature of her powers in the area of immigration and naturalization.

The legislation that gives the Attorney General her power in matters of immigration and naturalization states that "[t]he Attorney General shall be charged with the administration and enforcement of [the Immigration and Nationality Act] and all other laws relating to the immigration and naturalization *of aliens*."[143] Clearly, under the *Chevron* rule, the Attorney General must be given considerable deference in her interpretation of the laws "relating to the immigration and naturalization of aliens."[144] However, even assuming, arguendo, that Judge Kleinfeld is wrong and that the authority to denaturalize can be inferred from the power to naturalize, the Attorney General must overcome one more hurdle before *Chevron* deference is appropriate: can these newly naturalized citizens be considered "aliens"?

An "alien," as defined in the Immigration and Nationality Act, is "any person not a citizen or national of the United States."[145] However, Regulation 340.1 makes it clear that "the applicant shall be considered to be a citizen of the United States until a decision to reopen proceedings and deny naturalization becomes final."[146] If the person haled into these proceedings is a "citizen," they are by definition not an "alien."[147] Though *Chevron* deference would be appropriately applied to the Attorney General's interpretation of laws "relating to the immigration and naturalization *of aliens*,"[148] it should not be applied at all to her interpretation of laws affecting the status of U.S. citizens.

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143. Immigration and Nationality Act § 103(a), 8 U.S.C. § 1103(a) (1994) (emphasis added).

144. *Id.*

145. Immigration and Nationality Act § 101(a)(3), 8 U.S.C. § 1101(a)(3) (1994).

146. 8 C.F.R. § 340.1(g)(4) (2000).

147. *See* Immigration and Nationality Act § 101(a)(3), 8 U.S.C. § 1101(a)(3).

148. Immigration and Nationality Act § 103(a), 8 U.S.C. § 1103(a) (emphasis added).

The regulations attempt to escape this problem by consistently referring to the individual as an "applicant" for citizenship, thus constructively placing him or her in the position of an alien applying for citizenship.[149] If the INS were to prevail in its administrative proceedings, it would be as though an alien's application for citizenship had been denied, rather than a citizen having been stripped of his or her citizenship.[150]

The Attorney General cannot have it both ways. The categories of "citizen" and "alien" are mutually exclusive, and the individuals who receive the dreaded NOIR from the INS cannot be considered both. If they are deemed aliens, then the Attorney General, simply by sending the NOIR, has already summarily stripped a citizen of his or her citizenship before hearings have even begun, which would almost certainly constitute a violation of due process.[151] If they are deemed citizens, then they are, if not outside of the jurisdiction of the INS altogether, at least outside of the appropriate subject matter over which the Attorney General can justifiably claim *Chevron* deference.

2. The "clear statement" doctrine of statutory construction disallows the Attorney General's reading of the statute

Another important principle often used to determine when Congress has spoken on an issue is the "clear statement" doctrine. This canon of statutory construction allows courts to construe statutes narrowly when a broad reading would either render the statute unconstitutional or force the court to rule on a serious constitutional issue.[152] The clear statement doctrine, in effect, creates a presumption

149. *See* 8 C.F.R. § 340.1.

150. Indeed, the regulations provide that "[a] final decision to . . . revoke naturalization shall be effective as of the date of the original order purporting to admit the applicant to citizenship. The order purporting to admit the applicant to citizenship shall then have no legal effect." 8 C.F.R. § 340.1(g)(1).

151. *See* ERNEST GELLHORN & RONALD M. LEVIN, ADMINISTRATIVE LAW AND PROCESS 219-22 (4th ed. 1997) (noting that the right to predeprivation notice and hearing is generally required when an individual is threatened by adverse government action, unless there is a demonstrated need for immediate action to protect the public from serious harm, or there is a statutory or common law remedy available to compensate the individual for the loss of liberty or property—neither of which is present in this case).

152. *See* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 321 (4th ed. 1999).

that Congress will not generally create legislation that pushes the constitutional envelope, and that if it intends to pass a law that raises novel constitutional issues, it will use sufficiently clear language to force the issue.[153] Put another way, if a statute is worded in such a way that it is capable of more than one plausible interpretation, courts should generally avoid a reading that allows an administrative agency to raise a serious constitutional question that Congress did not clearly intend to raise.[154]

The language of the statute at issue in *Gorbach* is, taken at face value, admittedly capable of at least two interpretations. This might, at first blush, seem to lead inexorably to the conclusion that the Attorney General's reading should receive *Chevron* deference. However, some cases decided after *Chevron* have suggested that the clear statement doctrine can trump *Chevron* deference when an agency interprets an ambiguous statute in such a way that a serious constitutional question is raised.[155] Because the Attorney General's reading

153. *See id.*

154. This formulation of the clear statement doctrine makes explicit what some commentators have suggested: that the clear statement doctrine is simply "a more modest and targeted version of the nondelegation principle." *Id.* The nondelegation principle is a doctrine—now fallen into disuse—that purported to prevent Congress from delegating its lawmaking powers to an administrative agency. *See* GELLHORN & LEVIN, *supra* note 151, at 12-18. The doctrine was used explicitly by the Supreme Court on three occasions in the 1930s. In each instance it was used to invalidate a statute that granted broad discretion to agencies to make legislative-type policy decisions without in some way cabining that discretion. *See id.*

The clear statement doctrine achieves the same objective as the nondelegation doctrine: to ensure that Congress think with particularity about important policy issues rather than pass political hot potatoes to an agency to avoid the political consequences of taking a definitive public stand on a controversial issue. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131-34 (1980) (discussing the democratic importance of requiring Congress, rather than unelected agencies, to make clearly identifiable decisions on important public policy issues). However, the clear statement doctrine achieves this goal in a more "modest and targeted" way by focusing on instances where agencies make policy decisions that potentially infringe upon the constitutional rights of individuals, rather than policy decisions that broadly affect larger segments of the population that are better able to exert political pressure in an attempt to change the policy. Such a targeted approach is consistent with the modern role of federal courts as protectors of the constitutional rights of politically unpopular minorities.

155. *See, e.g.*, DeBartolo Corp. v. Fla. Gulf Coast, 485 U.S. 568, 574-75

of the statute raises serious constitutional issues that are not properly within her discretion to decide, this is an appropriate case in which to give the clear statement doctrine precedence over *Chevron* deference.

The first major constitutional issue raised by the Attorney General's interpretation is whether or not naturalized citizens will be accorded full due process rights in the denaturalization proceedings contemplated by the INS. Under the regulation as originally promulgated, which put the burden of proof on the citizen to prove his or her initial eligibility for naturalization,[156] it seemed clear that they would not be accorded full due process rights. Perhaps recognizing the potential due process problem, the Attorney General shifted the burden of proof to the INS the week after oral arguments were heard in *Gorbach II*.[157]

(1988) (holding that, although an administrative agency's interpretations are normally entitled to *Chevron* deference, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"); BREYER ET AL., *supra* note 152, at 322-24. Compare Rust v. Sullivan, 500 U.S. 173 (1991), in which Justice O'Connor, in dissent, argued that it was appropriate for the clear statement rule to override *Chevron* when an agency decides a constitutional question that should more appropriately be decided by the Congress:

> In these cases, we need only tell the Secretary that his regulations are not a reasonable interpretation of the statute; we need not tell Congress that it cannot pass such legislation. If we rule solely on statutory grounds, Congress retains the power to force the constitutional question by legislating more explicitly. It may instead choose to do nothing. That decision should be left to Congress; we should not tell Congress what it cannot do before it has chosen to do it. It is enough in this litigation to conclude that neither the language nor the history of [the statute] compels the Secretary's interpretation, and that the interpretation raises serious First Amendment concerns. On this basis alone, I would . . . invalidate the challenged regulations.

Id. at 224-25 (O'Connor, J., dissenting).

156. *See* 8 C.F.R. § 340.1(b)(6).

157. *See* Revoking Grants of Naturalization, 65 Fed. Reg. 17,127, 17,128 (Mar. 31, 2000) (amending 8 C.F.R. § 340.1(b)(6) by requiring the INS to prove "by clear, convincing, and unequivocal evidence that the grounds for reopening and revoking [citizenship] . . . have been met"). The INS asserted that the reason for the change was to make the burden of proof in the regulations reflect the actual practice of the INS in administrative denaturalization proceedings. *See id.* at 17,127. The INS further stated that if it discovered any cases where the burden of proof set forth in the original regulations had actu-

Though the shift in the burden of proof brings administrative denaturalization proceedings more in line with the proceedings conducted in the federal courts,[158] there are other aspects of the proceedings that have troubling due process implications. For example, the administrative official who issues the NOIR is the same official who ultimately decides whether or not the individual was initially eligible for citizenship.[159] Though this does not in itself constitute a per se violation of due process, it runs counter to the modern trend of separating prosecutorial and adjudicatory functions in administrative agencies.[160] This aspect of the regulations should therefore be viewed with suspicion by a court charged with evaluating the risk of diminished due process rights in an administrative setting.

The Attorney General's reading of the statute also raises potential problems under the equal protection requirement that has been read into the Fifth Amendment by the Supreme Court.[161] Courts have generally applied heightened scrutiny to classifications that distribute fundamental rights in an unequal manner. Though a definitive list of exactly what qualifies as a fundamental right has never been compiled by the Court, the right to vote and the right to conduct interstate travel—both of which are at least tangentially related to citizenship—have been consistently treated as fundamental rights.[162] Courts have also applied heightened scrutiny when a suspect class is

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ally been applied, it would "on its own motion, reconsider the decision under the clear, unequivocal, and convincing standard of proof." *Id.*

158. *See supra* note 50.

159. The INS District Director with jurisdiction over the naturalized citizen's current residence is responsible for both preparing the NOIR, *see* 8 C.F.R. § 340.1(b)(2)(i), and for rendering a final decision in the case. *See id.* § 340.1(d)(1); *see also* Levy, *supra* note 12, at 1708-09 (comparing the weak procedural protections guaranteed in administrative denaturalization proceedings, in which citizenship is at stake, with the stronger protections given in proceedings to cancel certificates of citizenship, in which the underlying status is not at stake).

160. *See* BREYER ET AL., *supra* note 152, at 33-35.

161. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (disallowing classifications by the federal government that would violate the Equal Protection Clause of the Fourteenth Amendment if made by a state government).

162. *See* Dunn v. Blumstein, 405 U.S. 330 (1972) (declaring a state statute unconstitutional because it infringed upon the fundamental rights to vote and to travel); *cf.* Kent v. Dulles, 357 U.S. 116, 125 (1958) (holding that the "right to travel" is part of "the 'liberty' of which a citizen cannot be deprived without due process of law").

burdened by a classification.[163] Though naturalized citizens have never been declared a suspect class, and citizenship has never been directly called a fundamental right, both branches of equal protection analysis raise enough of a constitutional issue to mandate a narrow reading of the authority granted to the Attorney General.

Though naturalized citizens, as such, have never been called a suspect class, the Court has called nationality—a closely related classification—a suspect class.[164] The Court has also stated, at times, that naturalized citizens are not second-class citizens. For example, in *Schneider v. Rusk*,[165] Justice Douglas declared that:

> We start 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. The only difference drawn by the Constitution is that only the "natural born" citizen is eligible to be President.
>
> . . . [T]he rights of the naturalized citizen derive from satisfying, free of fraud, the requirements set by Congress . . . . [Apart from the inability to become President, the 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."[166]

One might object that citizens who obtained their citizenship by fraud do not fall within the ambit of this language. However, the right to an adequate process before one is stripped of membership in a favored class—citizenship—means that guilt cannot be assumed ahead of time so as to make adherence to strict procedural standards unnecessary. To say that these citizens should be subject to denaturalization by the INS rather than the courts is roughly analogous to saying that a defendant in a criminal case should have his or her guilt

163. *See Bolling*, 347 U.S. at 499.
164. *See supra* note 25.
165. 377 U.S. 163 (1964).
166. *Id.* at 165-66 (internal quotations and citations omitted).

determined by an administrative tribunal rather than a jury of his or her peers, simply by virtue of the prosecutor's unproven allegations of criminal activity. In other words, the potential constitutional problems arise by virtue of the fact that newly naturalized citizens can have their citizenship stripped by an administrative agency, while all other citizens are entitled to a full trial in federal court.[167]

The fact that only citizens who have been citizens for less than two years are subject to denaturalization[168] does nothing to lessen the equal protection problems raised by the Attorney General's reading of the statute. States have been prohibited from distributing benefits to their citizens based on length of citizenship,[169] and the federal government, by analogy, should not be able to make the rights accorded to citizens turn on the length of time they have been citizens.[170]

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167. The citizens whose citizenship can be stripped by a full trial in federal court include not only naturalized citizens, *see infra* Part III.A, but also native-born citizens—under more limited circumstances. Though having never been naturalized native-born citizens cannot be denaturalized; they can be deemed to have "expatriated" if they have voluntarily performed an expatriating act—that is, an act that evidences an intent to exercise their right to shed their U.S. citizenship. *See generally* ALEINIKOFF ET AL., *supra* note 111, at 119-50 (tracing the development of expatriation law in the United States). An intent to relinquish U.S. citizenship can be evidenced by obtaining citizenship in a foreign state, *see* Immigration and Nationality Act § 349(a)(1), 8 U.S.C. § 1481, taking an oath of allegiance to a foreign state, *see id.* § 349(a)(2), serving in the armed forces of a foreign state, *see id.* § 349(a)(3), accepting a post in a foreign government, *see id.* § 349(a)(4), formally renouncing U.S. citizenship under certain conditions, *see id.* § 349(a)(5)-(6), or committing an act of treason against the United States, *see id.* § 349(a)(7).

168. *See* 8 C.F.R. § 340.1(b)(1) (stating that the NOIR "must be served no later than 2 years after the effective date of the order admitting a person to citizenship").

169. *See* Saenz v. Roe, 526 U.S. 489 (1999) (holding that it was unconstitutional to deny a citizen welfare benefits based on a durational residency requirement).

170. This analogy is admittedly not perfect, as limits on durational residency requirements for public benefits are generally premised on the fundamental right to *interstate* travel. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-8, at 1455 (2d ed. 1988). However, the analogy is still apt because the Court, while purporting to rest its holdings on the right to interstate travel, has in practice focused more on the penalty inflicted on newcomers than on the deterrence of interstate travel caused by durational residency requirements. *See id.* at 1456-57.

All of these factors taken in combination may or may not amount to an actual violation of due process or equal protection. However, they do raise enough of a constitutional question that a court should, under the clear statement doctrine, refuse to permit a reading of the statute that raises these questions in the absence of a clear statement from Congress that the questions ought to be raised. It is unlikely that Congress would have made the first two years of citizenship a sort of "trial period" without explicitly so stating. Because the Attorney General's reading of the statute effectively creates a sort of probationary period by withholding full due process rights for two years, her reading of the statute should be rejected under the clear statement doctrine.

It can also be argued under the clear statement doctrine that the Attorney General's reading of the statute should be avoided because it gives an administrative agency a judicial-type power traditionally reserved to the courts. Though Congress has the authority to delegate such power to agencies,[171] courts are reluctant to infer such a delegation in the absence of a clear statement from Congress.[172]

A variation on this type of clear statement argument in the context of denaturalization proceedings was used by the Supreme Court in *United States v. Minker*.[173] In *Minker*, the Court was asked to decide the scope of the power of immigration officers to subpoena witnesses in denaturalization proceedings. Specifically, the Court had to decide whether possible subjects of denaturalization trials could be subjected to subpoena and questioning in their own pretrial proceedings.[174]

Though the issue before the Court was a relatively narrow one, Justice Frankfurter addressed it in broad language applicable to the construction of the statute in *Gorbach*. The *Minker* Court called the subpoena power:

> a power capable of oppressive use . . . true, there can be no penalty incurred for contempt before there is a judicial order of enforcement. But the subpoena is in form an official

171. *See, e.g.*, Commodities Futures Trading Comm'n v. Schor, 478 U.S. 833, 847 (1986).
172. *See, e.g.*, Kent v. Dulles, 357 U.S. 116, 129-30 (1958).
173. 350 U.S. 179 (1956).
174. *See id.* at 180-81.

> command, and even though improvidently issued it has some coercive tendency, either because of ignorance of their rights on the part of those whom it purports to command or their natural respect for what appears to be an official command, or because of their reluctance to test the subpoena's validity by litigation.[175]

Minker weakens the Attorney General's argument that access to de novo judicial review following administrative denaturalization makes the implied grant of power to the Attorney General valid. Whereas the subpoenas at issue in *Minker* could not, if ignored, result in a contempt citation without judicial enforcement, the NOIR, if ignored, will result in loss of citizenship without any judicial intervention. New citizens might be unable, or unwilling, to pursue the matter in court after exhausting their administrative remedies. For many new citizens who are struggling to establish themselves in this country, being forced to try the issue of their naturalization twice—once in the INS bureaucracy and once in the court system—could prove financially and emotionally ruinous, leading many who obtained citizenship legitimately to throw up their hands in defeat. Indeed, many persons raised in less litigious societies may cringe at the very thought of challenging a government agency in court and might, therefore, accept with resignation the final determination of the INS.

The *Minker* Court found the greater potential for due process shortcomings inherent in administrative process to be a relevant consideration in determining the scope of the authority given to immigration officers by the statute:

> These concerns, relevant to the construction of this ambiguously worded power, are emphatically pertinent to investigations that constitute the first step in proceedings calculated to bring about the denaturalization of citizens. This may result in "loss of both property and life; or of all that makes life worth living." In such a situation where there is doubt it must be resolved in the citizen's favor. Especially must we be sensitive to the citizen's rights where the proceeding is nonjudicial because of "[t]he difference in security of judicial over administrative action . . . ." These

175. *Id.* at 187 (citation omitted).

> considerations of policy, which determined the Court's decisions in requiring judicial as against administrative adjudication of the issue of citizenship in a deportation proceeding and those defining the heavy criterion of proof to be exacted by the lower courts from the Government before decreeing denaturalization, are important guides in reaching decision here. They give coherence to law and are fairly to be assumed as congressional presuppositions, unless by appropriate explicitness the lawmakers make them inapplicable.[176]

Because the INS proceedings defined in Regulation 340.1 are even more explicitly intended to be the first step in the eventual denaturalization of a U.S. citizen, the Ninth Circuit was correct to be wary of reading the statute in such a way as to imply such a grant of power to an administrative agency in the absence of a clear statement from Congress.

B. Why Neither Congress, the Supreme Court, nor the INS Should Seek to Change the Naturalization/Denaturalization System Left in the Wake of Gorbach v. Reno

The ideal solution to the problem of delegating authority to naturalize and denaturalize is to leave with the INS the former power, and give district courts exclusive jurisdiction over the latter. As Judge Kleinfeld observed, it makes just as much sense, if not more, to impute to Congress the intent to vest the naturalization power in an administrative agency and the denaturalization power in the district courts.[177] Kleinfeld cited several structural reasons why such a system is preferable. Agencies, he wrote, excel at processing large volumes of cases that "do not take away important liberties from individuals," but worries that they are "dubious instruments for performing relatively rare acts catastrophic to the interests of the individuals on whom they are performed."[178] It, therefore, makes sense for Congress to give the naturalization power to the INS because the agency can process cases far more quickly than the courts,

176. *Id.* at 187-88 (internal quotations and citations omitted).
177. *See* Gorbach v. Reno, 219 F.3d 1087, 1096 (9th Cir. 2000) (*Gorbach II*) (en banc).
178. *Id.* at 1095.

and the denaturalization power to the courts because individual rights are at stake.[179] When naturalization is performed by an agency and denaturalization by the courts, the system can reap the benefits of the peculiar strengths of both types of governmental bodies.

Moreover, separating these two functions makes sense from a separation of powers standpoint. The INS, as an agency, is uniquely susceptible to political pressure, in that it is directly overseen by the Attorney General and is closely tied to the executive branch of the government.[180] It was this connection to the executive branch that led many media pundits[181] and Republican members of Congress[182] to suspect that the Citizenship U.S.A. program was little more than a Clinton administration ploy to add more Democratic voters to the electorate.[183] Indeed, there was some evidence that the drive to naturalize over one million new citizens in the course of a year was accelerated prior to the 1996 November election, possibly at the behest of White House personnel.[184] In addition to accusations of slipshod criminal background checks, simplified citizenship tests were criticized on the ground that they cheapened the value of U.S. citizenship.[185] It is entirely possible that fraudulent naturalizations,

179. *See id.* at 1095-96.

180. The INS is a unit of the Department of Justice, which is under the direction of the Attorney General. *See* ALEINIKOFF ET AL., *supra* note 111, at 247-60 (describing the various agencies within the Department of Justice charged with enforcing U.S. immigration laws).

181. *See, e.g.*, Jack Anderson & Jan Moller, *Clinton Ploy Strikes Again*, PRESS J. (Vero Beach, Fla.), June 22, 1999, at A8; Michael Barone, *Dishonesty Matters*, U.S. NEWS & WORLD REP., Feb. 8, 1999, at 27.

182. *See Congress Grills INS on Citizenship USA Program*, 74 INTERPRETER RELEASES 364 (1997).

183. Though a recent report from the Justice Department's Office of the Inspector General admits that the Citizenship U.S.A. program was flawed, the report did not find the program to have been implemented for improper political ends. *See IG Report Finds INS's "Citizenship USA" Program Was Flawed, But Not For Political Reasons*, 77 INTERPRETER RELEASES 1198 (2000). However, many Republicans in Congress who called for the investigation did not accept the conclusions of the study, noting the refusal of some White House advisors to be interviewed during the investigation, and Vice President Al Gore's insistence on giving only written replies to questions posed by the investigators. *See id.* at 1200.

184. *See Congress Grills INS*, *supra* note 182.

185. *See, e.g.*, John J. Miller & William James Muldoon, *Citizenship for Granted: How the INS Devalues Naturalization Testing*, *at* http://www.ceousa.

resulting from the inevitable errors arising from the rush to naturalize so many in such a short time, may have influenced the outcomes of certain close political races. It is also possible that simpler citizenship tests may have resulted in the admittance to citizenship of some immigrants with an inferior knowledge of U.S. civics.[186]

While expedited approvals and relaxed standards immediately preceding an election may cast a shadow on the integrity of the naturalization process and even affect election results, it is still appropriate to entrust naturalization to the executive branch. After all, naturalization is an inherently political undertaking that should be vested in a body with a degree of political accountability. In a democratic society, criteria for naturalization should reflect the values and priorities that "We the People" feel to be important, and a politically accountable body such as the INS is better qualified to judge who should be made citizens than are unelected federal judges. The Constitution even recognized the political nature of naturalization by vesting in Congress—a branch of government designed to respond to shifts in the body politic—the power to create a law of naturalization.[187] Since Congress itself could never carry out the "high volume business of naturalization,"[188] the best type of governmental body to perform the task is a nonindependent administrative agency such as the INS.

Denaturalization is entirely another matter. Whatever regulatory processes the executive branch may wish to use in granting citizenship, it should not be allowed to decide when citizenship should be taken away. If an incumbent administration can reap the political benefits of increasing its voter base through politically motivated naturalizations, it should also have to live with the political consequences of having improperly naturalized those who were not qualified.

The rights of new citizens should not depend on the latest political winds; otherwise, it is as if no rights had vested on the initial grant of citizenship, and such grants will therefore lose their meaning. If citizenship means anything, it should at least mean that one is

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org/html/citizen.html (last visited Oct. 20, 2000).

186. *See id.*

187. *See* U.S. CONST. art. I, § 8, cl. 4.

188. *Gorbach II*, 219 F.3d at 1095.

no longer an alien at the mercy of the INS and subject to the plenary power of Congress. The politically insulated federal courts are in a far better position to treat new citizens as individuals with individual rights, rather than as part of a group of people who merit lesser procedural protections because they collectively represent a political embarrassment to the current administration—or a political opportunity for the Congress. The federal courts have proven their willingness to defend individual rights by treating even the undeserving with this level of dignity.[189]

Moreover, placing denaturalization proceedings in the INS will inevitably result in naturalized citizens becoming de facto second-class citizens. Those who have acquired U.S. citizenship by birth cannot have their citizenship declared void by the INS. In fact, it was in the context of a case involving a claim of U.S. citizenship that the Supreme Court first enunciated the now seldom-used "constitutional fact" doctrine, which states that administrative agencies cannot conclusively determine matters of fact on which important constitutional rights depend.[190] If there is any context in which this doctrine might have valid application today, it would be in the context of denaturalization. If an alien becomes a U.S. citizen through chicanery and fraud, Congress can validly declare that he or she can be stripped

189. Even former Nazi prison officials who lied about their past in order to gain U.S. citizenship have enjoyed full-fledged trials in the federal court system when the government has sought to strip them of their citizenship. For example, in *Linnas v. INS*, 790 F.2d 1024, 1031 (2d Cir. 1986), when a former Nazi prison official objected that he would be subject to execution without due process of law were he denaturalized and deported to a country where he had been tried in absentia for war crimes, the court responded that "[t]he irony of Karl Linnas objecting to execution without due process is not lost on this court." Nevertheless, the court recognized that

> The right to due process is, of course, essential to the American system of ordered liberty, and must be extended to all persons in the United States . . . . The considerable length of time that Linnas has been able to remain in the United States after the discovery of his heinous past is a small price to pay for a system of law which separates our government from the government that Linnas served as Chief of the Tartu concentration camp.

Id. Considering that even Linnas was entitled to full judicial proceedings in federal court, it is doubtful that any of the plaintiffs in *Gorbach* are any less deserving.

190. *See* Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

of citizenship.[191] However, if the INS could have discovered alleged misrepresentations before citizenship was granted, this new citizen should be subject only to the power of the courts if the government wishes to proceed against him or her, and not to the INS. Constitutional due process rights apply to the worst elements of our society, and once an alien is naturalized, he or she is a full member of our society, no matter how bad his or her moral character or conduct may be.[192] For this reason, naturalized citizens, if they are not to be considered second-class citizens, should only be subject to the power of the district courts in matters of denaturalization.

VI. CONCLUSION

By preventing the INS from proceeding with its campaign of administrative denaturalization, the Ninth Circuit has struck a major blow for the equal protection of new citizens. The court made it clear that the agency cannot escape the political fallout of the Citizenship U.S.A. program at the expense of new citizens, who should be accorded the same due process rights as any other citizens. The *Gorbach* case illustrates what can happen when the fate of supposedly equal members of the community is placed in the hands of an agency, thereby leaving them subject to whatever constitutional horrors the latest winds of politics may stir up. While modern immigration law has essentially rejected the idea of equal protection by allowing aliens to be subjected to such treatment,[193] there must be a point at which immigrants are accepted as full members of the community. The point at which they become naturalized citizens—if that designation is to hold any value or meaning—is a sensible point at which to draw a line in the sand and grant them the full panoply of constitutional rights accorded to any other citizen. Subjecting them to summary denaturalization by the INS makes them de facto

191. *See id.*

192. *Cf.* United States v. Minker, 350 U.S. 179, 197 (1956) (Douglas, J., concurring) ("The citizenship of a naturalized person has the same dignity and status as the citizenship of those of us born here, save only for eligibility to the Presidency. He is a member of a community included within the protection of all the guarantees of the Constitution.").

193. *See supra* note 52.

second-class citizens, and the Ninth Circuit has rightly prevented this result by striking down Regulation 340.1.

Though it is unclear at this point how they plan to respond to this ruling, there is some chance that the INS may seek review by the Supreme Court, or that they may ask Congress to amend the statute to give the Attorney General, in no uncertain terms, the power to denaturalize. Should the case arrive at the Supreme Court, the Justices should reach the same result as the Ninth Circuit. Upholding the Ninth Circuit's decision would harmonize this case with the spirit of past Supreme Court decisions on denaturalization, which have sought to protect the dignity of American citizenship and the equal treatment of all citizens, while maintaining a reasonable sphere within which the Attorney General would receive appropriate *Chevron* deference.

Similarly, Congress should turn a deaf ear to any INS pleas to amend the statute to give the Attorney General the power to denaturalize. The current scheme of naturalization by INS and denaturalization in federal courts provides safeguards that can only be achieved by a separation of powers. It also combines the strengths of administrative action and judicial action into a system that protects the rights of new U.S. citizens while maintaining efficiency and integrity in the naturalization process. From a policy standpoint, Congress has already struck the proper balance with such a scheme, and any attempt by the INS to disturb this balance for its own political ends should be viewed as an intrusion on the rights of new citizens—rights that Congress has chosen to protect through an elaborate statutory scheme for denaturalization in the federal courts. The Ninth Circuit has properly decided that, in the absence of these carefully defined statutory safeguards, naturalization is something the INS can do that can't be undone.

*Jon B. Hultman**

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* J.D. candidate, May 2001. This Note is an expansion on the author's unpublished critique of the Ninth Circuit's three-judge panel opinion in *Gorbach v. Reno*, which won the *Loyola of Los Angeles Law Review* Award for Best Note or Comment of 1999-2000. The Author wishes first and foremost to thank his wife Natsuko and daughter Sarah for bearing with him not only during the endless writing and rewriting of this Note, but throughout the ongoing ordeal that is law school. Special thanks are also due to Professors William

Araiza and Edith Friedler for their helpful suggestions and reviews of the author's various drafts of this paper. And last—but certainly not least—the author wishes to thank his Note and Comment Development Editor, Chris Hawthorne, for his invaluable guidance and encouragement in the formative stages of this project.