

## *Online Essay*

### ALIENATING CITIZENS<sup>†</sup>

*Amanda Frost*

**ABSTRACT**—Denaturalization is back. In 1967, the Supreme Court declared that denaturalization for any reason other than fraud or mistake in the naturalization process is unconstitutional, forcing the government to abandon its aggressive denaturalization campaigns. For the last half century, the government denaturalized no more than a handful of people every year. Over the past year, however, the Trump Administration has revived denaturalization. The Administration has targeted 700,000 naturalized American citizens for investigation and has hired dozens of lawyers and staff members to work in a newly created office devoted to investigating and prosecuting denaturalization cases.

Using information gathered from responses to Freedom of Information Act requests, legal filings, and interviews, this Essay is the first to describe the Trump Administration’s denaturalization campaign in detail. The Essay then situates denaturalization within the Trump Administration’s broader approach to immigration. Under a policy known as “attrition through enforcement,” the Trump Administration has sought to discourage immigration and encourage “self-deportation.” Although attrition through enforcement is typically described as a method of persuading unauthorized immigrants to leave the United States, the denaturalization campaign and other Trump Administration initiatives suggest that the same approach is now being applied to those with legal status.

**AUTHOR**—Professor of Law, American University Washington College of Law. I received valuable comments on this paper from Jill Family, Alexandra Lahav, Jayesh Rathod, Juliet Stumpf, and the participants in the IV CINETS Conference at Queen Mary University of London and the GLOBALCIT Annual Conference at the European University Institute. Special thanks to Melina Oliverio for her excellent research assistance.

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*“[T]he creation of the [denaturalization campaign] itself is undoing the naturalization of the more than twenty million naturalized citizens in the American population by taking away their assumption of permanence. All of them—all of us—are second-class citizens now.”*

Masha Gessen<sup>‡</sup>

INTRODUCTION

Baljinder Singh has lived twenty-seven of his forty-four years in the United States, twelve of those as a U.S. citizen. He married a U.S. citizen, and he has no criminal record. Yet on January 5, 2018, he became the first American to lose his citizenship under “Operation Janus,” the government’s initiative to investigate 700,000 naturalized Americans.<sup>1</sup> In Singh’s case, he was targeted for denaturalization because as a teenager he was ordered deported in absentia after notice of his immigration hearing was sent to an

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<sup>‡</sup> Masha Gessen, *In America, Naturalized Citizens No Longer Have an Assumption of Permanence*, NEW YORKER (June 18, 2018), <https://www.newyorker.com/news/our-columnists/in-america-naturalized-citizens-no-longer-have-an-assumption-of-permanence> [<https://perma.cc/R5UC-WXR8>].

<sup>1</sup> *USCIS Partners with Justice Department and Secures First Denaturalization as a Result of Operation Janus*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Jan. 10, 2018), <https://www.uscis.gov/news/news-releases/uscis-partners-justice-department-and-secures-first-denaturalization-result-operation-janus> [<https://perma.cc/6JXD-69NL>]; DEP’T OF HOMELAND SEC., U.S. IMMIGR. & CUSTOMS ENF’T BUDGET OVERVIEW, OPERATIONS & SUPPORT, FISCAL YEAR 2019 CONGRESSIONAL JUSTIFICATION 21 (2019), <https://www.dhs.gov/sites/default/files/publications/U.S.%20Immigration%20and%20Customs%20Enforcement.pdf> [hereinafter ICE BUDGET OVERVIEW] [<https://perma.cc/LSN4-M4QB>].

address at which he was no longer living—a fact that apparently neither he nor the government was aware of when he naturalized. As a result of his denaturalization, Singh is now at risk of being removed from the United States.

Singh is likely to be the first of many. In June 2018, then-Director of U.S. Citizenship and Immigration Services (USCIS) L. Francis Cissna announced that his agency would be opening a new office in Los Angeles, California, dedicated solely to denaturalization. The agency is in the process of hiring several dozen lawyers and immigration officers to staff it.<sup>2</sup> As of June 2018, USCIS had identified the files of 2,536 naturalized citizens for review and referred 95 to the Department of Justice (DOJ) with a recommendation to commence denaturalization proceedings, with many more expected to come over the next few years.<sup>3</sup>

Operation Janus represents a sharp break from recent practice. For the past fifty years, Republican and Democratic administrations alike have used denaturalization sparingly. Between 1990 and 2017, the United States filed a total of 305 denaturalization cases, an average of eleven citizens per year.<sup>4</sup> Most of those targeted had committed war crimes or other atrocities, and then lied about their past to obtain citizenship.<sup>5</sup> But widescale denaturalization campaigns are not unprecedented. During the first half of the twentieth century, the government engaged in a proactive campaign to denaturalize thousands, often based on their ideological preferences or affiliations, until the Supreme Court put a stop to it in 1967 in *Afroyim v. Rusk*.<sup>6</sup> Now the government is ramping up denaturalization again, but this

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<sup>2</sup> Nicole Rojas, *New USCIS Office Aims to Strip U.S. Citizenship from Naturalized Americans for Lying on Application*, NEWSWEEK (June 13, 2018, 3:15 PM), <https://www.newsweek.com/new-uscis-office-aims-strip-us-citizenship-naturalized-americans-lying-975484> [<https://perma.cc/MA8E-JBWU>].

<sup>3</sup> *Id.*

<sup>4</sup> See Nick Miroff, *Scanning Immigrants' Old Fingerprints, U.S. Threatens to Strip Thousands of Citizenship*, WASH. POST (June 13, 2018), [https://www.washingtonpost.com/world/national-security/scanning-immigrants-old-fingerprints-us-threatens-to-strip-thousands-of-citizenship/2018/06/13/2230d8a2-6f2e-11e8-afd5-778aca903bbe\\_story.html?utm\\_term=.5498740979df](https://www.washingtonpost.com/world/national-security/scanning-immigrants-old-fingerprints-us-threatens-to-strip-thousands-of-citizenship/2018/06/13/2230d8a2-6f2e-11e8-afd5-778aca903bbe_story.html?utm_term=.5498740979df) [<https://perma.cc/Y42X-LYRT>].

<sup>5</sup> See PATRICK WEIL, *THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC* 179 (2013) (“Nowadays, denaturalization is largely a tool for targeting the perpetrators of crimes against humanity.”); Brenda Medina, *Naturalized Americans Could Lose Their Citizenship with Thousands of Cases Under Review*, MIAMI HERALD (Aug. 15, 2018, 7:00 AM, updated 2:44 PM), <https://www.miamiherald.com/news/local/immigration/article216693995.html> [<https://perma.cc/7N9J-NFZ8>] (explaining that the denaturalization program intends to identify people who committed fraud to naturalize or who failed to disclose crimes committed prior to naturalization).

<sup>6</sup> 387 U.S. 253, 267 (1967); see generally WEIL, *supra* note 5, 65–82, 92–133 (describing denaturalization campaigns targeting suspected anarchists, communists, Nazis, and others on ideological grounds).

time on the ground that the targets of its campaign “illegally procured” their naturalization through mistake or fraud.<sup>7</sup>

Although this Essay does not focus on the constitutionality of the Trump Administration’s denaturalization campaign, this campaign’s efforts may run afoul of the limits on denaturalization established by the Supreme Court. The Court declared in *Afroyim v. Rusk* that the Fourteenth Amendment’s citizenship clause barred the government from revoking citizenship without the citizen’s consent, but then noted in a footnote that denaturalization for fraud or error is permissible.<sup>8</sup> The Trump Administration claims to be acting within those bounds, but its definition of fraud and error are broad, and the scope of its investigation capacious, raising the very constitutional problem at issue in *Afroyim*. This constitutional question should be part of the debate over the aggressive use of denaturalization to accomplish the broader policy of discouraging legal and illegal immigration.

This Essay describes Operation Janus and then situates it in the context of the Trump Administration’s approach to immigration generally. The Trump Administration has embraced a policy known as “attrition through enforcement,” under which immigration policies are designed to encourage immigrants to self-deport and discourage would-be immigrants from coming to the United States.<sup>9</sup> Although much of the public conversation about immigration has focused on *unauthorized* immigrants, many of the Trump Administration’s policies target immigrants who are legally present in the United States. For example, the Trump Administration’s travel bans barred visa holders from seven designated countries from coming to the United States; new policies surrounding the H-1B temporary worker visas prevent even those qualified for such visas from obtaining them; and the separation of families at the border is intended to discourage even those who qualify for asylum from seeking it.<sup>10</sup> Aggressive use of the power to denaturalize sends immigrants the related message that, whatever their status, they will never be secure.<sup>11</sup>

Part I of this Essay provides the first detailed account of Operation Janus based on legal filings, responses to Freedom of Information Act (FOIA) requests, news reports, and interviews with lawyers representing the

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<sup>7</sup> 8 U.S.C. § 1451(a) (2012).

<sup>8</sup> 387 U.S. at 267 n.23.

<sup>9</sup> See *infra* Part II.A.

<sup>10</sup> See *infra* Part II.B.

<sup>11</sup> See Gessen, *supra* note ‡ (describing how the denaturalization campaign has deprived naturalized citizens of “their assumption of permanence”).

targets of this government initiative.<sup>12</sup> In Part II, the Essay describes how this denaturalization campaign fits within the Trump Administration’s larger goal of destabilizing immigrants as part of its “attrition through enforcement” campaign. Attrition through enforcement is typically described as a method of persuading *unauthorized* immigrants to “self-deport,” but the denaturalization campaign and other Trump Administration initiatives suggest that the same approach is now being applied to those with legal status.

## I. THE TRUMP ADMINISTRATION’S ESCALATION OF DENATURALIZATION

The Trump Administration’s denaturalization campaign relies on existing laws and practices. In 1906, Congress enabled aggressive use of the denaturalization power by enacting laws broadly permitting denaturalization for innocent errors by the applicant.<sup>13</sup> The Obama Administration then set the ball rolling by initiating an investigation into a limited number of naturalization files, which it dubbed “Operation Janus.”<sup>14</sup> The Trump Administration has now escalated the Obama Administration’s tailored review into an investigation of hundreds of thousands of naturalized citizens for errors in the naturalization process.<sup>15</sup>

### A. *The Naturalization Process*

Noncitizens may apply for naturalization if they meet the eligibility requirements established under 8 U.S.C. § 1427. To qualify, noncitizens must have been lawfully admitted to the United States for permanent residence, have sufficient periods of residence and presence in the United States, and be able to show “good moral character” for five years preceding their application.<sup>16</sup>

On the naturalization application form and in interviews, noncitizens must list any other names they have used in the past as well as whether they have ever been in deportation proceedings. They must also provide their

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<sup>12</sup> Professors Irina D. Manta and Cassandra Burke Robertson have recently published an excellent article describing the constitutional implications of the Trump Administration’s reliance on civil, as opposed to criminal, denaturalization. Cassandra Burke Robertson & Irina D. Manta, *(Un)Civil Denaturalization*, 94 N.Y.U. L. REV. 402 (2019). Their article also discusses Operation Janus, but does not describe it in significant detail.

<sup>13</sup> Naturalization Act of 1906, Pub. L. No. 59-338, § 15, 34 Stat. 596, 601; *see also* John P. Roche, *Statutory Denaturalization: 1906-1951*, 13 U. PITT. L. REV. 276, 281 (1952) (describing how the Naturalization Act of 1906 enabled the government to denaturalize citizens for error as well as for fraud).

<sup>14</sup> *See infra* Part I.C.

<sup>15</sup> *See infra* Part I.D.

<sup>16</sup> 8 U.S.C. § 1427(a) (2012).

fingerprints, which USCIS then checks against fingerprint records in the Department of Homeland Security's Automated Biometric Identification system (IDENT), or the Federal Bureau of Investigation's Next Generation Identification system (NGI). If they find a match, USCIS will investigate to determine whether the applicant has a criminal or immigration record, links to terrorism, or other issues that would make the individual ineligible for citizenship. USCIS will also use these fingerprint records to determine whether the individual used a different name or birthdate in the past and will check to see if there are records associated with that different identity that would affect eligibility for naturalization.<sup>17</sup>

The rights of naturalized U.S. citizens are equivalent to native-born U.S. citizens in almost every way. They can vote, serve on juries, work in government, and sponsor noncitizen family members seeking to come to the United States. Like birthright citizens, naturalized citizens cannot be deported from the United States for any reason while they retain citizenship status. They are eligible to serve in law enforcement and obtain security clearances. Once they have lived in the United States as citizens for a sufficient period of time, they are eligible to run for all political offices in the United States, save for President.<sup>18</sup> As the Supreme Court explained, 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."<sup>19</sup>

### B. *The Denaturalization Process*

For many decades, the government argued that it had broad and nearly unfettered denaturalization power under its inherent sovereign authority to protect national security and foreign policy.<sup>20</sup> At first, the courts accepted these arguments, allowing the government to revoke the citizenship of more than 22,000 Americans during the twentieth century—more than any other

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<sup>17</sup> DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., OIG-16-130, POTENTIALLY INELIGIBLE INDIVIDUALS HAVE BEEN GRANTED U.S. CITIZENSHIP BECAUSE OF INCOMPLETE FINGERPRINT RECORDS 2 (2016) [hereinafter IG REPORT].

<sup>18</sup> *Citizenship Rights and Responsibilities*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/citizenship/learners/citizenship-rights-and-responsibilities> [<https://perma.cc/93VQ-4XWK>].

<sup>19</sup> *Afroyim v. Rusk*, 387 U.S. 253, 261 (1967) (quoting *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 827 (1824)).

<sup>20</sup> See WEIL, *supra* note 5, at 4 (describing the government's claim that denaturalization was essential to protect "national security"); see also John P. Roche, *The Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. PA. L. REV. 25, 27 (1950) (explaining that Congress claimed the power to denaturalize "was essential to the proper conduct of foreign relations, and, as such, did not require explicit constitutional authorization").

democracy.<sup>21</sup> The government used its broad denaturalization power to pursue its ideological and political enemies.<sup>22</sup> Indeed, it often went about the task backwards—that is, it would first identify naturalized citizens it wished to remove from the United States, and then would scour their naturalization files to find grounds on which to strip them of citizenship and deport them.<sup>23</sup> After growing increasingly uneasy with the practice, the Supreme Court finally declared in *Afroyim v. Rusk* that the government has no constitutional authority to revoke citizenship without the consent of the citizen, absent fraud or mistake in the naturalization process.<sup>24</sup>

Fraud and mistake are defined broadly under the Immigration and Nationality Act (INA), however. Today, the government can revoke citizenship because naturalization was “procured by concealment of a material fact or by willful misrepresentation,” or because it was “illegally procured.”<sup>25</sup> A naturalized citizen’s intentional misrepresentation or omission of a material fact is one ground for denaturalization, but individuals can also be denaturalized because they were not eligible for naturalization to begin with, even if they were unaware of the grounds of ineligibility and engaged in no fraud or misrepresentation.<sup>26</sup> As the *U.S. Citizenship and Naturalization Handbook* explains, “unwitting ineligibility for permanent residency or citizenship could be used as a basis for denaturalization years after the fact.”<sup>27</sup>

Furthermore, whether naturalization was “illegally procured,” or even whether the applicant “conceal[ed] a material fact” is not always clear and can be subjective. The questions on the naturalization forms are broad and vague. For example, the form asks: “Have you **EVER** committed, assisted in committing, or attempted to commit, a crime or offense for which you

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<sup>21</sup> See WEIL, *supra* note 5, at 3, 11.

<sup>22</sup> *Id.* at 55–75, 111–44 (describing political motivations behind denaturalization).

<sup>23</sup> See, e.g., *id.* at 55–64 (describing how the government aggressively pursued denaturalization of anarchist Emma Goldman).

<sup>24</sup> 387 U.S. at 266–68, 267 n.23 (holding that the government has no express or implied constitutional power to take away citizenship, but also noting that “naturalization unlawfully procured can be set aside”).

<sup>25</sup> 8 U.S.C. § 1451(a), (e); 18 U.S.C. § 1425 (2012).

<sup>26</sup> *Fedorenko v. United States*, 449 U.S. 490, 506 (1981) (explaining that there must be “strict compliance” with all requirements to acquire naturalization); see also *United States v. Suarez*, 664 F.3d 655, 659 (7th Cir. 2011) (denaturalizing defendant despite absence of fraud or misrepresentation because individual was statutorily ineligible to naturalize based on prior conviction); *United States v. Dang*, 488 F.3d 1135, 1141 (9th Cir. 2007) (same); *United States v. Jean-Baptiste*, 395 F.3d 1190, 1191, 1193 (11th Cir. 2005) (same).

<sup>27</sup> DANIEL LEVY, *U.S. CITIZENSHIP AND NATURALIZATION HANDBOOK* § 14.19, Westlaw (database updated Sept. 2018).

were **NOT** arrested?”<sup>28</sup> Applicants have reported confusion about whether that question asks about incidents that took place outside the United States, especially for conduct that would be legally protected in the United States.<sup>29</sup> For example, engaging in political protest, having sex outside of marriage, or being in a same-sex relationship is all conduct criminalized in some countries.<sup>30</sup> Would an applicant be considered to have committed naturalization fraud if he left off of his application that he had engaged in such activity in a jurisdiction in which it was criminalized?<sup>31</sup> It is also unclear whether a traffic stop or parking citation qualifies as an “offense” that must be disclosed.<sup>32</sup> If authorities dig up an old parking ticket decades after naturalization, the applicant who answered no to this question could be found to have lied, constituting “willful misrepresentation” that could potentially lead to denaturalization. This hypothetical should not be dismissed as extreme. At oral argument in a criminal denaturalization case in 2017, Chief Justice John Roberts asked Assistant Solicitor General Robert A. Parker whether the failure to list the “offense” of driving sixty miles an hour in a fifty-five-mile-per-hour zone would allow the government to denaturalize a citizen years later.<sup>33</sup> Parker responded that it would.<sup>34</sup>

Under 8 U.S.C. § 1451, the executive branch cannot denaturalize a citizen unilaterally, but rather must bring a denaturalization case before an Article III federal judge—that is, a judge with life tenure who is therefore at least somewhat insulated from political pressure.<sup>35</sup> If one of the grounds for denaturalization exists, however, a court has no equitable discretion to refuse to denaturalize the defendant based on mitigating circumstances.<sup>36</sup> In addition, when the government brings a denaturalization case through the

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<sup>28</sup> U.S. CITIZENSHIP & IMMIGR. SERVS., FORM N-400: APPLICATION FOR NATURALIZATION 14 (2016), [https://www.uscis.gov/system/files\\_force/archive/delete/n-400.pdf?download=1](https://www.uscis.gov/system/files_force/archive/delete/n-400.pdf?download=1) [<https://perma.cc/3MKC-JNEH>].

<sup>29</sup> Gessen, *supra* note †.

<sup>30</sup> *See, e.g., id.* (pointing out that in “more than seventy countries, same-sex sexual activity is still illegal”).

<sup>31</sup> *Id.*

<sup>32</sup> *See, e.g.,* Ilona Bray, *Must You Include Traffic Violations on Your N-400 Citizenship Application?*, ALLLAW, <https://www.alllaw.com/articles/nolo/us-immigration/include-traffic-violations-n-400-citizenship-application.html> [<https://perma.cc/7NP4-KLK5>] (noting that the naturalization form “raises the question of whether a traffic violation is a crime that needs to be mentioned on your N-400 citizenship application. The answer is not entirely clearcut.”).

<sup>33</sup> Transcript of Oral Argument at 27–30, *Maslenjak v. United States*, 137 S. Ct. 1918 (2017) (No. 16-309).

<sup>34</sup> *Id.* at 30.

<sup>35</sup> 8 U.S.C. § 1451(a); *see also* *Gorbach v. Reno*, 219 F.3d 1087, 1091, 1093 (9th Cir. 2000) (“[R]ead in context, the statute [8 U.S.C. § 1451] is unambiguous in *not* conferring upon the Attorney General the power to denaturalize citizens administratively.”); LEVY, *supra* note 27, at § 14.30.

<sup>36</sup> *Fedorenko v. United States*, 449 U.S. 490, 517 (1981).

civil rather than criminal justice system, there is no statute of limitations.<sup>37</sup> Accordingly, the government could seek to denaturalize a citizen decades after her naturalization for innocent errors, and a court would have no choice but to revoke her citizenship.

The DOJ, on the other hand, can exercise discretion when choosing whether to pursue denaturalization, and internal guidance documents instruct U.S. Attorneys to proceed with caution. Department of Justice Circular Letter No. 107, which was drafted on September 20, 1909, instructs U.S. Attorneys to commence denaturalization proceedings only in cases in which it would lead to the “betterment of the citizenship of the country.”<sup>38</sup> As part of this analysis, the government is advised to consider (1) the length of time that the individual has been a citizen; (2) whether the individual has conducted himself as a good citizen since naturalization; and (3) whether the individual possesses the necessary qualifications for citizenship.<sup>39</sup> Although the 1909 circular has never been withdrawn, the government’s recent choice of targets for denaturalization suggests it no longer guides the DOJ in choosing to bring denaturalization cases.

### *C. Operation Janus Under the Obama Administration*

In 2008, a U.S. Customs and Border Patrol (CBP) employee identified several hundred individuals who had been ordered deported but who had subsequently obtained legal status and citizenship under different identities.<sup>40</sup> That fact alone was not necessarily grounds for denaturalization—noncitizens ordered deported in the past may be eligible for citizenship depending on their circumstances.<sup>41</sup> But the government had not been aware of these citizens’ deportation orders at the time it granted them citizenship and it might have denied citizenship to some or all of these individuals had it known. In addition, if these individuals lied or hid the fact that they had been ordered deported under a different name to obtain citizenship, then they had “conceal[ed] a material fact” and engaged in “willful misrepresentation”

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<sup>37</sup> *Costello v. United States*, 365 U.S. 265, 281–84 (1961) (permitting denaturalization twenty-seven years after defendant received his citizenship and rejecting argument that the government must seek denaturalization within a specific time limit).

<sup>38</sup> DEP’T OF JUSTICE, DEPARTMENT CIRCULAR LETTER NO. 107, INSTRUCTIONS AS TO NATURALIZATION MATTERS 1–2 (Sept. 20, 1909) [hereinafter DOJ CIRCULAR NO. 107]. INS Interpretation Letter 340.1(f) recommends that the government follow this circular’s guidance when determining whether to pursue denaturalization. IMMIGRATION & NATURALIZATION SERV., INTERPRETATION LETTER 340.1(f) (Oct. 1, 2001).

<sup>39</sup> DOJ CIRCULAR NO. 107, *supra* note 38, at 2.

<sup>40</sup> IG REPORT, *supra* note 17, at 1.

<sup>41</sup> *Id.* at 5 (“[M]erely having used multiple identities or having a previous final deportation order does not automatically render an individual ineligible for naturalization.”).

which is an independent basis for denaturalization. The Department of Homeland Security (DHS) launched Operation Janus to investigate the issue, and eventually referred the matter to the Inspector General (IG) to investigate further.<sup>42</sup>

In September 2016, the IG issued a report finding that USCIS granted citizenship to at least 858 individuals who the government had not realized were previously ordered deported under different names.<sup>43</sup> The error occurred because the applicants had not disclosed in their applications that they had been ordered deported, either because they were hiding that fact or did not know it themselves.<sup>44</sup> Immigration officials initially did not discover these deportation orders through an independent investigation because the agency had failed to upload into government databases some fingerprint records taken during immigration enforcement proceedings—mostly paper fingerprint records taken in the early 1990s, before fingerprints were digitized.<sup>45</sup> The IG further found that approximately 148,000 older fingerprint records of noncitizens ordered deported, or who were criminals or fugitives, had still not been digitized.<sup>46</sup>

The IG's report recommended that ICE digitize and upload to IDENT the 148,000 fingerprint records of noncitizens with final deportation orders, criminal histories, or who were fugitives.<sup>47</sup> In addition, the IG recommended that immigration authorities "evaluat[e] the eligibility of each naturalized citizen whose fingerprint records reveal deportation orders under a different identity" to determine whether the individual was ineligible for naturalization and if so, to determine whether to pursue denaturalization through civil or criminal proceedings.<sup>48</sup> DHS agreed with the IG's

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<sup>42</sup> *Id.* at 1, 5.

<sup>43</sup> *Id.* at 2; Ron Nixon, *Flaws in Fingerprint Records Allowed Hundreds to Become U.S. Citizens*, N.Y. TIMES (Sept. 19, 2016), <https://www.nytimes.com/2016/09/20/us/flaws-in-fingerprint-records-allowed-hundreds-to-become-us-citizens.html> [<https://perma.cc/M5DC-AKDG>].

<sup>44</sup> IG REPORT, *supra* note 17, at 5–6.

<sup>45</sup> *Id.* at 2. CBP and Immigration and Customs Enforcement (ICE) are required to take fingerprint records of noncitizens in enforcement proceedings. *Id.* at 3. For many years, the government kept these fingerprint records on paper cards. *Id.* at 3. In 1994, the government updated its system and began to gather and store all fingerprints digitally in IDENT, the Automated Biometric Identification System, but all the fingerprints that previously had been stored on paper cards did not get uploaded into IDENT. *Id.* at 4–5. In addition, ICE did not consistently upload fingerprints taken from noncitizens during encounters with law enforcement until 2010. Nor did ICE officers always note in fingerprint records that an individual had been subject to a final order of deportation. *Id.*

<sup>46</sup> *Id.* at 7.

<sup>47</sup> *Id.* at 8.

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

recommendations and was already implementing them at the time the report was issued.<sup>49</sup>

Finally, the IG reported that the U.S. Attorney’s Office planned to pursue denaturalization in some cases, but only if the individuals involved posed a particular risk to national security, such as those with “Transportation Security Administration (TSA) credentials, security clearances, positions of public trust, or criminal histories.”<sup>50</sup> By the time President Obama left office, no individual had been denaturalized as a result of these investigations.

#### *D. Operation Janus Under the Trump Administration*

The Trump Administration has revived and expanded Operation Janus, leading to the investigation of over 700,000 naturalized citizens and bringing the first denaturalization cases under the initiative. On September 19, 2017, the DOJ announced that it was filing civil denaturalization cases against three individuals identified through Operation Janus: Baljinder Singh from India, and Parvez Manzoor Khan and Rashid Mahmood from Pakistan. All three had been ordered deported in the early 1990s, when fingerprint records were not routinely digitized, and had subsequently naturalized under different names. In a press release, the government asserted that the three men had “exploited our immigration system” and sought to “defraud the United States.”<sup>51</sup>

On January 5, 2018, Baljinder Singh became the first naturalized American to lose his citizenship under Operation Janus after his Certificate of Naturalization was terminated by New Jersey Federal District Judge Stanley Chesler.<sup>52</sup> Acting Assistant Attorney General Chad Readler declared that Singh had “exploited our immigration system and unlawfully secured the ultimate immigration benefit of naturalization, which undermines both

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<sup>49</sup> *Id.* Although DHS had officially disbanded Operation Janus for reasons that were unclear, the IG noted that DHS “ha[d] established a team” to review records of 858 naturalized citizens with final deportation orders who were naturalized under a different identity, as well as to determine whether any of the 148,000 fingerprints to be digitized matched the identities of those granted naturalization or other immigration benefits. *Id.* at 7–8.

<sup>50</sup> *Id.* at 7.

<sup>51</sup> Press Release, U.S. Dep’t of Justice, Office of Pub. Affairs, United States Files Denaturalization Complaints in Florida, Connecticut and New Jersey Against Three Individuals Who Fraudulently Naturalized After Having Been Ordered Deported Under Different Identities (Sept. 19, 2017), <https://www.justice.gov/opa/pr/united-states-files-denaturalization-complaints-florida-connecticut-and-new-jersey-against> [<https://perma.cc/4JLG-LTFK>].

<sup>52</sup> Press Release, U.S. Dep’t of Justice, Office of Pub. Aff., Justice Department Secures First Denaturalization as a Result of Operation Janus (Jan. 9, 2018), <https://www.justice.gov/opa/pr/justice-department-secures-first-denaturalization-result-operation-janus> [hereinafter January 2018 Press Release] [<https://perma.cc/ZC4F-2QNH>].

the nation's security and our lawful immigration system.”<sup>53</sup> The same press release stated that USCIS had “dedicated a team to review these Operation Janus cases.”<sup>54</sup> This team would investigate about 315,000 old naturalization cases, and it “inten[ded] to refer approximately an additional 1,600 for prosecution”—a significant expansion of the program from its origins under the Obama Administration.<sup>55</sup>

By the summer of 2018, the denaturalization campaign had grown again. The ICE Fiscal Year 2019 Budget Overview described two programs dedicated to denaturalization: (1) Operation Janus, described as an “interagency initiative designed by DHS to prevent aliens who received a final removal order under a different identity from obtaining immigration benefits”; and (2) Operation Second Look, a program initiated to “address leads received from Operation Janus.”<sup>56</sup> The Budget Report noted that both programs needed to hire more staff to “support the review of an estimated 700,000 remaining alien files.”<sup>57</sup> The report did not explain why there were now 700,000 individuals under investigation—more than double the number mentioned in the 2016 Inspector General’s Report.

In June 2018, USCIS publicly announced it would be opening a new office in California and hiring dozens of lawyers and immigration officers to focus on denaturalization.<sup>58</sup> Internal USCIS memos describe the need for new procedures to handle “the anticipated large volume” of upcoming denaturalization cases involving “individuals who have unlawfully obtained naturalization, and their family members, who have consequently derived or acquired additional benefits . . . .”<sup>59</sup> The memo makes clear that the agency expects to investigate not only cases identified by Operation Janus, but also denaturalization cases originating from outside that program.<sup>60</sup> In a press

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

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> ICE BUDGET OVERVIEW, *supra* note 1, at 21.

<sup>57</sup> *Id.*

<sup>58</sup> Anna Giaritelli, *Homeland Security Will Strip Citizenship From Naturalized Americans Who Lied on Their Applications*, WASH. EXAM’R (June 13, 2018, 12:00 AM), <https://www.washingtonexaminer.com/news/homeland-security-will-strip-citizenship-from-naturalized-americans-who-lied-on-their-applications> [<https://perma.cc/H92W-EGF7>]; Amy Taxin, *US Launches Bid to Find Citizenship Cheaters*, ASSOCIATED PRESS (June 11, 2018), <https://www.apnews.com/1da389a535684a5f9d0da74081c242f3> [<https://perma.cc/ZHT7-GWQ2>].

<sup>59</sup> See Decision Memorandum from Daniel M. Renaud, Chair, Exec. Coordination Council, to L. Francis Cissna, [USCIS] Dir., Settlement Process for Historical Fingerprint Enrollment Denaturalization Cases (May 10, 2018) (on file with author).

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

release, then-Director of USCIS Cissna stated that he expected the effort to result in “potentially a few thousand [denaturalization] cases.”<sup>61</sup>

As this brief history shows, the Trump Administration is rapidly expanding denaturalization efforts. Although for the past several decades, denaturalization has been used sparingly and only in extreme cases, the Trump Administration’s revival of the practice is reminiscent of aggressive denaturalization campaigns of the early twentieth century.

## II. DENATURALIZATION AS A TOOL OF ATTRITION THROUGH ENFORCEMENT

The Trump Administration’s denaturalization campaign is a tool with which to accomplish its broader goal of restricting immigration into the United States and destabilizing the position of *all* immigrants, whether undocumented or legally present, under its policy of attrition through enforcement. Stringent enforcement of immigration laws directly reduces the number of immigrants in the United States through exclusion and deportation. Ramped-up immigration enforcement also has a signaling effect, dissuading would-be immigrants from coming to the United States and encouraging those already in the United States to leave voluntarily.<sup>62</sup> By design, these policies affect both legal as well as illegal immigrants, sending the message that immigrants are not welcome and perpetually at risk of removal.

### A. Attrition Through Enforcement and Illegal Immigration

Although President Trump publicly uses the simplistic rhetoric of “deport ’em all,” in private, his administration has adopted a more nuanced approach.<sup>63</sup> One influential advisor, former Kansas Secretary of State Kris Kobach, has argued in favor of the policy of attrition through enforcement.<sup>64</sup>

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<sup>61</sup> Taxin, *supra* note 58.

<sup>62</sup> See *infra* Part II.A. For a discussion of the law’s signaling effect generally, see Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 365 (1997) (describing how the law has “expressive and norm-regulatory effects” and concluding that “adopting laws that generate appropriate social meanings” can “discourage[] criminality”). See also Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 351–52 (1996) (providing additional explanation of the expressive theory of punishment); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 946–47 (1995) (describing how government action “construct[s] . . . social norms”).

<sup>63</sup> Nancy LeTourneau, *Trump Still Wants to Deport ’em All*, WASH. MONTHLY (Feb. 13, 2018), <https://washingtonmonthly.com/2018/02/13/trump-still-wants-to-deport-em-all/> [<https://perma.cc/QPC6-WHKH>].

<sup>64</sup> See Ari Berman, *The Man Behind Trump’s Voter-Fraud Obsession*, N.Y. TIMES MAG. (June 13, 2017), <https://www.nytimes.com/2017/06/13/magazine/the-man-behind-trumps-voter-fraud-obsession.html> [<https://perma.cc/8YZ8-JTCA>]. Kobach is reported to be “close to the White House inner circle,

This policy was adopted by several states before Trump was elected and now appears to be incorporated into federal immigration policy.<sup>65</sup> Although President Trump has not endorsed attrition through enforcement explicitly, he has met on several occasions with Kobach, and his administration's immigration policies are consistent with that approach.<sup>66</sup>

Kobach argued that there is no need to “round[] up and forcibly remove[]” millions of undocumented immigrants; instead, these individuals “can be encouraged to depart the United States on their own.”<sup>67</sup> This “encouragement” comes in several forms. First, immigration officials must ramp up enforcement so that undocumented immigrants face a greater risk of being detained or prosecuted. Second, the risk must be shared by *all* undocumented immigrants.<sup>68</sup> Accordingly, immigration officials cannot exercise prosecutorial discretion and prioritize removal of undocumented immigrants with criminal convictions, as was the policy under the Obama Administration.<sup>69</sup> Instead, officials must enforce the law against any undocumented immigrant who comes to the attention of law enforcement, no matter how sympathetic.<sup>70</sup> Third, laws and policies must make daily life for undocumented immigrants difficult by barring them from renting apartments, enrolling their children in school, obtaining public benefits, accessing medical services, and above all, working.<sup>71</sup> Kobach argues that if “attrition through enforcement were implemented nationwide, it would gradually, but inexorably, reduce the number of illegal aliens in the United

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including the president,” and Trump appointed him to serve as vice chairman of the short-lived Presidential Advisory Commission on Election Integrity. *Id.*

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

<sup>66</sup> *See id.* (In June 2017, Kobach stated publicly that he had “the honor of personally advising President Trump, both before the election and after the election, on how to reduce illegal immigration.”).

<sup>67</sup> Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT’L L. 155, 156 (2008).

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

<sup>69</sup> Barack Obama, President of the U.S., Remarks by the President in Address to the Nation on Immigration, The White House, Office of the Press Sec’y (Nov. 20, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> [<https://perma.cc/7QBQ-4DUX>] (“[W]e’re going to keep focusing enforcement resources on actual threats to our security. Felons, not families. Criminals, not children. Gang members, not a mom who’s working hard to provide for her kids. We’ll prioritize, just like law enforcement does every day.”).

<sup>70</sup> Kobach, *supra* note 6767, at 161 (describing how attrition through enforcement requires “increasing the removal rate of aliens who have not been convicted of serious felonies”).

<sup>71</sup> *Id.* at 156–60; Bea Bischoff, *Trump’s New Plan to Make Asylum-Seekers Suffer as Much as Possible*, SLATE (Jan. 28, 2019, 7:00 PM), <https://slate.com/news-and-politics/2019/01/family-separation-stay-in-mexico-plan-asylum.html> [<https://perma.cc/PMD9-ZJ3K>] (describing how Kobach advocated for state and local legislation making it a crime to provide employment, housing, or transportation to undocumented immigrants, barring undocumented immigrants from receiving state or local public benefits, and barring public universities and colleges from enrolling undocumented students, in an effort to encourage “self-deportation”).

States.”<sup>72</sup> Or, as Ari Berman of the *New York Times Magazine* put it: “Make life miserable enough for immigrants, and they will leave of their own volition.”<sup>73</sup>

The Trump Administration’s policies are consistent with Kobach’s proposed approach. For example, by executive order, President Trump rescinded the Obama Administration’s policy of prioritizing certain categories of undocumented immigrants for removal, such as those with felony convictions. In its place, DHS issued a memo stating that all of those “in violation of the immigration laws” are subject to enforcement actions.<sup>74</sup> The Trump Administration also rescinded deferred action programs that temporarily exempted certain sympathetic categories of undocumented immigrants from removal, so that no groups will be insulated from the threat of deportation.<sup>75</sup> Also by executive order, President Trump has enabled the expansion of the streamlined removal process known as “expedited removal,” which allows more undocumented immigrants to be removed with minimal procedural protections.<sup>76</sup>

Recently, the Trump Administration announced a “zero tolerance” policy under which it would criminally prosecute all attempts to enter the United States illegally at the southern border.<sup>77</sup> One of the most significant results of this change in policy was that adults incarcerated while awaiting

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<sup>72</sup> Kobach, *supra* note 67, at 160.

<sup>73</sup> Berman, *supra* note 64.

<sup>74</sup> Memorandum from John Kelly, Sec’y, DHS, to Kevin McAleenan, Acting Comm’r, CBP, et al., Enforcement of the Immigration Laws to Serve the National Interest 2 (Feb. 20, 2017) (on file with author) (rescinding the Obama Administration’s prosecutorial discretion guidelines and stating that “prosecutorial discretion shall not be exercised in a manner that exempts or excludes a specified class or category of [noncitizens] from enforcement of the immigration laws”); *see also* Border Security and Immigration Enforcement Improvements, Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 25, 2017) (directing immigration authorities to detain and remove all “individuals apprehended on suspicion of violating Federal or State law, including Federal immigration law”); Memorandum from Matthew T. Albence, Exec. Assoc. Dir., DHS, ICE, to All Enforcement & Removal Operations Employees, Implementing the President’s Border Security & Interior Immigration Enforcement Policies 1 (Feb. 21, 2017) (on file with author) (directing ICE officers to “take enforcement action against all removable aliens encountered in the course of their duties”).

<sup>75</sup> *See* Memorandum from Elaine C. Duke, Acting Sec’y, DHS, to James W. McCament, Acting Dir., USCIS, et al., Rescission of Deferred Action for Childhood Arrivals (DACA) (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [<https://perma.cc/EEF9-XPW8>]. Federal courts have issued nationwide injunctions staying the rescission of DACA. *See, e.g.,* Regents of Univ. of Cal. v. U.S. Dept. of Homeland Sec., 279 F. Supp. 3d 1011 (N.D. Cal. 2018).

<sup>76</sup> Memorandum from John Kelly, *supra* note 74, at 5–7.

<sup>77</sup> *See* Press Release, U.S. Dep’t of Justice, Office of Pub. Affairs, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry> [<https://perma.cc/FJR9-AQLD>] (“Today’s zero-tolerance policy further directs each U.S. Attorney’s Office along the Southwest Border . . . to adopt a policy to prosecute all Department of Homeland Security referrals of section 1325(a) violations, to the extent practicable.”).

criminal trial were separated from their children, and some were deported without their children, until court orders put a stop to the practice.<sup>78</sup> The policy was intended to discourage immigrants without visas from attempting to enter the United States. As one Homeland Security official explained, “[p]eople aren’t going to stop coming unless there are consequences to illegal entry.”<sup>79</sup>

All of these changes to immigration policy have been intended not only to increase the number of immigrants removed from the United States, but also to ramp up undocumented immigrants’ fears of arrest, detention, and removal. When he was the Acting Director of ICE, Thomas Homan testified before Congress that: “If you’re in this country illegally . . . you should look over your shoulder. You need to be worried.”<sup>80</sup> The ultimate goal is to discourage would-be immigrants from coming illegally to the United States, and prompt those who are already present to self-deport.<sup>81</sup>

### *B. Extending Attrition Through Enforcement to Legal Immigrants*

The Trump Administration has taken attrition through enforcement one step further than Kobach suggested by applying it to discourage legal, as well as illegal, immigrants from coming to and remaining in the United States. This expansion is not surprising, considering that President Trump supports restricting legal immigration and has endorsed legislation that would cut

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<sup>78</sup> See Aaron Hegarty, *Timeline: Immigrant Children Separated from Families at the Border*, USA TODAY (June 27, 2018, 11:04 AM, updated July 25, 2018, 10:54 AM), <https://www.usatoday.com/story/news/2018/06/27/immigrant-children-family-separation-border-timeline/734014002/> [<https://perma.cc/B7RR-HSWD>] (describing how the zero tolerance policy resulted in the separation of parents and children).

<sup>79</sup> Nick Miroff, *To Curb Illegal Border Crossings, Trump Administration Weighs New Measures Targeting Families*, WASH. POST (Dec. 21, 2017), [https://www.washingtonpost.com/world/national-security/to-curb-illegal-border-crossings-trump-administration-weighs-new-measures-targeting-families/2017/12/21/19300dc2-e66c-11e7-9ec2-518810e7d44d\\_story.html?utm\\_term=.9032b8d55567](https://www.washingtonpost.com/world/national-security/to-curb-illegal-border-crossings-trump-administration-weighs-new-measures-targeting-families/2017/12/21/19300dc2-e66c-11e7-9ec2-518810e7d44d_story.html?utm_term=.9032b8d55567) [<https://perma.cc/52FF-WL58>].

<sup>80</sup> Jonathan Blitzer, *In Calling for Politicians’ Arrest, an ICE Official Embraces His New Extremist Image*, NEW YORKER (Jan. 4, 2018), <https://www.newyorker.com/news/news-desk/in-calling-for-politicians-arrest-an-ice-official-embraces-his-new-extremist-image> [<https://perma.cc/GJ8L-DC83>]; House Appropriations Committee, *Hearing: Customs and Border Protection & Immigration and Customs Enforcement Budget (EventID=106057)*, YOUTUBE 1:53:54 (June 3, 2017), <https://www.youtube.com/watch?v=pjDybSnHIWo> [<https://perma.cc/D9JF-AQHP>].

<sup>81</sup> See Franklin Foer, *How Trump Radicalized ICE*, ATLANTIC (Sept. 2018), <https://www.theatlantic.com/magazine/archive/2018/09/trump-ice/565772/> [<https://perma.cc/8XS9-37S7>] (“[S]elf-deportation is the [Trump] administration’s guiding theory . . .”); Julianne Hing, *For Trump, Cruelty Is the Point*, NATION (Mar. 15, 2018), <https://www.thenation.com/article/for-trump-cruelty-is-the-point/> [<https://perma.cc/9X7W-KL9M>] (stating that “the real aim” of the Trump Administration’s enforcement policies has been “to inflict maximum suffering as a means of pushing out unwanted newcomers as well as those whose extended presence in the country may threaten white supremacy” and describing self-deportation as “the cornerstone of [Trump’s] immigration agenda”).

legal immigration in half.<sup>82</sup> His former Attorney General, Jeff Sessions, who played a major role in setting the Trump Administration's immigration policies, and in particular its focus on denaturalization, also made clear that he sought to reduce legal immigration.<sup>83</sup> In a white paper published in January 2015, Sessions decried policies that allow "legally importing millions of low-wage workers" and argued that polling shows broad public support for "cuts to legal immigration."<sup>84</sup> He expressed concern that the "size of the foreign-born population has quadrupled over the last four decades," and called for future restrictions on legal immigration to reduce the percentage of immigrants in the U.S. population.<sup>85</sup>

Many of President Trump's immigration policies have affected immigrants coming legally to the United States. For example, President Trump's January 27, 2017 executive order banning travel to the United States by nationals of seven predominantly Muslim countries applied to legal immigrants.<sup>86</sup> Indeed, as written, it applied to green card holders, though the Trump Administration quickly abandoned that position.<sup>87</sup> On the day the first travel ban went into effect, thousands of noncitizens with visas allowing entry into the United States were barred by the ban.<sup>88</sup> The executive order also temporarily barred refugees from entering the United States and significantly reduced the number of refugees the United States will accept each year.<sup>89</sup>

The Trump Administration has also changed regulations and policies to make life more difficult for noncitizens legally present in the United States.

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<sup>82</sup> Peter Baker, *Trump Supports Plan to Cut Legal Immigration by Half*, N.Y. TIMES (Aug. 2, 2017), <https://www.nytimes.com/2017/08/02/us/politics/trump-immigration.html> [https://perma.cc/ENK9-6KKW] (stating that Trump has "long supported" cuts to legal immigration).

<sup>83</sup> Seung Min Kim & Josh Gerstein, *What Jeff Sessions Thinks About Immigration, Police and Terrorism*, POLITICO (Jan. 10, 2017, 5:13 AM), <https://www.politico.com/story/2017/01/jeff-sessions-views-attorney-general-233383> [https://perma.cc/9UUX-NPV5] ("Sessions has . . . long advocated for curbs to future legal immigration, contending that a more generous immigration system ultimately hurts U.S.-born workers.").

<sup>84</sup> JEFF SESSIONS, IMMIGRATION HANDBOOK FOR THE NEW REPUBLICAN MAJORITY 1, 3 n.8 (2015), available at [http://images.politico.com/global/2015/01/12/immigration\\_primer\\_for\\_the\\_114th\\_congress.pdf](http://images.politico.com/global/2015/01/12/immigration_primer_for_the_114th_congress.pdf) [https://perma.cc/U26F-6ZMF].

<sup>85</sup> *Id.* at 10.

<sup>86</sup> Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

<sup>87</sup> Krishnadev Calamur, *What Trump's Executive Order on Immigration Does—and Doesn't Do*, ATLANTIC (Jan. 30, 2017), <https://www.theatlantic.com/news/archive/2017/01/trump-immigration-order-muslims/514844/> [https://perma.cc/9MCH-YP3H] (describing the Trump Administration's conflicting positions on whether the travel ban would apply to green card holders).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*; see also Jens Manuel Krogstad & Jynnah Radford, *Key Facts About Refugees to the U.S.*, PEW RES. CTR.: FACTTANK (Jan. 30, 2017), <https://www.pewresearch.org/fact-tank/2017/01/30/key-facts-about-refugees-to-the-u-s/> [https://perma.cc/8HJA-P5LN].

For example, DHS announced that it is considering rescinding the Obama Administration's policy allowing the spouses of H-1B visa holders to work, and it intends to narrow the qualifications for high-skilled visas.<sup>90</sup> USCIS has increased its requests for more information from applicants for high-skilled visas by 53%, slowing down the process of obtaining such visas.<sup>91</sup> It has also increased denials by 35%, leading immigration attorneys to report "an unprecedented level of difficulty for immigrants to get routine renewals of their visas."<sup>92</sup>

Likewise, a new rule proposed by DHS would deny green cards to legal immigrants who have received government benefits.<sup>93</sup> Millions of immigrant families use one or more of these services, and the proposed rule change has led some visa-holders to forgo using Medicaid, food stamps, and housing vouchers.<sup>94</sup> Finally, the Trump Administration is making it harder to claim asylum in the United States. One immigration expert explained that the administration is "using Kobach's playbook to make the lives of asylum-seekers so miserable that they choose to leave the country voluntarily."<sup>95</sup>

Former Obama Administration official Leon Fresco declared that all these changes "are signaling a belief that regardless of their skills and talent, people from foreign countries are not welcome," with the "goal . . . to reduce

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<sup>90</sup> Jethro Mullen, *Trump to Propose Ending Rule Allowing Spouses of H-1B Holders to Work in U.S.*, CNN (Dec. 15, 2017, 1:55 PM), <https://money.cnn.com/2017/12/15/technology/h1b-visa-spouses-h4-trump/index.html> [<https://perma.cc/PY5V-DHHM>] (noting a change in policy "could deter a number of high-skilled immigrants from staying in the U.S. if their spouses can't easily find work"); Ileana Najarro, *H-1B Spouses at Risk of Losing Their Work Permits*, HOUS. CHRON. (June 21, 2018, updated June 24, 2018, 8:27 PM), <https://www.houstonchronicle.com/business/article/H-1B-spouses-at-risk-of-losing-their-work-permits-13011862.php> [<https://perma.cc/Q4RF-SCHY>].

<sup>91</sup> Tal Kopan, *Legal Immigrants to the US Wonder: Amid DACA Attention, What About Us?*, CNN (Mar. 7, 2018, updated 10:12 AM), <https://www.cnn.com/2018/03/07/politics/legal-immigrants-daca-trump/index.html> [<https://perma.cc/A6XD-4F3Y>].

<sup>92</sup> *Id.*; see also Nelson D. Schwartz & Steve Lohr, *Companies Say Trump Is Hurting Business by Limiting Legal Immigration*, N.Y. TIMES (Sept. 2, 2018), <https://www.nytimes.com/2018/09/02/business/trump-legal-immigration-h1b-visas.html> [<https://perma.cc/2T4J-JW34>].

<sup>93</sup> Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, and 248).

<sup>94</sup> Tung Nguyen & Sherry Hirota, Opinion, *Trump's Next Target: Legal Immigrants*, N.Y. TIMES (Sept. 25, 2018), <https://www.nytimes.com/2018/09/25/opinion/trumps-next-target-legal-immigrants.html> [<https://perma.cc/G2SJ-9DXG>].

<sup>95</sup> See Bea Bischoff, *The Kris Kobach Playbook*, SLATE (July 10, 2018, 3:50 PM), <https://slate.com/news-and-politics/2018/07/jeff-sessions-is-doing-everything-in-his-power-to-make-asylum-seekers-suffer.html> [<https://perma.cc/7SPX-EYFW>] (describing changes such as limiting asylum seekers' ability to transfer cases to courts closer to their homes, denying them continuances, and the "zero tolerance" policy that requires assistant U.S. attorneys to try prosecuting every case of unauthorized entry into the United States, including those of asylum seekers).

the total number of foreigners” in the United States.<sup>96</sup> Although attrition through enforcement was initially described as a means of reducing unauthorized immigration, the Trump Administration has demonstrated that the policy can be equally effective when applied to legally present immigrants as well.

### C. *The Denaturalization Campaign as Attrition Through Enforcement*

The denaturalization campaign is another method of destabilizing the immigrant population, discouraging would-be immigrants from coming to the United States, and encouraging those already in the United States to leave. The campaign contributes to the perception that *all* immigrants are suspect, regardless of their legal status, their criminal history, or whether they are now U.S. citizens. The result is that all immigrants live in fear that their legal right to remain in the United States can be revoked at any time. As journalist and naturalized citizen Masha Gessen wrote for the *New Yorker*, the denaturalization campaign eroded the “assumption of permanence” that she and more than twenty million other naturalized Americans once enjoyed. Although naturalized citizens were once considered equal to native-born citizens, she concludes “all of us[] are second-class citizens now.”<sup>97</sup>

#### 1. *Denaturalization as a Tool for Enforcing Immigration Law*

The Trump Administration has ramped up denaturalization as part of its overall effort to reduce immigration by targeting not only undocumented immigrants, but also immigrants who believe themselves to be in the country legally.

In April 2017, then-Attorney General Jeff Sessions stated that the DOJ “will aggressively pursue denaturalization . . . to strategically enforce the nation’s immigration laws. . . .”<sup>98</sup> That statement was quoted at the top of the chapter addressing denaturalization in the July 2017 U.S. Attorneys’ Bulletin, a bimonthly publication produced by the DOJ to guide the work of

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<sup>96</sup> Tal Kopan, *Trump Fully Embraces Far Right Immigration Playbook*, CNN (Dec. 18, 2017, updated 6:26 PM), <https://www.cnn.com/2017/12/18/politics/trump-administration-immigration-hardline/index.html> [<https://perma.cc/6GJA-JJKG>].

<sup>97</sup> Gessen, *supra* note ‡.

<sup>98</sup> Press Release, U.S. Dep’t of Justice, Office of Pub. Affairs, Justice Department Secures the Denaturalization of a Senior Jihadist Operative Who Was Convicted of Terrorism in Egypt (Apr. 20, 2017), <https://www.justice.gov/opa/pr/justice-department-secures-denaturalization-senior-jihadist-operative-who-was-convicted> [<https://perma.cc/GF7N-WQEQ>]; see also Shoba Sivaprasad Wadhia, *Immigration Enforcement and the Future of Discretion*, 23 ROGER WILLIAMS U. L. REV. 353, 356–57 (2018) (describing the Trump Administration’s immigration enforcement policies).

the nation's U.S. Attorneys.<sup>99</sup> Citing President Trump's Executive Order instructing federal agencies to "employ all lawful means to enforce the immigration laws of the United States," the Bulletin further stated that "denaturalization will play a prominent role in securing the integrity of our immigration system."<sup>100</sup>

The DOJ seeks to accomplish the goal of using denaturalization as an immigration enforcement tool by encouraging federal prosecutors to pursue denaturalization through civil litigation, which avoids the "constitutional and statutory limitations" that accompany criminal denaturalization.<sup>101</sup> The July 2017 U.S. Attorney Bulletin notes that "many of the due process protections afforded in a criminal proceeding, such as a jury trial and a right to counsel, are not mandated" in civil denaturalization proceedings.<sup>102</sup> In criminal denaturalization cases, like all criminal cases, the government bears the highest possible burden of proving its case beyond a reasonable doubt; in civil denaturalization cases, the government need only meet the lower "clear, unequivocal, and convincing evidence" standard.<sup>103</sup> The Bulletin states that yet another "advantage[] of a civil denaturalization" is that it comes with no statute of limitations in contrast with the ten-year statute of limitations for criminal denaturalization.<sup>104</sup>

Civil denaturalization cases are also preferable, the Bulletin explains, because revocation of citizenship can be obtained based on conduct for which the defendant was never convicted and which does not amount to a crime.<sup>105</sup> In a civil case, a court must revoke a defendant's citizenship if the government establishes during a "mini-trial" that the defendant committed

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<sup>99</sup> See Anthony D. Bianco et al., *Civil Denaturalization: Safeguarding the Integrity of U.S. Citizenship*, 65 U.S. ATT'YS' BULL. 5–6 (July 2017) [hereinafter U.S. ATT'YS' BULL.] ("Actions to revoke naturalization unlawfully obtained or obtained by fraud are an integral part of the government's arsenal of remedies to enforce the immigration laws . . ."). The *United States Attorneys' Bulletin*, now renamed *Department of Justice Journal of Federal Law and Practice*, is published by the Executive Office of United States Attorneys, which is located within the DOJ. Each issue is focused on a particular legal topic of interest to its attorneys. See DEP'T OF JUST., J. FED. L. & PRACTICE, <https://www.justice.gov/usao/resources/journal-of-federal-law-and-practice> [<https://perma.cc/3PQU-PVBU>].

<sup>100</sup> Bianco, U.S. ATT'YS' BULL., *supra* note 99, at 6 (quoting Enhancing Public Safety in the Interior of the United States, Exec. Order 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017)).

<sup>101</sup> *Id.* at 8.

<sup>102</sup> *Id.*

<sup>103</sup> *Kungys v. United States*, 485 U.S. 759, 772 (1988).

<sup>104</sup> Bianco, U.S. ATT'YS' BULL., *supra* note 99, at 8–9 (noting that "prosecutions declined based on the ten-year statute of limitations are often viable in civil proceedings"). The Bulletin went on to state that "prosecutors should strongly consider referring" a case declined for criminal prosecution for civil denaturalization, noting that "prosecutions declined based on the ten-year statute of limitations are often viable in civil proceedings." *Id.* at 9.

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

“any act that warrants denaturalization.”<sup>106</sup> For example, the government could seek to revoke citizenship by demonstrating that the defendant lacked “good moral character” during the five-year period preceding naturalization, such as by providing evidence that the defendant committed a crime during that period, even if the defendant was never charged or convicted of that crime. Indeed, an individual can be found to lack good moral character even for conduct that is legal, such as for being a “habitual drunkard,” failing to support dependents, and committing adultery.<sup>107</sup>

Finally, the July 2017 U.S. Attorney Bulletin stated that civil denaturalizations “may be appropriate when a criminal denaturalization action results in an acquittal.”<sup>108</sup> In other words, the Bulletin advocates that the government take two bites of the same apple. Accordingly, even if a naturalized citizen is found not guilty of naturalization fraud, he may nonetheless subsequently face civil denaturalization proceedings.

The promotion of denaturalization as a method of enforcing immigration law is a sharp break from recent past practice, when the government denaturalized, at most, a handful of people each year. The government typically targeted truly bad actors, such as those who committed war crimes and then lied about their past to obtain U.S. citizenship.<sup>109</sup> When the Obama Administration initiated Operation Janus, it planned to denaturalize only the small number of citizens who had mistakenly received citizenship *and* posed a potential danger to the security of the United States, such as those who had obtained security clearances, held positions of public trust, or had criminal records.<sup>110</sup>

In contrast, USCIS’s newly announced denaturalization taskforce will review the files of 700,000 naturalized Americans.<sup>111</sup> The agency is opening a separate office in Los Angeles to run the investigations and is in the process

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<sup>106</sup> *Id.*; see also Agarwal v. Napolitano, 663 F. Supp. 2d 528, 542 n.7 (W.D. Tex. 2009).

<sup>107</sup> 12 U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL, pt. F, ch. 5 (J–L) <https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-5> (last updated June 6, 2019) [<https://perma.cc/TH2A-6V7M>]; see also Bianco, U.S. ATT’YS’ BULL., *supra* note 99, at 9 (emphasis in original) (explaining that denaturalization in the civil system can be obtained for “the *commission* of . . . non-criminal acts that establish the defendant was precluded from demonstrating the good moral character necessary to naturalize”).

<sup>108</sup> Bianco, U.S. ATT’YS’ BULL., *supra* note 99, at 9.

<sup>109</sup> See generally WEIL, *supra* note 5, at 12.

<sup>110</sup> IG REPORT, *supra* note 17, at 7 (explaining that the Department of Justice Office of Immigration Litigation “agreed to prosecute individuals with Transportation Security Administration (TSA) credentials, security clearances, positions of public trust, or criminal histories,” and stating that “ICE has identified and prioritized 120 individuals . . . for potential criminal prosecution and denaturalization”). See generally Robertson & Manta, *supra* note 12, at 9.

<sup>111</sup> ICE BUDGET OVERVIEW, *supra* note 1, at 21 (requesting “increased staffing” to “support the review of an estimated 700,000 remaining alien files”).

of hiring dozens of attorneys and staff to assist in the effort.<sup>112</sup> In a press release from January 2018, USCIS officials stated that the agency would be referring 1,600 cases to the DOJ for denaturalization.<sup>113</sup> As these numbers show, denaturalization is no longer reserved for a small number of bad actors, but now is a potential threat to the status of all naturalized citizens.

## 2. *Denaturalization Without Prosecutorial Discretion*

In keeping with the policy of attrition through enforcement, neither immigration officials nor the DOJ appears to be limiting denaturalization to cases involving those who pose a danger to the United States, or to those who intentionally committed fraud in the naturalization process.

The DOJ's longstanding policy, first stated in a circular letter in 1909, was not to seek denaturalization in cases in which the individual has been a citizen for many years and has proven to be a "good citizen" during that time.<sup>114</sup> In press releases touting Operation Janus, then-Director of USCIS Cissna stated that denaturalization would be reserved for bad actors who "intentionally lied" to obtain immigration status and exploited the system.<sup>115</sup> Thus far, however, the individuals targeted for denaturalization do not appear to pose a danger to the United States, and the facts of their cases suggest that they did not lie or intentionally conceal material facts during the naturalization process.

The very first individual denaturalized under Operation Janus, Baljinder Singh, had been in the United States for many decades, and was a citizen for twelve years.<sup>116</sup> He appears to have no criminal record, and the government did not claim that he held a security clearance or a sensitive position that implicated national security. Moreover, Singh may well have lost his citizenship as a result of his failure to update his address while he was a teenager, and not any intent to commit fraud. Singh did not appear in court to defend himself, so we do not know how he would have responded to the allegations in the government's denaturalization complaint. But even the facts as the government presents them suggest that he was more likely the victim of mistranslation and paperwork problems than a perpetrator of citizenship fraud.

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<sup>112</sup> Giaritelli, *supra* note 58.

<sup>113</sup> See January 2018 Press Release, *supra* note 52.

<sup>114</sup> DOJ CIRCULAR NO. 107, *supra* note 38.

<sup>115</sup> Associated Press, *Trump Administration Increasing Efforts to Denaturalize Citizens Who Lied in Applications*, NOLA.COM (July 5, 2018) [https://www.nola.com/national\\_politics/2018/07/trump\\_administration\\_increasin.html](https://www.nola.com/national_politics/2018/07/trump_administration_increasin.html) [<https://perma.cc/B27T-RAE4>].

<sup>116</sup> Complaint at 6, *United States v. Singh*, No. 17-7214 (SRC), 2018 WL 305325 (D.N.J. Jan. 5, 2018).

According to the government, Singh entered the United States through San Francisco International Airport in September 1991 as a teenager.<sup>117</sup> He had no identification documents but stated his name was Davinder Singh<sup>118</sup> and that he was born in 1975.<sup>119</sup> Singh was detained for ten days, and then released on bail into the custody of an adult friend who lived in New Jersey.<sup>120</sup> A few weeks later, the government sent notice of a master calendar hearing scheduled for January 7, 1992 to his New Jersey address.<sup>121</sup> Singh never responded to that notice or showed up at that hearing. Therefore, he was ordered excluded and deported in absentia in January 1992.<sup>122</sup>

Only a month later, on February 6, 1992, Singh filed a request for asylum.<sup>123</sup> He gave his name as Baljinder Singh, and his birth year as 1974—discrepancies that meant he was not flagged as the same man who had been ordered deported in absentia the month before.<sup>124</sup> He listed his address as in Elmhurst, New York, and stated he had been living at that address since October 1991.<sup>125</sup> He further reported that he had entered the United States in October 1991 near Los Angeles, California.<sup>126</sup>

Singh subsequently married a U.S. citizen and four years later, while his asylum application was still pending, his wife filed a petition on his behalf to enable Singh to adjust to lawful permanent resident status.<sup>127</sup> Singh stated on those forms that he had entered the United States without inspection, which was correct, but he also erroneously reported that he had never been in immigration proceedings or ordered deported.<sup>128</sup> In 1998, Singh received lawful permanent resident status,<sup>129</sup> and on July 28, 2006, he finished the naturalization process and took the oath to become a citizen of the United States.<sup>130</sup>

In denaturalization proceedings, the government claimed that Singh “willfully misrepresented his identity and immigration history throughout

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<sup>117</sup> *Id.* at 3.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* Ex. A, at 2 (providing an affidavit from a USCIS officer describing Singh’s immigration history).

<sup>120</sup> *Id.* at 4.

<sup>121</sup> *Id.*

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

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

<sup>124</sup> *Id.* Ex. A, at 3.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 2, Ex. A, at 3.

<sup>128</sup> *Id.* Ex. A, at 3.

<sup>129</sup> *Id.* at 4.

<sup>130</sup> *Id.* at 6.

the naturalization process” and that these “misrepresentations . . . were material to determining his eligibility for naturalization . . . .”<sup>131</sup> But the facts as described by the government strongly suggest inadvertent error—possibly by the government, and not Singh—rather than willful misrepresentation. Singh did not abscond or seek to evade immigration authorities. He filed for asylum within six months of arriving in the United States, as required by law, and only one month after he was ordered deported in absentia, thereby voluntarily bringing himself to the government’s attention. Moreover, when he filed for asylum, he gave his address as Elmhurst, New York, and not the New Jersey address to which the government had sent notice of his removal hearing, which suggests he never received either that notice or the deportation order.

Although Singh gave a different first name and different birth year when he filed for asylum, that discrepancy could have been an inadvertent error rather than an attempt to deceive. When he arrived, Singh did not speak English and communicated through a Punjabi interpreter, which exacerbated the potential for misunderstanding.<sup>132</sup> Singh gave the same surname on both occasions; only his first name differed. “Davinder” and “Baljinder” are similar sounding names, and it may be that an immigration officer or interpreter misheard it. Possibly, Singh was not sure of his birth year, or the difference in one year was due to a miscommunication or misunderstanding.

In short, it seems unlikely that Singh willfully evaded a hearing in immigration court in January 1992—a hearing at which he could have asserted asylum—only to turn around and apply for asylum a month later. Indeed, it is hard to see what he could possibly have gained by giving a false first name, purposely not showing up at a hearing so that he would be ordered deported in absentia, and then immediately seeking asylum under a slightly different first name. The government did not suggest that Singh was trying to hide any evidence from his past that would have rendered him ineligible for asylum, or that he was in any way better situated by petitioning for asylum in February 1992 rather than raising asylum as a defense to removal the month before.<sup>133</sup>

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<sup>131</sup> *Id.* Ex. A, at 8.

<sup>132</sup> *United States v. Singh*, No. 17-7214 (SRC), 2018 WL 305325, at \*1 (D.N.J. Jan. 5, 2018) (noting that “[t]hrough a Punjabi interpreter, Defendant gave his name as Davinder Singh”).

<sup>133</sup> The government also claims that Singh lied when he failed to disclose that he had received a final order of deportation. But from the facts as alleged by the government, it seems very likely that Singh never knew he had been ordered deported. The government sent notice of the hearing and his order of removal to the New Jersey address after Singh had moved to Elmhurst, New York, and that notice was issued to “Davinder Singh,” not Baljinder Singh. Accordingly, it appears very likely that Singh, just like the U.S. government, had no idea at the time he naturalized that he had been deported in absentia years before. *See generally* Complaint, *supra* note 116.

That is not to say that Singh did nothing wrong. Singh had a responsibility to update his address with immigration authorities, and he should also have been aware that he was in immigration proceedings based on his initial detention. But Singh was a teenager, traveling alone and fleeing his home country, and he did not speak English. Under these circumstances, these errors would have been unlikely to have barred him from naturalizing had he been given a chance to explain them at the time of naturalization.<sup>134</sup>

So why did Singh not show up at his denaturalization hearing to defend himself? Again, it seems likely that he never knew the hearing took place. He was served by mail rather than in person, and it is not clear that the government had his current address or that he received notice.<sup>135</sup> Moreover, because denaturalization is a civil proceeding, he had no right to a government-funded attorney, and so even if he did receive notice, he may not have known how to respond or defend himself.

Singh's case is not unique. On Tuesday, April 2, 2019, the government took the first case under Operation Janus to trial in federal district court in Florida. The government was seeking to denaturalize Parvez Manzoor Khan, a sixty-two-year-old truck driver from Pakistan who had lived in the United States for twenty-seven years, and had been a U.S. citizen for over a decade.<sup>136</sup> Like Singh, Khan was married to a U.S. citizen,<sup>137</sup> had no criminal convictions, and did not appear to pose a danger to the United States.<sup>138</sup>

Khan admitted to entering the United States under a false passport, for which he was detained for a month.<sup>139</sup> But Khan stated that never received notice of subsequent deportation hearings, and he assumed that he was permitted to stay in the United States.<sup>140</sup> He further explained in an affidavit and at his denaturalization hearing that he applied for a green card and for citizenship without realizing that the government had ordered him deported in absentia under a different name.<sup>141</sup>

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<sup>134</sup> See IG REPORT, *supra* note 17, at 5 (noting that “merely having used multiple identities or having a previous final deportation order does not automatically render an individual ineligible for naturalization”).

<sup>135</sup> Robertson & Manta, *supra* note 12, at 14–15, 15 n.62 (describing the service of process in Singh's case on a person living at his last known address, and noting that Federal Rule of Civil Procedure 4 does not require in-person service, but only service on a person of “suitable age and discretion”).

<sup>136</sup> Order at 3, 28, United States v. Khan, No. 17-cv-965-J-PDB (M.D. Fla. Feb. 21, 2019).

<sup>137</sup> *Id.* at 15.

<sup>138</sup> Transcript of April 2, 2019 Hearing at 131–32, United States v. Khan, No. 17-cv-965-J-PDB (M.D. Fla. Feb. 21, 2019).

<sup>139</sup> Order, *supra* note 136, at 31.

<sup>140</sup> *Id.* at 35.

<sup>141</sup> Transcript of April 2, 2019 Hearing, *supra* note 138, at 131; Order *supra* note 136, at 35.

USCIS internal documents state that its officials should weigh “aggravating” and “mitigating” factors before referring cases to the U.S. DOJ for denaturalization.<sup>142</sup> Factors to be taken into account include whether the target has “limited culpability” because, for example, the target “was underage.”<sup>143</sup> Another mitigating factor would be that the target “does not clearly have 2 distinct identities,” for example because the name differed due to “spelling variants.”<sup>144</sup> Both these mitigating factors were present in Singh’s case, however, and were either not taken into account or were considered insufficient to forgo denaturalization.

Singh and Khan have no criminal convictions, are longtime residents of the United States, have been U.S. citizens for over a decade, and have close family connections to U.S. citizens. The government has never argued that either man poses a danger to the United States. In the past, these factors would have all counseled against denaturalization.<sup>145</sup> The broad scope of the denaturalization campaign and the apparently harmless individuals who have been its first targets suggest that denaturalization is intended not to protect national security or the sanctity of the immigration system, but rather to send the message that no immigrant in the United States will ever be secure.

#### CONCLUSION

In 1967, the Supreme Court declared denaturalization unconstitutional for any reason other than fraud or mistake in the process. In response, the government virtually abandoned the practice, denaturalizing no more than a handful of cases a year—typically cases involving allegations of fraud by those who hid their participation in war crimes in their home countries. The Trump Administration has revived the practice, and is now devoting significant resources to investigating and denaturalizing thousands of U.S. citizens.

Internal government documents describing the denaturalization campaign, as well as the cases brought so far, suggest that denaturalization is one component of a broader immigration policy known as “attrition through enforcement,” which seeks to discourage immigration to the United

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<sup>142</sup> DEP’T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGR. SERVS., FIELD OPERATIONS STANDARD OPERATING PROCEDURE REVIEWING NATURALIZED SUBJECTS WITH MULTIPLE IDENTITIES FOR CIVIL DENATURALIZATION 14–16 (June 21, 2018). This document was produced in response to the author’s Fall 2018 FOIA request to USCIS for documents concerning denaturalization created on or after January 1, 2017.

<sup>143</sup> *Id.* at 16.

<sup>144</sup> *Id.* Some of the aggravating and mitigating factors were redacted under FOIA exemptions (b)(5) and (b)(7). *Id.*; see also DOJ CIRCULAR NO. 107, *supra* note 38, at 2 (listing mitigating factors that counsel against denaturalization).

<sup>145</sup> See *id.*

States and to encourage “self-deportation.” Attrition through enforcement originally targeted unauthorized immigration, but it can be equally effective as a means of reducing *legal* immigration to the United States. Aggressive use of denaturalization accomplishes that goal by sending the message that no immigrant has a safe and secure status, and therefore none can enjoy the “assumption of permanence” that naturalized citizens had come to expect.<sup>146</sup>

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<sup>146</sup> Gessen, *supra* note †.

