

# U.C.L.A. Law Review

## Aspiring Americans Thrown Out in the Cold: The Discriminatory Use of False Testimony Allegations to Deny Naturalization

Nermeen Saba Arastu

### ABSTRACT

From their earliest enactment, U.S. naturalization laws have reflected who the nation accepts as American and have always required, among other things, a showing of “good moral character.” From there, legislators and adjudicating agencies have carefully crafted changing naturalization laws and policies to welcome some into the fold and exclude others. The laws have evolved along with ideas about who can and should be American and have reflected the economic, political, and social dynamics of the time.

This Article looks closely at the good moral character clause and its potential to enable individual and institutional bias through a subsection that allows United States Citizen and Immigration Service (USCIS) to deny a naturalization petition when USCIS finds that the applicant offers “false testimony” and thus lacks requisite “good moral character.”

In recent years, immigration attorneys have noticed a pattern in which USCIS denies naturalization based on an application irregularity, usually an inconsistency between the application or applicant’s interview statement and other open source internet materials about the applicant. In certain cases, when an adjudicator finds such inconsistencies, they deny the application on good moral character grounds, alleging that the applicant provided false testimony. Because the naturalization application is twenty pages and delves into every detail of an applicant’s life—from associations and donations to employment and travel—irregularities, mistakes, and omissions are common. The government can likely insert some doubt into every case no matter how careful or transparent the applicant. In some cases, the government may uncover an allegation about communist association, in others it can cast doubt about other aspects of citizenship eligibility like continuous residence in the U.S., the underlying immigration status, or other political and criminal history. Finally, in cases, when all else fails, adjudicators can use any misstatement or omission to justify a naturalization denial.

But, of course, the government approves many naturalization applications. From 1907 to 1997, the government only denied about 5.6 percent of naturalization applications. So, in what cases does the government go on a fishing expedition to find contradictions in a naturalization application? Who does the government put under the metaphoric wringer? This Article analyzes an unprecedented study of the 158 cases in which courts reviewed naturalization denials based on false testimony. With these cases mapped out, it is clear that adjudicators have disproportionately held these



errors against applicants from the countries and religions the U.S. government had deemed suspect or undesirable.

Be they so-called drunkards, security threats, adulterers, or Communists, a historical survey of naturalization denials appealed to (or adjudicated by) courts gives us a window into the sizable grey zone in citizenship adjudication that has been manipulated to discriminatorily adjudicate citizenship from our nation's earliest days. Until September 11, 2001, only twenty-eight judicial opinions discuss citizenship denial on false testimony grounds. In these opinions, courts noticeably focus on those who sold alcohol in violation of local liquor laws and later those accused of having ties to Communism, the Mafia, and labor organizing. In the eighteen years after September 11, 2001, this number of cases being appealed to district courts quadrupled to 130.

Not only did the government use false testimony allegations exponentially more in the years after September 11, 2001 to deny naturalization applications, an examination of federal courts reviewing administrative naturalization adjudications in this context indicates the government used this denial tool disproportionately against those from Muslim-majority nations. Though constituting only around 12 percent of all naturalization applicants since 9/11, those from Muslim-majority nations make up nearly 46 percent of the applicants in appealed cases which included false testimony allegations as a basis for their denial. This data in context with revelations about clandestine USCIS adjudication policies that have targeted those from Muslim-majority nations confirms that the government has sought to use the false testimony provision to pretextually reject those it sought to keep out.

In the studied set, district and appeals courts upheld the agency's denial 63 percent of the time (99 of the 158 cases) and overturned denials only 20 percent of the time (32 of the 158 cases). The remaining cases are pending, have sealed, out-of-court agreements or settlements, were remanded back to the administrative adjudicator or scheduled for factfinding hearings with unknown results. Finally, in a few instances, courts dismiss cases as moot or due to lack of jurisdiction, where USCIS adjudicates applications while pending, or administrative remedies had not been exhausted.

Some of these cases reveal legal mechanisms and tests that scale back bias, implicit or intentional, at the administrative level. In overturning USCIS denials, courts usually focused on the intent requirement of the false testimony provision. When USCIS clearly expended investigatory resources to pretextually deny the application, courts sometimes questioned why some applications were thrown "out in the cold" and whether naturalization laws really "require perfection in our new citizens." Even in these cases, though, courts only allude to the fact that certain subsets of applicants are subject to discriminatory enforcement of naturalization laws in isolated dicta, giving USCIS free reign to continue these practices and expand them against the vilified immigrant group *du jour*.

## AUTHOR

Nermeen Saba Arastu is an Associate Professor at the City University of New York (CUNY) School of Law where she codirects the Immigrant and Non-Citizen Rights Clinic.

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## INTRODUCTION

To take away a man's citizenship deprives him of a right no less precious than life or liberty, indeed of one which today comprehends those rights and almost all others.<sup>1</sup>

From their earliest enactment, U.S. naturalization laws have reflected who the nation accepts as American and have always required, among other things, a showing of “good moral character.” From there, legislators have carefully crafted changing naturalization laws to welcome some into the fold and exclude others. The laws have evolved along with ideas about who can and should be American. Some attempts to exclude classes of aspiring Americans have been explicit, shown through, for example, race- and nationality-based exclusions, and literacy, civics, and financial tests. Other methods of exclusion, like family-based immigration rubrics, which favored those with family already present in the United States, have been facially neutral, but have borne disproportionate impacts.<sup>2</sup> Often, naturalization laws have reflected the economic, political, and social dynamics of the time.

This Article looks closely at the good moral character clause and its potential to enable individual and institutional bias through a subsection that allows United States Citizen and Immigration Service (USCIS) to deny a naturalization petition when USCIS finds that the applicant offers “false testimony.”<sup>3</sup> This Article analyzes an unprecedented study of the 158 cases in which courts reviewed naturalization denials (or adjudicated naturalization cases at the first instance under the pre-1990 statutory scheme) based, at least in some part, on the alleged provision of false testimony. With these cases mapped out, it is clear that the false testimony provision has allowed adjudicator and systemic bias to permeate the naturalization process. Throughout United States history, the government has used this provision disproportionately against applicants of certain nations and religions to pretextually deny their citizenship applications.

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1. *Klapprott v. United States*, 335 U.S. 601, 616 (1949).
  2. Arguing for the dismantling of the quota system in favor of the present-date family-based immigration rubric, Rep. Emmanuel Celler argued before Congress, “[S]ince the peoples of Africa and Asia have very few relatives here, comparatively few could immigrate from those countries.” See *THE IMMIGRATION AND NATIONALITY ACT OF 1965: LEGISLATING A NEW AMERICA* 47 (Gabriel J. Chin & Rose Cuison Villazor eds., 2015).
  3. 8 U.S.C. § 1101(f) (2012) (defining good moral character); 8 U.S.C. § 1101(f)(6) (2012) (enumerating false testimony as a basis for finding a lack of good moral character).

Until September 11, 2001, only twenty-eight judicial opinions discuss citizenship denial on false testimony grounds.<sup>4</sup> In these opinions, the courts noticeably focus on those who sold alcohol in violation of prevailing local liquor laws and later those accused of having ties to Communism, the Mafia, and labor organizing. In the eighteen years after September 11, 2001, this number quadrupled to 130. Not only did the government use false testimony allegations exponentially more in the years after September 11, 2001 to deny naturalization applications, an analysis of district court cases reviewing naturalization denials in this context indicates the government used it disproportionately on certain populations. Since September 11, 2001 around 12% of all approved naturalization applicants came from Muslim-majority nations, while those from Muslim-majority nations make up 46 percent of those denied naturalization on false testimony in the dataset.<sup>5</sup> This data in context with revelations about clandestine

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4. As discussed in subsequent sections, the statutory scheme governing naturalization has changed considerably from a decentralized process adjudicated by state and local courts (founding–1906) to a centralized approach with then-Bureau of Immigration Services making recommendations to courts who made the final naturalization awards (1906–1990) to the present scheme, which gives the administrative agency primary adjudicative authority with limited powers of judicial review. Given variable access to federal courts during these three disparate periods, as well as inconsistencies in their publication by WestLaw and/or Pacer, the presence of federal court decisions relating to denials based on false testimony and good moral character likely varies depending on the period in which the case was decided. Until 1946, cases that appear in the dataset relating to false testimony involve civil and criminal prosecutions in the context of naturalization revocations. The 19 cases involving false testimony in the naturalization denial between 1946–1990 include both denials at the district court level upon recommendation by the naturalization examiner, i.e., *Petition of Ledo*, 67 F.Supp. 917 (D. R.I. 1946), and appeals of District Court denials to Appeals Courts and the U.S. Supreme Court, i.e., *In re Berenyi*, 239 F. Supp. 725, 727 (1965), indicating that denials were being published before the advent of the current statutory scheme.

Even focusing on the post-1990 period alone (when the current scheme was enacted), only 9 cases involve judicial review of a false-testimony based naturalization denial. After September 2001, this number rises to 130. This growth may correlate with an increase in discriminatory denials based on false-testimony related allegations, a higher rate of appeals or a mixture of both.

Note, too, that naturalization rates have risen exponentially since 1970, more than doubling by 2015. Ana Gonzalez-Barrera, *Recent Trends in Naturalization: 1995–2015*, Pew Research Center (June 29, 2017), <https://www.pewresearch.org/fact-tank/2017/06/29/naturalization-trends/>. Though this may account for increases in the appearance of denials more generally, it does not account for the appearance of false testimony allegations appearing repeatedly against those from Muslim-majority nations and historically, others the U.S. has sought to exclude.

5. In an effort to measure adjudicator and systemic bias in the naturalization process, this study examines 158 naturalization cases in which the district court reviewed a naturalization denial that was based, at least in part, on the alleged provision of false testimony.

The initial case search was done on WestLaw using the search terms “naturalization” and “good moral character” with the search parameter set to “all federal.” Within those search results, cases were narrowed further based on the search terms “false testimony.” As of October 2019, the search yielded 533 cases. Those cases were all reviewed and only those that were based, in whole or in part, on a naturalization application denial were counted within the search results of this

USCIS policies indicates that the government has sought to use the false testimony provision pretextually to reject those it deemed unworthy or “too dangerous” to become American.

Part I focuses on how implicit and explicit bias has reared its head through the good moral character requirement and how, until recently, the requirement disproportionately appeared to impact certain subsets of applicants—early European immigrants considered to have lesser morals, and those suspected of bringing Communist ideology to American shores.

Part II describes the modern-day evolution of the good moral character clause and the addition of the false testimony provision. In recent years, immigration attorneys have noticed a pattern in which USCIS denies

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study. All denials were then reviewed for country of citizenship and other indicators such as name and content of testimony to determine whether the naturalization applicant came from a Muslim-majority country or could be perceived to be Muslim.

The author then compared the 533 cases against a broader WestLaw search based on the terms “naturalization and false testimony” to ensure that relevant cases were not overlooked based on WestLaw’s algorithms. As of March 1, 2019, that search yielded 437 cases. Those 437 cases were reviewed for overlap with the narrower search parameter noted above, and to determine which cases came before the court because of a naturalization application denial.

In total the WestLaw search results yielded 155 cases relevant to naturalization application denials based on false testimony.

Because no single legal research platform contains all United States case law, and all commercial legal research platforms are somewhat selective in which cases they choose to publish, those 158 cases do not represent the complete universe of all naturalization denials since the founding of this country. Yet, the dataset offers a comprehensive and representative sample of the published cases. Nonetheless, this author chose to compare the cases yielded through the WestLaw search with cases published through the Public Access to Court Electronic Records (PACER) and accessed via the Bloomberg Law dockets.

This author searched “naturalization and “false testimony” and “good moral character” using the Bloomberg Law docket search. As of March 1, 2019, that search yielded 194 federal cases. Three of those cases were not published on WestLaw and relevant to the search parameters of this study. Those three cases, combined with the WestLaw results, total the 158 cases examined in this study. Of the Bloomberg PACER cases, 57 of the 194 overlapped with the cases found via WestLaw. The remaining cases found through PACER were not relevant to the narrow search for this Article.

There are limitations to using cases published via PACER and Bloomberg Law. The cases on Bloomberg go back to 1989, a much smaller data set than WestLaw. Furthermore, the PACER documents available on Bloomberg are searchable either by the docket sheet submitted by counsel or the underlying documents to the case, such as a complaint. The underlying documents are not always available on Bloomberg, which is largely dependent on whether someone else has requested the document and the document is electronically available. Bloomberg also proactively pulls dockets from some courts, but not all, creating a limitation on what is available. Finally, the docket sheet may not contain complete information about a case or may lack the terms relevant to a particular search.

The author is confident that the methodology employed to identify the 158 cases for this study—cases that address citizenship denial based on false testimony—provides a comprehensive and accurate representation of citizenship denials appealed to district courts.

naturalization based on an application irregularity, usually an inconsistency between the application or applicant's interview statement and other open source internet materials about the applicant. In certain cases, when an adjudicator finds such inconsistencies, they deny the application on good moral character grounds, alleging that the applicant provided false testimony. Because the naturalization application is twenty pages and delves into every detail of an applicant's life—from associations and donations to employment and travel<sup>6</sup>—irregularities, mistakes, and omissions are common. But adjudicators have disproportionately held these errors against applicants from the countries and religions the U.S. government had deemed suspect or undesirable. Currently, this includes those from Muslim-majority nations whom the government indiscriminately labels as national security concerns.

Part III grapples with courts' response (or lack thereof) to these denials. This study reveals that courts continue to give broad deference to administrative agencies regulating immigration, but sometimes turn to intent requirement within the false testimony provision to overturn wrongful naturalization denials.

## I. THE GENESIS & EVOLUTION OF EXCLUSIONARY NATURALIZATION LAWS

Throughout U.S. history, lawmakers have revisited a debate that began with the founding fathers. As they have narrowed and widened the gates to citizenship in response to the political, racial, and economic climate of the time, lawmakers have asked: Who will we allow into the sacred fold? Throughout this history, however, certain foundational principles have remained constant: The American-to-be must have been present in the nation for a certain number of years and prove good character to merit citizenship

On the road to Independence, as colonists were being recast as immigrants setting citizenship's terms in their new nation, President Washington approved the Naturalization Act of 1790.<sup>7</sup> This law stated that "any alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years," could apply for citizenship before a

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6. See U.S. CITIZENSHIP & IMMIGRATION SERVS., FORM N-400, APPLICATION FOR NATURALIZATION (Oct. 29, 2018), <https://www.uscis.gov/n-400> [<https://perma.cc/47EB-W7R5>].

7. Naturalization Act of 1790, ch. 3, 1 Stat. 103 (1790) (repealed 1795); see also ARISTIDE R. ZOLBERG, A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA 51 (2006); Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. 1571 ("As historian James Kettner succinctly put it, 'The status of "American citizen" was the creation of the [American] Revolution.' The colonials quickly went to work defining citizenship in the new nation and setting the terms for access to it. Yet it was not immediately clear whether the Revolution had created one political community or a collection of many.").



common law court of record where the person had resided for the previous year.<sup>8</sup> Among other conditions, the applicant would have to “[prove] to the satisfaction of such court that he is a person of good character.”<sup>9</sup> In the thirty years following the Act’s passage, some 75,000 Irish and Scotch Irish entered the United States, putting the brand new naturalization laws to the test.<sup>10</sup>

The Federalist Party, under President John Adams, feared immigrant votes for the Republican Party would upend it.<sup>11</sup> Massachusetts Congressman Harrison Gray Otis wrote to his wife: “If some means are not adopted to prevent the indiscriminate admission of wild Irishmen & others to the right of suffrage, there will soon be an end to liberty and property.”<sup>12</sup> The U.S. Congress incorporated the sentiment into legislation, and five years after the nation’s first naturalization laws, enacted The Naturalization Act of 1795.<sup>13</sup> It extended residency requirements from two to five years and required aspiring Americans to declare their intent to naturalize three years before applying.<sup>14</sup> The term “good character” changed to “good moral character” as it has remained since.<sup>15</sup>

At the brink of war with France in 1798, Congress passed the Alien and Sedition Acts, which, along with many measures suppressing immigrant rights, spiked the minimum residency requirement from five to fourteen years.<sup>16</sup> With

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8. Naturalization Act of 1790, ch. 3, 1 Stat. 103.

9. *Id.* For a more extensive history of moral character’s introduction into the naturalization rubric, see Jennifer Chin and Zeenat Hassan, *As Respected as a Citizen of Old Rome: Assessing Good Moral Character in the Age of National Security*, 56 U.C. IRVINE L. REV. 945, 949–54 (2015) (explaining that Jackson, concerned with the respectability and character of the American name, hoped this requirement would allow the title of a “citizen of America” to become as “highly venerated and respected as was that of a citizen of old Rome” and that Congress adopted his proposal to require good moral character).

10. *Immigration Timeline*, ELLIS ISLAND FOUND., INC., <https://www.libertyellisfoundation.org/immigration-timeline#1790> [<https://perma.cc/H8UG-5GAE>].

11. Edward C. Carter II, *A “Wild Irishman” Under Every Federalist’s Bed: Naturalization in Philadelphia, 1789–1806*, 133 PROC. AM. PHIL. SOC’Y 178, 180 (1989) (describing how for the Federalists the fear of the Irish urban vote in the presidential election of 1796 motivated the passage of a legislative device as “needed to check the influx of foreigners”).

12. SAMUEL ELIOT MORISON, *HARRISON GRAY OTIS, 1765–1848: THE URBANE FEDERALIST* 107 (1969); see also Robert J. Steinfeld, *Subjectship, Citizenship, and the Long History of Immigration Regulation*, 19 LAW AND HIST. REV. 645 (2001) (discussing the young nation’s “double-sided view of immigrants,” where the “right sort of immigrant” was desired “as a critical source of future prosperity” and the undesired—such as the Irish—a drain on the nation’s economy and threat to American culture).

13. Naturalization Act of Jan. 29, 1795, ch. 20, 1 Stat. 414 (1795).

14. *Id.*

15. *Id.*

16. The Alien and Sedition Acts typically refer to only An Act Concerning Aliens (ch. 58, 1 Stat. 570 (1798)) and An Act for the Punishment of Certain Crimes Against the United States (Sedition Act) (ch. 74., 1 Stat. 596 (1798)), though they technically comprise four bills passed in 1798, including the Naturalization Act of 1798 (ch. 54, 1 Stat. 566 (repealed 1802)) and An Act

the rise of nativism and anti-Catholic sentiment in the 1850s, the Know-Nothing Party gained popularity for supporting a twenty-one-year naturalization period.<sup>17</sup> After the Republican Party took control, Congress enacted the Naturalization Act of 1802, which kept intact the provisions from 1790 and 1798, but brought the minimum residency requirements back down to five years.<sup>18</sup>

Through the early twentieth century, the United States added an evolving set of English proficiency tests to the naturalization regime, earning the country the name “The Original Tester” and credit for “inventing” the idea of administering formal civics and language tests to aspiring citizens.<sup>19</sup> Amitai Etzioni notes that the introduction of citizenship tests “followed the rise of anti-immigrant feeling” and were originally devised “as a means of discouraging often illiterate southern and eastern Europeans from immigrating.” He adds, “[c]ombined with national quotas, the literacy test, followed by the civics test, served for over thirty years as a tool to limit immigration.”<sup>20</sup> Citizenship laws at this time served to convert northern and western Europeans into Americans and exclude all others.

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Respecting Alien Enemies (Alien Enemies Act) (ch. 66, 1 Stat. 577 (1798)). The Alien and Sedition Acts, in addition to tightening citizenship requirements, increased the president’s power to imprison and deport noncitizens judged “dangerous to the peace and safety” of the United States. The Alien Enemies Act allowed the president broad discretion to imprison and deport any noncitizen male older than fourteen who came from any foreign nation at war with or threatening the United States.

17. See Elliott J. Gorn, “Good-Bye Boys, I Die a True American”: *Homicide, Nativism, and Working-Class Culture in Antebellum New York City*, 74 J. AM. HIST. 388, 394 (1987).
18. Naturalization Act of 1802, ch. 28, 2 Stat. 153.
19. Stella Burch Elias, *Testing Citizenship*, 96 B.U. L. REV. 2093, 2111 (2016). In 1887, the economist Edward Bemis invented the first U.S. citizenship test in response to Southern and Eastern European immigration. *Id.* at 2111. Support for the test grew because many felt “requiring any would-be citizens to demonstrate their knowledge of civics and the English language would protect the national interest.” *Id.* The literacy test has been in use in the United States ever since. The Immigration and Nationality Act of 1952 formalized the civics and literacy tests, drawing on “sociological theories of the time relating to cultural assimilation.” *Id.*, citing JOYCE C. VIALET, CONG. RESEARCH SERV., 80-223 EPW, A BRIEF HISTORY OF U.S. IMMIGRATION POLICY 20 (1980). Today, President Trump’s immigration policies similarly reflect the late nineteenth century’s nativist sentiment. In a recent speech on the Reforming American Immigration for a Strong Economy Act (RAISE Act), Trump emphasized the need to end “chain migration,” change the process for obtaining legal permanent residency, and implement a “competitive application process [that] will favor applicants who can speak English.” *Remarks: Donald Trump Announces New Immigration Reform Act*, FACTBASE (Aug. 2, 2017), <https://factba.se/transcript/donald-trump-remarks-immigration-raise-act-august-2-2017> [<https://perma.cc/J7QD-6UKA>]. He concluded by stating that the RAISE Act would “restore the sacred bonds of trust between America and its citizens . . . [and] help ensure that newcomers to our wonderful country will be assimilated.” *Id.*
20. Amitai Etzioni, *Citizenship Tests: A Comparative, Communitarian Perspective*, 78 POL. Q. 353, 354 (2007); see also Elias, *supra* note 19.

Though the first immigration laws only allowed whites to naturalize, over the next century, citizenship's gates hesitatingly opened to those who were not white.<sup>21</sup> With the Fourteenth Amendment's passage, all persons born in the United States were granted citizenship.<sup>22</sup> In 1848, the treaty ending the U.S.–Mexico War guaranteed citizenship to Mexican subjects in the new territories, and decades later the Naturalization Act of 1870 extended citizenship to immigrants of African birth and descent.<sup>23</sup> Notably, Asian immigrants remained barred from citizenship, and the Chinese Exclusion Act of 1882 prevented them from immigrating to the United States.<sup>24</sup> In 1943, President Franklin D. Roosevelt signed into law the Magnuson Act, also known as the Act to Repeal the Chinese Exclusion Acts, overturning previously set limitations on Chinese immigrations and including persons of Chinese descent among immigrants eligible to naturalize.<sup>25</sup>

As Congress grappled with citizenship requirements, the nation's courts were confronted with interpreting vague and everchanging naturalization statutes. “Any court of record” had jurisdiction to make naturalization decisions, leading to confusion and irregularity between the thousands of local, state, and

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21. Several U.S. Supreme Court decisions from the twentieth century illustrate the time's restrictive judicial interpretation of the meaning of “white” in the naturalization statute. In a 1922 case, *Ozawa v. United States*, the Court denied citizenship to a Japanese man who had lived in the country for twenty years, noting that all of the naturalization acts between 1790 and 1906 confined the “privilege of naturalization” to white persons, with the exception of those of “African nativity and descent” starting in 1870. *Ozawa v. United States*, 260 U.S. 178, 193 (1922). In reaching its decision, the Court wrote that “the words ‘white person’ were meant to indicate only a person of what is popularly known as the Caucasian race.” *Id.* at 197. The Court attempted to sidestep the law's clear racism by writing “[o]f course there is not implied—either in legislation in our interpretation of it—any suggestion of individual unworthiness or racial inferiority.” *Id.* at 198. Later, in *United States v. Thind*, the Court denied citizenship to an Indian man because he was not white. *United States v. Thind*, 261 U.S. 204, 207 (1923). In its lengthy decision, the Court wrote “[t]he words of familiar speech, which were used by the original framers of the law, were intended to include only the type of man whom they knew as white . . . . When they extended the privilege of American citizenship ‘any alien, being a free white person’ it was these immigrants—bone of their bone and flesh of their flesh—and their kind whom they must have had affirmatively in mind.” *Id.* at 213.
  22. U.S. CONST. amend. XIV, § 1.
  23. Treaty of Guadalupe-Hidalgo [Exchange copy], February 2, 1848; Perfected Treaties, 1778–1945; Record Group 11; General Records of the United States Government, 1778–1992; National Archives.
  24. See Act of May 6, 1882, ch. 126, 22 Stat. 58 (1882). In 1882, the Chinese Exclusion Act suspended entry of Chinese laborers into the United States and created a registry for those entering the country within the ninety days of the Act's passage.
  25. Magnuson Act (Chinese Exclusion Repeal Act of 1943), 8 U.S.C. ch. 7 §§ 262–297, 299. Note that those of Chinese descent but U.S. birth were granted automatic citizenship at birth in 1898 by the Supreme Court in *Wong Kim Ark v. United States*. *Wong Kim Ark v. United States*, 169 U.S. 649 (1898).

federal courts making decisions about a new nation's most powerful classification.<sup>26</sup>

In response to increasing fraud and inconsistencies in naturalization procedures, Congress reaffirmed their singular authority to delegate naturalization authority and establishing the U.S. Naturalization Service in the Basic Naturalization Act of 1906.<sup>27</sup> The law provided for federal administrative supervision of naturalization and centralized the naturalization process. With this centralization, the Bureau of Immigration and Naturalization was responsible for the initial findings and recommendations on each application, which were then submitted to designated courts for final decision.<sup>28</sup>

In response to a backlogged court system responsible for making final naturalization decision upon the recommendation of the then-Immigration and Naturalization Service (INS), the current statutory scheme was enacted with the Immigration Act of 1990 in hopes of lessening delays and increasing accessibility.<sup>29</sup> The 1990 Act places primary responsibility for adjudication into the hands of administrative officers, presently U.S. Citizenship and Immigration Services (USCIS). Under the 1990 Act, an applicant can only benefit from judicial intervention where the agency has failed to adjudicate the case within 120 days after the initial citizenship interview or where an individual has received a final denial of naturalization after pursuing an administrative appeal. Centralization did not cure the inconsistencies that have plagued the naturalization process from its genesis, however. With the judicial appeal system largely replaced by an administrative hearing, the applicant is even more removed from a judicial body.<sup>30</sup>

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26. Naturalization Act of 1790, ch. 3, 1 Stat. 103; Deborah L. Rhode, *Virtue and the Law: The Good Moral Character Requirement in Occupational Licensing, Bar Regulation, and Immigration Proceedings*, 43 LAW & SOC. INQUIRY 1027 (2018); Nancy Morawetz, *Citizenship and the Courts*, 2007 U. CHI. LEGAL F. 447 (2007).
  27. Act of June 29, 1906, ch. 3592, 34 Stat. 596. See also Report to the President of the Commission on Naturalization, HR Doc No 46, 59th Cong, 1st Sess 11 (Dec 5, 1905). For a more detailed discussion of the evolution of naturalization laws during this period see Nancy Morawetz, *Citizenship and the Courts*, 2007 U. CHI. LEGAL F. 447 (2007); Louis DeSipio and Harry P. Pachon, *Making Americans: Administrative Discretion and Americanization*, 12 CHICANO-LATINO L. REV. 52 (1992); Ruth Z. Murphy, *Government Agencies Working with the Foreign Born*, 262 ANNALS AM. ACAD. POL. & SOC. SCI. 131, 135–36 (1949).
  28. Act of June 29, 1906, ch. 3592, 34 Stat. 596.
  29. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1994). For a detailed history of the evolution of the system of administrative and judicial review of naturalization cases, see Nancy Morawetz, *Citizenship and the Courts*, 2007 U. CHI. LEGAL F. 447 (2007); Louis DeSipio, *Making Americans: Administrative Discretion and Americanization*, 12 CHICANO-LATINO L. REV. 52 (1992).
  30. For a broader discussion of limitations to judicial review not addressed in this article, see Daniel Makled, *De Novo: A Proposed Compromise to Closing the Naturalization Review Loophole*, 90 U. DET. MERCY L. REV. 367 (2013) and Michael Castle Miller, *Checking the DHS: Constitutional and*

Nancy Morowitz points out that “[a]lthough Congress provided the agency with the authority to provide a hearing mechanism at the agency level, it never created a mechanism that could play the role that had previously been performed by the courts.”<sup>31</sup>

With the lesser role of courts in naturalization post-1990, inconsistencies and bias in citizenship adjudication may have become harder to identify and check as adjudication lies in the hands of a single administrative officer. In this manner discriminatory naturalization denials may have become a more covert, yet no less powerful, tool to exclude unwanted aspiring Americans.

**A. The Good Moral Character Requirement’s First 150 Years:  
Varied Judicial Interpretations**

For the first 150 years after the enactment of United States’ naturalization laws, Congress did not define good moral character. Lack of a definition coupled with varied jurisdiction over naturalization proceedings left a long trail of disparate and evolving understandings across the nation’s courthouses. For some jurists, that which would pass muster with the average man would be sufficient to establish good moral character. Still for other jurists of the time, good moral character became a test of whether one was worthy enough to join the fold. Even today there is no singular definition or interpretation of good moral character. USCIS uses both statutory bars and discretion to deny naturalization applications on good moral character grounds. Even if an applicant remains statutorily eligible, USCIS may find a lack of good moral character as a matter of discretion, even for dismissed cases, where no arrest was made or for non-criminal behavior altogether.

In the first case to define good moral character, decided in 1878, an Oregon court opined about the differing understandings of the term:<sup>32</sup>

What is ‘a good moral character’ within the meaning of the statute may not be easy of determination in all cases. The standard may vary from one generation to another, and probably the average man of the country is as high as it can be set. In one age and country dueling, drinking and gaming are considered immoral, and in another they are regarded as venial sins at most. . . . Upon general principles it would seem that whatever is forbidden by the law of the land ought to be

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*Subconstitutional Approaches to Resolving Whether Noncitizens in Removal Proceedings Can Obtain Effective Judicial Review of Naturalization Decisions*, 63 AM. U. L. REV. 497 (2013).

31. Nancy Morawetz, *Citizenship and the Courts*, 2007 U. CHI. LEGAL F. 447, 455 (2007).

32. Rhode, *supra* note 26.

considered, for the time being, immoral, within the purview of this statute.<sup>33</sup>

Another example of the court's interpretation of the clause is found in a 1909 Supreme Court of Illinois case that considered whether an Austrian native who kept his saloon's back door open on Sundays was fit to naturalize. Denying the petition, the court found that one who had "knowingly, willfully and habitually violated the Sunday closing law" did not have the requisite good character.<sup>34</sup> A year later, a judge on the United States District Court for the Eastern District of Wisconsin declared:

A good moral character is one that measures up as good among the people of the community in which the party lives; that is, up to the standard of the average citizen. . . . So here, where the law says a good moral character, it means such a reputation as will pass muster with the average man. It need not rise above the level of the common mass of people.<sup>35</sup>

Law regulating alcohol sale and consumption sparked good moral character discussions during this period in which immigration from European countries grew exponentially. Between 1850 and 1920, the percentage of foreign-born people in the United States increased from 9.7 to 13.2 percent as Germans and Italians arrived in record numbers.<sup>36</sup> To many, they, together with other new immigrants, represented a threat to Anglo-Saxon life and American culture, economies, and political institutions.<sup>37</sup> New cultural practices relating to the liquor consumption were one aspect of this threat.<sup>38</sup> These immigrants were singled out for alleged exaggerated drinking habits that were painted as amoral.<sup>39</sup> Owing to racism, industry ties, and broad societal generalizations, immigrant communities during the late nineteenth and early twentieth centuries became

33. *In re Spenser*, 22 Fed. Cas. 921, 921–22 (C.C.D. Or. 1878) (considering whether a man convicted of perjury lacked good moral character).

34. *United States v. Hrasky*, 88 N.E. 1031, 1034 (Ill. 1909) (distinguishing "character" from "reputation"); see also Elmer Plischke, "Good Moral Character" in the Naturalization Law of the United States, 23 MARQ. L. REV. 117, 118 (1939).

35. Plischke, *supra* note 34, at 118 (citing *In re Hopp*, 179 Fed. 561, 562–63 (E.D. Wis. 1910).

36. Jayesh M. Rathod, *Distilling Americans: The Legacy of Prohibition on U.S. Immigration Law*, 51 HOUS. L. REV. 781, 803 (2014) (citing ROGER DANIELS, *COMING TO AMERICA: A HISTORY OF ETHNICITY AND IMMIGRATION IN AMERICAN LIFE* 125 (2d ed. 2002)).

37. *Id.* at 803–08.

38. *Id.*

39. *Id.* at 803–04 (tracing the history of alcohol-related legal norms in U.S. immigration law and the "preoccupation with noncitizen drunkenness").

closely linked with alcohol consumption, and alcohol-related laws were used to control noncitizens.<sup>40</sup>

A Missouri district court commented on the difficulty of assessing cases when a petitioner's sole fault was a single violation of the state's liquor sale laws: "Cases involving conduct evil in itself would present little difficulty. Discussion arises where the offense is merely *malum prohibitum*."<sup>41</sup> For this court, like many others analyzing alcohol sale and consumption under the good moral character clause, questions would also arise about (1) whether the crime occurred within the five-year statutory period preceding the naturalization application and (2) whether any mitigating circumstances existed.<sup>42</sup> Of course, the existence of mitigating circumstances, like the original good moral character inquiry, was a determination wrought with personal bias and societal norms that would differ through geographies and generations.

During its first 150 years, the good moral character clause became a catchall for excluding aspiring Americans with threatening qualities, even when the conduct involved was not evil or any different than what would pass muster with the average man.<sup>43</sup> Over time, the U.S. government relaxed previously rigorous standards on vices like gambling, alcohol consumption, and adultery, instead focusing on other perceived wrongs such potential Communist affiliation.<sup>44</sup>

## B. The Good Moral Character Requirement's Modern Development

Even today, the good moral character requirement lacks clear definition, leaving great latitude for discretion, bias, and unequal application. In 1952, the McCarran-Walter Act (hereinafter Nationality Act) set out a number of behaviors that precluded establishing good moral character.<sup>45</sup>

40. See *id.* at 784-86, 798; see also *Hrasky*, 88 N.E. 1031.

41. *In re Trum*, 199 F.361, 362 (W.D. Mo. 1912) (finding that the naturalization applicant lacked good moral character for violating the state's liquor laws and reasoning that "[h]is act was that of a lawbreaker—not one well-disposed to the good order and happiness flowing from attachment to the principles of the Constitution of the United States. . . . Defiance of the established order . . . constitutes bad citizenship, bad behavior, and . . . indicates a perverted moral character").

42. Harold F. Bonacquist Jr. & Philip A. Mittleman, Comment, *The Evaluation of Good Moral Character in Naturalization Proceedings*, 38 ALB. L. REV. 895, 901 (1974).

43. See Rathod, *supra* note 36, at 804 ("In short, 'Irish and German immigrants personified the dangers of moral laxity of alcohol consumption' and were easily scapegoated as enemies for their failure to embrace dominant practices and values.") (quoting MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 110-11 (2004)).

44. PHILIP B. PERLMAN ET AL., PRESIDENT'S COMM'N ON IMMIGRATION & NATURALIZATION, WHOM WE SHALL WELCOME 255 (1953).

45. *Id.* at 246 ("The act of 1952 does not undertake a full definition of good moral character, but the statute attempts to describe certain patterns of conduct that are not to be regarded as fulfilling the

USCIS makes determinations on a “case-by-case basis” taking into account statutory bars and the “standards of the average citizen in the [applicant’s] community of residence.”<sup>46</sup> Though there is no affirmative good moral character definition, those convicted of murder or an aggravated felony are permanently barred from naturalizing.<sup>47</sup> Those who furthered persecution, genocide, torture, or severe religious freedom violations are also permanently barred under the good moral character provisions.<sup>48</sup>

The Nationality Act also established temporary bars to proving good moral character. Those found to be “habitual drunkard[s],” those “whose income is derived principally from illegal gambling activities,” those “convicted of two or more gambling offenses,” those who have assisted in Nazi persecution, those with certain other criminal convictions, and those who have been confined as a result of a conviction for an aggregate period of 180 days or more will be barred from establishing good moral character for five years. Those temporarily barred may apply to naturalize after the five-year statutory period is complete.<sup>49</sup>

The same section of the Nationality Act, codified in the United States Code, also delineates that “one who has given false testimony for the purpose of obtaining benefits under this chapter will also be precluded from a finding of good moral character.”<sup>50</sup> In 1988 the U.S. Supreme Court in *Kungys v. United States* limited “testimony” for good moral character purposes to “oral statements made under oath.”<sup>51</sup> The Court established that false testimony need not relate to a material fact to preclude a good moral character: “[E]ven the most immaterial of lies with the subjective intent of obtaining immigration or naturalization benefits” will prevent a good moral character finding.<sup>52</sup> By explicitly inserting a intent requirement, the United States Code and the case law that interpreted sought to protect those who commit an innocent mistake or misunderstanding even when it relates to a material fact as long as they had no intent to deceive.<sup>53</sup>

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requirement of good moral character. In each instance, the new law usually attempts to negate a specific court decision.”).

46. 8 C.F.R. § 316.10(a)(2) (1995).

47. 8 C.F.R. § 316.10(b); 8 U.S.C. § 1101(a)(43) (2012).

48. 8 U.S.C. § 1101(f)(9); 8 U.S.C. § 1182(a)(3)(E) (2012); 18 U.S.C. § 1091 (2012).

49. 8 U.S.C. § 1101(f).

50. 8 U.S.C. § 1101(f)(6).

51. *Kungys v. United States*, 485 U.S. 759, 780 (1988).

52. *Id.* at 779–80.

53. *See id.* at 780; *Plewa v. Immigration & Naturalization Serv.*, 77 F. Supp. 2d 905, 912 (N.D. Ill. 1999) (“It seems incongruous that Congress would consider an innocent mistake, misinterpretation, or incorrect statement as grounds to disqualify an otherwise upstanding person for American citizenship when the speaker had no deceitful intent.”).



An applicant must have offered false testimony during the five-year period preceding the naturalization application to be a basis for denial.<sup>54</sup> Still, adjudicators are not limited to this five-year period and may look to actions before the statutory five-year period to support negative findings or to question the applicant's credibility.<sup>55</sup> The burden to prove good moral character rests squarely with the applicant who needs to prove their eligibility by clear, convincing, and unequivocal standard. Previously when courts encountered behavior specified in this Act, whether it be drinking practices, adultery or gambling, jurists often weighed these acts against mitigating circumstances. Some scholars from this period commented that the Nationality Act served to stop any such inquiry in its tracks, while others suggested it was a way to classify actions that demonstrate bad moral character *per se*.<sup>56</sup> But in its efforts to bring clarity to naturalization adjudication, Congress added language that would become a catchall mechanism to deny good moral character: the false testimony provision.<sup>57</sup>

### C. The Road to Citizenship Today

If an immigrant has reached naturalization's doorstep, she has already undergone a series of inquiries, questioning, health screenings, security checks, and other reviews by multiple U.S. government agencies.

To start, unless born to U.S. citizens abroad, generally one must enter the country. Some enter as a permanent resident, others with a temporary visa, and still others with fraudulent documents. The government affords legal permanent resident status to some upon arrival, while others may enter outside delineated border crossings without inspection. Customs and Border Protection (CBP) may turn some away at the border, even asylum-seekers and those with valid documents, arguing their expansive discretion to deny entry to those at the border. Many who enter may naturalize one day, albeit through different routes in the complex immigration maze.<sup>58</sup>

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54. 8 U.S.C. § 1427(a)(1)–(3) (2012); *see also* 8 C.F.R. § 316.10(a)(1) (1995).

55. 8 U.S.C. § 1427(e); 8 C.F.R. § 316.10(a)(2).

56. Bonacquist & Mittleman, *supra* note 42, at 901.

57. Section 346(a) of the Nationality Act of 1940, 8 U.S.C.A. § 707(a), makes it a felony for any noncitizen or other person, whether or not an applicant for naturalization or another immigration benefit, to: “Knowingly to make a false statement under oath, either orally or in writing, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization or citizenship.”

58. For a general overview of the many steps an immigrant must take before they are able to naturalize, *see Becoming a U.S. Citizen: An Overview of the Naturalization Process*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/citizenship/learners/study->

Those who did not enter the United States as a permanent resident must go through a lengthy and extensive process to obtain lawful permanent residence (commonly called a green card).<sup>59</sup> Various paths to a green card exist. Some secure their green card affirmatively by petitioning USCIS for status, while others apply for an immigrant visa before an immigration judge to avoid deportation. Some acquire their green card through marriage to a U.S. citizen or Legal Permanent Resident, asylum or other humanitarian relief, extraordinary abilities, or employer sponsorship. Each of these paths come with significant obstacles, including, for example, proving a lasting, bona fide marriage or persecution in your home country or certifying that a sponsoring employer could not have hired a U.S. citizen for the job. Before becoming eligible for a green card, many first secure a temporary visa. After a statutorily mandated period, many visa holders may apply for legal permanent resident status. But many are indefinitely barred from being admitted to the United States with immigrant visas because of manner of entry, length of out-of-status residence, criminal and health history, and a myriad of other factors.<sup>60</sup>

Obtaining permanent resident status involves the same extensive screening as that required to secure an underlying visa or status. For example, the U.S. government can review the validity of an asylee's underlying asylum grant and will

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test/study-materials-civics-test/becoming-us-citizen-overview-naturalization-process [https://perma.cc/RUP3-UMLD].

For an overview of how one receives a green card, a necessary prerequisite of naturalization, see *Green Card Eligibility Categories*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/greencard/eligibility-categories> [https://perma.cc/VZ2R-55KX]; *Green Card Processes and Procedures*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/greencard/green-card-processes-procedures> [https://perma.cc/CJ82-M6NJ].

For narrative accounts of various iterations of this complicated process, see Smriti Jacob, *A Legal Immigrant's Long Road*, ROCHESTER BEACON (October 29, 2018), <https://rochesterbeacon.com/2018/10/29/a-legal-immigrants-long-road/> [https://perma.cc/LV8E-5BNM]; Michelle Mark, *A Brand-New US Citizen Walks Us Through the "Hell" It Takes to Go From Foreigner to American*, INSIDER (Mar. 23, 2019), <https://www.insider.com/us-citizenship-process-foreigner-to-american-2019-3> [https://perma.cc/XE6X-4S8X]; Lerman Montoya & Adriana de Alba, *Path to Citizenship is Long, Frustrating and Expensive*, CRONKITE NEWS: ARIZ. PBS (Mar. 30, 2018), <https://cronkitenews.azpbs.org/2018/03/30/path-to-citizenship/> [https://perma.cc/KA9K-RV9E].

59. See *Green Card Processes and Procedures*, *supra* note 58.

60. See 8 U.S.C. § 1182 (2012). For examples of potential bars to admissibility that may impact those seeking to adjust status to that of an individual lawfully admitted for permanent resident (a prerequisite to naturalization), see *Unlawful Presence and Bars to Admissibility*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/legal-resources/unlawful-presence-and-bars-admissibility> [https://perma.cc/DJ4E-NQXT]; *Public Charge*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/greencard/public-charge> [https://perma.cc/8LZ3-HYWB]; and *USCIS Policy Manual Volume 8, Part B: Health-related Grounds of Inadmissibility*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/policy-manual/volume-8-part-b> [https://perma.cc/LS3H-LX8W].

extensively renew health, security, biometric, and criminal history checks. In addition, the government will again do a comprehensive admissibility screening, considering other factors such as whether the immigrant may become dependent on public welfare programs,<sup>61</sup> whether the immigrant was a Communist or other totalitarian party member,<sup>62</sup> and how long the applicant has maintained physical presence and residency in the United States.<sup>63</sup>

Many who successfully enter the United States and acquire a green card can apply for citizenship after maintaining legal permanent residence for a statutorily enacted period, five years for most.<sup>64</sup> The burden of proving eligibility falls on the applicant,<sup>65</sup> and doubts are to be resolved in the United States' favor.<sup>66</sup> One must be at least eighteen years old at the time of filing and have maintained continuous physical presence and residence for a requisite period.<sup>67</sup> To apply, one must file Form N-400, Application for Naturalization, a twenty-page document that asks almost seventy-five questions about everything from identity information and employment and travel history to criminal records and organizational affiliation.<sup>68</sup> The filing fee, currently \$725.00, is a significant deterrent for many.<sup>69</sup> After filing the form, the applicant will have to pass a biometrics test and complete a detailed interview. Those who are not eligible for age-based or medical waivers must also pass a civics and English language test. And even if the applicant succeeds with each step of the process, USCIS can ultimately deny citizenship if it finds that the applicant has not established good moral character during the five-years

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61. 8 U.S.C. § 1182(a)(4)(A).

62. 8 U.S.C. § 1182(a)(3)(D).

63. 8 U.S.C. § 1255(a) (2012).

64. For a transformative analysis of the evolution of immigration and citizenship law, see HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006) (proposing that new lawful immigrants should be treated like U.S. citizens until they fulfill the residency requirement to be eligible to apply for citizenship, in sum treating new lawful immigrants as "Americans in waiting").

65. 8 C.F.R. § 316.2(b) (1995); *Berenyi v. Dist. Dir., Immigration & Naturalization Serv.*, 385 U.S. 630, 636–37 (1967).

66. *United States v. Manzi*, 267 U.S. 463, 467 (1928).

67. 8 C.F.R. § 316.5(c).

68. See U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 6.

69. See, e.g., Jens Hainmueller et al., *A Randomized Controlled Design Reveals Barriers to Citizenship for Low-Income Immigrants*, 115 *PROC. NAT'L ACAD. SCI.* 939 (2018) (finding that fee vouchers doubled the naturalization application rate among low-income immigrants, indicating that current high fees prevent low-income immigrants from submitting naturalization applications). Note that some may qualify for a fee-waiver by filing Form I-912. See U.S. CITIZENSHIP & IMMIGRATION SERVS., FORM I-912, REQUEST FOR FEE WAIVER (Oct. 9, 2019), <https://www.uscis.gov/i-912> [<https://perma.cc/TBV2-TCXB>].

immediately preceding his or her application, taking into account activity long before that five-year period begins.<sup>70</sup>

Misstatements, omissions, and mistakes are nearly impossible to avoid while navigating this complex immigration web, which makes the false testimony provision an ideal catchall mechanism to deny applications from unwanted aspiring Americans. The remainder of this Article looks closely at the manner in which the government has used this specific provision of the good moral character clause to discriminatorily deny citizenship to those the U.S. seeks to exclude.

## II. USING FALSE TESTIMONY ALLEGATIONS TO DENY CITIZENSHIP

Be they alleged drunkards, adulterers, or Communists, a historical survey of naturalization denials appealed to federal courts gives us a window into the sizable grey zone in citizenship adjudication that has been manipulated to discriminatorily adjudicate citizenship from our nation's earliest days. In these cases, even if petitioners met every other element required for naturalization, adjudicators used any iota of evidence contradicting a petitioner's testimony as a basis for denial.

The government can likely insert some doubt into every case no matter how careful or transparent the applicant. In some cases, the government may uncover an allegation about Communist association; in others, it can cast doubt about other aspects of citizenship eligibility like travel history, the underlying immigration status or other political and criminal history. Finally, in cases, when all else fails, adjudicators can use any misstatement or omission to justify a naturalization denial.

But, of course, the government approves many naturalization applications. So, in what cases does the government go on a fishing expedition to find contradictions in a naturalization application? Who does the government put under the metaphoric wringer? From 1907 to 1997, the government only denied about 5.6 percent of naturalization applications. Reviewing federal appeals of naturalization denials based on false testimony reveals discriminatory patterns. These patterns disturbingly track the biases and fears our nation displayed at the time.

### A. Historical Trends

Throughout U.S. history, the government has pretextually used the good moral character clause to deny citizenship to members of certain suspect groups

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70. See 8 U.S.C. § 1427(a) (2012); 8 C.F.R. § 316.10.

who would otherwise be eligible. These denials manipulated naturalization's testimonial requirements to powerfully exclusionary ends. In many of these cases, the applicants' false testimony did not prove them to be dangerous, nor did the alleged false testimony prevent the government from learning about the aspiring citizen's relevant qualities. Rather, the government painted minor inconsistencies as false testimony to legitimize excluding undesirable aspiring Americans at the brink of citizenship.

In the nation's earliest cases involving false testimony, the government used false testimony allegations to deny citizenship to those who allegedly made misstatements or omissions about alcohol sale or consumption, extramarital children, or adulterous relationships. By the early 1900s, cases that indicated any shred of Communist association dominated naturalization denial appeals, reflecting the shifting protective national outlook.

In 1951, the Ninth Circuit considered how and if false testimony would preclude naturalization. In *United States v. Fraser*, the Ninth Circuit considered an appeal of a district court order admitting a mechanist's helper of Scottish descent, Walter Keay Fraser, for citizenship.<sup>71</sup> His record was clean aside from a few drunk arrests, which resulted in no more than five days jail time.<sup>72</sup> The United States admitted that the offenses for which the applicant was arrested would not preclude good moral character per se.<sup>73</sup> The Government instead argued that the applicant's failure to disclose all of the arrests while under oath amounted to "knowing and willful concealment precluding finding of good moral character."<sup>74</sup> The appellate court described the district court judge's "opportunity to observe [the applicant's] demeanor and gauge his sincerity," and concluded that he had not purposely withheld information, and granted him citizenship.<sup>75</sup> In determining that good moral character was not precluded, the Ninth Circuit considered the district court's analysis of the applicant's demeanor while the lower court surmised that the applicant may have been ashamed to admit his various arrests. The dissent criticized this analysis as a manner of "walking around" the false testimony provisions where one could "explain away perjured testimony which the government was clearly entitled to have during the administrative process."<sup>76</sup>

*Fraser* displays a sequence of events that shows up repeatedly in cases in which the government denies naturalization based on false testimony. If the

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71. *United States v. Fraser*, 219 F.2d 844, 845 (1955).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 846.

76. *Id.* at 847.

government has no basis to deny an application, they can challenge an applicant's candor and truthfulness on the naturalization application. Sometimes the allegations are about past crimes, but often they are about marriages, residences, travel, political affiliations, and organizational membership.

As open source information about individuals becomes more readily available through the internet, it has become even easier for the government to allege that an applicant provided false testimony. In 2008, the government established the Controlled Application Resolution and Review Program (CARRP).<sup>77</sup> CARRP, which advocates only excavated through Freedom of Information Act (FOIA) requests, calls for extreme vetting of certain classes of naturalization applicants and systematically denies and delays citizenship to those perceived as security threats. Yet the program is only the most recent legal innovation used to make such denials of citizenship.

### 1. Then: The Communism Cases

In the early 1900s, when the country feared anarchists, Congress shaped immigration laws to exclude those who would advocate overthrowing the government by violent means.<sup>78</sup> Congress folded those who were part of "subversive organizations" into these exclusionary laws by the 1920s and, two decades later, included present and former Communist Party members as well.<sup>79</sup> Whereas prior immigration laws attempted to preserve the predominant sociocultural norms, at this time, their goal shifted to protecting the nation from real or perceived threats.<sup>80</sup> Naturalization denials on false testimony grounds

77. See Memorandum from Jonathan R. Scharfen on Policy for Vetting and Adjudicating Cases with National Security Concerns, Deputy Dir., U.S. Citizenship & Immigration Servs., to Field Leadership, U.S. Citizenship & Immigration Servs. (Apr. 11, 2008), [https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Electronic%20Reading%20Room/Policies\\_and\\_Manuals/CARRP\\_Guidance.pdf](https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Electronic%20Reading%20Room/Policies_and_Manuals/CARRP_Guidance.pdf) [<https://perma.cc/2L9T-7KSJ>] [hereinafter Vetting Policy]; JENNIE PASQUARELLA, ACLU S. CAL., MUSLIMS NEED NOT APPLY: HOW USCIS SECRETLY MANDATES THE DISCRIMINATORY DELAY AND DENIAL OF CITIZENSHIP AND IMMIGRATION BENEFITS TO ASPIRING AMERICANS 31 (Ahilan Arulanantham et al. eds., 2013), <https://www.aclusocal.org/sites/default/files/carrp-muslims-need-not-apply-aclu-socal-report.pdf> [<https://perma.cc/Y8NV-GQCP>].

78. See Immigration Act of 1903. See also, Julia Rose Kraut, *Global Anti-Anarchism: The Origins of Ideological Deportation and the Suppression of Expression*, 19 IND. J. GLOBAL LEGAL STUD. 169 (2012) (describing the history and implementation of the Immigration Act of 1903 which barred and expelled those classified as anarchists and became the first immigration law excluding and deporting individuals on the basis of their political beliefs).

79. ROBERT A. DIVINE, AMERICAN IMMIGRATION POLICY, 1924–1952 92 (1957).

80. See Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59, 78 (2004) (citing ROBERT A. DIVINE, AMERICAN IMMIGRATION POLICY, 1924–1952 163 (1957) ("Previously the primary motivation of the restrictionists has been

reflect this evolution from a preservationist to protectionist stance. These cases first focus on policing morality and then later focus on those with certain past political affiliations or religious and racial identities that were (and in some cases, still are) deemed threatening.

In *Klig v. United States*, a fifty-seven-year-old Russian native, Myer Klig, filed a naturalization petition in the United States District Court for the Southern District of New York in 1958.<sup>81</sup> At his naturalization hearing, he stated that he had not been a Communist Party member at any time during his twenty-year continuous residence in the United States and also declared his support for democratic government without reservation. He openly testified about his past membership in the Canadian Communist Party, which he attested he terminated in 1932 when the Canadian government declared membership in the Canadian Communist Party illegal. The government countered, offering witnesses who testified about Mr. Klig's continued involvement in the Canadian Communist Party from 1932 to 1938 through attendance at certain Party functions. Mr. Klig denied this participation and responded that his attendance at these functions would have only been in connection to his latter involvement in the Canadian labor movement.<sup>82</sup> The district court admitted that "these facts, so found, in and of themselves, would not have disqualified appellant from citizenship," but went on to assert the applicant had testified falsely about when he had terminated Communist activities in Canada and was thus not eligible for naturalization.<sup>83</sup> On appeal, the Second Circuit cited a foundational Supreme Court decision in considering the requirement of candor while pursuing naturalization:

Acquisition of American citizenship is a solemn affair. Full and truthful response to all relevant questions required by the naturalization procedure is, of course, to be exacted, and temporizing with the truth must be vigorously discouraged. Failure to give frank, honest, and unequivocal answers to the court when one seeks naturalization is a serious matter.<sup>84</sup>

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racial and cultural nationalism—the desire to preserve the predominant cultural patterns and ethnic composition of the United States by limiting immigration. With the rise of totalitarian governments in its most fundamental meaning, the security of the nation, became evident . . . . The fear of Communistic infiltration, which played such a large role in the mid-20<sup>th</sup>-century American life, permeated discussions of immigration legislation and tended to replace the old fear of ethnic invasion as the dominating immigration policy.”).

81. *Klig v. United States*, 296 F.2d 343 (2d Cir. 1961).

82. *Id.* at 344.

83. *Id.*

84. *Chaunt v. United States*, 364 U.S. 350, 352 (1960) (revoking naturalization of alleged former Communist who falsely denied ever being arrested).

After establishing that false testimony had been provided, the court went on to look at the applicant's positive equities and remanded the case for further consideration:

Appellant has been a resident of this country for 20 years. There is nothing in that 20 years to which the INS can point which reflects poorly on appellant's character. He has been steadily employed and is law-abiding. He is married to an American citizen. His children are citizens and they reside here. Despite this, his petition for naturalization has been denied . . . because . . . two persons testified differently from him about minor events that transpired more than 20 years earlier.<sup>85</sup>

Three years later, the Supreme Court heard a similar fact pattern in *Berenyi v. District Director*. The court described that Mr. Kalman Berenyi, a Hungarian national, became a Communist Party member in Hungary in 1945.<sup>86</sup> A few years later, Communists took complete control over Hungary and Mr. Berenyi served in the Hungarian army during his medical studies and later attained the rank of captain as a physician.<sup>87</sup>

When applying to naturalize in 1966, Mr. Berenyi testified that he had never been a Party member.<sup>88</sup> At his final hearing, the government presented two witnesses who stated they had seen Mr. Berenyi at Communist Party meetings in Hungary.<sup>89</sup> Mr. Berenyi defended his prior statements denying membership in the Party by describing university pressure to attend meetings, and explained he attended as a nonmember.<sup>90</sup> Finding Mr. Berenyi's argument unpersuasive, the district court concluded Mr. Berenyi had provided false testimony and denied his application for citizenship on good moral character grounds.<sup>91</sup>

The Supreme Court affirmed, noting it was not denying Mr. Berenyi's application based on past, loose associations with the Communist Party, but rather because of his lack of candor about those associations: "The Government is entitled to know any facts that may bear on an applicant's statutory eligibility for citizenship, so that it may pursue leads and make further investigation if doubts were raised."<sup>92</sup> In both *Klig* and *Berenyi*, the United States government did not question the petitioners' loyalty to the United States or their opposition to

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85. *Klig*, 296 F.2d at 347.

86. *In re Berenyi*, 239 F. Supp. 725, 727 (1965).

87. *Id.*

88. *Id.* at 728.

89. *Berenyi v. Dist. Dir., Immigration & Naturalization Serv.*, 385 U.S. 630, 668 (1967).

90. *Id.* at 634.

91. *Id.*

92. *Id.* at 638.



Communism.<sup>93</sup> Instead the courts used doubt, no matter how scant, about the applicant's candor to deny citizenship. In their *Berenyi* dissent, Justice Douglas, joined by Chief Justice Warren and Justice Brennan, criticized this insurmountable standard:

Thus, we are confronted with the curious proposition that the speculations of one witness and the hazy memory of another witness as to a statement made in the distant past, can outweigh the overwhelming evidence adduced by the petitioner, and thereby prevent his naturalization. *To me this is tantamount to saying that the Government can merely throw very slim doubt into the case, and deny naturalization when the applicant fails to disprove the ephemeral doubt.* . . . Must the applicant tilt with every windmill thrown in his path by the Government? . . . If the Government's sketchy evidence did raise a doubt, the doubt was clearly dispelled by the overwhelming evidence adduced by the petitioner.<sup>94</sup>

In both *Klig* and *Berenyi* the government presumably expended significant investigative resources to find witnesses to attest to the applicants' attendance at Communist Party events decades earlier in foreign nations.<sup>95</sup> There was no evidence establishing present Communist Party affiliation in either situation, so the government introduced proof of past association and false testimony allegations. Here false testimony served as a pretense to punish the applicant for past communist association and to prevent the entry and expedite the removal of those feared to be Communists.<sup>96</sup>

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93. *Id.*; see also *Klig v. United States*, 296 F.2d 343, 344 (2d Cir. 1961) (“[A]ppellant has declared that he is now opposed to communism and that without any reservations whatsoever he supports the American form of government. This testimony of his, testimony covering the most recent 18 years of his life was uncontroverted in any particular by the Immigration and Naturalization Service (INS).”).

94. *Berenyi*, 385 U.S. at 642–43 (emphasis added).

95. *Klig*, 296 F.2d at 344–45 (“At the hearing before Judge Edelstein on May 25, 1959, the INS sought to establish that appellant had attended Communist Party meetings in New York City in 1936–1939 . . . . At the reopened hearing on June 9 and 11, 1959, instead of offering evidence concerning Klig’s alleged Community Party activity in New York City, the INS concerned itself solely with attacking appellant’s statement that he terminated his connection with the Communist Party in 1932. The Service presented two witnesses who testified to Klig’s continued participation during the period from 1932 to 1938 in Canadian Communist Party affairs through attendance at certain functions of the Party in Toronto. Both of these witnesses were admittedly members of the Canadian Communist Party during those years and both terminated their affiliation with it later than the time when appellant claimed to have severed his connection. Appellant . . . categorically denied attending any Communist Party affairs during the period about which these witnesses testified.”).

96. See *Control of Communist Activities*, 1 STAN. L. REV. 85 (1948); see also D.E. Balch, *Denaturalization Based on Disloyalty and Disbelief in Constitutional Principles*, 29 MINN. L. REV. 405 (1945); *Deportation of Aliens for Membership in the Communist Party*, 48 YALE L.J. 111 (1938);

With the increased technological capacity to capture details of applicants' lives through ones' internet visibility and social media presence, there may no longer be a need to expend significant investigation resources to capture misstatements and omissions. This increase in information via technology may be another basis for the rise of naturalization denials citing false testimony as evinced by the rise of appeals of these types. The formation of the CARRP program, described below, is a direct result of the confluence of increased technological capability and systemic bias.

## **2. From Individual Adjudicator Bias to Government Policy: The CARRP Program**

In the years after September 11, 2001, the United States systematized what before may have functioned as individual adjudicator or judge bias.<sup>97</sup> In June 2010, the ACLU of Southern California (ACLU SoCal) filed a FOIA request after practitioners noticed that USCIS subjected naturalization applicants from Arab and Muslim countries to heightened scrutiny and discriminatory delays and denials. In its FOIA letter, ACLU SoCal noted that it was "concerned that USCIS appears to have a pattern and practice of denying naturalization to applicants from [these] nations for reasons unsupported by naturalization law or fact" such as pretextual claims of false statements about organizational associations and charitable giving.<sup>98</sup> In response to its request, ACLU SoCal uncovered CARRP, a vast and clandestine USCIS program.

Put into place by an internal USCIS policy memo, Congress did not enact CARRP, nor did USCIS promulgate it through the Administrative Procedure Act-mandated notice and comment process.<sup>99</sup> CARRP established the "systematic review and adjudication of applications or petitions with national security concerns."<sup>100</sup> "Nearly all applications that convey immigrant and nonimmigrant

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*Hearing on H.R. 4422 and H.R. 4581 Before the Subcomm. on Legis. of the Comm. on Un-American Activities*, 80th Cong., 2d Sess. (1948).

97. It is possible that programs like the Controlled Application Resolution and Review Program (CARRP) existed in the past to guide adjudicators to deny naturalization applications of individuals from populations the nation sought to exclude. The author's research scope did not include ascertaining whether such programs existed in the past.

98. Freedom of Information Act Request (FOIA) Letter from ACLU of S. Cal. to U.S. Citizenship & Immigration Servs. (June 16, 2010), <https://www.aclusocal.org/sites/default/files/wp-content/uploads/2013/01/First-FOIA-Request-June-16-2010.pdf> [https://perma.cc/JY27-8YWD].

99. Vetting Policy, *supra* note 77.

100. *Oversight of U.S. Citizenship and Immigration Services: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 19 (2010).

status” are subject to CARRP, including refugee processing and screening.<sup>101</sup> CARRP defines a “national security concern” as “an individual or organization [that] has been determined to have an articulable link to prior, current or planned involvement in, or associations with, an activity, individual or organization described in [security- or terrorism-related sections] of the Immigration and Nationality Act.”<sup>102</sup> Once an adjudicator labels an applicant as a national security concern, USCIS seeks to deny an application through any means possible through extensive “vetting.”<sup>103</sup>

As of April 2016, USCIS opened 41,805 CARRP cases nationwide. The top five countries impacted were Pakistan, Iraq, India, Iran, and Yemen.<sup>104</sup> Pakistan, Iraq, Iran and Yemen are majority-Muslim nations, while India is home to 10 percent of the world’s Muslim population.<sup>105</sup> The fact that these nations are at the top of the CARRP list proves that in practice, “national security concern” serves as a thinly veiled metonym for Muslim, and that CARRP joins the “corpus of

101. Vetting Policy, *supra* note 77, at 1 n.4 (directing USCIS to refer to routine “Operational Guidance” when adjudicating petitions unrelated to conveying immigrant or non-immigrant status, i.e. work authorization applications); *see also* *Refugee Processing and Security Screening*, USCIS, <https://www.uscis.gov/refugeescreening> (listing CARRP as one step in the refugee screening policies put into place by the U.S. Refugee Admissions Program (USRAP)). Further, practitioners have noted seeing applications explicitly excluded by the CARRP guidance appearing to be subject to CARRP as well. *See* KATIE TRAVERSO & JENNIE PASQUERELLA, ACLU S. CAL., PRACTICE ADVISORY: USCIS’S CONTROLLED APPLICATION REVIEW AND RESOLUTION PROGRAM (2016), [https://www.nationalimmigrationproject.org/PDFs/practitioners/our\\_lit/impact\\_litigation/2017\\_03Jan-ACLU-CARRP-advisory.pdf](https://www.nationalimmigrationproject.org/PDFs/practitioners/our_lit/impact_litigation/2017_03Jan-ACLU-CARRP-advisory.pdf).

102. Vetting Policy, *supra* note 77, at 1 n.1; *see also* Chapter 6: *Adjudicative Review*, CSIS, <https://www.uscis.gov/policymanual/Print/PolicyManual-Volume7-PartA-Chapter6.html> [<https://perma.cc/8ZV8-QRUM>] (“The officer should consider the totality of the circumstances to determine whether an articulable link exists between the foreign national (or organization) and prior, current, or planned involvement in, or association with an activity, any foreign national (or organization) described in any of these sections.”); Yesenia Amaro, *Little-Known Law Stops Some Muslims From Obtaining US Citizenship*, LAS VEGAS REV.-J. (April 16, 2016), <https://www.reviewjournal.com/news/little-known-law-stops-some-muslims-from-obtaining-us-citizenship> [<https://perma.cc/KET2-8WG3>].

103. *Id.* at 1.

104. Yesenia Amaro, *Little-Known Law Stops Some Muslims From Obtaining US Citizenship*, LAS VEGAS-REV. J. (April 16, 2016), <https://www.reviewjournal.com/news/little-known-law-stops-some-muslims-from-obtaining-us-citizenship> [<https://perma.cc/KET2-8WG3>]; Daniel Burke, *He Applied for a Green Card. Then the FBI Came Calling*, CNN (Oct. 3, 2019), <https://www.cnn.com/2019/10/03/us/muslim-immigrants-carrp-program/index.html> [<https://perma.cc/2AXR-2DRG>] (“One USCIS document lists 20 countries from which immigrants were subjected to CARRP from 2009–2012. In all except one -- Sri Lanka -- Muslims form a majority of the population.”).

105. *See The World in Muslim Populations, Every Country Listed*, GUARDIAN: DATA BLOG (October 2009), <https://www.theguardian.com/news/datablog/2009/oct/08/muslim-population-islam-religion> [<https://perma.cc/VQU5-LM8M>] (citing data from Pew Research Center’s Forum on Religion and Public Life).

immigration law and law enforcement policy that by design or effect applies almost exclusively to Arabs, Muslims, and South Asians.”<sup>106</sup>

CARRP training materials list a host of statutory and nonstatutory factors that may indicate an applicant is a national security concern. Foreign government service, knowledge of biology, computer systems, or chemistry, and a name that matches with any on a host of government databases including the TSA “No Fly” List and the FBI Namecheck Database all are listed as possible indicators.<sup>107</sup> Travel to areas of “known terrorist activity” can also lead adjudicators to flag an applicant as a concern.<sup>108</sup> USCIS guidance instructs officers to consider indicators related to the individual’s family members or close associates and determine whether those indicators relate to the applicant as well.<sup>109</sup>

Such indicators themselves have long been found to be discriminatory and unreliable,<sup>110</sup> inextricably tied to the overpolicing and surveillance of American Muslim communities and those who look like them. For example, TSA and FBI

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106. Muneer I. Ahmad, *A Rage Shared by Law: Post September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1262 (2004); see also Amna Akbar, *Policing “Radicalization,”* 3 U.C. IRVINE L. REV. 809 (2013) (examining “how government concern with radicalization and increased allowances for law enforcement intelligence gathering have allowed law enforcement to marshal significant resources towards monitoring American Muslim communities”); Ramzi Kassem, *Passport Revocation As Proxy Denaturalization: Examining the Yemen Cases*, 82 FORDHAM L. REV. 2099 (2014) (identifying a trend in which the U.S. government suddenly revoked Yemeni Americans’ passports under the pretense that they committed naturalization fraud).

107. U.S. CITIZENSHIP & IMMIGRATION SERVS., CARRP OFFICER TRAINING: NATIONAL SECURITY HANDOUTS 2 (2009), <https://www.aclusocal.org/wp-content/uploads/2013/01/Guance-for-Identifying-NS-Concerns-USCIS-CARRPTraining-Mar.-2009.pdf> [hereinafter CARRP OFFICER TRAINING HANDOUTS].

108. *Id.*

109. Vetting Policy, *supra* note 77; Memorandum from Alanna Ow, Acting Chief, Int’l Operations Division, U.S. Citizenship & Immigration Servs., on Guidance for the Int’l Operations Division on the Vetting, Deconfliction, and Adjudication of Cases with Nat’l Sec. Concerns, to Overseas District Directors, Field Office Directors, & Headquarters Int’l Operations Staff, U.S. Citizenship & Immigration Servs. (April 28, 2008), [https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Electronic%20Reading%20Room/Policies\\_and\\_Manuals/CARRP\\_Guidance.pdf](https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Electronic%20Reading%20Room/Policies_and_Manuals/CARRP_Guidance.pdf) [<https://perma.cc/L8V3-WYG>]. See also CARRP OFFICER TRAINING HANDOUTS, *supra* note 107, at 5 (explaining that “[a] close associate includes but is not limited to a roommate, coworker, employee, owner, partner, affiliate, or friend”).

110. See, e.g., Diala Shamas, *A Nation of Informants: Reining in Post-9/11 Coercion of Intelligence Informants*, 83 BROOK. L. REV. 1175 (2018) (documenting the limited safeguards that deter law enforcement misconduct during the informant recruitment process); Margaret Hi, *Algorithmic Jim Crow*, 86 FORDHAM L. REV. 633 (2017) (describing current immigration- and security-related vetting protocols as an “algorithmic” Jim Crow, enabling discrimination in the form of designing, interpreting, and acting upon vetting and screening systems in ways that result in a disparate impact); Shirin Sinnar, *Rule of Law Tropes in National Security*, 129 HARV. L. REV. 1566 (2016) (analyzing the mechanisms, or lack thereof, that led to the use and misuse “reasonable suspicion” in terrorist watchlisting).

databases are overbroad and include many who share names with persons of interest or provided voluntary interviews to the FBI but were never subject to a national security investigation.<sup>111</sup>

Once USCIS finds an “articulable link,” a term for which USCIS provides no definition or explanation, to vague and overbroad security- or terrorism-related indicators, it puts the application under a magnifying glass. The internal eligibility assessment’s stated purpose is “to ensure that valuable time and resources are not unnecessarily expended externally vetting a case when the individual is otherwise ineligible for the benefit sought.”<sup>112</sup> Training manuals instruct the USCIS officer, potentially the same one who flagged the applicant as a national security concern in the first place, to conduct a “thorough review of the record” and deny the application “on any legally sufficient ground.”<sup>113</sup>

During the vetting process, adjudicators pay close attention to “inconsistencies,” focusing on aliases and various name spellings, institutions and degrees, school records, roommates, group membership, and travel companions.<sup>114</sup> Training manuals instruct field officers to create a detailed timeline for each applicant to “understand temporal relationships” and “create a list of questionable items.”<sup>115</sup> To prepare for their interviews with applicants, training materials instruct field officers to “[p]ick a date and time when you can dedicate yourself to the case” and “[b]e ready to explore answers and prepare for resistance.”<sup>116</sup>

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111. Akbar, *supra* note 106, at 879–80 (describing a young Pakistani man who was placed on the No-Fly List after refusing to act as an FBI informant in his community); Sahar F. Aziz, *Caught in a Preventative Dragnet: Selective Counterterrorism in a Post-9/11 America*, 47 GONZ. L. REV. 429 (2011–2012) (identifying FBI practices targeting Muslims, including “voluntary” interviews and coercion to act as informants against their communities); *see also* Sameer Ahmed *Targeting Highly-Skilled Immigrant Workers in Post-9/11 America*, 79 UMKC L. REV. 935, 936 (2011) (critiquing the government’s “unprecedented interpretation of immigration regulations” in the post-9/11 world to target Muslims in the United States).

112. Vetting Policy *supra* note 77, at 5. Internal vetting refers to the vetting done internally by the USCIS adjudicator where they are tasked with reviewing the application for any inconsistencies, mistakes or omissions. Where any such issues are found, the adjudicator is directed to use this as justification for denying the application. Where no mistakes are found internally to justify a denial of the application, the application is then referred for external vetting by law enforcement and intelligence agencies to investigate the relevance of the national security concern and its relevance.

113. PASQUARELLA, *supra* note 77, at 31.

114. *Id.* at 32–33.

115. *Id.* at 55, 59.

116. U.S. CITIZENSHIP & IMMIGRATION SERVS., NAT’L SECURITY DIVISION, CONTROLLED APPLICATION REVIEW AND RESOLUTION PROGRAM (CARRP) VERSION 2.3.1 54–59 (2012) <https://aclusocal.org/sites/default/files/wp-content/uploads/2013/01/CARRP-Course-Powderpoint-Natl-Sec.-Division-FDNS-v.2.3.1-Jan.-2012.pdf> [https://perma.cc/3VUL-U7T5] [hereinafter CONTROLLED APPLICATION REVIEW].

In contrast, general USCIS adjudication guidelines provide simple, straightforward instructions for reviewing naturalization applications. For example, the Adjudicator's Field Manual reminds adjudicators to check that the form is completed and signed, supporting documents are unaltered, and the applicant is statutorily eligible for the benefit sought.<sup>117</sup> Further, in non-CARRP adjudications, if USCIS plans to deny an application or petition, it routinely issues a Notice of Intent to Deny explaining the nature of the adverse findings and providing the applicant an opportunity to respond or inspect the proceeding record.<sup>118</sup> The CARRP training materials do not mention such notice or opportunity to rebut adverse findings or inspect the record of proceedings. The differing instructions set a heightened, often unattainable, naturalization bar for those the U.S. government has labeled suspect or of an undesirable race, religion, nationality, or other suspect group.

The message is clear: The government tasks adjudicators with rejecting an application however they can to prevent a lengthy and extensive external vetting process that would reveal whether the security concern classification was relevant or legitimate in the first place.<sup>119</sup> As USCIS touts, a denial of an application on any legally sufficient ground would "preclude[e] lengthy vetting," increasing efficiency.<sup>120</sup> In sum, USCIS denies immigration benefits to individuals loosely linked to a set of overbroad security markers solely to save USCIS time.<sup>121</sup> The government prefers to summarily deny naturalization applications of entire groups instead of determining whether a specific applicant is actually a so-called national security concern. Relying on already overbroad and faulty indicators that disproportionately target and impact immigrants from Muslim-majority nations, the lengthy and extensive vetting process is problematic in and of itself.<sup>122</sup> In

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117. See U.S. CITIZENSHIP & IMMIGRATION SERVS., *Chapter 10: An Overview of the Adjudication Process*, in ADJUDICATOR'S FIELD MANUAL—REDACTED PUBLIC VERSION, <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-1067/0-0-0-1166.html> [https://perma.cc/23YM-GANP].

118. *Id.*

119. Vetting Policy, *supra* note 77, at 5.

120. U.S. CITIZENSHIP & IMMIGRATION SERVS., NAT'L SECURITY BRANCH, CARRP FOR ROTC VIII, AUG–OCT 2011 11 (2011), <https://aclusocal.org/sites/default/files/wp-content/uploads/2014/07/USCIS-National-Security-Branch-CARRP-Training-Materials-Sep.-2011.pdf> [https://perma.cc/42MN-FZ3S].

121. CONTROLLED APPLICATION REVIEW, *supra* note 116, at 54–59 (describing the purpose of CARRP's eligibility assessment "to ensure that valuable time and resources are not unnecessarily expended externally vetting a case...when the individual is otherwise ineligible for the benefit sought").

122. Recall that the 1990 reforms were made in part to address the delay and inaccessibility inherent in naturalization adjudication when courts were in the sole position to award naturalization. See *supra* Part I. The CARRP program works to undo this reform and create delays and inaccessibility, narrowly targeting and impacting American Muslims applying for naturalization.

furthering this problematic policy, CARRP joins a host of other historical and present-day policies aimed at excluding and removing American Muslims from the United States.<sup>123</sup> While historically false testimony-based denials may have resulted from individual adjudicator bias against suspect populations, CARRP institutionalizes discriminatory denials by creating an explicit framework through which the government uses false testimony to pretextually deny citizenship to aspiring American Muslims and those perceived to be Muslim.<sup>124</sup>

## B. False Testimony: The Numbers

One way to understand how and why bias shapes naturalization adjudication is to search for patterns in denials. Since, at the first instance, naturalization denial takes place at the administrative level, detailed data on why adjudicators deny naturalization applications is not readily available.<sup>125</sup> Administrative denials are

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Nancy Morawetz described the limited utility of §1447(b)—which allows for judicial intervention when the agency fails to issue a decision within 120 days of the initial examination—pointing out how the government can shift the delay to the period before the examination without redress. She described that “[t]his kind of manipulation obviously undermines Congress’s concern with assuring timely adjudications.” Nancy Morawetz, *Citizenship and the Courts*, 2007 U. CHI. LEGAL F. 447 (2007).

123. See, e.g., Sahar F. Aziz, *A Muslim Registry: The Precursor to Internment?*, 2017 BYU L. REV. 779 (2017) (critiquing recent discriminatory anti-Muslim policy proposals such as a Muslim registry and Trump’s “Muslim bans”); Aziz, *supra* note 111 (discussing mosque infiltration, aggressive prosecutions of Muslim charities, “material support” of terrorism laws, prolonged and arbitrary detention, and more to exclude Muslim communities from public life in the post-9/11 United States); Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609, 612–14 (2005) (identifying pre-9/11 government programs targeting citizen and noncitizen Arabs and Muslims, including President Nixon’s “Operation Boulder,” which focused FBI surveillance on Arabs, and President Reagan’s “Alien Terrorists and Other Undesirables: A Contingency Plan,” which led to mass arrests of noncitizen Arabs based on “ideological exclusion grounds under the [Immigration and Nationality Act]”); Ramzi Kassem, *Passport Revocation as Proxy Denaturalization: Examining the Yemen Cases*, 82 FORDHAM L. REV. 2099 (2014).
124. Margaret Chon & Donna E. Arzt, *Walking While Muslim*, 68 L. & CONTEMP. PROBS. 215, 222–23 (2005) (discussing how religion has been racialized in the war on terror resulting in widespread targeting of Latinx, African Americans, Asian Americans, and Native Americans); Muneer I. Ahmad, *A Rage Shared By Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1263 (2004) (arguing that post-9/11 racialized violence against Muslims, Arabs, and those perceived to be either or both is not an “isolated phenomenon” but a “major shift in American racial conceptualization”).
125. In 1992, Professor Louis DeSipio highlighted the inconsistency and lack of uniformity in the administration of naturalization, asking a question which reverberates today: “What administrative reviews should be instituted to allow oversight of individual abuse that apparently continues to occur?” His analysis demonstrated the grave geographic and racial disparities in naturalization adjudication, highlighting differential rejection rates for immigrants from different

issued in the form of letters from USCIS, and not publicly available in the manner that some court opinions are. If USCIS denies naturalization, an applicant can appeal their case through the administrative appeal process, but the results of this process are also not published in a publicly available forum. After this, the case is eligible for federal court review, where resultant opinions are openly published and, in some cases, provide a rare opportunity to understand the underlying agency decision making.

As of October 2019, over 500 federal court cases relate to naturalization and false testimony. Of these, many relate to naturalization revocation.<sup>126</sup> A small percentage relate to other forms of immigration relief, leaving 158 cases that squarely consider naturalization denials.

The research presented in this Article takes a closer look at the 158 cases in which adjudicators used false testimony allegations as at least one basis to deny naturalization. These numbers only tell a small part of the story, as most applicants are unlikely to appeal naturalization denials to the federal courts. Appeals are expensive, time consuming, and, since most may reapply for naturalization five years after the event that rendered them ineligible (in this case, the provision of false testimony), many choose to wait it out and apply again.<sup>127</sup> Still others may abandon hopes of naturalization altogether. Further, many who pursue judicial review settle out of court when USCIS offers naturalization in response to

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regions of the world. See Louis DeSipio, *Making Americans: Administrative Discretion and Americanization*, 12 CHICANO-LATINO L. REV. 52 (1992).

In 2007, Professor Nancy Morawetz also addressed the concerns identified by Professor DeSipio, underscoring that an adjudicatory system for naturalization should provide for methods of oversight for adjudicators who make erroneous decisions or apply improper standards. See Nancy Morawetz, *Citizenship and the Courts*, 2007 U. CHI. LEGAL F. 447 (2007). Before the revelations about the CARRP program, she highlighted that “a line adjudicator’s assessment of “good moral character” could easily be influenced by discriminatory attitudes” and advocated for the agency to develop “written records of its findings and the facts on which those findings are based.” *Id.*

126. Citizenship revocation is the withdrawal of a person’s citizenship after it was granted based on a violation of a limited number of statutory provisions. Revocation may occur, for example, when it is discovered that a person obtained citizenship unlawfully, committed fraud or willful misrepresentation to procure it, or when someone becomes a member of the Communist party, totalitarian party or terrorist organization within five years of becoming naturalized. A person who obtained citizenship through service in the U.S. armed forces could face revocation if they are discharged before a certain number of years of service, and under dishonorable conditions. 8 U.S.C. § 1451 (2012).
127. An ACLU report identifies prolonged delays in adjudicating naturalization applications, including an eleven-year process for Tarek Hamdi who ultimately received his citizenship in federal court after three previous denials. PASQUARELLA, *supra* note 77, at 7. The report identifies various consequences of prolonged delays, including the stress and cost of filing mandamus lawsuits, inability to vote and “participate in the U.S. democratic process,” and lost professional and academic opportunities. *Id.* at 42. See also MOTOMURA, *supra* note 64.



litigation.<sup>128</sup> But even with this dataset's limitations, the opinions tell a compelling story that tracks biases and complements the limited data available on the top countries impacted by the CARRP program.<sup>129</sup>

From our nation's founding until September 11, 2001 there are only twenty-eight naturalization appeals cases that appear in the data set involving false testimony.<sup>130</sup> To account for differences in statutory schemes and the fact that older cases might be less available, one may consider cases after the current statutory scheme was enacted in 1990. With that measure, there are only nine cases between 1990 and September 11, 2001. In the almost nine years between September 11, 2001 and April 2008, when USCIS introduced the CARRP program, the number rose exponentially to thirty-seven. Courts have considered another ninety-three such cases in the decade since CARRP's implementation. These numbers point toward the marked increase in the use of false testimony to deny citizenship in the years after 9/11.

To look at who was impacted by these denials, 45.9 percent of cases involving false testimony from 9/11 until CARRP's implementation involved a naturalization applicant from a Muslim-majority nation.<sup>131</sup> After CARRP's

128. See, e.g., *Adam v. U.S. Dep't of Homeland Sec.*, No. 1:16-cv-06725-WFK (E.D.N.Y. Mar. 1, 2017).

129. *Amaro*, *supra* note 104.

130. See *supra* notes 4–5 to understand the body of data these findings describe. This description refers to cases that were found via targeted searches and are limited by what is available on those legal search platforms. For the earlier part of our nation's history, petitions could be filed in any common law court and thus may not have been consolidated on to available legal research platforms.

131. See *Islam v. Harrington*, 3:00-CV-1683-P, 2001 WL 1335851 (M.D. AL Oct. 23, 2001); *Poka v. Immigration & Naturalization Servs.*, No. Civ. A. 3:01CV1378, 2002 WL 31121382 (D. Conn. Sept. 19, 2002) (court accepted that applicant had misunderstood the word "arrested" when he denied two previous arrests due to his limited English proficiency, case denied on other grounds); *St. Amanze v. Immigration & Naturalization Servs.*, No. Civ. A. 02-502T, 2003 WL 22061870 (D.R.I. Mar. 28, 2003) (discussion about whether Nigerian petitioner may have understood questions about past immigration violations); *Zaher Abu Saad v. Barrows*, No. Civ. A. 3:03-CV-1342G, 2004 WL 1359165 (N.D. Tex. June 16, 2004) (finding misstatements about marital status to be "innocent mistakes," court looks towards lack of criminal history, employment records, remanded to exhaust administrative remedies); *Omari v. Gonzales*, 3:05-CV-0397-P, 2005 WL 2036498 (N.D. Tex. Aug. 11, 2005) (natz denial upheld); *United States v. Hovsepian*, 422 F.3d 883, 888 (9<sup>th</sup> Cir. 2005) (looks to vagueness of question where applicant describes organizational affiliation as a youth group instead of a political party, court finds "no intent to deceive," and applicants have GMC); *Edem-Effiong v. Acosta*, No. Civ. A. H-04-2025, 2006 WL 626406 (S.D. Tex. Mar. 13, 2006) (assessing whether question about applicant's children was vague where applicant failed to mention out-of-wedlock child); *Farah v. Gonzales*, CIV. 05-1944 DWFAJB, 2006 WL 1116526 (D. Minn. Apr. 26, 2006); *Naserallah v. U.S. Citizenship & Immigration Servs.*, No. 1:05 CV 1022, 2006 WL 991073 (N.D. Ohio Apr. 13, 2006) (where applicant concealed a crime, court looked to see if applicant was aware that the crime would not have precluded naturalization); *Shalan v. Chertoff*, No. 05-10980-RWZ, 2006 WL 1308175, at \*2 (D. Mass. May 9, 2006) (naturalization granted even after USCIS denies application based on plethora of alleged omissions related to prior charges, a temporary restraining order, a "red flag" about employment,

implementation this number held steady at 46.2 percent. Though they made up nearly half of the petitioners in appealed cases initially denied on account of false testimony, between 2005 to present, an average of only 11.525 percent of all naturalization applicants were from Muslim-majority nations.<sup>132</sup> This dataset, and the qualitative analysis of the cases it includes, shows that the government used false testimony allegations disproportionately against aspiring American Muslims since, and perhaps even before, September 11, 2001. Long before the government systemized the use of false testimony allegations to deny naturalization applications under CARRP, biased adjudication disproportionately impacted those from Muslim-majority nations.

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and his use of family name versus formal name); *Damra v. Chertoff*, 1:05CV0929, 2006 WL 1786246 (N.D. Ohio June 23, 2006); *Ibrahim v. Gonzales*, 434 F.3d 1074 (8th Cir. 2006); *Hussain v. Chertoff*, 486 F. Supp. 2d 196 (D. Mass. 2007) (USCIS denies naturalization after prolonged adjudicative delay due to a single prior 16-year-old charge for writing a bad check; no discussion of intent); *Butt v. U.S. Citizenship & Immigration Servs.*, No. 06-805(JLL), 2007 WL 446922 (D.N.J. Feb. 7, 2007) (district court upholds USCIS denial due to omission of dismissed charges even though applicant claimed he misunderstood the legal system and was not aware that he had been criminally charged); *Azziz v. Chertoff*, 527 F. Supp. 2d 188 (D. Mass. 2007) (naturalization denial upheld where applicant omitted out-of-wedlock child, USCIS felt this was relevant to lawful marriage); *Aarda v. U.S. Citizenship & Immigration Servs.*, 06-1561 RHK/AJB, 2008 WL 53280 (D. Minn. Jan 3, 2008) (court found that district court review was premature because administrative review had not been exhausted).

132. These averages were formulated employing data from a Center for Immigration Studies article and the author's additional calculations relying on DHS records. See Dan Cadman, *Is There Bias Against Muslims Who Apply for Naturalization?* CTR. FOR IMMIGR. STUD. (June 22, 2016), <https://cis.org/There-Bias-Against-Muslims-Who-Applied-Naturalization#3> [<https://perma.cc/WBK4-E9BR>]; U.S. Department of Homeland Security, *Yearbook of Immigration Statistics*, Fiscal Year 2017, Table 21.

TABLE 1: Judicial Review of Naturalization Denials by Era

Time Period	Number of Naturalization Denials Involving False Testimony Allegations Appealed to Federal Court	Number of Applicants From Muslim-Majority Nations**	% of Cases Where Applicant From Muslim-Majority Nation**
Founding–Passage of Immigration Act of 1990	19	1	.05%
Immigration Act of 1990 –9/11 (~11 year)	9	4	44.4%
9/11–CARRP’s Implementation* (~ 8.5 years)	37	17	45.9%
CARRP’s Implementation*– Present (~11.5 years)	93	43	46.2%
Total	158	65	41.1%

\*According to internal USCIS documents, it enacted CARRP in April 2008 and, to the author’s knowledge, the program remains in effect. CARRP remains listed as one of the mechanisms through which USCIS completes “National Security Processing” on its webpage describing Refugee Screening, *available at* <https://www.uscis.gov/refugeescreening> [<https://perma.cc/3ZKV-NHUY>].

\*\* Includes those from Muslim-majority nations, and seven applicants who are placed within this group because they have names which distinctly indicate a Muslim heritage. See *U.S. v. Abdulghani*, 671 F. Supp. 754 (N.D. Georgia 1987) ; *Gholamreza Nagahi v. I.N.S.*, 219 F.3d 1166 (10th Cir. 2000); *Naserallah v. .S. Citizenship & Immigration Servs.*, 1:05 CV 1022, 2006 WL 991073 (N.D. Ohio, April 13, 2006); *Shalan v. Chertoff*, No. 05-10980-RWZ, 2006 WL 1308175, at \*2 (D. Mass. May 9, 2006); *Ayman Girgis v. Chertoff*, 06-B-538-NE, 2006 WL 8436580 (N.D. Al. Dec. 7, 2006); *Mukarram v. Collett*, 649 F.Supp.2d 418 (D. Md., May 5, 2009); *Iqbal v. Sec. of U.S. Dep’t of Homeland Sec.*, 190 F. Supp. 3d 322, 326 (2016).

According to the Pew Research Center's 2017 Survey of U.S. Muslims, 69 percent of foreign-born U.S. Muslim adults are naturalized U.S. citizens.<sup>133</sup> The Center for Immigration Studies compiled United States Department of Homeland Security data showing the percentage of naturalizations by applicants from Muslim-majority countries has risen from 11.27 percent of the total pool of naturalized Americans in 2005 to 13.16 percent in 2014.<sup>134</sup> According to the Center for Immigration Studies, this data disproves allegations of bias against aspiring American Muslims in the immigration system.<sup>135</sup>

Though more individuals from Muslim-majority nations may have naturalized in 2014 than 2005, this data disguises the difficult terrain aspiring American Muslims, and those who may look or sound like them, face when naturalizing. To start, these total percentages are volatile; in 2007 and 2008, those from Muslim-majority nations made up only 9.79 percent and 7.69 percent of the pool of naturalizations, respectively. These numbers increased while to 14.3 percent, 13.4 percent, and 12.3 percent of total naturalizations in 2015, 2016 and 2017, respectively.<sup>136</sup> Changes in global migration patterns all contribute to this volatility, which is why bias and discrimination are hard to uncover when looking only at data that measures a final grant. For example, this data does not account for extensive delays or for approvals won after filing administrative and judicial appeals. Though, applicants from Muslim-majority nations have made up a larger percentage of the pool in some years, USIS may still be using false testimony allegations pretextually and disproportionately to deny some petitions.

In the federal case law reviewing naturalization denials, two clearly different adjudication standards come into clear focus. The vast majority of applicants who appeal their naturalization denials allegedly misstated or omitted past arrests, convictions, or a fact that implicated the underlying immigration status that opened the path to naturalization. In these cases, the penalized misstatement or

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133. *U.S. Muslims Concerned About Their Place in Society, But Continue to Believe in the American Dream*, PEW RES. CTR.: RELIGION & PUB. LIFE (July 26, 2017), <http://www.pewforum.org/2017/07/26/findings-from-pew-research-centers-2017-survey-of-us-muslims> [https://perma.cc/4KDR-6PTX].

134. Note that the Center for Immigration Studies (CIS) has been designated as a "hate group" by the Southern Poverty Law Center. Their arguments and methodology are offered here only to refute commonplace arguments denying the discriminatory practices highlighted in this article. *Center for Immigration Studies*, S. POVERTY LAW CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/center-immigration-studies> [https://perma.cc/37RY-FSKD].

135. Cadman, *supra* note 132. Note that this estimate strictly accounts for only those applicants who come from Muslim-majority nations, presumably undercounting those Muslims who immigrate from those nations that do not have a Muslim-majority.

136. Calculations made by author using the U.S. Department of Homeland Security, *Yearbook of Immigration Statistics*, Fiscal Year 2017, Table 21, employing identical methodology as the Center for Immigration study discussed at *supra* note 132.

omission usually had a direct relation to specific statutory requirements (or bars) to naturalization. Note that a focus on non-violent minor crimes, dismissed cases and traffic violations, permeates the data set generally, including in cases from non-Muslim majority nations. This focus on omissions about minor criminal activity likely has an outsized effect on communities of color who are subject to greater policing, compounding the discriminatory impacts of false testimony-based denials.<sup>137</sup>

In a curious set of cases, though, adjudicators deny naturalization applications based on misstatements or omissions relating to aliases, organizational associations, extramarital affairs, travel and employment history, taxes, land ownership, and almost anything else in the N-400.<sup>138</sup> Sometimes these

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137. A study of how false testimony allegations impact communities of color more broadly is outside the scope of this article. According to U.S. Senate data from 1987 on administrative adjudication of naturalization, analyzed by Professor Louis Desipio, naturalization applicants from Africa and Spanish-speaking areas of Latin America and the Caribbean are more likely than applicants from other regions to be given a recommended denial by the then-INS. See Desipio, *supra* note 125. The study of racial animus in the development of crime-based deportation and immigration removals and admissions generally has been well-studied by immigration scholars. See, e.g., Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 UC DAVIS L. REV. 171 (2018); Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993 (2016).
138. See, e.g., *El-Ali v. Carroll*, 83 F.3d 414 (4th Cir. 1996) (USCIS denied naturalization in part because El-Ali failed to report income from a single employment site); *Hovsepian*, 422 F.3d at 888 (looks to vagueness of question where applicant describes organizational affiliation as a youth group instead of a political party, court finds “no intent to deceive,” and applicants have GMC); *Shalan*, 2006 WL 1308175, at \*2 (naturalization granted even after USCIS denies application based on plethora of alleged omissions related to prior charges, a temporary restraining order, a “red flag” about employment, and his use of family name versus formal name); *Hussain*, 486 F. Supp. 2d 196 (USCIS denies naturalization after prolonged adjudicative delay due to a single prior sixteen-year-old charge for writing a bad check; no discussion of intent); *Ghaffarpour v. Gonzalez*, No. 06 C 3842, 2008 WL 4686161 (N.D. Ill. May 29, 2008) (USCIS denied naturalization alleging applicant provided false testimony about land ownership in Iran, and natz was granted by district court after finding applicant’s testimony credible); *Keaik v. Dedvukay*, 557 F. Supp. 2d 820 (E.D. Mich. 2008) (USCIS denied because applicant failed to reveal speeding offenses); *Hayek v. Chertoff*, No. 07 CV 1957, 2008 WL 11380197 (N.D. Ohio, Aug. 4, 2008) (Lebanese physician denied naturalization where misstatements about travel, addresses and organizational association led to denial under false testimony and physical presence requirements); *Gedi v. Gonzalez*, No. 1:07-CV-2507-RWS, 2009 WL 2515627 (D. N.D. Ga. 2009) (omits single trip to Somalia); *Sekibo v. Chertoff*, No. H-08-2219, 2010 WL 2196271 (naturalization denied where applicant lied about filing tax returns which were filed weeks after the naturalization interview); *Atalla v. U.S. Citizenship & Immigration Servs.*, 541 Fed. Appx. 760 (9th Cir. Oct. 2, 2013) (USCIS denies on good moral character grounds because applicant failed to disclose CBP interview and charitable giving. Further, because of claims that this false testimony in and of itself was a CIMT, the Court of Appeals upheld a grant of naturalization by district court and found that applicant answered questions carefully and the government’s approach was imprecise and muddled); *Hamdi v. U.S. Citizenship & Immigration Servs.*, No. EDCV 10-894 VAP, 2012 WL 632397 (C.D. Cal. Feb. 25, 2012) (court finds that alleged misrepresentations about organizational affiliations,

accusations are lumped on top of other more serious bases for denials; other times, these immaterial misstatements are the sole reason for denial.<sup>139</sup> Often the misstatements have no bearing on the core components of citizenship eligibility and USCIS's sole reason for denying naturalization is that the false testimony evinced a lack of good moral character.

The vast majority of recent applicants denied citizenship in this manner are either from Muslim-majority nations or have names that indicate they may have Muslim origins, a pattern which begins appearing in 1970 and endures until the present day.<sup>140</sup> Historically, those judged to have communist associations or those from formerly Communist nations were also disproportionately impacted by allegations involving false testimony related to organizational associations.<sup>141</sup> In

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residences, and minor dates were not made with the requisite intent to rise to false testimony); *Hajro v. Barrett*, No. C 10-01772 MEJ, 2011 WL 2118602 (N.D. Cal. May 27, 2011) (court finds it a triable issue of fact whether petitioner failed to disclose organizational and military associations in order to gain immigration benefit, dismissing government's motion for summary judgment); *Abusamhadaneh v. Taylor*, 873 F. Supp. 2d 682 (E.D. Va. 2012) (organizational memberships); *Bankole v. Holder*, No. 6:14-cv-01104-EFM-JPO, 2014 WL 3734209 (D. Kan. July 29, 2014) (USCIS denies naturalization where applicant failed to reveal traffic citations, in denying government's motion to dismiss court states that question of subjective intent cannot be resolved at pleading stage); *Khalil v. Holder*, No. 1:13-MC-486, 2015 WL 3629634 (S.D. Texas June 10, 2015) (Court finds omissions regarding residency history amount to false testimony); *Iqbal v. Sec. of U.S. Dep't of Homeland Sec.*, 190 F. Supp. 3d 322, 326 (2016) (USCIS denies application on the basis that applicant allegedly failed to disclose past due taxes but then recants, stating denial based on employment issues and "involvement with others' immigration papers").

139. *Compare Omar v. Chertoff*, No. 106CV02750, 2008 WL 4380200 (N.D. Ohio Aug. 21, 2008) (after naturalization was first denied due to allegations that plaintiff was not living in marital union for require statutory period, USCIS additionally alleged that applicant had given false testimony), *Hayek*, 2008 WL 11380197 (Lebanese physician denied naturalization where misstatements about travel, addresses and organizational association led to denial under false testimony and physical presence requirements), and *Khalil*, 2015 WL 3629634 (finding omissions regarding residency history amount to false testimony), with *Hamdi*, 2012 WL 632397 (finding alleged misrepresentations about organizational affiliations, residences, and minor dates were not made with the requisite intent to rise to false testimony).
140. Applicants included in this study whose country of origin is not apparent from the public filings but whose names indicate a Muslim heritage/identity include: Includes those from Muslim-majority nations, and seven applicants who are placed *U.S. v. Abdulghani*, 671 F. Supp. 754 (N.D. Georgia 1987); *Gholamreza Nagahi v. I.N.S.*, 219 F.3d 1166 (10th Cir. 2000); *Naserallah v. .S. Citizenship & Immigration Servs.*, 1:05 CV 1022, 2006 WL 991073 (N.D. Ohio, April 13, 2006); *Shalan v. Chertoff*, No. 05-10980-RWZ, 2006 WL 1308175, at \*2 (D. Mass. May 9, 2006); *Ayman Girgis v. Chertoff*, 06-B-538-NE, 2006 WL 8436580 (N.D. Al. Dec. 7, 2006); *Mukarram v. Collett*, 649 F.Supp.2d 418 (D. Md., May 5, 2009); *Iqbal v. Sec. of U.S. Dep't of Homeland Sec.*, 190 F. Supp. 3d 322, 326 (2016).
141. See, e.g., *Klig v. United States*, 296 F.2d 343, 346 (2d Cir. 1961) (accused of testifying falsely about attendance at Communist party meetings twenty years prior to naturalization application); *Berenyi v. Dist. Dir., Immigration & Naturalization Serv.*, 385 U.S. 630, 668 (1967) (naturalization denied where accused of providing false testimony about Communist Party attendance); *In re Kwong Hai Chew*, 278 F.Supp. 44 (S.D.N.Y. 1967) (where applicant denied prior Community

fact, allegations of false testimony based on lies or misstatements about organizational associations only appear in cases in which the applicant was from a Muslim-majority country, had a name which indicated a Muslim heritage, or where USCIS was concerned about ties to Communism. The apparent use of these denials only in situations involving those deemed suspect by the U.S. government indicates that the government is using the false testimony provision as a catchall mechanism to deny naturalization to those it wants to exclude from U.S. citizenship.

### III. THE JUDICIAL RESPONSE

Federal courts give immense deference to the U.S. government when reviewing immigration-related matters; the naturalization context is no different. It is well established that any doubts regarding naturalization eligibility “should be resolved in favor of the United States and against the claimant.”<sup>142</sup> The most common cause of action in the studied naturalization denials suits is under 8 USC § 1421(c), which grants *de novo* review where USCIS has denied an application. A portion of the cases in the data set also reviewed delays in administrative action in response to a mandamus action or review under 8 USC § 1447(b) which allows applicants to pursue district court intervention where USCIS has failed to take action within the 120-day period after the naturalization examination. In the included cases litigating delays, the matter was administratively adjudicated and challenged while the federal court case was pending.

In the context of false testimony-based denials, at least, the sparse number of cases—158 cases since the first case appears in 1942 until the present—show the limited breath of judicial review that this policy has received. In comparison, in fiscal year 2013 alone, 779,929 naturalization petitions were granted while 83,112 petitions were denied.<sup>143</sup> Litigation related to naturalization delay and denials are on the rise, though. In the last five years there has been a 66 percent increase in naturalization related litigation.<sup>144</sup> Though, this may partially account for why there is an increased number of cases involving false testimony appearing in the data set in the last decade, it does not explain why Muslim applicants appeared 46

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Party membership and U.S. government produces three witnesses to refute this denial, district court grants naturalization and sets aside problematic evidence).

142. *United States v. Macintosh*, 283 U.S. 605, 626 (1931). *See also Berenyi*, 385 U.S. at 637.

143. *Recent Trends in Naturalization Application Lawsuits*, TRAC IMMIGRATION (June 30, 2014), <https://trac.syr.edu/immigration/reports/357> [<https://perma.cc/2WU3-LJGP>].

144. *See Increased Litigation for Denials and Delays on Naturalization Applications*, TRAC IMMIGRATION (January 22, 2019), <https://trac.syr.edu/tracreports/civil/544> [<https://perma.cc/4EA4-DRCF>].

percent of the time when they made up less than 12 percent of the total pool of naturalization applications.

In the studied set, courts upheld USCIS's naturalization denial (or in the pre-1990 scheme, denied naturalization at the first instance) 63 percent of the time (99 of the 158 cases).<sup>145</sup> Courts overturned USCIS's denial (and/or granted citizenship in the pre-1990 scheme) only 20 percent of the time (32 of the 158 cases). The remaining cases are pending, have sealed, out-of-court agreements or settlements, were remanded back to the administrative adjudicator or scheduled for fact finding hearings with unknown results.<sup>146</sup> Finally, in a few instances federal courts dismiss cases as moot due to lack of jurisdiction, where USCIS adjudicates applications while pending, or administrative remedies had not been exhausted.

The following Subparts analyze the judicial response to naturalization denials with a special focus on the reaction, or lack thereof, to the government's discriminatory application of eligibility criteria. Some of these cases reveal legal mechanisms and tests that scale back bias, implicit or intentional, at the administrative level. In overturning USCIS denials, courts usually focused on the false testimony provision's intent requirement. When USCIS clearly expended investigatory resources to pretextually deny the application, courts sometimes questioned why some applications were thrown "out in the cold"<sup>147</sup> and whether naturalization laws really "require perfection in our new citizens."<sup>148</sup> Even in these cases, though, courts only allude to the fact that certain subsets of applicants are subject to discriminatory enforcement of naturalization laws in isolated dicta, giving USCIS free reign to continue these practices and expand them against the vilified suspect immigrant group *du jour*.

#### **A. Applicants "Thrown Out in the Cold": The Courts' Failure to Address Discriminatory Naturalization Adjudications**

A select few reviewing courts have explicitly identified discriminatory adjudication practices, and even amongst these cases they have inconsistently overturned the underlying naturalization denial. Other courts have been

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145. Both the grant and denial data include the disposition of the 19 cases that fall within the data pool preceding the 1990 statutory scheme. In these cases, district courts were either granting naturalization at the first instance, or appeals courts were affirming or denying grants made by district courts.

146. Given the difficulty in determining final dispositions for many matters, data about the judicial response is offered not for its statistical significance but only as an observation.

147. *Lajevardi v. U.S. Dep't Homeland Sec.*, No. SACV 14-1249-AG (ANx), 2015 WL 10990359, at \*5 (C.D. Cal. Oct. 16, 2015).

148. *Klig v. United States*, 296 F.2d 343, 346 (2d Cir. 1961).



completely silent in the face of discriminatory denials of naturalization. Take the recent case CARRP-era case, *Lajevardi v. Department of Homeland Security*.<sup>149</sup> When Amir Lajevardi applied to become a citizen, he offered an array of evidence to prove the continuous physical presence required to naturalize. Mr. Lajevardi offered compelling and thorough evidence through his business records, passport, taxes, and corroborating declarations.<sup>150</sup> The government discounted each piece of evidence, alleging that the affidavits were “self-serving” and “he might have managed those businesses outside of the United States.”<sup>151</sup> The government argued the passport-related evidence, too, was insufficient because “it does not show exit dates from the United States.”<sup>152</sup>

In Amir Lajevardi’s case, the government essentially required back-to-back time sheets to show continuous presence and relied on *Berenyi v. District Director*,<sup>153</sup> noting that “doubts ‘should be resolved in favor of the United States and against the claimant.’”<sup>154</sup> When the court questioned how the applicant could account for weekends, the government responded that the applicant had the burden of accounting for time between work weeks. The court was unconvinced that such a “detailed showing that essentially presumes international travel on weekends” was required and found no genuine issue of material fact concerning Mr. Lajevardi’s continuous presence.<sup>155</sup> The government further contended that Mr. Lajevardi did not establish good moral character because he had provided false testimony about how many days he spent in Mexico on vacation.

Granting Mr. Lajevardi’s motion for summary judgment, the court commented: “During the hearing on the motions, the Court asked counsel for both sides whether there was a lingering equal protection issue concerning the United States being generous on immigration issues with one group of people, while throwing this application out in the cold. This result also resolved any looming equal protection issues.”<sup>156</sup> In questioning why Lajevardi’s application was “thrown out in the cold” the court observed that the government scrutinized certain applications for any reason to deny them while it granted others without any such scrutiny.

Though adjudicated in the CARRP-era, there is no confirmation that Mr. Lajevardi’s application was subject to CARRP. Still, USCIS’s treatment of his

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149. 2015 WL 10990359.

150. *Lajevardi*, 2015 WL 10990359, at \*2–3.

151. *Id.* at \*3.

152. *Id.*

153. *Berenyi v. Dist. Dir., Immigration & Naturalization Serv.*, 385 U.S. 630, 668 (1967).

154. *Lajevardi*, 2015 WL 10990359, at \*3.

155. *Id.* at \*3–4.

156. *Id.* at \*5.

application reflects the CARRP policy where USCIS explicitly directs adjudicators to require an impossibly high standard of detail and accuracy about topics like travel history, organizational membership, charitable giving, and taxes. Cases during the period when the United States was preoccupied with Communism, like *Berenyi* and *Klig v. United States*,<sup>157</sup> reflect similar a similar level of review.<sup>158</sup> The government seems to reserve intense questioning and high level of detail for applicants from backgrounds deemed suspicious at the time. When an applicant was so situated, USCIS used allegations about false testimony to deny an application if there was no other reason to do so.

In a handful of cases, the court noticed and rejected the awkward and often last-minute attempt to deny an application based on good moral character.<sup>159</sup> In *Lajevardi*, the court stated, “[p]laintiff mentions that, for ‘the first time out of this long process, Defendants now claim that Plaintiffs lacks [good moral character] because he stated in the interview at the airport that he was out in 2012 for one (1) week on a trip to Mexico and then stated he was out for twenty (20) days during the same trip on his N-400 application.’ . . . . Indeed, it does not appear that this good moral character issue was raised earlier. The Court is not convinced that it can consider issues not raised during the earlier proceedings, even applying de novo review. But even if the Court did consider the good moral character issue, it would grant summary judgment in Plaintiff’s favor.”<sup>160</sup>

In a few other isolated examples like *Lajevardi*, courts observed and commented on government bias. Take, for example, *Tiere v. Immigration & Naturalization Service*.<sup>161</sup> Mr. Frank Tieri was born in Italy in 1904 and was lawfully admitted to the United States at age seven. His naturalization application revealed six arrests, an adulterous relationship, and two out-of-wedlock children. As the court described, “[a]rmed with the foregoing information, and apparently motivated in part by the firm but unprovable conviction that petitioner was connected with the ‘Mafia’, the Immigration and Naturalization Service conducted an extensive investigation . . . into petitioner’s eligibility for citizenship.”<sup>162</sup> Though the Second Circuit upheld the naturalization denial, the court’s observation into the motivation behind the “thorough” agency investigation suggests that but for the applicant’s Italian background and

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157. 296 F.2d 343, 346 (2d Cir. 1961).

158. *Berenyi*, 385 U.S. 630; *Klig v. United States*, 296 F.2d 343 (2d Cir. 1961).

159. *Lajevardi*, 2015 WL 10990359, at \*4–5.

160. *Id.*

161. 457 F.2d 391, 392 (2d Cir. 1972).

162. *Tieri v. Immigration & Naturalization Serv.*, 457 F.2d 391, 392 (2d Cir. 1972).

presumed mafia ties, the government would not have subjected him to such an extensive inquiry.

In the 1996 case, *El-Ali v. Carroll*,<sup>163</sup> the court remanded a Qatari government employee's naturalization denial based on incorrect and incomplete tax records for further proceedings.<sup>164</sup> The single piece of evidence the government offered to support its false statement allegation were signed tax returns bearing Mr. Ali Mohammed El-Ali's in-laws' address instead of his own, an arguably innocent mistake. In the concurrence, Judge Peter Hall pointed out:

Finally, I must say that I am troubled by the alleged conduct of the interview examiner in this case. According to El-Ali, the examiner called him a "crook" and a "criminal," accused him of committing fraud, and opined that he "should be deported, [because] we don't want people like you in this country." I hasten to point out that the interview examiner has flatly denied making such statements, but, if the allegations are true, it seems to me that the INS has a much larger problem than a few incorrect tax returns.<sup>165</sup>

In cases like these, we see how a citizenship application can succeed or fail on personal whims and bias. Individual adjudicatory bias is rarely as explicit as in *El-Ali* because adjudicators have broad discretion to deny a naturalization petition based on any false testimony. Any iota of contradicting evidence can justify a denial,<sup>166</sup> thus masking discriminatory intent and action.

*Tieri*, *Lejvardi*, and *El-Ali* involved adulterous relationships, questions about tax records, and isolated travel histories, all facts that were arguably irrelevant to core eligibility for naturalization. Many might falter and omit information or misstate facts like those. In contrast, in most false testimony cases under judicial review, false testimony was only an issue if the applicant lied about a matter that impacted underlying immigration status or involved arrests or convictions that may have statutorily precluded them from citizenship eligibility.<sup>167</sup> For example, Raymoundo Bernal immigrated to the United States as

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163. 83 F.3d 414 (4th Cir. 1996).

164. *Id.*

165. *Id.* at \*6 (Hall, J., concurring).

166. See, e.g., U.S. CITIZENSHIP & IMMIGRATION SERVS., USCIS POLICY MANUAL, VOLUME 12: CITIZENSHIP AND NATURALIZATION, PART F- GOOD MORAL CHARACTER, CHAPTER 2: ADJUDICATIVE FACTORS, <https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-2> [<https://perma.cc/34HQ-7LGF>] (describing how an adjudicating officer must assess the totality of circumstances and weigh all factors when making a good moral character determination).

167. See, e.g., *Deluca v. Ashcroft*, 203 F. Supp. 2d 1276 (M.D. Ala. 2002) (answered no to questions on N-400 about whether he had ever been arrested because she had been adjudicated as youthful offender, denial upheld); *Poka v. Immigration & Naturalization Servs.*, No. Civ. A. 3:01CV1378, 2002 WL 31121382 (D. Conn. Sept. 19, 2002) (omitted arrests, court found his explanation to be

the unmarried son of a lawful permanent resident alien. Yet, he was previously married.<sup>168</sup> Had the U.S. government known about this marriage, Mr. Bernal would have never been able to receive a green card under the unmarried child preference category.<sup>169</sup> Therefore, his naturalization application's underlying basis was improperly granted. Since his marriage directly impacted his eligibility for legal permanent residence and, in turn, naturalization, Mr. Bernal's lie was directly relevant to his naturalization eligibility.

In another similar case, *Chan v. Immigration and Naturalization Services*,<sup>170</sup> petitioner Harry Chan asked the district court to review his citizenship denial based on false testimony about prior marriages and a previous arrest. On various immigration forms Mr. Chan submitted in a multidecade attempt to gain status in this country, he had sometimes denied or omitted that he was married to a woman in Singapore, which made him ineligible for a green card based on marriage to a U.S. citizen. Additionally, Mr. Chan denied ever being arrested on his naturalization form, but he had been arrested and indicted, though never prosecuted, for heroin possession and distribution. In this example, both marriage and criminal records may directly impact whether Mr. Chan was eligible for naturalization in the first place. If he was still married in Singapore, his marriage to a U.S. Citizen was invalid, invalidating his eligibility for a green card based on

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truthful after considering his limited English proficiency but naturalization denied on other grounds); *Cacho v. Ashcroft*, 403 F. Supp. 2d 991 (D. Haw. 2004) (granted naturalization after USCIS flags discrepancies between sexual battery account to then-INS and police reports about the incident); *Nguyen v. Monica*, No. 05-3021, 2006 WL 2788211 (E.D. Pa. Sept. 26, 2006) (omitted DUI conviction, court upholds naturalization denial); *Lora* (though he had old convictions, court felt it "unfair to conclude that these crimes should deprive him of citizenship 17 years later"); *Serrano v. U.S. Citizenship & Immigration Servs.*, No. CV-05-0364-LRS, 2007 WL 2303328 (E.D. Wa. Aug. 7, 2007) (naturalization denial upheld after applicant lied about arrest for smuggling); *Camara v. Chertoff*, No. C-06-7552 EMC, 2008 WL 80933 (N.D. Cal. Jan. 7, 2008) (naturalization denial upheld where petitioner did not enter the U.S. lawfully as an unmarried child); *Seijas v. Zannoti*, No. Civ. 07-5191 SRC, 2008 WL 413739 (D.N.J. Feb. 11, 2008) (naturalization denied due to false testimony about whether he had committed a crime for which he had not been arrested due to a seventeen-year-old drug indictment); *Scott v. Collett*, No. ELH-13-02022, 2014 WL 3725086 (D. Md. July 23, 2014) (false testimony found where failed to disclose charges of operation vehicle with suspended license made when applying for adjustment of status); *Grunbaum v. U.S. Citizenship & Immigration Servs.*, No. 10-10147, 2012 WL 2359966 (E.D. Mi., May 21, 2012) (omitted failure to pay child and spousal support, naturalization denied and summary judgment granted to USCIS).

168. *Bernal v. Immigration & Naturalization Serv.*, 154 F.3d 1020, 1021 (9th Cir. 1998).

169. See *Green Card for Family Preference Immigrants*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/greencard/family-preference> [<https://perma.cc/ZLR9-WR2M>] for description of the Second preference category (F2A). This category allows for foreign nationals who are family members of U.S. citizens and lawful permanent residents to become lawful permanent residents where their spouse or child is unmarried and under the age of 21. *Id.*

170. No. 00 MISC 243(FB), 2001 WL 521706 (E.D.N.Y. May 11, 2001).

marriage to a U.S. Citizen. Further, since controlled substance offenses during the statutory period render one *per se* ineligible for naturalization under the statute, Mr. Chan's denials regarding related criminal activity may have prevented this inquiry.<sup>171</sup>

Even still, the court granted Mr. Chan's naturalization petition, finding that the "misrepresentations" were not made with intent to gain an immigration benefit, but rather were a result of a limited command of English and a lack of understanding of the American criminal system.<sup>172</sup> In this case, too, Mr. Chan's testimony had a direct relation to his eligibility to naturalize because his invalid marriage to a U.S. Citizen nullified his eligibility for permanent residence based on that marriage. Further, his drug-related arrests may have made him ineligible for naturalization during the statutory period if they were considered controlled substance offenses.<sup>173</sup>

In contrast, the appeals data set displays that the government has predominantly used false testimony allegations focusing on irrelevant and immaterial facts against populations they seek to exclude. Throughout the 1950s and 1960s, most false testimony cases unrelated to criminal history or underlying immigration status involve applicants from Eastern European nations, Italy, and China who were charged with providing false testimony about their Communist ties or adulterous relationships.<sup>174</sup> During this period, district courts thwarted the agency recommendations and awarded naturalization in almost every instance, but rarely commented on the possibility that biased adjudicators were enforcing naturalization laws unequally against certain populations.

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171. 8 C.F.R. § 316.10(b)(2)(iii), (iv) (1995). Note that Mr. Chan only omitted information about an arrest and indictment. According to the judicial opinion, he was never charged. Nevertheless, the statute related to controlled substance offences requires only a "violation of any law" not a "conviction."

172. *Chan*, 2001 WL 521706 at \*7.

173. 8 C.F.R. § 316.10(b)(2)(iii), (iv). See discussion *supra* notes 137, 172.

174. See, e.g., *Petition of K*, 174 F. Supp. 343 (D. Md. 1959) (where false testimony provided about whether applicant ever committed adultery, court denied petition stating that applicants shall not be "admitted to citizenship however illiterate, immoral or disloyal they may be"); *Klig v. United States*, 296 F.2d 343, 344 (2d Cir. 1961) (petition denied because petitioner was alleged to lie about attendance at Communist party meetings more than two decades earlier, rehearing granted); *In re Messina*, 207 F. Supp. 838 (E.D. Pa. Aug. 7, 1962) (court grants naturalization even where INS recommended denial on ground that petitioner willfully concealed committing adultery); *Berenyi v. Dist. Dir., Immigration & Naturalization Serv.*, 385 U.S. 630, 668 (1967) (naturalization denied where petitioner was accused of providing false testimony about Communist Party attendance); *In re Kwong Hai Chew*, 278 F. Supp. 44 (S.D.N.Y. 1967) (naturalization granted where applicant denied prior Community Party membership and U.S. government produces three witnesses to refute this denial).

For example, in *Klig*, the Second Circuit reversed the denial of Mr. Klig's application because of misstatements concerning attendance at Communist Party functions almost twenty-five years earlier. The court recognized that "these facts, so found, in and of themselves would not have disqualified appellant from citizenship."<sup>175</sup> The court granted Mr. Klig's naturalization application and declared "we do not require perfection in our new citizens."<sup>176</sup> But, the court did not comment on the discriminatory investigation of Mr. Klig's application in which the government brought in international investigators to describe the events he attended twenty years earlier. Though Justice Douglas's scathing dissenting opinion in *Berenyi* describes the speculative government evidence used to insert "ephemeral doubt" into the application, he does not mention the elephant in the room: Mr. Berenyi had perhaps only been subject to this scrutiny because of his alleged attendance at Communist Party meetings in medical school.<sup>177</sup>

From the 1970s through the 1990s, the false testimony allegation reared its head in a variety of contexts. A bulk of the reviewed cases involve false testimony related to underlying immigration status, criminal and arrest history, or other ongoing criminal investigations.<sup>178</sup> As described previously in Part II, these denials, both historically and presently, are also likely to disproportionately impact communities of color and others who are targets of aggressive policing, surveillance and discriminatory immigration enforcement.

Certain populations during this period, too, seem to be pretextually denied citizenship: an applicant from Hungary whose application was denied for providing false testimony about his sexuality,<sup>179</sup> an Italian applicant was denied naturalization where the INS "was apparently motivated in part by the firm and unprovable conviction that petitioner was connected with the Mafia,"<sup>180</sup> and British and Chinese applicants who faced allegations related to denied communist

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175. *Klig v. United States*, 296 F.2d 343, 344 (2d Cir. 1961).

176. *Id.* at 346.

177. *Berenyi*, 385 U.S. at 638–43.

178. See, e.g., *In re Yao Quinn Lee*, 480 F.2d 673 (2d Cir. 1973) (provided false testimony about whether he was living with his wife while seeking to naturalize under special three-year residency provisions applicable to those married to United States citizens); *Tan v. Immigration & Naturalization Serv.*, 931 F. Supp. 725 (D. Haw. 1996) (granting naturalization because of petitioner's distinguished professional record as an active-duty noncommissioned officer in United States Army despite false testimony about ten year scheme to immigrate his wife and son); *Bernal v. Immigration & Naturalization Serv.*, 154 F.3d 1020, 1021 (9th Cir. 1998) (upholding denial where false testimony regarding marriage in the Philippines when he immigrated to the U.S. as an unmarried son of LPR parents); *Plewa v. Immigration & Naturalization Serv.*, 77 F. Supp. 2d 905 (N.D. Ill. 1999) (finding applicant cannot be denied citizenship when she failed to disclose arrest because of erroneous advice of experienced immigration counselor).

179. *In re Kovacs*, 476 F.2d 842 (2d Cir. 1973).

180. *Tieri v. Immigration & Naturalization Serv.*, 457 F.2d 391, 392 (2d Cir. 1972).

affiliations.<sup>181</sup> As these examples show, applicants appearing in the appealed pool of denials seemed to carry a common thread of belonging in a suspect category, whether they were gay, Mafia-affiliated, or suspected Communists. In the same manner, as we move toward the turn of the century, the government uniquely singled out applicants from Muslim nations for false testimony denials based on statements that did not otherwise impact their citizenship eligibility. This pattern continued into the 2000s and was systematized with CARRP and, more recently, administrative directives calling for extreme vetting of with a focus on decades-old travel histories, employment records, and social media handles.<sup>182</sup>

Laws leaving immense discretion and judgment in the hands of a single public officer created avenues for discrimination and unequal enforcement at many points in our history. In the foundational *Yick Wo v. Hopkins*, the Supreme Court considered whether San Francisco's application of an ordinance prohibiting unpermitted laundry facilities in wooden buildings violated the Equal Protection Clause.<sup>183</sup> At the time, 95 percent of San Francisco's laundry facilities were in wooden buildings and Chinese immigrants operated 75 percent of those facilities. When operators began applying for permits, the Board of Supervisors denied all petitions from Chinese owners, while granting all but one from non-Chinese owners.<sup>184</sup>

In considering whether a race-neutral law administered in a prejudicial manner violates equal protection, the Court cited *City of Baltimore v. Radecke*,<sup>185</sup> which viewed with concern a similar ordinance enforced at officer discretion:

[The ordinance] commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam-engine in the prosecution of any business in the city of Baltimore to cease to do so, and, by providing compulsory fines for every day's disobedience of such notice and order of removal, renders his power of the use of steam in that city practically absolute, so that he may prohibit its use altogether. *But if he should not choose to do this, but only to act in particular cases, there is nothing in the ordinance to guide or control his action.* It lays down no rules by which its impartial execution can be secured, or partiality and oppression prevented. It is clear that giving and enforcing these notices may, and quite likely will, bring ruin to the

181. *In re Duncan*, 713 F.2d 538 (9th Cir. 1983); *In re Kowng Hai Chew*, 278 F. Supp. 44 (S.D.N.Y. 1967).

182. See Michael D. Shear, *Trump Administration Orders Tougher Screening of Visa Applications*, N.Y. TIMES (March 23, 2017), <https://www.nytimes.com/2017/03/23/us/politics/visa-extreme-vetting-rex-tillerson.html> [<https://perma.cc/A9UF-7AGU>].

183. *Yick Wo v. Hopkins*, 118 U.S. 356, 357 (1886).

184. *Id.* at 359.

185. 49 Md. 217 (1878).

business of those against who they are directed, while others, from whom they are withheld, may actually be benefited by what is thus done to their neighbors; and, when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment, and difficult to be detected and exposed, it becomes unnecessary to suggest or comment upon the injustice capable of being wrought under cover of such a power . . . .<sup>186</sup>

Finding the San Francisco ordinance arbitrarily deprived the plaintiffs of their property interest in earning a living, the *Yick Wo* Court concluded the ordinance violated the Fourteenth Amendment's Equal Protection Clause.<sup>187</sup> Though "fair on its face," the ordinance was "applied and administered by public authority with an evil eye and an unequal hand" against Chinese immigrants.<sup>188</sup> The case was the first to rule that a law that is neutral on its face, but prejudicial as administered is in violation of the Equal Protection Clause.

Like the permit adjudicator in *City of Baltimore* and the prosecutor in *Yick Wo*, naturalization decisions lie at the will of a single officer. This vast discretion and resulting discrimination is a stark reminder of the necessity of constitutional checks when the government misuses its plenary powers to regulate the nation's borders in a discriminatory manner in the name of economic, moral, racial, or national security. Though a robust judicial appeals process could protect against unbridled discretion, the appeals studied in this Article show that individual courts reviewing naturalization have not yet captured or corrected large-scale discrimination. Given the limited cases that make it up to judicial review, courts are not in the best position to observe these broader patterns outside the context of multi-party suits. Still, they remain the only check on administrative action to ensure cases are adjudicated correctly and fairly.

Suits that have directly challenged the CARRP program have surfaced how the policy discriminates based on national origin, is motivated by racial animus, and has a disparate impact on people of color. As seen in the naturalization appeals process more generally, federal litigation challenging the CARRP program is quickly resolved out of court as long delayed applications are suddenly adjudicated by USCIS after suit is filed, leading district courts to dismiss constitutional challenges as moot.<sup>189</sup> In the single lawsuit challenging CARRP to survive

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186. *Id.* at 372–73 (emphasis added).

187. U.S. CONST. amend. XIV, § 1.

188. *Id.* at 373–74. For an in-depth discussion of constitutional protections granted to noncitizens, see Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U.L. REV. 801 (2013).

189. See, e.g., Judgment of Dismissal, *Arapi v. U.S. Citizenship & Immigration Servs.*, No. 4:16-CV-00692-JAR (E.D. Mo. Oct. 17, 2019); Order Dismissing Case, *Muhanna v. U.S. Citizenship &*



dismissal, *Wagafe v. Trump*,<sup>190</sup> the District Court found the equal protection claims alleging the discriminatory application of CARRP sufficient to survive a motion to dismiss and reiterated that “naturalization applicants have a property interest in seeing their naturalization claims adjudicated lawfully.”<sup>191</sup> The *Wagafe* plaintiffs alleged that they had met all the statutory requirements to naturalize, and that the CARRP practice of pretextually denying applications attached extra-statutory requirements that deprived plaintiffs of their due process rights; the District Court found this argument sufficient to survive the motion to dismiss.<sup>192</sup>

### B. Requiring Intent: Holding USCIS to the Statutory Intent Requirement

While courts have been reluctant to cite the underlying agency’s discriminatory practices to overturn naturalization denials, they have been more likely to overturn these denials when the government does not prove that the applicant made a false statement with the subjective intent of obtaining immigration benefits or when the statements do not meet the strict definition of what amounts to “testimony.” In *Kungys v. United States*,<sup>193</sup> the Supreme Court found that false testimony for purposes of denying a naturalization application is found where “even the most immaterial of lies” is made with the “subjective intent of obtaining immigration or naturalization benefits.”<sup>194</sup> In the case, Juozas Kungys applied for an immigrant visa in Stuttgart, Germany in 1947. He received a visa, came to the United States, and naturalized in 1954. Almost thirty years later, the United States filed a complaint pursuant to 8 U.S.C. § 1621(a) to denaturalize Mr. Kungys. The government claimed he had executed over 2000 Lithuanian civilians and lied about his date and place of birth, wartime occupation, and residence. The government thus argued he “illegally procured” citizenship because his false testimony demonstrated a lack of good moral character.<sup>195</sup> Examining the false testimony provision, the Supreme Court determined that:

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Immigration Servs., No. 14-CV-05995, 2016 WL 500550 (C.D. Cal. Feb. 9, 2016). See also Harleen Gambir, *Summary: Wagafe v. Trump, a Preview of ‘Extreme Vetting’ Litigation*, LAWFARE BLOG (Jan. 3, 2018, 9:00 AM), <https://www.lawfareblog.com/summary-wagafe-v-trump-preview-extreme-vetting-litigation> [<https://perma.cc/3NTR-DKZX>].

190. No. 17-CV-0094-RAJ, 2017 WL 2671254 (W.D. Wash. June 21, 2017).

191. *Id.* at \*8.

192. *Id.* Note the court found that plaintiffs impacted by CARRP who were seeking to adjust status did not have a protected property interest in adjustment, as adjustment of status is a discretionary decision in the hands of the Attorney General. *Id.* at \*9.

193. 485 U.S. 759 (1988).

194. *Id.* at 780.

195. *Id.* at 764–65, 780.

On its face, § 1101(f)(6) does not distinguish between material and immaterial misrepresentations. Literally read, it denominates a person to be of bad moral character on account of having given false testimony if he has told even the most immaterial of lies with the *subjective intent* of obtaining immigration or naturalization benefits . . . [I]t means precisely what it says.<sup>196</sup>

In addition to highlighting the subjective intent requirement, the Court observed that “testimony” is limited to “oral statements made under oath,” not including “other types of misrepresentations or concealments, such as falsified documents or statements not made under oath.”<sup>197</sup> These two limitations gave the Court confidence that reading the statute literally would not produce “draconian results” where individuals would be denied citizenship because of misunderstandings, mistakes, or misinterpretations.<sup>198</sup> The Court was unpersuaded by the United States’ argument that “Kungys’ so-called pattern of lies” in and of themselves reflected a subjective intent to obtain immigration benefits and remanded the case to determine whether Mr. Kungys gave false testimony within the meaning of Section 1101(f)(6).<sup>199</sup>

Though *Kungys* involved citizenship revocation, courts reviewing citizenship denials have used the *Kungys* test to determine whether an applicant gave alleged false testimony with the required subjective intent. In *Chan*, where the petitioner omitted a valid marriage in Singapore and drug-related arrests, the district court concluded Mr. Chan’s mistakes were not misrepresentations aimed to deceive the government, but rather resulted from Mr. Chan’s “confusion, misunderstandings, limited command of English, and lack of a full appreciation of the factors that would constitute and render impregnable his arrest under the American legal system.”<sup>200</sup>

Unfortunately for groups the U.S. government has sought to exclude, the specific intent requirement has not avoided “the draconian results” the Supreme Court sought to avoid in *Kungys*. The administrative record presented during the appellate stage often has little mention of USCIS’s requisite intent findings at the administrative denial stage. Some courts have upheld these denials with little to no discussion or fact finding about requisite intent.<sup>201</sup> Though courts have rarely

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196. *Id.* at 779–80 (emphasis added).

197. *Id.* at 780.

198. *Id.* at 780.

199. *Id.* at 782.

200. *Chan v. Immigration & Naturalization Serv.*, No. 00 MISC 243(FB), 2001 WL 521706, at \*7 (E.D.N.Y. May 11, 2001).

201. See, e.g., *Hussain v. Chertoff*, 486 F. Supp. 2d 196 (D. Mass. 2007) (USCIS denies naturalization after prolonged adjudicative delay due to a single prior sixteen-year-old charge for writing a bad

called out discriminatory patterns, they have in some cases overturned denials when they found the applicant did not have the required subjective intent to deceive.<sup>202</sup> This suggests the intent requirement may be a one counter against discriminatory naturalization denials. Where an applicant can display their intent to tell the truth by being forthcoming, explicit in how they understand the parameters of the questions they are being asked, and follow-up with USCIS where they remember new information not previously revealed they strengthen defenses against any future allegations of malintent.<sup>203</sup>

### 1. Inferring Intent

It appears that, contrary to clear statutory<sup>204</sup> and judicial mandates,<sup>205</sup> the administrative record presented by appellate courts indicate that USCIS often overlooks intent when examining false testimony. The CARRP training materials do not mention intent when instructing adjudicators to deny cases with inconsistencies. In defending denials, the U.S. government has circularly furthered that a misrepresentation in and of itself proves intent to deceive.<sup>206</sup> While a misrepresentation itself is offered as proof of intent, the U.S. government has further argued that quantity may matter as well, arguing that multiple misrepresentations can be evidence of mal intent.<sup>207</sup> Rejecting this argument, the

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check; no discussion of intent); Keaik v. Dedvukay, 557 F. Supp. 2d 820 (E.D. Mich. 2008) (USCIS denied because applicant failed to reveal speeding offenses, no specific discussion of how intent was found) Hayek v. Chertoff, No. 07 CV 1957, 2008 WL 11380197 (N.D. Ohio, Aug. 4, 2008) (Lebanese physician denied naturalization where misstatements about travel, addresses and organizational association led to denial under false testimony and physical presence requirements, though discussion of case law relating to intent no reasoning of how and why Hayek had a subjective intent to deceive); Fatayer v. Swacina, 2:07-cv-00527, 2008 WL 4279688 (M.D. Fla. Aug 23, 2007) (omits dismissed case related to fraudulent checks so naturalization is denied on false testimony grounds, no discussion of intent to obtain immigration fraud, dismissed on jurisdictional grounds).

202. See, e.g., Hamdi v. U.S. Citizenship & Immigration Servs., No. EDCV 10-894 VAP, 2012 WL 632397 (C.D. Cal. Feb. 25, 2012) (court finds that alleged misrepresentations about organizational affiliations, residences, and minor dates were not made with the requisite intent to rise to false testimony); Hajro v. Barrett, No. C 10-01772 MEJ, 2011 WL 2118602 (N.D. Cal. May 27, 2011) (court finds it a triable issue of fact whether petitioner failed to disclose organizational and military associations in order to gain immigration benefit, dismissing government's motion for summary judgment).

203. For a comprehensive discussion of practitioner tips where representing applicants who may be subject to CARRP, see TRAVERSO & PASQUERELLA, *supra* note 101.

204. 8 U.S.C. § 1101(f)(6); 8 C.F.R. § 316.10(b)(2)(vi) (1995).

205. See *Kungys v. United States*, 485 U.S. 759 (1988); 8 U.S.C. § 1101(f)(6).

206. *Id.*

207. *Moore v. Thompson*, No. 09-1747 (RBK/KMW), 2010 WL 398633, at \*6 (D. N.J. 2010) (discussing how the U.S. government relied on *Golding v. Department of Homeland Security*, No.

District Court of New Jersey stated: “Respondents’ logic, if followed, would mean that all misrepresentations are per se evidence of an intent to achieve benefits.”<sup>208</sup>

In reviewing naturalization denials, however, courts have frequently followed the government’s logic, inferring intent when an applicant misstated or omitted a fact. For example, in *Gedi v. Gonzalez*, petitioner Abdullah Mohamed Gedi omitted a single, 1994 trip to Kenya from his N-400’s travel history section.<sup>209</sup> Despite receiving the opportunity to correct this information in 2000 before verifying under oath that its contents were true, Mr. Gedi did not do so.<sup>210</sup> Without offering any proof, the government maintained that Mr. Gedi omitted his trip to Kenya to improve his citizenship prospects. They argued that the misrepresentation prevented the examiner from exploring whether Mr. Gedi abandoned his permanent residence as a result of his prolonged absence from the United States.<sup>211</sup> Consequently, they argued, he “directly benefitted” from his misrepresentation because “he improved his prospects by not having to undergo extensive questioning about his prolonged absence from the country.”<sup>212</sup> The court found that the misrepresentation at least raised a question about Mr. Gedi’s intent that would be best assessed at a hearing.<sup>213</sup>

In *Gedi*, the government’s only evidence of Mr. Gedi’s subjective intent to gain an immigration benefit was the contrived notion that the information *may* have led to questioning that *may* have led to a determination that Mr. Gedi had abandoned his green card. The court accepted that the “potential benefit” of avoiding this conversation alone could evidence a subjective intent to gain immigration benefit even though Mr. Gedi maintained that the omission was simply an “isolated oversight.”<sup>214</sup>

In another case, *Usude v. Luna*, Nigerian native Christopher Usude neglected to mention a child for which he had not provided paternity payments. The court found, “[p]etitioner . . . had reason to lie about his paternity . . . to prevent inquiry

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05-21095, 2009 WL 2222779, at \*13 (S.D. Fla. July 27, 2009), to support the proposition that multiple misrepresentations show a subject intent.)

208. *Id.*

209. *Gedi v. Gonzalez*, No. 1:07-CV-2507-RWS, 2009 WL 2515627, at \*1 (D. N.D. Ga. 2009).

210. *Id.*

211. *Id.* at \*4.

212. *Id.*

213. *Id.* In *Maina v. Lynch*, the court stated, “[a]s a general rule, [i]t is rarely appropriate on summary judgment for a district court to make a finding on state of mind.” *Maina v. Lynch*, No. 1:15-cv-00113-RLY-DML, 2016 WL 3476365, at \*6 (S.D. Ind. June 27, 2016) (citing *McGreal v. Ostrov*, 368 F.3d 657, 677 (7th Cir. 2004)). It also cautioned, “courts should be careful . . . not to grant summary judgment if there is an issue of material fact that is genuinely contestable, which an issue of intent often though not always will be.” *Id.* (citing *Wallace v. SMC Pneumatics*, 103 F.3d 1394, 1396 (7th Cir. 1997)).

214. *Gedi*, 2009 WL 2515627, at \*4.

into Petitioner's failure to financially support" his child, making it "more likely than not that Petitioner lied about his paternity in order to obtain an immigration benefit."<sup>215</sup>

Similarly, a Louisiana district court upheld Mohamed Saleh's naturalization denial because he did not disclose his detention at JFK airport in response to the question "[h]ave [you] ever been arrested, cited, or detained by any law enforcement officer (including INS and military officers) for any reason?"<sup>216</sup> Mr. Saleh testified that he did not consider himself detained at the airport because he felt free to leave. The district court found he lacked credibility for three reasons: (1) He "show[ed] a history of mendacity when interacting with law enforcement[.]" (2) had a "chronic inability to recall past events with clarity," and (3) gave testimony that directly contradicted that of the adjudicating officer.<sup>217</sup>

In direct contrast to the guidance laid out by *Kungys*, the court stated it would have been more inclined to find Mr. Saleh did not act with requisite intent had the testimony in question been immaterial.<sup>218</sup> Citing the *Kungys* dissent, the district court noted, "when false testimony forecloses a line of questioning into the applicant's past that could influence . . . his eligibility for naturalization, the most logical conclusion is that the statement was made for the purpose of obtaining immigration benefits."<sup>219</sup> The court found Mr. Saleh offered no credible reason for failing to disclose his detention so the "repeated non-truths, non-disclosures, and convenient lapses of memory fully support the Government's argument."<sup>220</sup>

Assuming intent based simply on the fact that a misstatement or omission exists is problematic because naturalization application errors are exceedingly common. In another naturalization denial involving false testimony, *Maina v. Lynch*, a USCIS officer stated, "it is common for an applicant to make 'a lot' of mistakes when filing out a Form N-400." In the case at issue, the plaintiff's application contained ten corrections, including an omitted arrest, two omitted trips outside the United States, and a new home address. The USCIS officer noted, "ten changes is not 'a lot,' but is actually 'about average.'"<sup>221</sup> The frequency of errors shows that any application may have mistakes that in some way prevent inquiry into a material fact relevant to some aspect of citizenship eligibility. By legitimizing arguments that assume intent if a misstatement exists or if the misstatement may have foreclosed a relevant line of inquiry, courts are essentially disregarding the

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215. *Usude v. Luna*, No. CV 15-00301-AB (SSx), 2018 WL 522250, at \*7 (C.D. Ca. Jan. 23, 2018).

216. *Saleh v. U.S. Dept. of Justice*, No. 12-425, 2013 WL 1288233, at \*2 (E.D. La. March 26, 2013).

217. *See id.* at \*6-7.

218. *Id.*

219. *Id.*

220. *Id.* at \*7.

221. *Maina v. Lynch*, No. 1:15-cv-00113-RLY-DML, 2016 WL 3476365, at \*2 (S.D. Ind. June 27, 2016).

intent requirement, which was crafted to prevent draconian naturalization denials based on commonplace errors.

## 2. Finding Other Explanations for Misstatements and Omissions

Not all federal courts assume that misstatements or omissions imply an intent to obtain benefits, some credit misunderstandings, innocent mistakes and confusion for the alleged false testimony in lieu of an intent to deceive.<sup>222</sup> The *Kungys* Court found that “willful misrepresentations made for other reasons, such

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222. See, e.g., *Poka v. Immigration & Naturalization Servs.*, No. Civ. A. 3:01CV1378, 2002 WL 31121382 (D. Conn. Sept. 19, 2002) (court accepted that applicant had misunderstood the word “arrested” when he denied two previous arrests due to his limited English proficiency and his misrepresentations were not made with intent to obtain an immigration benefit, case denied on other grounds); *St. Amanze v. Immigration & Naturalization Servs.*, No. Civ. A. 02-502T, 2003 WL 22061870 (D.R.I. Mar. 28, 2003) (discussion about whether Nigerian petitioner may have understood questions about past immigration violations); *Zaher Abu Saad v. Barrows*, No. Civ. A. 3:03-CV-1342G, 2004 WL 1359165 (N.D. Tex. June 16, 2004) (finding misstatements about marital status to be “innocent mistakes,” court looks towards lack of criminal history, employment records, remanded to exhaust administrative remedies); *United States v. Hovsepian*, 422 F.3d 883, 888 (9th Cir. 2005) (looks to vagueness of question where applicant describes organizational affiliation as a youth group instead of a political party, court finds “no intent to deceive,” and applicants have GMC); *Edem-Effiong v. Acosta*, No. Civ. A. H-04-2025, 2006 WL 626406 (S.D. Tex. Mar. 13, 2006) (assessing whether question about applicant’s children was vague where applicant failed to mention out-of-wedlock child); *Naserallah v. U.S. Citizenship & Immigration Servs.*, No. 1:05 CV 1022, 2006 WL 991073 (N.D. Ohio Apr. 13, 2006) (where applicant concealed a crime, court looked to see if applicant was aware that the crime would not have precluded naturalization); *Ajuz v. Mukasey*, No. 07-MC-0185, 2009 WL 902369 (E.D. Pa. Apr. 2, 2009) (overturning USCIS finding precluding GMC where applicant allegedly concealed his marriage, where he adjusted status as an unmarried son, court found it was an innocent mistake and considered that applicant provided date of marriage and wife’s name elsewhere in the application); *Nesari v. Taylor*, 806 F. Supp. 2d 848, 864–65 (E.D. Va. 2011) (naturalization denied on other grounds but court recognizes that “questions that Nesari was asked concerned specific details of events that took place in 1996, almost 13 years before his July 8, 2009 naturalization interview” and so it was “entirely possible that Nesari was simply confused and inadvertently mixed up dates . . . . After all, it would be the rare person indeed who is able to recall with perfect clarity what happened to them over a decade ago,” and so the court refrained from making a judgment as to whether these statements amounted to false testimony.); *Hamdi v. U.S. Citizenship & Immigration Servs.*, No. EDCV 10-894 VAP, 2012 WL 632397 (C.D. Cal. Feb. 25, 2012) (court finds that alleged misrepresentations about organizational affiliations, residences, and minor dates were not made with the requisite intent to rise to false testimony); *Hajro v. Barrett*, No. C 10-01772 MEJ, 2011 WL 2118602 (N.D. Cal. May 27, 2011) (court finds it a triable issue of fact whether petitioner failed to disclose organizational and military associations in order to gain immigration benefit, dismissing government’s motion for summary judgment); *Abusamhadaneh v. Taylor*, 873 F. Supp. 2d 682 (E.D. Va. 2012) (the court finding petitioner’s omissions about religious organizational memberships reasonable based on confusion and his understanding of attorney’s advice and not made with the intent to deceive).

as embarrassment, fear, or a desire for privacy, [are] not deemed sufficiently culpable to brand the applicant as someone who lacks good moral character.”<sup>223</sup>

When naturalization appeals cases survive summary judgment and proceed to a hearing on intent, some courts explore factors like language skills, the clarity of the question asked and cultural context that may have led to misstatements or omissions.<sup>224</sup> For example, when Chioma Ihejirika, a Nigerian national, applied for citizenship, she checked “no” where the N-400 application asked if she had ever given false or misleading information to a government official.<sup>225</sup> In her application for adjustment of status six years earlier, though, she admitted to entering on a passport that was not her own. The government initially denied her naturalization application because she “conceal[ed] her use of another’s passport to gain entry into the United States in order to secure a favorable decision regarding [petitioner’s] application for naturalization.”<sup>226</sup> On appeal, Ms. Ihejirika claimed she forgot how she entered, thought she was forgiven for the past fraudulent entry, and did not completely understand the question.<sup>227</sup> Finding her credible, the court found that any discrepancies between her answers were “consistent with her limited command of English, her nervous inexperience with the naturalization process, and her lack of understanding of the scope of the questions being asked.”<sup>228</sup>

Courts have also looked towards the vagueness of the question asked when determining whether omissions or misstatements were warranted. This has been especially helpful in cases where applicants have omitted answers to broad questions about organizational associations or may not know what constitutes an

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223. *Kungys v. United States*, 485 U.S. 759, 780 (1988).

224. See, e.g., *Poka v. Immigration & Naturalization Servs.*, No. Civ. A. 3:01CV1378, 2002 WL 31121382 (D. Conn. Sept. 19, 2002) (court accepted that applicant had misunderstood the word “arrested” when he denied two previous arrests due to his limited English proficiency, case denied on other grounds); *St. Amanze*, 2003 WL 22061870 (discussion about whether *pro se* Nigerian petitioner may have understood questions about past immigration violations); *Hovsepian*, 422 F.3d 883 (looks to vagueness of question where applicant describes organizational affiliation as a youth group instead of a political party, GMC found); *Ajuz v. Mukasey*, No. 07-MC-0185, 2009 WL 902369 (E.D. Pa. Apr. 2, 2009) (overturning USCIS finding precluding GMC where applicant allegedly concealed his marriage, where he adjusted as an unmarried son, court found it was an innocent mistake and considered that applicant provided date of marriage and wife’s name elsewhere in the application); *Bankole v. Holder*, No. 6:14-cv-01104-EFM-JPO, 2104 WL 3734209 (D. Kan. July 29, 2014) (USCIS denies naturalization where applicant fails to reveal a traffic citation, court finds no requisite intent and grants the application partially due to the fact that USCIS instructions guide applicants not to submit information about traffic incidents unrelated to drugs or alcohol).

225. *Ihejirika v. Klapakis*, No. 10-3190, 2011 WL 4499301, at \*1 (E.D. Pa. Sept. 29, 2011).

226. *Id.* at \*2 (internal quotations omitted).

227. *Id.*

228. *Id.* at \*4.

“arrest or “violation.”<sup>229</sup> In *U.S. v. Hovsepian*, the court conceded that a question which asked “Have you at any time, anywhere, ever ordered, incited, assisted or otherwise participated in the persecution of any person because of race, religion, or national origin, or political opinion?” was “susceptible to many interpretations” and that a negative answer was warranted because of the applicants’ “reasonable interpretation of the terms used in the question . . . .”<sup>230</sup>

Courts have additionally looked to whether an attorney counseled an applicant to answer in a certain manner,<sup>231</sup> or whether the applicant was even aware that the omission or misstatement may or may not preclude naturalization.<sup>232</sup>

This body of cases displays that factors such as language ability and cultural context may influence courts’ intent inquiry. This inquiry can function as a crucial check on the administrative agency’s assumption of requisite intent when they find misrepresentations or omissions.

### 3. Using External Factors to Deduce Intent

Courts also turn to external factors to determine whether an applicant gave false testimony.<sup>233</sup> In *Saleh*, the court’s inquiry into Mr. Saleh’s credibility expanded beyond the false testimony in question. The court considered his “mendacity when interacting with law enforcement” and the fact that he had “not

229. See, e.g., *Hovsepian*, 422 F.3d 883 (looks to vagueness of question where applicant describes organizational affiliation as a youth group instead of a political party, court finds “no intent to deceive,” and applicants have GMC); *Edem-Effiong v. Acosta*, No. Civ. A. H-04-2025, 2006 WL 626406 (S.D. Tex. Mar. 13, 2006) (assessing whether question about applicant’s children was vague where applicant failed to mention out-of-wedlock child, finding a question requesting applicant to list “all” children is not vague).

230. *Hovsepian*, 422 F.3d at 888.

231. *Abusamhadaneh v. Taylor*, 873 F. Supp. 2d 682 (E.D. Va. 2012) (the court finding petitioner’s omissions about religious organizational memberships reasonable based on confusion and his understanding of attorney’s advice and not made with the intent to deceive, applicant understand attorney advice to say he had a right to not list religious organizations).

232. *Naserallah v. U.S. Citizenship & Immigration Servs.*, No. 1:05 CV 1022, 2006 WL 991073 (N.D. Ohio Apr. 13, 2006) (where applicant concealed a crime, court looked to see if applicant was aware that the crime would not have precluded naturalization).

233. See, e.g., *El-Ali v. Carroll*, 83 F.3d 414 (4th Cir. 1996) (USCIS denied naturalization in part because El-Ali failed to report income from a single employment site, court remands because questions about his “willfulness”); *Zaher Abu Saad v. Barrows*, No. Civ. A. 3:03-CV-1342G, 2004 WL 1359165 (N.D. Tex. June 16, 2004) (finding misstatements about marital status to be “innocent mistakes,” court looks towards lack of criminal history, employment records, remanded to exhaust administrative remedies); *Petition of Kostas*, 169 F. Supp. 77, 79 (D. Del. 1958) (though naturalization was denied where false testimony related to length of cohabitation with U.S. citizen wife, the court looked toward other “ameliorating factors,” citing that petitioner led “quiet, peaceful and hardworking existence,” had no criminal record, “bears a good reputation,” and advised applicant to have a “more candid attitude” in the future).



registered for the Selective Service and repeatedly denied knowledge of the obligation to do so” even though the record reflected that he was previously aware of this obligation.<sup>234</sup> With this discussion, the court expanded the inquiry into Mr. Saleh’s false testimony by drawing on other aspects of Ms. Saleh’s life. Essentially, the court assumed his history with law enforcement and lies about selective service meant he intentionally lied to benefit his naturalization process.<sup>235</sup>

By analyzing aspects of an applicant’s life that are irrelevant to naturalization eligibility to assess credibility, courts subject applicants to additional eligibility screening not provided for in the statute, thwarting lawmaking that is clearly within the purview of Congress about one of the most central tenets of American life, citizenship itself.<sup>236</sup>

### CONCLUSION

It bears repeating that “American citizenship is a right no less precious than life or liberty, indeed of one which today comprehends those rights and almost all others.”<sup>237</sup> The elevated status of citizenship gives those who attain it privileged access to our nation’s political, social, and economic systems that, in theory, should render them indistinguishable from citizens *jus soli*.

Noncitizens, however, remain an explicit other class, left without many constitutional protections. They are denied access to the political, social, and economic systems of the nation where they reside, work, and invest. If citizenship is moored with stability, the constant prospect of insecurity and displacement overshadows the noncitizen.

The United States citizenship rubric has always rested on a policy of exclusion. The United States has explicitly created residency requirements, literacy tests, racial prohibitions, and national quotas to tightly control the face of America’s future. This Article argues that the United States has used the false testimony provisions specifically and good moral character allegations generally as another means to exclude certain classes of aspiring Americans. While the most recent targets of this tool are disproportionately those who appear to be Muslim, this study also reflects how the United States government used this tool against perceived Communists, Eastern Europeans, and Irish and Italian immigrants in our

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234. *Id.* at \*6.

235. *Id.*

236. The court’s thinking here undoubtedly reflects the analysis an adjudicator may also employ when determining whether an applicant is lying: Is the applicant the type of person the adjudicator thinks may lie? This question adds another layer of bias to the discretionary inquiry.

237. *Klapprott v. United States*, 335 U.S. 601, 616 (1949).

recent past. The result? False testimony denials hide systematized and individual discrimination in naturalization adjudications, compounding the impacts of discriminatory immigration policies that have long disadvantaged immigrants of color.

Accountability and redress for this discrimination is grossly inadequate. The discriminatory application of naturalization eligibility criteria has gone largely unchecked because of wide adjudicator discretion, broad language governing good moral character, the limited use of judicial review, and the judiciary's general deference when the executive's plenary powers are at stake. Even when the judiciary has overturned individual cases, it has been nearly silent about the danger of a naturalization process governed by individual adjudicators with the statutory and discretionary tools to deny almost any application.

Citizenship is an expensive proposition, and when communities learn of possible denial and delay, individuals may not apply in the first place. If the United States denies an individual's application, it may seem easier to reapply after the relevant statutory period to avoid costly and time-consuming judicial review. Those who do seek judicial review may be subject to lengthy and intrusive discovery, questioning, and depositions, exposing themselves to even greater scrutiny than during the administrative application process.

The implications of naturalization policies that target and demonize certain classes of citizens are about more than citizenship denial. Discriminatory naturalization denial others minorities, chills constitutionally protected activity, and creates a flawed rubric for what constitutes American behavior.<sup>238</sup>

With the growing demonization of immigrant populations, the United States is employing increasingly aggressive enforcement policies to deny immigration benefits and deport immigrants in growing numbers using tactics that have long marred our history. In the midst of this instability, advocates encourage immigrants to naturalize as the ultimate protection against aggressive deportation policies. Nevertheless, citizenship—this once untouchable status—is no longer untouchable. Globally, citizenship revocation is a growing trend, another tool linked to the post-9/11 expansion of so-called security measures.<sup>239</sup>

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238. See generally PASQUERELLA, *supra* note 77.

239. See generally David J. Trimbach and Nicole Reiz, *Unmaking Citizens: The Expansion of Citizenship Revocation in Response to Terrorism*, CTR. MIGRATION STUD. (January 30, 2018), <http://cmsny.org/publications/unmaking-citizens> [https://perma.cc/QZ2N-UBZX] ("Citizenship revocation expansion is a growing and troubling trend that requires immediate attention, particularly from policymakers and human rights' advocates. While historical precedence exists for revocation, particularly in relation to fraud or treason, revocation is expanding in light of growing fears and threats of transnational terrorism."); Audrey Macklin, *Sticky Citizenship*, in *THE HUMAN RIGHT TO CITIZENSHIP: A SLIPPERY CONCEPT* (Rhode E.

In June 2018, USCIS announced new initiatives to identify and denaturalize those who procured citizenship fraudulently.<sup>240</sup> The United States has arrested and charged a growing number of citizens under a rarely used federal statute criminalizing the procurement of naturalization “contrary to law.”<sup>241</sup> A conviction under this statute leads to automatic naturalization revocation. Notably, allegations of misstatements and omissions during the naturalization process are also frequently used in the denaturalization context to allege that naturalization was acquired “contrary to law.”<sup>242</sup> As in the citizenship denial context, the facts at issue in revocation hearings often relate to events that took place decades prior, and applicants offered the allegedly false statements in response to vague and overbroad questions.<sup>243</sup>

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Howard-Hassman & Margaret Walton-Roberts eds., 2015); Diana Stancy Correll, *DOJ Moves to Rescind Naturalized US Citizenship of Chicago Man Who Provided Support to Terrorists*, WASH. EXAMINER (July 3, 2018), <https://www.washingtonexaminer.com/news/doj-moves-to-rescind-naturalized-us-citizenship-of-chicago-man-who-provided-support-to-terrorists> [https://perma.cc/R4SZ-RSPL] (“‘The [U.S.] will use every available law enforcement tool to combat terrorism,’ Acting Associate Attorney General Jesse Panuccio said in a statement . . . ‘Civil denaturalization is thus one important tool in our anti-terrorism efforts,’ he added.”).

240. Seth Freed Wessler, *Is Denaturalization the Next Front in the Trump Administration’s War on Immigration?*, N.Y. TIMES MAG. (Dec. 19, 2018), <https://www.nytimes.com/2018/12/19/magazine/naturalized-citizenship-immigration-trump.html> [https://perma.cc/AX6G-5Q3E] (outlining the rise in denaturalization cases since the end of the Obama Administration, when DHS planned to refer 120 cases to face federal charges, to the Trump Administration’s present desire to refer 1600 individuals to the Justice Department to revocation hearings). In this administration the agency has “referred 167 cases to the Justice Department for civil charges, nine of which have already led to denaturalization.” *Id.* As ICE expands the amount of files under review, the “total number of files under scrutiny” amounts “to more than one million.” *Id.* See also, Anna Giaritelli, *Homeland Security Will Strip Citizenship From Naturalized Americans Who Lied on Their Applications*, WASH. EXAMINER (June 13, 2018), <https://www.washingtonexaminer.com/news/homeland-security-will-strip-citizenship-from-naturalized-americans-who-lied-on-their-applications> [https://perma.cc/G98W-B8DJ] (noting that USCIS “has begun hiring dozens of lawyers and immigration officers to staff the forthcoming USCIS office in Los Angeles . . . to review and initiate the civil denaturalization process against individuals who had been ordered removed and intentionally used multiple identities in order to defraud the government and the American people to obtain citizenship”).

241. 18 U.S.C. § 1425(a).

242. *Maslenjak v. United States*, 137 S. Ct. 1918, 1923 (2017) (discussing revocation where applicant lied about husband’s service in Bosnian Serbian Army); see also Wessler, *supra* note 240 (describing the civil case against Shorab Hussain who is charged with intentionally misspelling his name, by one letter, to alter his identity and naturalize after he had a final order of removal issued against him). Additionally, Freed describes the case against Norma Borgona, a 64 year-old grandmother, where the Office of Immigration Litigation (OIL) claimed Borgona “should have alerted U.S.C.I.S.” to her role in an ongoing crime she plead guilty to four years after she naturalized, “even though it is plausible she may not have been aware, at that point, that she was participating in a crime.”

243. See Teo Armus, *Virginia Man Accused of Human Rights Abuses Charged With Lying on Citizenship Form*, WASH. POST (Aug. 18, 2018), <https://www.washingtonpost.com/local/public->

In *Maslenjak v. United States*,<sup>244</sup> the Supreme Court examined how false testimony could be used to denaturalize a citizen, holding that the false testimony must have “justified denying naturalization or would predictably have led to other facts warranting that result.”<sup>245</sup> In *Maslenjak*, the petitioner had lied about her husband’s service in the Bosnian Serbian Army during the Bosnian Civil War. The Court questioned whether this fact, even if properly revealed, would have prevented Ms. Maslenjak’s naturalization.<sup>246</sup> The Court required a causal relationship between the false testimony and the procurement of citizenship, reigning in potentially unbridled prosecutorial discretion.<sup>247</sup> Still, criminal prosecutions of illegal procurement of naturalization are on the rise, vulnerable to the same discriminatory bias in investigation and prosecution as naturalization denials.<sup>248</sup>

Using inconsistencies, omissions, and immaterial misstatements to deny or revoke immigration benefits impacts immigrants at every stage of the process—from entry visa procurement to attaining legal permanent residence to gaining and keeping naturalized status. Whether at a consular interview in their home country, before a Border Patrol agent at a point of entry, or with a USCIS adjudicator at an adjustment interview, U.S. officials question and investigate at their personal discretion. The more one is questioned at these stages, the more likely she is to omit or misstate information. Any finding of willful misrepresentation or doubts about an applicant’s credibility may result in a denial.

Whether looking at the earliest stages of an immigrant’s admission, adjustment to permanent residence, or naturalization, an aspiring American’s fate rests in an administrative review process governed by personal discretion vulnerable to racial animus. While federal courts can review naturalization denials in limited instances, there is no judicial review for those denied visas and only

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safety/virginia-man-accused-of-human-rights-abuses-charged-with-lying-on-citizenship-form/2018/08/18/54094660-a2f1-11e8-83d2-70203b8d7b44\_story.html?utm\_term=.fd73d3c6a572 [https://perma.cc/XA2F-7KWX] (“Prosecutors said that Negussie failed to disclose that he had committed a crime or offense for which he had never been arrested, another question on the application for citizenship. He also allegedly lied about having never provided false or misleading information to immigration officials while gaining entry to and benefits in the United States.”).

244. 137 S. Ct. 1918 (2017).

245. *Id.* at 1923.

246. *Id.*

247. *Id.* at 1926–27. In the naturalization denial context, applicants remain unprotected by the *Maslenjak* limitations as even immaterial omissions can lead to citizenship denial.

248. See Wessler, *supra* note 240 (“From 2004 to 2016, denaturalization cases filed by the [Office of Immigration Litigation] and by United States attorneys have averaged 46 each year. In each of the last two years, prosecutors filed nearly twice that many cases.”).

limited redress for those denied permanent residence status. For many, citizenship is foreclosed because of bias-laden policies and discretionary decisions long before they even reach naturalization's gates. And unfortunately, even in the naturalization review process, judicial checks on unbridled administrative authority are often too sparse to identify and correct adjudicator bias. When courts do correct discriminatory behavior, it will come far too late for many aspiring Americans because our country's face will have already been carefully shaped to exclude them and their future generations.