

The Denaturalization Consequences of Guilty Pleas

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ABSTRACT. The Obama and Trump Administrations have engaged in a systematic effort to revoke the citizenship of foreign-born U.S. citizens. The denaturalization program has targeted naturalized citizens who allegedly committed a crime before obtaining citizenship but were arrested for that crime post naturalization. The federal government is pursuing denaturalization on the basis that these citizens committed fraud during the naturalization process by failing to disclose their criminal conduct. This Essay presents a novel legal theory to protect the Sixth Amendment and due-process rights of those facing denaturalization on this basis. Under the Supreme Court’s groundbreaking decision in *Padilla v. Kentucky*, criminal-defense counsel have a duty to advise noncitizen clients of the deportation consequences of pleading guilty. This Essay argues that, under *Padilla’s* reasoning, criminal-defense counsel and judges must also advise defendants who are naturalized citizens of the potential denaturalization consequences of pleading guilty.

INTRODUCTION

Over the past few years, the federal government has significantly increased its capacity to systematically strip naturalized U.S. citizens of their citizenship. Throughout this country’s history, courts have slowed or halted efforts to take away the citizenship of Americans on a broad scale. The Supreme Court has emphasized that “[g]reat tolerance and caution are necessary” when deciding to strip one’s citizenship, given its severe consequences and its potential use as a political tool.¹ That is why the citizenship-stripping process, known as denaturalization, had been used sparingly over the last several decades, until recently.

1. *Knauer v. United States*, 328 U.S. 654, 658 (1946); *see also Schneiderman v. United States*, 320 U.S. 118, 122 (1943) (noting that it is “difficult to exaggerate [the] value and importance [of citizenship]”).

The Obama Administration’s investigations into naturalized citizens’ files laid the groundwork for the Trump Administration’s pursuit of large-scale denaturalization. Despite the government’s best efforts to portray their denaturalization targets as the worst in our society,² denaturalization cases have often been brought against individuals who are alleged only to have committed some fraud on their naturalization application. These cases almost exclusively include people who have lived in the United States for decades and have significant roots and families in the country.³

The District of Massachusetts, in its opinion issuing a denaturalization order against Myrlene Charles, noted:

The Department of Justice is launching a new section for denaturalization cases, placing at the forefront cases of terrorists, war criminals, sex offenders, and also “other fraudsters” The spirit of the new section, as was expressed by Assistant Attorney General Jody Hunt, is to prosecute the most serious criminals **Is this such a case?** . . .

. . . .

. . . . Charles is a sixty-year-old woman who has lived half her life in the United States. She works as an accountant and, since she was naturalized fifteen years ago, has been a law-abiding American citizen. There is no contention to the contrary. Charles committed a low-level fraud. In a case such as this, to truly administer justice, the legal tools of statute of limitations and judicial discretion are most needed, yet absent.⁴

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2. The Department of Justice characterized its pursuit of denaturalization as “bring[ing] justice to terrorists, war criminals, sex offenders, and other fraudsters who illegally obtained naturalization.” Press Release, Office of Pub. Affairs, Dep’t of Justice, The Department of Justice Creates Section Dedicated to Denaturalization Cases (Feb. 26, 2020), <https://www.justice.gov/opa/pr/department-justice-creates-section-dedicated-denaturalization-cases> [https://perma.cc/6SD9-S9US].
 3. A report by the Open Society Justice Institute found that in denaturalization cases brought in 2017 and 2018, the length of time a person had been naturalized ranged between two and 24 years, with an average of 10 years. Open Soc’y Justice Initiative, *Unmaking Americans: Insecure Citizenship in the United States*, OPEN SOC’Y FOUND. 8 (2019), <https://www.justiceinitiative.org/uploads/e05c542e-odb4-40cc-a3ed-2d73abcf37f/unmaking-americans-insecure-citizenship-in-the-united-states-report-20190916.pdf> [https://perma.cc/K3GZ-QS87]. This does not include the number of years the individual has spent as a *noncitizen*. For example, “persons naturalizing spent a median of eight years in lawful permanent resident (LPR) status before becoming U.S. citizens” in 2017. John Teke, *U.S. Naturalizations: 2017, Annual Flow Report* 5, DEP’T OF HOMELAND SECURITY (2018), https://www.dhs.gov/sites/default/files/publications/Naturalizations_2017.pdf [https://perma.cc/E5HW-LCSE].
 4. *United States v. Charles*, No. 18-11535-WGY, 2020 WL 1951483, at *1, *13 (D. Mass. Apr. 22, 2020).

Numerous citizens like Myrlene Charles have faced or are under threat of facing denaturalization under this liberal interpretation of our denaturalization laws. Legal scholarship on the federal government's recent efforts to strip the citizenship of thousands of citizens has situated the denaturalization program within the Trump Administration's broader immigration agenda⁵ and raised concerns about the legality of pursuing civil denaturalization entirely.⁶ Instead of highlighting broad concerns with these denaturalization efforts, this Essay focuses on a common fact pattern among recent denaturalization cases and presents a novel legal argument to restrict denaturalization cases against citizens with criminal convictions. This Essay highlights denaturalization cases in which the defendant failed to disclose during the naturalization process the commission of a crime for which she was arrested, charged, and convicted after naturalizing. Those subject to denaturalization on this basis often plead guilty to a crime without knowing or understanding that their guilty plea may affect their U.S. citizenship. I argue that criminal-defense counsel must advise, and judges must warn, naturalized U.S.-citizen defendants of the potential denaturalization consequences of their guilty plea in accordance with the Supreme Court's holding in *Padilla v. Kentucky*.⁷

In Part I of this Essay, I provide a brief overview of the past efforts to denaturalize U.S. citizens, the recent emphasis on denaturalization, and the existing legal standard to pursue civil denaturalization. Part II focuses on recent denaturalization cases brought against citizens who were convicted of crimes and provides an illustrative example of a client's story. In Part III, I argue that one way to curtail the denaturalization efforts against those with criminal convictions is by requiring criminal-defense counsel to advise naturalized-citizen defendants of the denaturalization consequences of pleading guilty under the Sixth Amendment and judges to warn defendants of those consequences under the Due Process Clause.

5. See Amanda Frost, *Alienating Citizens*, 114 NW. U. L. REV. ONLINE 241, 244 (2019) (“[T]he Trump Administration’s approach to immigration generally . . . has embraced a policy known as ‘attrition through enforcement,’ under which immigration policies are designed to encourage immigrants to self-deport and discourage would-be immigrants from coming to the United States” and that “many of the Trump Administration’s policies target immigrants who are legally present in the United States.”).

6. See Cassandra Burke Robertson & Irina D. Manta, *(Un)Civil Denaturalization*, 94 N.Y.U. L. REV. 402, 406 (2019) (“[C]ivil denaturalization violates both the procedural and substantive due process guarantees of the Fourteenth Amendment and that it is fundamentally inconsistent with the democratic framework established by the United States Constitution.”).

7. 559 U.S. 356 (2010).

I. OVERVIEW OF DENATURALIZATION

A. History of Denaturalization

The Naturalization Act of 1906 established the practice of denaturalization in the United States “as a new instrument for deterring any fraud or illegality that might occur during the naturalization process.”⁸ Soon after its introduction, denaturalization started being used as a political tool as the U.S. government began targeting those new citizens who were later discovered to have “un-American” characteristics.⁹

The pace of denaturalization cases escalated during the World War II era as denaturalization became a central part of the government’s national security policy.¹⁰ It was during this crucial time that the Supreme Court intervened and began to reduce the scope of the federal government’s denaturalization authority. Starting in 1943 with *Schneiderman v. United States*, the Supreme Court issued a series of opinions that strengthened procedural protections for the rights of naturalized citizens.¹¹ These important interventions by the Court significantly curtailed the government’s denaturalization program at the time, yet they did not mark the end of denaturalization entirely.¹²

During the height of the Red Scare, there was another push for the denaturalization of American citizens who were allegedly sympathetic to communism. While the Supreme Court remained largely silent in denaturalization cases during the “hottest period of the anti-Communist campaign, between 1950 and 1955,” the Court decided to intervene on more narrow questions of interpretation of the naturalization statute during the late 1950s.¹³

8. PATRICK WEIL, *THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC* 4 (2012).

9. *Id.* at 55.

10. See Kritika Agarwal, *Stripping Naturalized Immigrants of Their Citizenship Isn’t New*, SMITHSONIAN MAG. (July 24, 2018), <https://www.smithsonianmag.com/history/stripping-naturalized-immigrants-their-citizenship-isnt-new-180969733> [<https://perma.cc/359X-R7TD>].

11. *Schneiderman v. United States*, 320 U.S. 118, 135 (1943) (establishing a higher burden of proof – that of “clear, unequivocal, and convincing” evidence – for denaturalization proceedings); see *Baumgartner v. United States*, 322 U.S. 665, 670 (1944) (affirming the burden of proof laid out in *Schneiderman*).

12. See *Knauer v. United States*, 328 U.S. 654, 669 (1946) (cancelling the citizenship of a German American member of the Bund who was an active pro-Hitler leader before his naturalization).

13. WEIL, *supra* note 8, at 138; see *Nowak v. United States*, 356 U.S. 660, 665-66 (1958) (holding that mere membership in the Communist Party does not prove, under the standard required in denaturalization cases, that the citizen had known of the party’s advocacy of forcible government overthrow and therefore was not attached to the principles of the Constitution);

The scope of the government's denaturalization power was also substantially reduced when the Supreme Court later intervened in cases involving the stripping of citizenship of native-born Americans by a process known as expatriation.¹⁴ In *Afroyim v. Rusk*, the Supreme Court declared that the government had no constitutional authority to revoke the citizenship of a native-born citizen without his consent.¹⁵ The Court left open the possibility of denaturalization based on fraud,¹⁶ but the decision effectively ended other avenues for denaturalization. Before *Afroyim*, between 1907 and 1967, there were around 22,000 denaturalizations.¹⁷ Following the decision, from 1968 to 2012, there were fewer than 150.¹⁸ During the 1930s, "as many as a thousand denaturalizations" occurred in some years, "but denaturalization [was] imposed on fewer than a half-dozen people per year" from 1968 to 2012.¹⁹ Therefore, the Court played a key role in substantially curtailing the federal government's attempts to conduct systemic denaturalization in the past.

Although the Supreme Court sharply restricted the practice of denaturalization, a nearly unanimous Court permitted—and continues to permit—naturalized citizens to lose their American citizenship. Specifically, the Court's decisions have left open the possibility of denaturalization based on fraud or misrepresentation committed during the naturalization process.²⁰ Until recently, the government deployed this justification for denaturalization rarely, with only a few

United States v. Minker, 350 U.S. 179, 190 (1956) (holding that immigration officers were not authorized to subpoena a person to obtain information for a denaturalization affidavit); United States v. Zucca, 351 U.S. 91, 100 (1956) (holding that denaturalization is invalid when the U.S. Attorney does not file an affidavit showing good cause); WEIL, *supra* note 8, at 139-42.

14. See *Vance v. Terrazas*, 444 U.S. 252, 270 (1980) (holding that expatriation requires both the voluntary performance of an expatriating act and performance of that act with the intention of renouncing one's nationality); *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967) (holding that expatriation without the citizen's consent is prohibited); *Trop v. Dulles*, 356 U.S. 86, 87, 93, 103-04 (1958) (invalidating a provision of the Nationality Act that provided for the involuntary expatriation of U.S. nationals convicted of desertion).
15. *Afroyim*, 387 U.S. at 268.
16. *Id.* at 267 n.23 ("Of course, as The Chief Justice said in his dissent naturalization unlawfully procured can be set aside." (citation omitted)).
17. See WEIL, *supra* note 8, at 179.
18. *Id.*
19. *Id.* at 179-80.
20. See *Fedorenko v. United States*, 449 U.S. 490, 505-07 (1981); see also Aram A. Gavoov & Daniel Miktus, *Snap: How the Moral Elasticity of the Denaturalization Statute Goes Too Far*, 23 WM. & MARY BILL RTS. J. 637, 654 (2015) ("In *Fedorenko v. United States*, the Court explicitly held that 'district courts lack equitable discretion to refrain from entering a judgment of denaturalization against a naturalized citizen whose citizenship was procured illegally or by willful misrepresentation of material facts.' Accordingly, obtaining citizenship illegally or by willful misrepresentation appears to be the only grounds upon which naturalization may constitutionally

dozen naturalized Americans having lost their citizenship because they committed fraud, many of whom for having camouflaged crimes against humanity prior to their immigration to the United States.

B. Legal Standard for Denaturalization

Under the Immigration and Nationality Act, U.S. Attorneys are authorized to initiate civil denaturalization proceedings against citizens whose certificate of naturalization was “illegally procured” or procured through “concealment of a material fact or by willful misrepresentation.”²¹ The government must show by “clear, unequivocal, and convincing” evidence that naturalization was obtained by illegal means, concealment of a material fact, or willful misrepresentation.²² If the government meets this burden, the court lacks equitable discretion to refrain from entering judgment against the citizen and therefore must enter an order revoking the naturalization order and cancelling the certificate of naturalization.²³

Regarding the illegal procurement prong, the Supreme Court has held that naturalization is illegally procured if “the congressionally imposed prerequisites to the acquisition of citizenship” were not fulfilled at the time citizenship was being acquired.²⁴ The Immigration and Nationality Act provides the procedures and requirements for the United States to confer citizenship to individuals not born in the United States via the naturalization process.²⁵ To successfully naturalize, an individual must satisfy various enumerated prerequisites.²⁶ For instance, the Act provides requirements that individuals applying for naturalization possess “good moral character,” be “attached to the principles” of the U.S. Constitution, and be “well disposed to the good order and happiness of the United States” from the five-year period before filing the application until the

be cancelled. Considering that ‘the bulk of denaturalization after 1909 . . . occurred out of a desire to expel . . . un-American citizens’ or those considered to be behaving in ‘un-American’ ways based on what they had done after naturalization, many denaturalization actions may actually have been carried out unconstitutionally.” (first quoting *Fedorenko*, 449 U.S. at 517 (1981); then quoting WEIL, *supra* note 8, at 52)).

21. See 8 U.S.C. § 1451(a) (2018); see also *Kungys v. United States*, 485 U.S. 759, 767 (1988) (holding that in a section 1451(a) denaturalization proceeding initiated because the individual misrepresented information during the naturalization process, he must have done so in a willful way and the information misrepresented must have been material).
22. *Fedorenko*, 449 U.S. at 505 (citing *Schneiderman v. United States*, 320 U.S. 118, 125 (1943)).
23. *Id.* at 517.
24. *Id.* at 506.
25. 8 U.S.C. §§ 1421-1459 (2018).
26. See *id.* §§ 1423, 1427(a)-(c); 8 C.F.R. § 316.2(a) (2020).

time of admission to citizenship.²⁷ The definition of good moral character is vague under the statute and regulations.²⁸ An individual can be found to lack good moral character if he or she is convicted of a crime involving moral turpitude,²⁹ has given false testimony for the purpose of obtaining immigration benefits,³⁰ or has committed unlawful acts that “adversely reflect upon the applicant’s moral character.”³¹ The statute also includes a “catch-all” provision which allows for a finding of lack of good moral character even if none of the enumerated categories apply.³² Naturalization may be revoked if any of the conditions for naturalization, including the requirement to show good moral character, are not completed or complied with.

The second prong under 8 U.S.C. § 1451(a) authorizes denaturalization against individuals who procure naturalization by concealing a material fact or by willful misrepresentation. Under this prong, a citizen can be denaturalized for providing any false or inconsistent information to the U.S. Citizenship and Immigration Services (USCIS) – not only during the naturalization application and interview, but also during any prior interactions with USCIS. This includes when applying for visas or lawful permanent residency that contributed to the eventual grant of citizenship. The Supreme Court limited the power to denaturalize under the second prong in *Kungys v. United States*, holding that four requirements must be met in order to denaturalize someone under this prong: (1) the naturalized citizen misrepresented or concealed some fact; (2) the misrepresentation or concealment was willful; (3) the fact was material, that is it had a

27. 8 U.S.C. § 1427(a), (d) (2018).

28. See 8 U.S.C. § 1101(f) (2018); 8 C.F.R. § 316.10 (2020).

29. See 8 U.S.C. §§ 1101(f)(3), 1182(a)(2)(A)(i)(I) (2018); 8 C.F.R. § 316.10(b)(2)(i) (2020). The term “crime involving moral turpitude” is not defined by statute. Courts and the Board of Immigration Appeals have defined the term “as comprising crimes that are ‘inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.’” See *Robles-Urrea v. Holder*, 678 F.3d 702, 708 (9th Cir. 2012) (quoting *In re Robles-Urrea*, 24 I. & N. Dec. 22, 25, 2006 WL 3337625 (B.I.A. 2006)); *Matter of Ortega-Lopez*, 26 I. & N. Dec. 99, 2013 WL 957625 (B.I.A. 2013). Courts therefore consider whether a criminal provision, on a case-by-case basis, is categorically a crime involving moral turpitude. To determine whether a criminal conviction amounts to a crime involving moral turpitude, it is the statute that defines the crime, rather than the act committed that is controlling. See *Rodriguez-Herrera v. Immigration & Naturalization Serv.*, 52 F.3d 238, 239-40 (9th Cir. 1995).

30. 8 U.S.C. § 1101(f)(6) (2018); 8 C.F.R. § 316.10(b)(2)(vi) (2020).

31. 8 C.F.R. § 316.10(b)(3)(iii) (2020).

32. 8 U.S.C. § 1101(f)(9) (2018) (“The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.”).

“natural tendency to influence” the decision to grant naturalization; and (4) the naturalized citizen procured citizenship as a result of the misrepresentation.³³

C. Recent Efforts of Large-Scale Denaturalization

Over the last decade, the federal government has mounted a new concerted campaign to increase the use of denaturalization to revoke the citizenship of foreign-born U.S. citizens under both prongs of 8 U.S.C. § 1451.

Between 2008 and 2016, the Department of Homeland Security (DHS) undertook an initiative called Operation Janus, through which the U.S. government began digitizing old fingerprint data in immigration files and matching prints against existing digital records. Under Operation Janus, immigration agencies reviewed the immigration files of hundreds of thousands of naturalized citizens by identifying multiple entries with the same fingerprints in order to detect fraud during the naturalization process.³⁴ DHS initially identified 315,000 cases where “some fingerprint data was missing from the centralized digital fingerprint repository.”³⁵ This resulted in a coordinated interagency effort to track down cases of fraud in naturalization through both Operation Janus and later, its successor, Operation Second Look, which expanded the scope of this initiative and began reviewing even more records for evidence of fraud.³⁶

The Trump Administration has since increased and intensified the reach of these programs. The current administration has filed twice as many denaturalization cases in each of its first two years as the average number of denaturalization cases for the prior twelve years.³⁷ This number is only expected to grow as the federal government diverts more resources towards and increases its capacity

33. *Kungys v. United States*, 485 U.S. 759, 767, 772 (1988).

34. Press Release, Office of Pub. Affairs, Dep’t of Justice, Justice Department Secures First Denaturalization as a Result of Operation Janus (Jan. 9, 2018), <https://www.justice.gov/opa/pr/justice-department-secures-first-denaturalization-result-operation-janus> [<https://perma.cc/GX99-PZXW>].

35. *Id.*

36. U.S. Immigration & Customs Enf’t, Operations and Support – Fiscal Year 2019 Congressional Justification, DEP’T OF HOMELAND SECURITY 21, <https://www.dhs.gov/sites/default/files/publications/U.S.%20Immigration%20and%20Customs%20Enforcement.pdf> [<https://perma.cc/KKD9-PX3Q>].

37. 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/X9RF-RK73>] (“From 2004 to 2016, denaturalization cases filed by [the Office of Immigration Litigation in the Department of Justice] and by United States attorneys have averaged 46 each year. In each of the last two years, prosecutors filed nearly twice that many cases.”).

for denaturalization. In January 2018, DHS announced its intention to refer approximately 1,600 cases to the Department of Justice for prosecution based on a review of an estimated 700,000 immigration files;³⁸ and in June 2018, USCIS announced the institution of a new office within the agency dedicated to reviewing and referring cases to the Justice Department for denaturalizing U.S. citizens.³⁹ After denaturalization referrals from DHS to the Justice Department increased 600 percent, the Justice Department announced in February 2020 the creation of a new Denaturalization Section within its Office of Immigration Litigation, which previously contained only two other sections—the District Court Section and the Appellate Section.⁴⁰ The Department of Justice has acknowledged that, even though a denaturalization judgment will typically result in the defendant reverting back to a lawful permanent resident, the ultimate goal in most denaturalization proceedings is removal of the defendant from the United States.⁴¹ Therefore, once the individual loses her citizenship, the government will likely initiate removal proceedings against her under one or more of the many grounds of removability under the Immigration and Nationality Act.⁴²

Data on these denaturalization efforts is difficult to uncover, as there is no comprehensive method to search for civil denaturalization cases and most denaturalization case filings are not available through Public Access to Court Electronic Records. The Open Society Justice Initiative obtained case files directly from courthouses across the country and reviewed 168 denaturalization cases initiated between January 1, 2017 and December 31, 2018.⁴³ Out of the 168 cases, 37.5 % were Operation Janus/Second Look cases.⁴⁴ Therefore, almost two-thirds of the cases brought during this time period went beyond the Operation Janus and Operation Second Look investigations. The second largest category of cases, representing 13.1 percent of denaturalization cases during this period, were based

38. *Id.*

39. Amy Taxin, *US Launches Bid to Find Citizenship Cheaters*, ASSOCIATED PRESS (June 11, 2018), <https://apnews.com/1da389a535684a5f9doda74081c242f3> [<https://perma.cc/V85A-FV2D>].

40. Katie Benner, *Justice Dept. Establishes Office to Denaturalize Immigrants*, N.Y. TIMES (Feb. 26, 2020), <https://www.nytimes.com/2020/02/26/us/politics/denaturalization-immigrants-justice-department.html> [<https://perma.cc/9VJW-BXKU>].

41. Anthony D. Bianco, Paul Bullis & Troy Liggett, *Civil Denaturalization: Safeguarding the Integrity of U.S. Citizenship*, U.S. ATT'YS' BULL., July 2017, at 5, 16-17, <https://www.justice.gov/usao/page/file/984701/download> [<https://perma.cc/MSB6-P6CQ>] (“Typically, the government does not expend resources on civil denaturalization actions unless the ultimate goal is the removal of the defendant from the United States.”).

42. 8 U.S.C. § 1227 (2020).

43. Open Soc’y Justice Initiative, *supra* note 3, at 8.

44. *Id.* at 49.

on some prior criminal activity.⁴⁵ Other categories include: Fraudulent Documents (11.9%), Sex/Child-Related Crimes (9.5%), Marriage Fraud (7.7%), Terrorism Related Activity (6.6%), War Crime Related Activity (5.4%), Immigration Issue (4.8%), and Unclear (3.6%).⁴⁶

II. DENATURALIZING CITIZENS FOR POST-NATURALIZATION CRIMINAL CONVICTIONS

When announcing the new Denaturalization Section, the Department of Justice noted that individuals with criminal convictions are one of the primary targets of the administration's denaturalization program.⁴⁷ The Trump Administration is casting a wide net by attempting to denaturalize individuals who were convicted of crimes even after they naturalized.

Recently, the federal government has been attempting to denaturalize U.S. citizens for failing to disclose during the naturalization process any pre-naturalization acts that contributed to a crime for which the citizen was arrested, charged, and convicted after naturalizing.⁴⁸ At the heart of these cases lies the following question on the naturalization application: "Have you **EVER** committed, assisted in committing, or attempted to commit, a crime or offense for which you were **NOT** arrested?"⁴⁹

Many recent denaturalization cases involve alleged fraud committed by noncitizens in answering this question.⁵⁰ These cases tend to follow the same fact pattern: John naturalizes after stating on his naturalization application that he has never committed any crime for which he was *not* arrested. After naturalizing, John is arrested and charged with a crime stretching back to when he was a noncitizen. John pleads guilty and, in his guilty plea, admits that the crime began at a date before John had naturalized. Because John did not state on his naturalization application that he had committed a crime for which he had *not*

45. *Id.*

46. *Id.*

47. See Press Release, *supra* note 2.

48. It is difficult to ascertain how often such cases are being brought partly because, as mentioned above, there is no comprehensive way to search for denaturalization cases and they are often closed to the public through the Public Access to Court Electronic Records database. However, practitioners in the field have reported an increasing number of such denaturalizations under the Trump administration.

49. *Application for Naturalization*, U.S. CITIZENSHIP & IMMIGRATION SERVS. 14 (Sept. 17, 2019), <https://www.uscis.gov/sites/default/files/document/forms/n-400.pdf> [https://perma.cc/236T-VPB9].

50. See, e.g., Complaint, *United States v. Ahmed*, No. 1:18-cv-04598 (N.D. Ill. July 3, 2018); Complaint, *United States v. Borgono*, No. 1:18-cv-21835 (S.D. Fl. May 8, 2018).

been arrested, he may be subject to denaturalization on the basis that he illegally procured his naturalization or procured it through concealment of a material fact or willful misrepresentation.

These cases are often brought where the criminal activity involved inchoate liability, such as attempting to commit or conspiring to commit a crime, or otherwise stretched over a long period of time. Such cases are especially troubling as it is often difficult to determine when exactly the criminal activity began. That determination is important when the government's central argument in the denaturalization proceeding is that the individual concealed his criminal activity *prior to* naturalizing. Other disturbing applications of this legal theory could arise in cases where a person is aiding or abetting a crime or is convicted for the overt acts of his co-conspirator under *Pinkerton*⁵¹ liability. If convicted under such theories of criminal liability, a citizen may even be denaturalized on the basis of the actions of another. While there may be defenses to the denaturalization proceeding based on the facts of the underlying criminal case, collateral estoppel may prevent these issues from being litigated in the denaturalization proceedings.⁵²

When the alleged misrepresentation on the naturalization application is relatively minor, there is an argument that the materiality requirement established in *Kungys* protects against denaturalization. However, as explained above, the denaturalization statute allows for denaturalization on two separate bases, illegal procurement (the citizen was ineligible to naturalize because they did not meet the requirements to naturalize) and willful misrepresentation (the citizen fraudulently acquired citizenship).⁵³ This materiality requirement only applies to the willful misrepresentation prong of denaturalization, and not the illegal procurement prong. In other words, a person may still be denaturalized under an illegal procurement theory even if the fraud the person is alleged to have committed is immaterial to the grant of citizenship.

A. Illustrative Case

Sara⁵⁴ is a U.S. citizen who immigrated to the United States when she was a teenager. She has lived in Arizona for over thirty years and finally became a U.S. citizen about ten years ago. Sara has a fifteen-year-old son, who is also a U.S. citizen, and much of her extended family also resides in the United States.

51. See *Pinkerton v. United States*, 328 U.S. 640, 646 (1946).

52. See, e.g., *United States v. Akamo*, 515 F. App'x 248, 249 (5th Cir. 2012) (finding that collateral estoppel applied in a denaturalization case because the issue of the defendant's involvement in a criminal conspiracy had been fully litigated in the criminal proceeding).

53. See *supra* Section I.B.

54. Pseudonym used and some case details altered to protect client confidentiality.

For a few years, Sara worked as a low-level employee for an organization that provided in-home healthcare supplies to nursing homes. The State of Arizona filed criminal charges against Sara and her coworkers, alleging that they conspired to commit Medicaid fraud by stealing supplies subsidized by the federal government that were supposed to be delivered to patients. Sara ultimately pled guilty to the offense and was sentenced to one year of community supervision and a small fine.

Even though Sara was a U.S. citizen when she pled guilty to the offense, the date listed in Sara's indictment and plea agreement was the first date of her employment, which was one year before she had naturalized. Although it is highly improbable that the conspiracy actually began on that date, neither Sara nor her criminal-defense counsel paid attention to that fact because it was immaterial to her criminal case. Neither Sara's criminal-defense counsel nor the judge warned her that her conviction could result in any adverse immigration consequences or affect her naturalization status.

After her conviction, Sara continued to live in Arizona and raise her son. Almost ten years after she pled guilty, and nine years after she fulfilled her sentence of community supervision, the federal government initiated civil denaturalization proceedings against Sara. The government claimed that Sara illegally procured her citizenship because

1. she committed unlawful acts, and therefore lacked the good moral character required to naturalize;
2. she committed a crime of moral turpitude, and therefore lacked the good moral character required to naturalize; and
3. she falsely testified during her naturalization interview that she had never committed any crime for which she had not been arrested, and therefore lacked the good moral character required to naturalize.

The government additionally claimed that Sara concealed or willfully misrepresented a material fact, that is, her pre-naturalization criminal acts.⁵⁵

Sara's case provides an extreme – but, under this administration, not atypical – example of denaturalization cases brought on a similar basis. Revocation of Sara's citizenship could result in her deportation to a country she has not lived in since she was a teenager. She may have to be separated from her family, or her

55. As noted above, although the Supreme Court's requirement that the misrepresentation or concealment be *willful* and *material* may protect individuals like Sara, see *Kungys v. United States*, 485 U.S. 759, 767 (1988), this requirement only extends to the concealment and misrepresentation prong of the denaturalization statute, not the illegal procurement prong, under which the government brought its first three claims.

denaturalization may result in revocation (in some cases, automatic revocation) of citizenship or lawful immigration status of her family.⁵⁶ These are some of the “tremendously high stakes for the individual” in denaturalization cases.⁵⁷

Sara’s case not only highlights the particular vulnerabilities of naturalized U.S.-citizens, but it also presents complicated questions regarding what and how much naturalized citizens must disclose on their naturalization application. For example, should a person seeking to naturalize list any act on her naturalization application that could conceivably contribute to a future crime? Even if it were possible to identify all such acts, what should be the limiting principle to determine the extent of disclosure? These concerns are obviously heightened where, as in Sara’s case, it is unclear whether the criminal liability extends prior to naturalization.

Even in cases where individuals were involved with criminal activity prior to naturalization, such individuals may not have any intent to commit a crime or knowledge of their wrongdoing at the time of their naturalization. At the very least, the government should not be utilizing limited government resources to pursue denaturalization proceedings where there are legitimate questions as to whether the citizen was aware that he was engaged in criminal activity. Ultimately, denaturalization based on misrepresentations of criminal acts must be used sparingly, if at all.

III. ADVISING DEFENDANTS OF THE DENATURALIZATION CONSEQUENCES OF PLEADING GUILTY

A. *Criminal-Defense Counsel’s Obligations Under Padilla v. Kentucky*

In 2010, the Supreme Court issued a landmark decision for crimmigration⁵⁸ law in *Padilla v. Kentucky*.⁵⁹ The Court held that the Sixth Amendment requires criminal-defense counsel to provide accurate advice to a noncitizen defendant regarding the immigration consequences of pleading guilty. If criminal-defense

56. 8 U.S.C. § 1451(d) (2018) (“Any person who claims United States citizenship through the naturalization of a parent or spouse [who is later denaturalized because of fraud] shall be deemed to have lost and to lose his citizenship and any right or privilege of citizenship . . .”).

57. *Knauer v. United States*, 328 U.S. 654, 659 (1946).

58. “Crimmigration” refers to the ever-growing intersection of criminal law and immigration law. See Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376-77 (2006).

59. 559 U.S. 356 (2010).

counsel fails to do so, the noncitizen defendant may bring a claim of ineffective assistance of counsel in proceedings for post-conviction relief.⁶⁰

José Padilla was a lawful permanent resident who faced deportation after pleading guilty to drug-distribution charges. In a post-conviction proceeding, Padilla claimed that defense counsel told him that he did not have to worry about deportation since he had been a legal permanent resident for over forty years. Padilla claimed that he relied on his counsel's erroneous advice when he pleaded guilty to the drug charges, which triggered his deportation. The Court in *Padilla* held that "constitutionally competent counsel would have advised that [Padilla's] conviction for drug distribution made him subject to automatic deportation."⁶¹

The Court declined to apply the Kentucky Supreme Court's reasoning that the Sixth Amendment's protections do not apply to collateral consequences such as deportation, and instead held that Padilla was entitled to "reasonable professional assistance" under the Sixth Amendment "because of the unique nature of deportation."⁶² The Court noted the severity of the penalty and the intricate ties between the criminal and immigration processes in rejecting the direct/collateral consequence distinction that had developed in lower courts.⁶³

The Court then applied the test for Sixth Amendment right-to-effective-assistance-of-counsel claims articulated in *Strickland v. Washington*⁶⁴ to "determine whether counsel's representation 'fell below an objective standard of reasonableness.'"⁶⁵ The Court relied on professional norms and practices, including standards promulgated by the American Bar Association, authoritative treatises, and recommendations by the criminal-defense and public-defender associations, to conclude that an attorney "must advise her client regarding the risk of deportation."⁶⁶

Under the Court's analysis, when deportation consequences of a guilty plea are clear, criminal-defense counsel has a duty to correctly advise the defendant of those consequences.⁶⁷ However, when the deportation consequences are unclear or uncertain, the criminal-defense attorney "need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences."⁶⁸ As a result of this case, criminal-defense counsel

60. *Id.* at 373-76.

61. *Id.* at 359-60.

62. *Id.* at 364-65.

63. *Id.* at 365-66.

64. 466 U.S. 668 (1984).

65. *Padilla*, 559 U.S. at 366 (quoting *Strickland*, 466 U.S. at 688).

66. *Id.* at 367.

67. *Id.* at 368-69.

68. *Id.* at 369.

have an affirmative, constitutional obligation to inform their clients whether a plea carries a risk of deportation.

Although *Padilla*'s holding appears limited to removal of noncitizens, it must apply in equal, if not greater, force in the context of denaturalization.⁶⁹ As illustrated above, U.S. citizens can face denaturalization when they plead guilty to a crime involving acts committed before naturalization. The Court's reasoning and holding in *Padilla* logically applies to denaturalization even though the Court did not explicitly acknowledge it in its opinion. The Court in *Padilla* relied on "the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country" in issuing its decision.⁷⁰ The severity of consequences and the effects on families living lawfully in the United States are just as relevant, if not heightened, in denaturalization proceedings. In fact, the Supreme Court has noted that denaturalization, like deportation, "may result in the loss 'of all that makes life worth living.'"⁷¹ Furthermore, because the government's aim in denaturalization proceedings is

69. There has been much debate about how far *Padilla*'s holding should extend outside of the realm of advice regarding immigration consequences. See Gabriel J. Chin, *Making Padilla Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675, 675-76 (2011) (arguing that "Padilla's clear implication is that defense attorneys should warn clients about other serious consequences" beyond immigration); César Cuauhtémoc García Hernández, *Criminal Defense After Padilla v. Kentucky*, 26 GEO. IMMIGR. L.J. 475, 477 n.7 (2012) ("[C]ourts have held and scholars argued that *Padilla*'s rationale informs the right of criminal defendants, including United States citizens, to receive advice about such issues as civil commitment of sex offenders and license revocation."); Derek Wikstrom, "No Logical Stopping-Point": *The Consequences of Padilla v. Kentucky's Inevitable Expansion*, 106 Nw. U. L. Rev. 351, 354 (2012) ("[R]equiring warnings [under *Padilla*] for all collateral consequences of guilty pleas will give rise to unintended and undesirable consequences."); Joanna Woolman, *Padilla's "Truly Clear" Test: A Case for a Broader Application in Minnesota*, 37 WM. MITCHELL L. REV. 840, 847-55 (2011) (arguing for the expansion of *Padilla* to include advice about other collateral consequences of conviction beyond immigration in Minnesota); Colleen A. Connolly, Note, *Sliding Down the Slippery Slope of the Sixth Amendment: Arguments for Interpreting Padilla v. Kentucky Narrowly and Limiting the Burden It Places on the Criminal Justice System*, 77 BROOK. L. REV. 745, 781-82 (2012) (arguing for a narrower interpretation of *Padilla* that is limited to deportation consequences in order to avoid "overburdening court systems and criminal defense attorneys"); Danielle M. Lang, Note, *Padilla v. Kentucky: The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful Padilla Claims*, 121 YALE L.J. 944, 973 (2012) (noting that the "logic of *Padilla* naturally extends beyond immigration consequences to at least some other serious collateral consequences, such as registration as a sex offender or elimination of federal benefits" but "courts have been wary of expanding its reach"). Moreover, there has been some scholarship on the scope and limits of *Padilla* within the immigration context. See, e.g., Daniel A. Horwitz, *Actually, Padilla Does Apply to Undocumented Defendants*, 19 HARV. LATINO L. REV. 1, 3-4, 32 (2016) ("Courts should reject the prevailing view that *Padilla* does not apply to undocumented defendants").

70. *Padilla*, 559 U.S. at 374.

71. *Knauer v. United States*, 328 U.S. 654, 659 (1946) (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)).

to ultimately remove the citizen from the United States,⁷² the Court's analysis of *Strickland*'s objective standard of reasonableness should dictate the same result for denaturalization.

If noncitizens have a right to competent counsel about the immigration consequences of their convictions under *Padilla* then, *a fortiori*, criminal-defense attorneys must have an obligation under *Padilla* to provide information about denaturalization consequences of criminal convictions to naturalized U.S. citizens. Therefore, naturalized defendants must be informed that pleading guilty to a crime that occurred before the defendant naturalized may result in denaturalization.

In the case of crimes extending over a significant period of time, criminal-defense counsel should also try to ensure that the date listed in the plea agreement avoids any denaturalization consequences. After speaking with criminal-defense counsel in various parts of the country, there appears to be no consistent practice regarding what date is listed on guilty pleas for commission of the crime where crimes extend over a period of time. Some pleas list date ranges, and others list the earliest possible date that the crime could have occurred. Defense counsel have also stated that it is generally relatively easy to have the date listed in the plea agreement changed. Therefore, wherever possible, defense counsel should attempt to structure plea agreements to avoid denaturalization consequences.

B. Judges' Obligations to Provide Warnings

While the Supreme Court's decision in *Padilla v. Kentucky* only analyzed the duty of criminal-defense counsel under the Sixth Amendment, "the decision shed new light on judges' preexisting legal and professional obligations to safeguard the constitutional rights of the accused, including the rights to effective assistance of counsel and Due Process."⁷³ Under the Due Process Clause, a guilty plea must be entered knowingly, intelligently, and voluntarily.⁷⁴ A plea is "know-

72. Bianco et al., *supra* note 41, at 16-17.

73. See *Judicial Obligations After Padilla v. Kentucky: The Role of Judges in Upholding Defendants' Rights to Advice about the Immigration Consequences of Criminal Convictions*, IMMIGRANT DEF. PROJECT & N.Y. U. SCH. L. 7 (Oct. 2011), <https://immigrantdefenseproject.org/wp-content/uploads/2011/11/postpadillaFINALNov2011.pdf> [<https://perma.cc/78DS-HAHM>].

74. See *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

ing and voluntary” only if the defendant was made fully aware of the consequences.⁷⁵ Therefore, a plea made without awareness of its denaturalization consequences cannot be considered to have been made “knowingly” under the Due Process Clause.

Judicial warnings provided to defendants regarding immigration consequences of guilty pleas must be revised in order to take into account the possibility of denaturalization in both federal and state pleas. Under the Federal Rules of Criminal Procedure, judges have an obligation to inform noncitizen defendants of their rights when accepting guilty pleas.⁷⁶ The plain text of Federal Criminal Procedure Rule 11 does not require that a United States citizen be advised of the risk of denaturalization, instead it explicitly states that a noncitizen defendant must understand that he “may be removed from the United States, denied citizenship, and denied admission to the United States in the future.”⁷⁷ The Advisory Committee’s Note for the Rule recommends that the district court provide this “generic warning” to “every defendant, without attempting to determine the defendant’s citizenship.”⁷⁸ Therefore, under the Federal Rules, judges must warn defendants that, if the defendant is a noncitizen, he or she may face immigration consequences such as removal from the United States, denial of citizenship, and denial of admission into the United States in the future.

State statutes in most states require courts to issue advisements to defendants prior to accepting guilty pleas. Most of those statutes advise only noncitizen defendants of immigration consequences.⁷⁹ Three notable exceptions are the

75. *Brady v. United States*, 397 U.S. 742, 755 (1970).

76. FED. R. CRIM. P. 11(b)(1)(O).

77. *Id.*

78. *Id.*, Advisory Committee Note.

79. See ALASKA R. CRIM. PROC. 11(c)(3)(C); ARIZ. R. CRIM. P. 17.2(b); CAL. PENAL CODE § 1016.5(a) (West 2020); CONN. GEN. STAT. § 54-1j(a) (2020); D.C. CODE § 16-713(a) (2020); FLA. R. CRIM. P. 3.172(c)(8)(A); GA. CODE ANN. § 17-7-93 (2020); HAW. REV. STAT. § 802E-2 (2020); I.C.R. 11(d); 725 ILL. COMP. STAT. ANN. 5/113-8(a) (2020); ME. R.U. CRIM. P. 11(h); MD. RULE 4-242(f); MASS. ANN. LAWS ch. 278, § 29D (LexisNexis 2020); MINN. R. CRIM. P. 15.01(subdiv. 1)(6)(l); MI. R. CRIM. P. 15.3(d)(4); MONT. CODE ANN. § 46-12-210(1)(f) (2020); NEB. REV. STAT. ANN. § 29-1819.02(1) (2020); N.Y. CRIM. PROC. LAW § 220.50(7) (McKinney 2020); N.C. GEN. STAT. § 15A-1022(a)(7) (2020); N.D.R. CRIM. P. RULE 11(b)(1)(J); OHIO REV. CODE ANN. § 2943.031(A) (LexisNexis 2020); OR. REV. STAT. ANN. § 135.385(2)(d) (2020); R.I. GEN. LAWS § 12-12-22(a) (2020); TEX. CODE CRIM. PROC. art. 26.13(a)(4); VT. STAT. ANN. tit. 13, § 6565(c)(1) (2020); WASH. REV. CODE ANN. § 10.40.200(2) (LexisNexis 2020); WIS. STAT. ANN. § 971.08 (2020). The following states do not have any specific state laws around judicial advisements of immigration consequences when presiding over guilty pleas: Alabama, Arkansas, Colorado, Delaware, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Nevada, New Hampshire, New Jersey, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, Virginia, West Virginia, and Wyoming.

state laws in Iowa, New Mexico, and Tennessee, which require providing an immigration-related warning to all defendants, not just noncitizens.⁸⁰ State law in New Mexico and Tennessee requires judges to warn all defendants that, if the defendant pleads guilty or *nolo contendere*, “it may have an effect upon the defendant’s immigration or *naturalization* status.”⁸¹

Some potential changes could be made to the Federal Rules and state laws in order to take into account denaturalization consequences of guilty pleas and comport with Due Process principles. One option is for judges to include a specific warning to naturalized citizens regarding the potential risk of denaturalization. Under this approach, courts could add the following advisement to the defendant prior to the acceptance of a guilty plea: “If you are a naturalized citizen of the United States, you are advised that conviction of the offense for which you have been charged may have the consequence of revocation of citizenship pursuant to federal immigration law.” This statement is straightforward and will likely be easily understood by most defendants. However, because this advisement is directed to *all* naturalized citizens, its overbreadth may mislead the many naturalized defendants who would not be subject to denaturalization on the basis of a guilty plea.

Another approach is to amend the existing warnings to advise all defendants who were noncitizens at the time of the commission of the crime, rather than only those who are noncitizens at the time of pleading guilty. Under this option, the advisement would be as follows: “If you were not a citizen *at the time of the commission of the crime*, you are advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, denial of naturalization, *or revocation of citizenship* pursuant to federal immigration law.” For most states, this approach would require minimal changes (in italics above) to the existing advisement structure. Instead of warning all naturalized citizens as the first option does, this approach would be narrowly tailored to only those naturalized citizens who committed the crime before naturalizing. Moreover, this approach would also warn such individuals of the threat of other immigration consequences that could stem from denaturalization. On the other hand, this advisement is potentially more confusing for defendants in cases where the date of the commission of the crime is vague or stretches over a long period of time.

Ultimately, either of these advisements would be marked improvements over the status quo, in which no such warning is given. These judicial warnings do

80. IOWA R. CRIM. P. 2.8(2)(b)(3); N.M. R. MAG. CT. R. CRIM. P. 6-502(B)(5); TENN. R. CRIM. P. 11(b)(1)(J).

81. See N.M. R. MAG. CT. R. CRIM. P. 6-502(B)(5) (emphasis added); TENN. R. CRIM. P. 11(b)(1)(J) (emphasis added).

not substitute for defense counsel's duty to advise their clients, but instead provide an additional caution to defendants who are pleading guilty to a crime, and allow the court to ensure that the guilty plea is knowing and voluntary. The need for comprehensiveness is considered less crucial for judicial warnings compared to criminal-defense counsel's obligations, and efficient, comprehensible warnings are the norm.⁸² Therefore, states and the Federal Rules should adopt whichever of the two approaches outlined above fits better with their existing advisement scheme.

CONCLUSION

As a result of the aggressive denaturalization effort waged by the Trump Administration against U.S. citizens convicted of crimes, criminal-defense counsel and judges should have an obligation to inform defendants in criminal proceedings that they may be at risk of denaturalization as a result of pleading guilty.

Criminal-defense counsel should advise their clients in criminal proceedings of the denaturalization consequences of pleading guilty. Defense counsel should also attempt to negotiate plea agreements for their clients that avoid denaturalization consequences: where possible, counsel should ensure that the defendant does not admit to committing a crime when she was a noncitizen. Judges should also advise naturalized-citizen defendants of the denaturalization consequences of pleading guilty in order to comport with due process. Finally, immigration lawyers challenging denaturalization proceedings should consider arguing to vacate criminal convictions that form the basis of denaturalization where the criminal-defense lawyer provided ineffective assistance of counsel under the Sixth Amendment.

Large-scale reforms are desperately needed to protect U.S. citizens from arbitrary and widescale denaturalization. For example, the civil denaturalization statute, 8 U.S.C. § 1451, should, among other things, be amended by Congress to include a statute of limitations and provide judges with equitable discretion to refrain from entering judgment against the citizen. Furthermore, the denaturalization policies and practices pursued by the Trump Administration raise significant questions about whether the federal government should be spending

82. See Danielle M. Lang, *Padilla v. Kentucky: The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful Padilla Claims*, 121 YALE L.J. 944, 987 (2012) ("By their nature, plea colloquy warnings are general.").

vast resources in bringing these cases.⁸³ As immigration agencies struggle to remain operative due to budget shortfalls,⁸⁴ the current administration should reconsider its strategy to denaturalize U.S. citizens and instead divert much-needed resources to naturalization and immigration-benefit applications. While such reforms are much needed, courts and criminal-defense counsel can take small, well-justified steps to quickly address some of the harsh consequences of this administration's policies by requiring the provision of *Padilla* warnings to criminal defendants who may be subject to denaturalization on the basis of pleading guilty.

Yale Law Journal *Justine Wise Polier Fellow, National Immigration Project of the National Lawyers Guild. I am grateful for the helpful comments and feedback from Connor P. Mui and Michael Avi-Yonah. I would also like to thank Carlos Garcia, Gideon Yaffe, Hope Metcalf, Matt Vogel, and Sirine Shebaya for contributing to the development of this Essay. Finally, I would not have been able to write this Essay without my husband, Joe Press, who is a continuous source of support and inspiration.*

83. Maryam Saleh, *Trump Administration Is Spending Enormous Resources to Strip Citizenship from a Florida Truck Driver*, INTERCEPT (Apr. 4, 2019, 6:00 AM), <https://theintercept.com/2019/04/04/denaturalization-case-citizenship-parvez-khan> [<https://perma.cc/259X-X9BR>].

84. Miriam Jordan, *Immigration Agency that Issues Visas, Green Cards Struggles to Stay Afloat*, N.Y. TIMES (May 17, 2020), <https://www.nytimes.com/2020/05/17/us/immigration-agency-uscis-budget.html> [<https://perma.cc/FP52-T4T6>].