PUT UP OR SHUT UP: *L. Xia v. Tillerson* and the Government's End Run Around Judicial Denaturalization

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I. INTRODUCTION

The facts read like a movie plot: a broker with multiple aliases, a corrupt government employee, and a man with a stack of cash meet outside of Washington, D.C.[1] They arrange how to funnel hundreds of thousands of dollars to purchase forged documents.[2] But this was the not the opening scene of a political conspiracy blockbuster. It was the height of Robert Schofield's multi-year scheme to produce fraudulent immigration and citizenship paperwork for hundreds of individuals.[3]

In 2006, Schofield, a U.S. Citizenship and Immigration Services ("USCIS") supervisor at the busy Fairfax, Virginia, field office, pled guilty to accepting $600,000 in bribes to falsify paperwork and generate fraudulent certificates of naturalization for immigrants who did not complete the naturalization process.[4] Over the course of nearly ten years, Schofield worked with Yuhua Ren, also known as Eva Zhang, to provide over 400 individuals with fraudulent citizenship or immigration paperwork for bribes ranging from $3,000 to $80,000 a document.[5] As part of his plea deal, Schofield provided the U.S. government with a list of approximately 200 names associated with

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1. Indictment at 3, United States v. Liu, No. 1:09-cr-00388-TSE (E.D. Va. Aug. 27, 2009) [hereinafter *Liu* Indictment]; Affidavit in Support of a Criminal Complaint and an Arrest Warrant at 5–7, United States v. Ren, No. 1:07-cr-00452-LMB (E.D. Va. Oct. 16, 2007) [hereinafter *Ren* Affidavit].

2. *See Liu* Indictment, *supra* note 1, at 3; *Ren* Affidavit, *supra* note 1, at 8.

3. *Ren* Affidavit, *supra* note 1, at 3–5.

4. Jerry Markon, *Immigration Official Pleads Guilty to Falsifying Documents*, WASH. POST (Dec. 1, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/11/30/AR2006113000603.html [https://perma.cc/L29C-SELL].

5. *See* Indictment at 6, United States v. Ren, No. 1:07-cr-00452-LMB (E.D. Va. Nov. 8, 2007); *Ren* Affidavit, *supra* note 1, at 3–5, 7.

the fraudulent paperwork.[6] In 2011, the government alleged that Lihong Xia was number 180 on the list.[7]

Lihong Xia was a Chinese immigrant living in Virginia who applied for naturalization in 2003.[8] In 2004, she received her naturalization certificate and a U.S. passport.[9] Five years later, the government revoked her passport and cancelled her certificate, claiming her citizenship was bought and that she did not complete the naturalization process.[10] Without a U.S. passport, Xia could not travel internationally or prove she was a U.S. citizen.[11] She challenged the government's actions, first administratively and then in federal court.[12] In 2017, the D.C. Circuit dismissed her claim in *L. Xia v. Tillerson*, reaffirming that the government may exercise its authority of cancellation—acting to cancel naturalization certificates—with minimal proof and without judicial oversight because the action only affects documents, not citizenship status itself.[13]

This Note argues that the rule reaffirmed in *L. Xia* allows the government to avoid meeting its burden of proof in judicial proceedings in violation of due process and undermines the intent of statutory denaturalization provisions. Part II provides an overview of current naturalization, denaturalization, and cancellation procedures. Next, it recounts the history of judicial protection of denaturalization and provides an update on its current use. Then, this Note reviews the Ninth Circuit decision, *Gorbach v. Reno*, confirming the distinction between citizenship status and documents. Part II concludes by examining the government's theory, raised in *L. Xia*, that it can void citizenship status by claiming the original grant was invalid and the individual was never a citizen to begin with.[14] Part III analyzes *L. Xia v. Tillerson*, which upheld the hollow distinction between documents and status for naturalized citizens. Part IV argues the distinction between citizenship status and documents is illusory. Cancellation allows the government to avoid producing evidence required for judicial denaturalization while achieving the same practical result—denying an individual access to citizenship. This Note

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6. *See* Markon, *supra* note 4.

7. Letter from Admin. Appeals Office to Lihong Xia (Oct. 12, 2011) (on file with author).

8. Complaint at 2, Xia v. Kerry, No. 1:14-cv-00057-RCL (D.D.C. Nov. 10, 2014) [hereinafter *Xia* Complaint].

9. *Id.*

10. *Id.* at 3; *see* Defendant's Exhibit 1 at 2, Xia v. Kerry, No. 1:14-cv-00057-RCL (D.D.C. Nov. 10, 2014).

11. *Xia* Complaint, *supra* note 8, at 2–3.

12. *Id.* at 1, 3.

13. L. Xia v. Tillerson, 865 F.3d 643, 646, 655 (D.C. Cir. 2017).

14. *See In re* Falodun, 27 I. & N. Dec. 52, 55 (B.I.A. 2017).

explains that cancellation creates serious due process concerns and constitutes an improper shift of the burden of proof onto putative citizens because their statutory remedy is nearly impossible to access. Finally, Part IV discusses whether the government's avoidance of formal denaturalization procedures violates its statutory duty. Part V concludes.

II. FROM THEN TO NOW: BECOMING A CITIZEN

United States Supreme Court Justices have described citizenship as the "right to have rights."[15] Proof and presentation of citizenship is required to travel internationally, receive government benefits, obtain work authorization, and access judicial proceedings.[16] In the United States, citizenship is required to vote, obtain a passport for international travel, attain many state and federal benefits, be eligible for federal government jobs and many law enforcement positions, run for certain offices, participate in a jury, and assist non-citizen family members in obtaining U.S. citizenship.[17]

A. A Primer on Naturalization, Denaturalization, and Cancellation

Individuals born on U.S. soil are automatically U.S. citizens.[18] A foreign-born individual may obtain U.S. citizenship through a process called naturalization.[19] This process, administered by USCIS, includes a background investigation, an in-person interview, and an English competency and civics test.[20] Individuals with permanent residency, known

15. Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., Black & Douglas, JJ., dissenting).

16. 12 U.S. CITIZENSHIP & IMMIGRATION SERVS., POLICY MANUAL pt. A, ch. 2 (2019), https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartA-Chapter2.html [https://perma.cc/FAB8-Z8M6].

17. *Id.*

18. Immigration and Nationality Act § 301, 8 U.S.C. § 1401 (2018).

19. 8 U.S.C. § 1427 (2018).

20. *Id.* §§ 1423, 1446–1447. USCIS' sole authority over naturalization is the result of Congressional attempts to streamline the process. Congress originally granted the power to issue naturalization certificates to the judiciary. The process evolved over time from a purely judicial proceeding to one with more administrative review. In the past, applicants for naturalization submitted a petition to the Department of Justice's Immigration and Naturalization Service ("INS") which conducted a background investigation and then made a recommendation on the petition to court. Because both the executive and judiciary played a role, bureaucratic delays were common. The 1990 Act changed the process to be entirely in the purview of the executive to minimize wait times. This change meant naturalization no longer included an in-court interview and judicial order. Instead, INS officers investigated and interviewed applicants for naturalization and once the applicant satisfied all requirements and completed the oath of allegiance, a district

as lawful permanent residents or green card holders, may apply for naturalization after residing in the U.S. for five years, or after residing in the U.S. for three years if married to a U.S. citizen.[21] During the naturalization process the applicant's original admission to the U.S. is re-examined.[22] The government evaluates any past crimes and affiliations to ensure the applicant has established good moral character and demonstrated attachment to the U.S. Constitution.[23] After successfully completing all steps, a newly naturalized citizen must take an oath of allegiance to the United States.[24] As proof of successful completion of all naturalization requirements, USCIS issues a "Certificate of Naturalization."[25]

Once an individual has been naturalized, she may only lose her citizenship status by a judicial decree through a process known as revocation or, more commonly, denaturalization.[26] To revoke a naturalized citizen's status, the government must demonstrate that naturalization was obtained illegally or through fraud.[27] Denaturalization proceedings may be civil or criminal.[28] Criminal proceedings require the government to prove beyond a reasonable doubt that an individual knew her citizenship was obtained unlawfully.[29] In civil denaturalization proceedings, the government must prove by clear and

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court clerk would certify that the individual was admitted as a citizen of the U.S. The statutory change left denaturalization in the purview of the courts. *See* Immigration Act of 1990, 8 U.S.C. § 1453 (2018); H.R. REP. No. 101-187, at 8 (1989).

21. 8 U.S.C. §§ 1427, 1430 (2018).

22. This process reviews the original visa issued to the individual to enter the U.S. to confirm that the entry was lawful and all subsequent statuses derived from that original visa are also valid. *Id.* § 1446.

23. *See id.* §§ 1427, 1446.

24. 8 U.S.C. § 1448 (2018).

25. 8 U.S.C. § 1449 (2018). Certificates of naturalization are distinct from certificates of citizenship. Certificates of citizenship reflect an individual's acquisition of citizenship through her parents or grandparents despite a foreign birth, also known as derivative citizenship. 8 U.S.C. §§ 1433, 1452 (2018). While USCIS may pursue cancellation if it discovers an individual did not lawfully acquire citizenship, additional potential claims for acquisition through other relatives may exist and cancellation does not affect those claims. 12 U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 16, at pt. K, ch. 5, https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartK-Chapter5.html [http://perma.cc/6Z2Z-663S]. Conversely, certificates of naturalization reflect that an individual has met the statutory requirements for citizenship by completing the naturalization process. 8 U.S.C. § 1449 (2018).

26. 8 U.S.C. § 1451 (2018); 12 U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 16, at pt. L, ch. 1, https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartL-Chapter1.html [http://perma.cc/4UWN-DUW2]. The 1990 Act left denaturalization in the purview of the courts. 8 U.S.C. § 1451; Gorbach v. Reno, 219 F.3d 1087, 1089–91 (9th Cir. 2000).

27. 8 U.S.C. § 1451.

28. *Id.*

29. 18 U.S.C. § 1425 (2018).

convincing evidence that citizenship was unlawfully obtained.[30] Critically, however, the government does not need to prove any level of mens rea to civilly denaturalize an individual.[31]

An individual cannot claim that she did not know or should not have reasonably known that she failed to complete all naturalization requirements, otherwise obtained the grant illegally, or committed some type of fraud.[32] And courts do not have independent authority to create equitable remedies, even if the naturalization grant is invalid due to the fault of the government.[33] The absence of a mens rea requirement for denaturalization gives the government a clear path to denaturalize individuals if it can demonstrate *any* failure to comply with statutory requirements. However, the government also has a serious power short of denaturalization it can exercise with even more ease: cancellation.[34]

In 1990, Congress authorized the Attorney General to cancel certificates of naturalization and certificates of citizenship when illegally or fraudulently obtained or illegally or fraudulently created.[35] The Attorney General must be "satisf[ied]" that the documents should be cancelled and give the individual written notice of the decision to cancel the certificate, the reasons for cancellation, and sixty days to respond with reasons to prevent cancellation.[36] Congress was explicit that "[t]he cancellation . . . of any document purporting to show the citizenship status of the person to whom it was issued shall affect only the document and not the citizenship status of the person in whose name the document was issued."[37]

The Attorney General delegated his cancellation authority to USCIS.[38] USCIS, following the statute's guidance, has created a multi-step process to

30. Schneiderman v. United States, 320 U.S. 118, 135 (1943).

31. 8 U.S.C. § 1451 (2018). Comparatively, an individual applying for a visa who is suspected of membership in a terrorist group can rebut the charge by clear and convincing evidence that she "did not know, and should not reasonably have known" that she was a member of a group engaging in terrorist activity. *Id.* § 1182(a)(3)(B)(VI). No similar provision is available to rebut a claim that naturalization was invalid. *Id.* § 1451.

32. *See id.* § 1451.

33. Hizam v. Kerry, 747 F.3d 102, 104–05 (2d Cir. 2014) (noting the lack of equitable remedies available for an individual who failed to satisfy the plain statutory requirements even when the government erroneously told him he had complied).

34. Immigration Act of 1990, 8 U.S.C. § 1453 (1994).

35. *Id.*

36. *Id.*

37. *Id.*

38. 8 C.F.R. § 103.1(a) (2011); Immigration Benefits Business Transformation, Increment I, 76 Fed. Reg. 53,764, 53,780 (Aug. 29, 2011).

effect cancellation.[39] It starts by providing the individual with written notice listing the reasons for the intended cancellation and allows sixty days for the individual to respond in writing or to request an in-person hearing to respond to the notice.[40] If, after receiving a written response or conducting a hearing regarding the notice, the agency finds the individual's reasons to not cancel are insufficient or not credible, it then provides an appeal opportunity with a hearing.[41]

USCIS maintains that cancellation is not a viable option against anyone who has completed the naturalization process and taken an oath of allegiance.[42] It may only be used against those whose original application was not lawfully filed or did not successfully complete the entire naturalization process.[43] The agency explains the distinction as follows:

> The main difference between cancellation and [denaturalization] proceedings is that cancellation only affects the document, not the person's underlying status. For this reason, cancellation is only effective against persons *who are not citizens*, either because they have not complied with the entire naturalization process or because they did not acquire citizenship under law, but who nonetheless have evidence of citizenship which was fraudulently or illegally obtained.[44]

B. Judicial Protection of Denaturalization

Congress first established the power to denaturalize in 1906.[45] If an individual violated any naturalization requirements while obtaining U.S. citizenship, Congress determined that citizenship should be stricken.[46] It conferred this serious power to courts, who have zealously safeguarded the "priceless benefit[]" of citizenship ever since.[47] Courts have established and enforced the government's burden of proof in denaturalization proceedings

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39. 12 U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 16, at pt. K, ch. 5, https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartK-Chapter5.html [http://perma.cc/6Z2Z-663S].

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. 12 U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 16, at pt. L, ch. 1, https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartL-Chapter1.html [https://perma.cc/264J-89KW] (emphasis added).

45. Naturalization Act of 1906, Pub. L. No. 59-338.

46. *Id.*

47. *Id.*; Schneiderman v. United States, 320 U.S. 118, 122 (1943).

and found that Congress intended that denaturalization remain a judicial process.

1. Establishing the Government's Burden of Proof

Though Congress established a formal denaturalization power in the early 1900s, it was not regularly invoked in the following decades.[48] Denaturalization actions in the early twentieth century were primarily connected with political bias against anarchists, socialists, and communists.[49] The first judicial standard of proof required for denaturalization developed out of a case attempting to denaturalize a communist at the outset of World War II amid tension with the Soviet Union.[50]

William Schneiderman, a registered member of a Communist-affiliated Workers Party, was naturalized in 1927.[51] Twelve years later, the U.S. government moved to revoke Schneiderman's citizenship by claiming his original grant was illegally procured.[52] The government contended that Schneiderman's communist ideology, allegedly concealed from the court during his original naturalization proceedings, meant his claim of attachment to the Constitution was insincere and therefore voided his original grant of citizenship.[53] The district court and Ninth Circuit agreed with the government, ordering his citizenship grant invalid.[54] On appeal, the Supreme Court reversed.[55] It demanded that denaturalization only proceed with the "clearest sort of justification and proof" and far more than a "bare preponderance of the evidence."[56] The Court noted that citizenship was a "precious" right which should not be revoked without "'clear, unequivocal, and convincing' evidence which does not leave the issue in doubt."[57] Viewing the case as a fundamental statement about the United States' tolerance for

48. Patrick Weil, *Citizen Bomber: Why Can't Dzhokhar Tsarnaev Be Stripped of His Citizenship? History*, SLATE (Apr. 26, 2013, 11:15 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/04/history_lesson_why_dzhokhar_tsarnaev_can_t_be_stripped_of_his_citizenship.html [https://perma.cc/X3CU-KF7W].

49. *Id.*

50. *Schneiderman*, 320 U.S. at 122–23.

51. *Id.* at 125–26.

52. *Id.* at 122.

53. *Id.* at 121–22.

54. David Fontana, *A Case for the Twenty-First Century Constitutional Canon:* Schneiderman v. United States, 35 CONN. L. REV. 35, 43 (2002).

55. *Schneiderman*, 320 U.S. at 161.

56. *Id.* at 122, 125.

57. *Id.* at 122, 135.

diverse political ideology, the Court imposed this significant burden of proof on the government in all future proceedings.[58]

Schneiderman is best remembered for its fulsome endorsement that the Constitution protects and encompasses even those political beliefs which may seek to change it.[59] Yet, it also highlighted the danger in allowing the government to easily void citizenship. In his concurrence, Justice Rutledge explained that allowing the government to strip away citizenship by asserting non-fraudulent failure to comply with the process years after the fact undermined the value of the grant itself:

> If this is the law and the right the naturalized citizen acquires, his admission [as a citizen] creates nothing more than citizenship in attenuated, if not suspended, animation. He acquires but prima facie status, if that. Until the Government moves to cancel his certificate and he knows the outcome, he cannot know whether he is in or out. . . . No citizen with such a threat hanging over his head could be free. . . . This is not citizenship. [60]

The Supreme Court reaffirmed the standard for judicial denaturalization the following year in *Baumgartner v. United States*.[61] There, the government contended that Carl Baumgartner's renunciation of allegiance to the German Reich, a requirement during the oath of allegiance to U.S., was fraudulent and therefore he illegally and fraudulently procured his citizenship.[62] While substantial evidence existed that Baumgartner supported Nazism, the Court reaffirmed the standard that any evidence of fraud must be "weighty" and "sufficiently compelling" to meet the government's burden for denaturalization.[63]

2. Protecting the Statutory Process

The same year the government attempted to revoke Schneiderman's citizenship, it also pursued denaturalization against Peter Bindczyck.[64] A

58. *See id.* at 138.

59. Fontana, *supra* note 54, at 68 ("[T]he Court—rather than issuing a discrete opinion during a time when Americans were rallying around their democratic principles as a source of national pride—came forward and said that communists were Americans.").

60. *Schneiderman*, 320 U.S. at 166–67 (Rutledge, J., concurring).

61. 322 U.S. 665, 670 (1944).

62. *Id.* at 666.

63. *Id.* at 675, 677.

64. Bindczyck v. Finucane, 342 U.S. 76, 77 (1951).

Maryland state court issued Bindczyck's naturalization order in 1943.[65] Seven days after the order, the government moved to denaturalize him, accusing Bindczyck of fraudulently declaring allegiance to the United States.[66] The Maryland court, in compliance with its local procedures for setting aside orders within the same term, set aside Bindczyck's naturalization order.[67]

Bindczyck claimed that he was still a U.S. citizen because the government failed to comply with the statutory procedures for denaturalization when it merely had the original judicial grant set aside.[68] The Supreme Court agreed, finding the Nationality Act of 1940's procedures for denaturalization were the exclusive method to revoke citizenship.[69] The Court noted that the Nationality Act was passed in large part due to concerns about fraud.[70] Congress attempted to mitigate fraud by allowing the government to appear in court, instituting waiting periods between the time of application and the naturalization hearing, and creating a Bureau of Immigration and Naturalization to investigate and confirm applicants met all requirements.[71] The Act also directly addressed denaturalization provisions, limiting the proceedings to the court which issued the certificate or the court of jurisdiction where the individual lived.[72] The Court found it could not "escape the conclusion that in its detailed provisions for revoking a naturalization . . . Congress formulated a self-contained, exclusive procedure."[73]

Moreover, the Court noted that state rules for setting aside judgments varied widely.[74] If it accepted the government's argument that setting aside a state court order of naturalization was sufficient to denaturalize an individual, there would be vastly different denaturalization procedures and outcomes

65. *Id.* At that time the governing naturalization law, the Nationality Act of 1940, authorized state and federal courts to adjudicate naturalization applications. Nationality Act of 1940, Pub. L. No. 76-853, 54 Stat. 1137.

66. *Bindczyck*, 342 U.S. at 77. Bindczyck, a German national before naturalization, enlisted in the Army. Shortly after his naturalization, he was promoted and informed that he would be deployed overseas. Bindczyck then disavowed his statement that he would fight to defend the U.S. from its enemies as made in his oath of allegiance. The military placed him under arrest and the government subsequently moved to denaturalize. Brief for the Respondents at 4–6, Bindczyck v. Finucane, 342 U.S. 76 (1951), 1951 WL 81942.

67. *Bindczyck*, 342 U.S. at 92 (Reed, J., dissenting).

68. *Id.* at 77–78 (majority opinion).

69. *Id.* at 79.

70. *Id.*

71. *Id.* at 80–81.

72. *Id.* at 83.

73. *Id.*

74. *Id.* at 85–86.

across the country.[75] Instead, the Court reasoned that Congress established a specific and consistent procedure.[76] While the dissent criticized the majority opinion for being overly formalistic,[77] the Supreme Court was clear: where Congress has explicitly created a denaturalization procedure, that procedure—and that procedure alone—must be followed.

3. Denaturalization Today

Despite clear standards and an explicit statutory process, judicial denaturalization is not frequently pursued. Historically, the U.S. Department of Justice ("DOJ") has prosecuted less than two dozen denaturalization cases per year.[78] Resource constraints, more pressing litigation, and timing concerns have traditionally kept denaturalization at the bottom of DOJ's affirmative litigation list.[79] Additionally, the political nexus of denaturalization affects how different Presidential administrations approach the process, especially for complaints unrelated to national security.[80] For example, while a President Obama-era investigation found fingerprint mismatches in immigration records that potentially indicated fraudulent naturalization applications,[81] no leads from that investigation were referred to

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75. *Id.*

76. *Id.* at 87.

77. *Id.* at 97 (Reed, J., dissenting).

78. Eric Schmitt, *U.S. Is Seeking to Strip 5,000 of Citizenship*, N.Y. TIMES (May 24, 1997), http://www.nytimes.com/1997/05/24/us/us-is-seeking-to-strip-5000-of-citizenship.html [https://perma.cc/JFM5-YUYN]. The vast number of denaturalization proceedings instituted in the late 1990s are an aberration. *See infra* note 89.

79. Gabby Morrongiello, *Justice Department 'Too Busy with Litigation' to Denaturalize Illegal Immigrants Who Wrongly Received Citizenship*, WASH. EXAMINER (Aug. 9, 2017), http://www.washingtonexaminer.com/justice-department-too-busy-with-litigation-to-denaturalize-illegal-immigrants-who-wrongly-received-citizenship/article/2631041 [https://perma.cc/49AJ-5MGE].

80. *Compare id.* (describing criticism of the slow denaturalization pace under Obama), *with* Tina Vasquez, *A 'McCarthy-Like Witch Hunt': Legal Experts Weigh In on Operation Targeting Immigrants for Denaturalization*, REWIRE (Jan. 12, 2018), https:// rewire.news/article/2018/01/12/mccarthy-like-witch-hunt-legal-experts-weigh-operation-targeting-immigrants-denaturalization/ [https://perma.cc/5UN3-ZCUD] (noting complaints that Trump-era denaturalization attempts are a thinly veiled attack against Muslims immigrants and immigrants generally).

81. OFFICE OF THE INSPECTOR GEN., DEP'T OF HOMELAND SEC., POTENTIALLY INELIGIBLE INDIVIDUALS HAVE BEEN GRANTED U.S. CITIZENSHIP BECAUSE OF INCOMPLETE FINGERPRINT RECORDS 1 (2016), https://www.oig.dhs.gov/assets/Mgmt/2016/OIG-16-130-Sep16.pdf [https://perma.cc/VD3V-9AUL].

DOJ until after President Trump's administration took office.[82] In September 2017, DOJ publicized three civil complaints filed to denaturalize individuals for alleged fraud and undisclosed aliases.[83] One order of denaturalization was obtained in 2018.[84] Recently, the Trump Administration acted to prioritize denaturalization, announcing the hiring of USCIS attorneys specifically dedicated to investigating naturalization files in order to refer cases to DOJ for denaturalization proceedings.[85]

C. The Development of Cancellation

As described above, Congress acted to combat perceived problems with fraudulent applications by granting the Executive Branch the authority to cancel certificates of citizenship and naturalization.[86] In 1996, Attorney General Janet Reno issued regulations clarifying her interpretation that the Immigration and Naturalization Service ("INS"), USCIS' predecessor agency, had equal authority to the district courts to reopen and vacate prior grants of naturalization if notice was issued within two years of the initial grant.[87] In *Gorbach v. Reno*, the Ninth Circuit unequivocally rejected the government's interpretation and reasserted judicial control over denaturalization.[88]

1. Paperwork Is Distinct from Status

After a government audit revealed a consistent pattern of errors in INS naturalizations, DOJ attempted to revoke the citizenship of over 300

82. *See* Press Release, U.S. Dep't of Justice, 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. 17, 2017), https://www.justice.gov/opa/pr/united-states-files-denaturalization-complaints-florida-connecticut-and-new-jersey-against [https://perma.cc/T7RU-Q8BB].

83. *Id.*

84. Press Release, U.S. Dep't of Justice, 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 [https://perma.cc/F7NV-WYP8].

85. Amy Taxin, *US Launches Bid to Find Citizenship Cheaters*, ASSOCIATED PRESS (June 11, 2018), https://apnews.com/1da389a535684a5f9d0da74081c242f3 [https://perma.cc/B2MX-QLDV].

86. *See supra* Part II.A.

87. 8 C.F.R. § 340.1 (2011); Memorandum Opinion for the General Counsel Immigration and Naturalization Service, 21 Op. O.L.C. 44, 46 (1997), https://www.justice.gov/file/19851/download [https://perma.cc/8FG9-LHZ4].

88. Gorbach v. Reno, 219 F.3d 1087, 1095 (9th Cir. 2000).

individuals naturalized between 1995 and 1996.[89] Ten individuals targeted for denaturalization sued to enjoin the government's attempt to revoke their citizenship under the Attorney General's newly issued regulations.[90] The government argued that the 1990 amendments implicitly gave the Attorney General the power to denaturalize by authorizing the power to naturalize.[91]

The Ninth Circuit rejected the argument, finding the statute regarding denaturalization explicitly conferred the power to district courts.[92] It also noted that the power to denaturalize had never been exercised administratively and it would not read in a new administrative authority from statutory silence.[93] The court held there was no ambiguity in the statute's language and there was no implicit grant of denaturalization power in the authorization to naturalize citizens.[94] The court similarly rejected the claim that the savings clause[95] included in the denaturalization provision created any authority.[96] It merely protected pre-existing powers.[97] As the Attorney General never had authority to denaturalize, the savings clause did not create such authority, despite the terms "reopen" and "vacate."[98]

The court stated it was highly implausible that Congress would implicitly authorize the Attorney General to revoke naturalization when it took the step of explicitly confirming the district court's authority to vacate its own judgments.[99] Congress was unlikely to dispense with the important subject of citizenship under an implicit grant when it felt the need to explicitly confirm a much more logical revocation power—a court's ability to vacate its own

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89. *Id.* at 1095. After Republicans accused the Clinton administration of allowing individuals with criminal records to obtain citizenship to increase Democratic voter turnout before the 1996 election, INS reviewed every naturalization grant from August 1995 to September 1996. Press Release, U.S. Dep't of Justice, INS and KPMG Complete Review of August 1995—September 1996 Naturalizations (Feb. 9, 1998), https://www.justice.gov/archive/opa/pr/1998/February/052.htm.html [https://perma.cc/7TX4-AZPP]. The review determined that nearly 5,000 individuals were improperly granted citizenship. Schmitt, *supra* note 78. The government then began attempts to develop a process outside of the judicial system to revoke citizenship for such large numbers of individuals. *Id.*

90. *Gorbach*, 219 F.3d at 1091.

91. *Id.*

92. *Id.* at 1093.

93. *Id.* at 1091.

94. *Id.* at 1093.

95. 8 U.S.C. § 1451(h) (2018) ("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.").

96. *Gorbach*, 219 F.3d at 1094.

97. *Id.*

98. *Id.*

99. *Id.* at 1095.

rulings.[100] The court also explained that while administrative agencies may be able to successfully process bulk applications for naturalization, denaturalization involves an inquiry into individual facts and fundamental questions of rights.[101] It concluded Congress intended to preserve the district court's role in denaturalization due to its importance and concern about political misuse.[102] Similarly, it noted the government had multiple options to protect citizenship from being granted to unqualified applicants, and neither the savings clause nor an implicit grant allowed the Attorney General to denaturalize citizens.[103] If Congress intended "[f]or the Attorney General to gain the terrible power to take citizenship away without going to court" the court needed Congress to say so explicitly and unambiguously.[104]

The court, however, accepted that the statute was clear that cancellation did not affect citizenship status.[105] It agreed with the government that paperwork was not the same as status and because of this distinction the government may cancel paperwork without offending judicial denaturalization procedures.[106]

2. Pattern of Avoiding Denaturalization with Ab Initio Claims

The Supreme Court has been clear that judicial denaturalization is the only process to remove citizenship and the various executive branch departments involved in immigration have accepted this ruling. However, the two main immigration adjudicative bodies, the Board of Immigration Appeals ("BIA")[107] and USCIS' Administrative Appeals Office ("AAO") continue to assert that the cancellation power remains valid in a vast number of cases.[108]

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100. *Id.*
101. *Id.*
102. *Id.* at 1095–96.
103. *Id.* at 1096–97.
104. *Id.* at 1098–99.
105. *Id.* at 1090, 1093, 1098.
106. *Id.*
107. The BIA is an administrative court within the Department of Justice's Executive Office for Immigration Review which oversees removal matters. *Board of Immigration Appeals*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/board-of-immigration-appeals [https://perma.cc/4EV8-5TTJ] (last updated Oct. 15, 2018). It is distinct from the USCIS' Administrative Appeals Office which oversees appeals of immigration benefit denials, such as notices of intent to cancel certificates of naturalization. *The Administrative Appeals Office*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao/administrative-appeals-office-aao [https://perma.cc/K24X-5JLJ] (last updated July 11, 2018).
108. *E.g.*, *In re* Falodun, 27 I. & N. Dec. 52, 55 (B.I.A. 2017).

In cases with evidence of fraud or illegality, cancellation is a sufficient remedy, because in the government's view, the applicant was never a lawful citizen.[109]

Bright Falodun's situation demonstrates a common application of this theory.[110] Falodun received a certificate of citizenship in 1995 after his adoptive father naturalized.[111] In 2002, USCIS cancelled Falodun's certificate, claiming that his adoptive father was in fact his biological brother and therefore his underlying claim to citizenship was invalid.[112] The AAO denied Falodun's appeal and he was ordered deported.[113]

On appeal to the BIA, Falodun argued that his citizenship status remained unaffected despite the cancellation of his citizenship certificate and that the removal order violated due process by not comporting with the statutory procedures for denaturalization outlined in 8 U.S.C. § 1453.[114] The Board rejected his argument, distinguishing between cancellation of citizenship certificates and naturalization certificates.[115] In the Board's view, § 1453's language that "any document purporting to show the citizenship status of the person to whom it was issued shall affect only the document and not the citizenship status of the person in whose name the document was issued"[116] applied only to naturalized citizens.[117] A certificate of naturalization documented an individual's compliance with all naturalization requirements and certification that he or she took an oath of allegiance.[118] It documented a grant of United States citizenship.[119] By contrast, certificates of citizenship provided to derivative citizens "only serve[d] as *indicia* of citizenship. [They were] not a *grant* of United States citizenship."[120]

Under the Board's reasoning, because Falodun's original claim to citizenship through his father was invalid, Falodun was never a citizen of the U.S. ab initio, or to begin with, and so the action to cancel his certificate did not offend the denaturalization statute because there was no citizenship to

109. *Id.*
110. *Id.*
111. *Id.* at 52. Children under eighteen years old become citizens when their parent naturalize through a process known as derivative citizenship. 8 U.S.C. § 1431 (2018).
112. *In re Falodun*, 27 I. & N. Dec. at 53.
113. *Id.* at 52.
114. *Id.* at 54.
115. *Id.*
116. 8 U.S.C. § 1453 (2018).
117. *See In re Falodun*, 27 I. & N. Dec. at 54; *id.* at n.3 (quoting 8 U.S.C. § 1453).
118. *Id.* at 54.
119. *Id.*
120. *Id.* at 55.

judicially denaturalize. [121] The Board cited *Matter of Koloamatangi*,[122] where the Board drew a similar ab initio holding regarding lawful permanent resident status, finding an original ineligibility meant the status was never obtained.[123]

III. *L. XIA V. TILLERSON*

In 2004, Lihong Xia received her certificate of naturalization and shortly thereafter her U.S. passport.[124] Xia used this passport to travel to China to visit her parents.[125] Because she entered China on a U.S. passport, Chinese officials became aware of her U.S. citizenship and her Chinese citizenship was automatically revoked in accordance with Chinese nationality law.[126] In 2009, while returning from a trip visiting her parents, ICE detained Xia and confiscated her passport.[127] ICE placed Xia into deportation proceedings with an immigration judge. At Xia's hearing in early 2010, the immigration judge dismissed the case because of the government's failure to prosecute.[128]

After the removal proceedings were dismissed, Xia demanded that her passport be returned.[129] When those demands failed, she applied to have her passport reissued.[130] Before she heard back from the State Department, she received a Notice of Intent to Cancel from USCIS in October 2011, citing her as individual 180 out the 193 individuals identified by Schofield as connected to fraudulent naturalization certificates.[131] Next, Xia received a letter from the Department of State in September 2012 informing her that her naturalization certificate had already been cancelled in July 2012.[132] Meanwhile, Xia continued to contest the intended cancellation with USCIS but in October

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121. *Id.*

122. 23 I. & N. Dec. 548, 551 (B.I.A. 2003). Kolomatangi sought to avoid deportation under a provision which cancels proceedings for lawful permanent residents with five years of U.S. residence. *Id.* at 548. He obtained his lawful permanent resident status by virtue of his marriage to a U.S. citizen. *Id.* at 549. The Board determined that as Kolomatangi was married to a Tongan national at the time of his purported marriage to a U.S. citizen, the marriage was invalid and his original grant of lawful permanent residence status "never, in a legal sense" took place. *Id.*

123. *In re Falodun,* 27 I. & N. Dec. at 55.

124. *Xia* Complaint, *supra* note 8, at 2.

125. *Id.* at 3.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. Letter from Admin. Appeals Office to Lihong Xia (Oct. 12, 2011) (on file with author).

132. Letter from U.S. Dept. of State to Lihong Xia (Sept. 6, 2012) (on file with author).

2013 the agency cancelled her certificate after determining it was illegally obtained through Schofield's unlawful conduct and that because of Schofield's conduct, Xia did not complete all the statutory requirements of naturalization.[133] During Xia's appeal to the AAO, USCIS then asserted that Xia's parents, not Xia herself, were listed by Schofield as recipients of fraudulent certificates.[134] Xia disputed this new allegation, maintaining her now-deceased parents never left China before their deaths and were never connected to Schofield.[135] The AAO denied Xia's appeal finding that USCIS met the "satisfaction" burden under the statute and that any due process claims were outside of its jurisdiction.[136]

A. Xia's District Court Suit

Exhausting her administrative options, Xia and several other similarly situated plaintiffs, filed suit in district court alleging the government's action violated the statutory denaturalization procedures because they amounted to an administrative revocation of citizenship.[137] The plaintiffs acknowledged the cancellation statute's distinction between status and documents but nevertheless asserted the government revoked their citizenship and that this non-judicial deprivation of rights left them in "limbo."[138] The D.C. District Court dismissed all claims.[139] It noted that the remedy sought by Xia—documentary proof of her citizenship status—was available to her through 8 U.S.C. § 1503(a).[140] Section 1503 provides that an individual denied a right because she is not a U.S. citizen may seek a declaratory judgment of citizenship in district court.[141] The court stated that Xia did not explain why

133. Letter from Admin. Appeals Office to Lihong Xia (June 19, 2014) (on file with author) [hereinafter June AAO Letter to Xia] (describing the October 2013 certificate cancellation).

134. *Id.*

135. Affidavit Statement of Lihong Xia (June 17, 2014) (on file with author).

136. June AAO Letter to Xia, *supra* note 133.

137. Xia v. Kerry, 73 F. Supp. 3d 33, 37 (D.D.C. 2014). The plaintiffs also alleged violations of due process under the Fifth Amendment, the Administrative Procedures Act and the Civil Rights Act, which the court dismissed for failure to state a claim. *Id.* Three other plaintiffs had very sparse and unclear factual records and are therefore not addressed in this Note. This Note also does not address the fourth plaintiff, Wei Lui, who asserted similar claims but was indicted by a grand jury after it found Lui made payments to Schofield. *Liu* Indictment, *supra* note 1. If the government's criminal charges against Lui are successful, his naturalization order will be judicially revoked upon a finding of guilt and therefore comply with 8 U.S.C. § 1453.

138. *Xia*, 73 F. Supp. 3d at 37–38.

139. *Id.* at 46.

140. *Id.* at 45.

141. 8 U.S.C. § 1503(a) (2018).

she could not seek a declaratory judgment, rejecting her argument that forcing a citizen to do so created a due process risk.[142] It dismissed all claims without prejudice.[143]

Xia and her co-plaintiffs filed an amended complaint which was dismissed after the court found the plaintiffs failed to clarify the basis of relief.[144] It also dismissed Xia's new § 1503 claim, determining that any § 1503 claim must be brought in New Jersey, the jurisdiction where Xia then resided.[145] Xia appealed.

B. Xia's Appellate Suit

On appeal, the D.C. Circuit noted the long history of judicial protection for denaturalization beginning with *Schneiderman*.[146] It described the government's criminal and civil options when it "concludes that a naturalized citizen is not legally entitled to citizenship."[147] Because of the serious deprivation of rights involved in denaturalization, the court reaffirmed the previously stated evidentiary standards and noted that civil suits are available for situations where the government cannot meet the burden of proof for a criminal prosecution.[148]

The government did not bring denaturalization proceedings against Xia. Instead, it cancelled her naturalization certificate. The court noted that this move did not implicate her citizenship status.[149] But it acknowledged that the cancellation still had tangible consequences and, unlike previous courts, addressed the merits of the plaintiffs' arguments that cancellations are an "unauthorized and unconstitutional workaround of the requisite denaturalization process, accomplished by treating the revocation of plaintiffs' certificates of citizenship and passports as having confirmed plaintiffs' lack of U.S. citizenship without the requisite court order."[150]

At oral arguments, the government stated it did not pursue formal civil denaturalization because the plaintiffs were not citizens.[151] Because they failed to complete all naturalization requirements, the government

142. *Xia*, 73 F. Supp. 3d at 44.
143. *Id.* at 46.
144. Lihong Xia v. Kerry, 145 F. Supp. 3d 68, 74 (D.D.C. 2015).
145. *Id.*
146. L. Xia v. Tillerson, 865 F.3d 643, 650 (D.C. Cir. 2017).
147. *Id.*
148. *Id.* at 650–51.
149. *Id.* at 651.
150. *Id.* at 652.
151. *Id.* at 653.

determined that plaintiffs' certificates were illegally issued.[152] Under the government's theory, the plaintiffs were never citizens and were never entitled to the due process provided in judicial denaturalization.[153] The court rejected this argument as it "assume[d] what the government must prove."[154] The government cannot escape its duty to prove by clear and convincing evidence that a naturalization was invalid by merely asserting a lack of citizenship and then arguing that lack of citizenship obviates the need to prove the alleged invalidity.[155] The court found the statute's text explicitly precluded such an interpretation by providing a remedy for naturalizations obtained illegally, through willful misrepresentation, or by concealing a material fact.[156] If Congress did not want to protect putative citizens who had illegally obtained naturalization, it would not have created an explicit denaturalization procedure for those individuals.[157] The court reasoned that allowing such an ab initio justification would undermine over fifty years of precedent, make the statute itself pointless, and equate to administrative denaturalization.[158]

Additionally, the government argued that it did not fail to comply with the statutory denaturalization requirements as the cancellation did not denaturalize the plaintiffs.[159] The cancellation merely took away the document, illegally issued, but the plaintiffs had their citizenship.[160] The court agreed that the government's actions were not procedurally deficient because the plaintiffs were not denaturalized.[161] It also affirmed the lower court's finding that § 1503 provided a remedy to Xia, so long as she moved her suit to New Jersey.[162] The court determined that although § 1503 shifted the burden of proof onto Xia, the burden was so minimal that it did not offend due process.[163] The court concluded its analysis by noting that § 1451 appears

152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 654.
158. *Id.*
159. *Id.* at 653.
160. *Id.* at 655.
161. *Id.*
162. *Id.* at 655–56.
163. *Id.* at 656.

to obligate the government to bring civil charges if it has sufficient evidence.[164]

C. Section 1503 Procedures

In denying her claims, the D.C. Circuit directed Xia to her § 1503 remedy. This section provides that an individual denied rights or privileges as a U.S. national on the basis that she is not a citizen may:

> institute an action . . . for a judgment declaring [her] to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any removal proceeding under the provisions of this chapter or any other act, or (2) is in issue in any such removal proceeding.[165]

This remedy is limited to five years after the final administrative action which denied rights or privileges and must be instituted in the jurisdiction of the court of the individual's residence.[166]

Under § 1503(a) proceedings, the plaintiff must demonstrate citizenship by a preponderance of evidence.[167] The Supreme Court has stated that an individual under this section only needs to provide prima facie evidence of citizenship.[168] The burden then shifts to the government to prove the basis for the denial with "clear, unequivocal, and convincing" evidence.[169]

Citizenship claims which "(1) arose by reason of, or in connection with any removal proceeding under the provisions of this chapter or any other act, or (2) [are] in issue in any such removal proceeding" are excluded from a court's § 1503 jurisdiction.[170] The plain language of the statute suggests that individuals who defend against potential deportation by asserting citizenship

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164. *Id.* at 661. The court reversed the lower court ruling regarding APA exhaustion for the revocation of Xia's passport and affirmed the denial of the plaintiffs' Civil Rights claims. *Id.* at 660–61.

165. 8 U.S.C. § 1503(a) (2018).

166. *Id.*

167. Martinez v. Secretary of State, 652 F. App'x 758, 761 (11th Cir. 2016) ("In a § 1503(a) declaratory judgment action, the plaintiff has the burden of proving that he is a U.S. citizen by a preponderance of the evidence."); Mathin v. Kerry, 782 F.3d 804, 807 (7th Cir. 2015) ("[Plaintiff] has the burden of demonstrating his citizenship by a preponderance of the evidence."); Edwards v. Bryson, 578 F. App'x 81 (3d Cir. 2014) (finding the petitioner's expired passport did not meet his burden to establish his citizenship by a preponderance of evidence).

168. Perez v. Brownell, 356 U.S. 44, 47 n.2 (1958), *overruled on other grounds by* Afroyim v. Rusk, 387 U.S. 253 (1967).

169. *Id.*

170. 8 U.S.C § 1503(a) (2018).

are barred from a § 1503 suit. Several circuits, including the Third and Fifth Circuit, have adopted a more lenient interpretation. If citizenship claims have "genesis" outside of removal proceedings and all removal proceedings have terminated before the declaratory judgment action is initiated, the court does not lose jurisdiction of the claim.[171] In a review of over 300 cases since the 1990 amendments to the Immigration and Nationality Act, no plaintiff asserting a claim of naturalization has successfully received a declaratory judgment of citizenship.[172]

Notably, a successful § 1503 suit does not result in a grant of citizenship. The judicial branch cannot grant citizenship no matter how sympathetic it may be to the facts presented.[173] If a plaintiff successfully obtains a declaratory judgment from a § 1503 suit, she must still return to administrative agencies to obtain new copies of the documents that were cancelled. As there have been no successful § 1503 suits since the 1990 amendments, there is no data on the ease or difficulty of obtaining reissued paperwork.

IV. ANALYSIS

In *L. Xia*, the court reaffirmed that cancellation does not implicate citizenship status and asserted that any due process concerns are not significant.[174] This formalistic holding creates real hardship for individuals like Xia. It perpetuates an administrative scheme that jeopardizes due process for naturalized citizens by allowing the government to cancel access to

171. The Third and Fifth Circuit have both interpreted the statute to only bar jurisdiction of claims which found "its genesis" in removal proceedings. Olopade v. Attorney Gen. of the U.S., 565 F. App'x 71, 73 (3d Cir. 2014); Rios-Valenzuela v. U.S. Dep't of Homeland Sec., 506 F.3d 393, 399 (5th Cir. 2007). However, some courts have determined citizenship claims first raised in a removal proceeding derive their "genesis" from that context. *Olopade*, 565 F. App'x at 73.

172. The majority of § 1503(a) actions are associated with birth-right and derivative claims, not naturalization claims. Cases failed for various reasons including jurisdictional bars (claims raised in or connection with removal proceedings, individuals still in removal proceedings), failure to exhaust administrative remedies, or plaintiff's failure to meet their burden of preponderance of evidence. *See, e.g.*, Ali v. Tillerson, No. 16CV3691KAMSJB, 2017 WL 7048809, at *3 (E.D.N.Y. Nov. 21, 2017) (failure to meet burden); De Los Santos v. United States, 133 F. App'x 992 (6th Cir. 2005) (failure to exhaust); Asemani v. Rice, No. CIV.A. 04-1622(JDB), 2005 WL 1903560, at *3 (D.D.C. July 12, 2005) (claim raised in connection with removal proceeding). There are some early cases involving lost or duplicate judicial orders of naturalization where plaintiffs were successfully able to achieve declaratory judgment relief. *See, e.g.*, Brassert v. Biddle, 59 F. Supp. 457, 459–60 (D. Conn. 1944).

173. *See* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1698 (2017) (noting that the Court cannot grant citizenship).

174. L. Xia v. Tillerson, 865 F.3d 643, 655 (D.C. Cir. 2017).

citizenship benefits under a low evidentiary standard. It also forces the burden of proof onto putative naturalized citizens. Additionally, the government's avoidance of formal denaturalization suits may violate its statutory duty to bring proceedings. The government's reliance on cancellation is not necessary as civil denaturalization provisions cover the types of cases where the government is exercising its cancellation power. However, the government continues to favor cancellation due to the lower evidentiary standard, the administrative efficiency, and its ab initio theories regarding initial grants.

A. Distinction Without a Difference

Cancellation places individuals like Xia in a difficult position. The law makes a distinction between documents and citizenship status. Reality does not. Most benefits of citizenship, such as state protection and international recognition, depend primarily on documentation.[175] An individual who cannot travel, obtain government benefits, or validly participate in the political process is unlikely to feel encompassed in the warm embrace of citizenship because she technically retains citizenship status. Cancellation creates a de facto statelessness for individuals like Xia.[176]

B. Due Process Problems

Cancellation creates serious due process concerns for naturalized citizens. It lacks the individual inquiry into facts and fundamental questions of law provided in judicial proceedings. The holding from *L. Xia* follows jurisprudence which continues due process deficiencies by allowing the government to cancel access to citizenship under a low evidentiary standard. It also forces the burden of proof onto citizens, who are often at an evidentiary disadvantage, to judicially challenge the cancellation through a remedy that is difficult to access.

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175. *See generally* Ramzi Kassem, *Passport Revocation As Proxy Denaturalization: Examining the Yemen Cases*, 82 FORDHAM L. REV. 2099 (2014) (describing passport revocation and subsequent inability to travel); Patrick Weil, *Citizenship, Passports, and the Legal Identity of Americans: Edward Snowden and Others Have A Case in the Courts*, 123 YALE L.J. F. 565 (2014) (describing the potential Fourteenth Amendment concerns in denying international travel by revoking passports).

176. De facto statelessness describes individual who, for various reasons, cannot access the benefits or rights associated with citizenship status. Polly J. Price, *Stateless in the United States: Current Reality and a Future Prediction*, 46 VAND. J. TRANSNAT'L L. 443, 450 (2013).

1. Lower Evidentiary Standard

After the *L. Xia* decision, the government can continue to avoid the burden of proof in civil denaturalization proceedings by choosing to cancel naturalization certificates. To civilly denaturalize an individual, the government must provide "clear, unequivocal, and convincing" evidence.[177] The Supreme Court in *Schneiderman* counseled that the evidence must be so clear as to remove the issue from doubt.[178] Cancellation, on the other hand, only requires that the government be satisfied that citizenship was obtained illegally or fraudulently. There is no judicial oversight over the "satisfied" standard and USCIS does not publish requirements associated with this standard. An individual has administrative appeal options after cancellation, including the option of a full hearing in front of the AAO. But in these hearings, the standard remains "satisfied" and the government, as the administrator of the process and custodian of all original paperwork, has a natural evidentiary advantage over the challenging individual. The lower evidentiary standard diminishes the protection associated with citizenship.

For example, Xia challenged her naturalization cancellation administratively. The D.C. Circuit, in restating the facts of the case, noted that:

> Neither the complaint nor any public record the parties have identified or provided explains precisely whether or how these plaintiffs' facially valid certificates of naturalization and passports were affected by Schofield's activities. No information before the court at this stage shows that plaintiffs were aware of inadequacies or fraud in the procurement of their naturalization certificates or passports.[179]

USCIS did not provide any specific information linking Xia's application to Schofield or details of his allegations. It merely stated that her parents were named on a list Schofield provided. USCIS asserted it produced her full naturalization file and any omissions in the file added credence to its claims that she did not complete the process. Although the record shows that USCIS rescheduled interviews at Xia's request and provided her with multiple opportunities to present evidence to demonstrate her citizenship, the agency maintained that it was Xia who must prove she completed the process to avoid cancellation rather than USCIS demonstrate where or how she failed to do

177. Schneiderman v. United States, 320 U.S. 118, 135 (1943).
178. *Id.*
179. L. Xia v. Tillerson, 865 F.3d 643, 647 (D.C. Cir. 2017).

so.[180] USCIS was not required to address that Schofield frequently took records from his office to conflate and borrow valid naturalization numbers for fraudulent certificates.[181] If, however, the government complied with the civil denaturalization process, it is unclear whether the sparse record and alleged omissions would constitute "clear, unequivocal, and convincing" evidence that citizenship was obtained illegally.[182] Judicial denaturalization provides more due process and security to putative citizens before removing citizenship status.

2. Shifting Burdens

Cancellation improperly shifts the burden of proof and persuasion to the naturalized citizen. During any administrative review of cancellation, the government has the initial burden of proof. However, because the evidentiary standard is so low, the burden quickly shifts to the naturalized citizen to present evidence conclusively demonstrating citizenship. The burden is also shifted onto the citizen to initiate a § 1503 declaratory judgment claim should administrative attempts to prevent cancellation fail.

In *L. Xia*, the D.C. Circuit noted that a plaintiff in a § 1503 action only has to make a prima facie showing of citizenship to shift the burden to the government.[183] The government must then prove by clear and convincing evidence that the plaintiff is not entitled to citizenship.[184] The court stated that as a cancelled certificate of naturalization is likely sufficient to meet a plaintiff's prima facie burden, it is not an onerous requirement and does not create due process concerns. However, other circuits have held that

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180. USCIS' swift actions to address Schofield's fraud are understandable. This Note seeks to highlight the inconsistency between cancellation and the due process standards in statutory denaturalization.

181. *Ren* Affidavit, *supra* note 1, at 4. Additionally, it is not clear that a reasonable individual would be on notice to retain copies of all application documentation and interactions for multiple years in case the government seeks to challenge citizenship.

182. *Schneiderman*, 320 U.S. at 125. For additional information on record-keeping problems by USCIS, see OFFICE OF THE INSPECTOR GEN., DEP'T OF HOMELAND SEC., USCIS HAS BEEN UNSUCCESSFUL IN AUTOMATING NATURALIZATION BENEFITS DELIVERY (Nov. 30, 2017), https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-23-Nov17.pdf [https://perma.cc/5WVF-PLJV]; Jerry Markon, *A Decade into a Project to Digitize U.S. Immigration Forms, Just 1 Is Online*, WASH. POST (Nov. 8, 2015), https://www.washingtonpost.com/politics/a-decade-into-a-project-to-digitize-us-immigration-forms-just-1-is-online/2015/11/08/f63360fc-830e-11e5-a7ca-6ab6ec20f839_story.html?utm_term=.d23ae3fa5b04 [https://perma.cc/XQ3Y-YU3F].

183. *L. Xia*, 865 F.3d at 656.

184. *Id.*

documentation of citizenship only satisfies the prima facie burden if the recipient was a lawful U.S. citizen at the time of issuance.[185] Under this reasoning, courts ask plaintiffs to prove they are citizens instead of asking the government to prove they are not. If a plaintiff needs to provide more than a cancelled or expired document to successfully meet her burden, the D.C. Circuit's assertion that a naturalized citizen's burden is so minimal it cannot offend due process is thrown in doubt. Moreover, placing the burden on the citizen flatly disregards the Supreme Court's guidance that courts should zealously guard citizenship and scrutinize attempts to revoke it.

Section 1503 actions do not provide a genuine remedy because of time and jurisdictional limitations. Congress has denied jurisdiction over any claims older than five years and excluded all claims relating to or raised in removal proceedings. Although courts have interpreted this exclusion differently, it provides another significant hurdle to achieve a successful outcome in a § 1503 suit. The lack of modern successful declaratory judgment actions raises questions as to an individual's realistic judicial recourse if their administrative appeal fails.

C. The Government Should Put Up the Evidence

If the government has the proof required to bring denaturalization proceedings and does not do so, it may be violating its statutory duty. Section 1451 notes the government's "duty . . . to institute [denaturalization] proceedings in any district court of the United States" upon finding evidence of fraud or illegality.[186] Where the government has sufficient evidence to demonstrate illegality, Congress appears to have intended that judicial denaturalization proceed.

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185. Edwards v. Bryson, 578 F. App'x 81, 83 (3d Cir. 2014). Such a requirement, like the government's argument in *L. Xia*, presumes what the government must prove. Xia's place of residence is New Jersey and any potential § 1503(a) declaratory judgment action would fall under the Third Circuit.

186. 8 U.S.C. § 1451 (2018). For a possible explanation of why civil denaturalization does not require mens rea, see William J. Stuntz, *The Pathological Politics of Criminal Law* (Harvard Law Sch. Pub. Law, Working Paper No. 022, 2001), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=286392 [https://perma.cc/NN2P-QCUM]. Stuntz argues that criminal law's breadth reflects a symbiotic relationship between prosecutors and legislatures—by increasing the number of crimes, prosecutors have more substitutes and can charge crimes with a lower burden of proof, thereby lowering the government expense of criminal litigation. Stunz's theory provides an explanation for the breadth of denaturalization charges. By allowing the government to denaturalize without any evidence of mens rea, the litigation becomes less expensive, and the legislature remains satisfied that the law's message—fraud in naturalization will not be tolerated under any circumstance—remains clear.

Judicial denaturalization proceedings include individuals, who for a variety of fraudulent or illegal reasons, did not lawfully complete naturalization. The burden of proof in criminal denaturalization suits may counsel against those proceedings, but civil denaturalization can proceed for any violation of a statutory requirement.[187] Still the government must prove lack of compliance with statutory procedures by clear and convincing evidence. Cancellation is less demanding on the government. It allows the government to remove an individual's access to citizenship without judicial scrutiny. And it allows the government to quietly address embarrassing errors. Like the thousands of improper citizenship grants in the 1990s,[188] Schofield's corruption is understandably distressing to the government. In a choice between the prospect of hundreds of civil or criminal suits, or hundreds of actions to administratively cancel documents, cancellation moves more quickly, less expensively, requires less evidence, and achieves the same result—depriving the individual of the benefits of citizenship.

The Trump administration's recent hiring of individuals dedicated to reviewing naturalization files for possible denaturalization charges suggests the current administration may attempt to comply with formal denaturalization procedures. But if the government decides a judicial option is not advisable because of evidentiary concerns, it may still turn to cancellation without judicial scrutiny. The creation of a dedicated denaturalization task force underscores the need to utilize formal denaturalization procedures for all challenges to citizenship because of the susceptibility of the cancellation process to political misuse.

The government's reliance on cancellation over formal denaturalization comports with its argument that denaturalization is not required because individuals like Xia are not citizens. In *L. Xia*, the government stated it did not bring civil charges against Xia because the flaws in her naturalization process meant she was never a citizen. Therefore, it found no need to follow the judicial denaturalization procedures. This reasoning was rejected by the court but reveals troubling insight into the government's logic and decision to not bring civil charges. USCIS' current manual also states that cancellation is valid against any individual who did not fully complete naturalization because they are *not* citizens. The same logic was presented in *Falodun*. In cancellation, government treats certificates of naturalization as mere indicia of citizenship. It presumes an individual is not a citizen and acts accordingly but does not prove its contention through clear and convincing evidence.

187. 8 U.S.C. § 1451.

188. *See supra* note 89 and accompanying text.

When the government has clear and convincing evidence that the process was not fully completed, it should follow statutory instruction to bring formal proceedings and not merely rely on document cancellation. If, however, the government does not have the evidence needed to properly denaturalize an individual, it should not be able to use cancellation to achieve the same result.

V. CONCLUSION

The government needs to provide the appropriate proof to denaturalize individuals it claims have received fraudulent naturalization certificates. It should not be able to invalidate citizenship, a precious right, without a judicial process. Congress intended to protect and insulate denaturalization from executive branch whims and prevent denaturalization from being used as a remedy for administrative embarrassment or political posturing.

Xia, a citizen of the U.S., was indirectly accused of buying her citizenship. Without clearly demonstrating she did not become a citizen, the government has deprived Xia of all meaningful access to citizenship. The court suggested Xia has a clear remedy—sue for a declaratory judgment of citizenship—but this remedy is hamstringed by numerous jurisdictional and administrative exhaustion requirements.[189] There are no recent instances of naturalized individuals successfully obtaining a declaratory judgment of citizenship status after the U.S. government has denied it. *L. Xia* continues a system of illogical legal technicalities which fail to hold the government to its burden of proof in denaturalization proceedings.

In the Supreme Court's landmark *Schneiderman* decision, Justice Rutledge warned that allowing citizenship to be striped without clear evidence diminishes the value of naturalization. Today Justice Rutledge's fear is realized in the government's cancellation power—"[t]his is not citizenship."[190]

189. As of this Note's publication, there is no record of a § 1503 declaratory judgment action filed in the District of New Jersey—Xia's last recorded jurisdiction of residence. The five-year statute of limitation to bring a suit started on October 25, 2013, the date of the AAO's final administrative action, and has now lapsed.

190. Schneiderman v. United States, 320 U.S. 118, 167 (1943) (Rutledge, J., concurring).