

OPEN SOCIETY JUSTICE INITIATIVE

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UN Human Rights Committee Secretariat
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Re: List of Issues Prior to Reporting—United States of America (ICCPR Articles 2, 12, 17, 24 & 26)

The Open Society Justice Initiative (Justice Initiative) writes to bring to the Human Rights Committee's attention key issues in advance of the development of a List of Issues Prior to Reporting (LOIPR) for the United States of America. We respectfully submit the following concerns (alongside their relevant Covenant articles) for the Committee's consideration for inclusion in the LOIPR.

I. Open Society Justice Initiative

The Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. Its efforts focus on accountability for racial discrimination, migrants' equality, and the rights of stateless populations, international crimes, abuses of national security and counterterrorism, as well as support for criminal justice reform, freedom of information and expression, and natural resource corruption. Our staff is based in Abuja, Brussels, Budapest, The Hague, London, Mexico City, New York, Paris, and Washington, D.C.

The Open Society Institute, of which the Justice Initiative is a part, has consultative status with the United Nations Economic and Social Council.

II. Issue Summary

Denaturalization of US Citizens

Denaturalization is inherently discriminatory, because it targets only naturalized citizens. Our research to date suggests that the United States Government (USG), since 2017, is denaturalizing a markedly increasing number of individuals. Denaturalization became a legal possibility in the US following the adoption of the 1906 Naturalization Act. Over the years, both law and policy has strictly confined its application, reserving denaturalization for rare and exceptional cases—i.e. former Nazis and other war criminals attempting to evade prosecution by hiding out in the US under false pretenses.¹ The process of denaturalization implicates serious violations of due process and nondiscrimination; places denaturalized citizens at risk of statelessness; and permits for retroactive revocation of citizenship of children and spouses who derived their nationality through a naturalized citizen. The US is home to over 21 million

¹ See *generally*, PATRICK WEIL, THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC (2012).

naturalized citizens.²

US Passport Denials and Revocations

The USG continues to deny and revoke passports to many US citizens, thereby depriving them of documentary proof of nationality to which they are entitled. This practice has been employed arbitrarily and on discriminatory grounds, disproportionately impacting US citizens of minority backgrounds. US citizens who are outside the country at the time of denial or revocation have been prevented from entering the US (their own country), while others are trapped in immigration detention awaiting adjudication of potential deportation. There is no effective remedy to address denials, and the USG fails to disclose information regarding its policies and procedures triggering denial and revocation.

III. Relevant ICCPR Articles

Effective protections and remedies: Article 2(2) and (3)

Freedom of movement: Article 12(4)

Family life and children's right to nationality: Article 17 and 24(3)

Equality and non-discrimination: Articles 2(1) and 26

IV. Current U.S. Government Policy and Practice

Denaturalization

The scale of denaturalization has increased strikingly. On average, US prosecutors filed ten civil denaturalization cases each year between 1990 and 2015³ (the corresponding number of criminal cases filed is unknown). In 2016, 15 civil and 46 criminal denaturalization cases were filed.⁴ These numbers have dramatically increased since 2017 to roughly 200, and the current administration has stated outright that it aspires to prosecute as many as 1600 individuals.⁵

As well, the profile of the individuals targeted for denaturalization has changed significantly. Unlike past practice, in which denaturalization was reserved for war criminals and perpetrators of heinous crimes, the current administration is instituting legal proceedings on the basis of minor clerical errors. Trump administration officials have publicly vowed to utilize denaturalization as a means of enforcing the country's immigration laws.⁶ This blanket, unprincipled application of an extreme and inherently

² Jie Zong, Jeanne Batalova & Jeffrey Hallock, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POLICY INST. (Feb. 8, 2018), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states>.

³ Matthew Hoppock (@MatthewHoppock), Twitter (June 13, 2018, 5:52 PM), <https://twitter.com/MatthewHoppock/status/1007017818309758978>.

⁴ *Id.*; Timothy M. Belsan, Danielle K. Schuessler & Sebastian Kielmanovich, *OIL-DCS Availability for Assistance and Support in Denaturalization Prosecutions under 18 U.S.C. § 1425*, 65 U.S. ATTORNEYS' BULL. 26 (July 2017), available at <https://www.justice.gov/usao/page/file/984701/download>.

⁵ It is unclear whether this also includes the number of criminal denaturalizations it intends to prosecute. See Department 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>.

⁶ See, e.g., Anthony D. Bianco, Paul Bullis & Troy Liggett, *Civil Denaturalization: Safeguarding the Integrity of U.S. Citizenship*, 65 U.S. ATTORNEYS' BULL. 17 (July 2017), available at <https://www.justice.gov/usao/page/file/984701/download>; Brittny Mejia, *Under Trump, the rare act of denaturalizing US citizens on the rise*, L.A. TIMES (Aug. 12, 2018), <https://www.latimes.com/local/california/la-me-ln-denaturalization-20180812-story.html>; Nick Miroff, *Scanning immigrants' old fingerprints, US threatens to strip thousands of citizenship*, WASH. POST. (June 13, 2018), <https://www.washingtonpost.com/world/national-security/scanning-immigrants-old-fingerprints-us-threatens-to-strip->

discriminatory measure is destined to result in discriminatory treatment of members of vulnerable minority groups on the basis of race, ethnicity, religion, and/or national origin. Thus far, we know that the highest proportion of denaturalizations under the Trump administration affects people originally from Afghanistan, Bangladesh, Ghana, Haiti, Nigeria and Somalia.⁷

There are two distinct methods by which the federal government can denaturalize US citizens—using civil statute 8 U.S.C. § 1451 (*Revocation of naturalization*) or criminal statute 18 U.S.C. § 1425 (*Procurement of citizenship or naturalization unlawfully*). Violations of due process and fair trial rights are prevalent in both civil and criminal denaturalization proceedings (e.g., no right to appointed counsel, no right to a jury trial, no right not to testify, lack of statutory limitations, lack of notice, *in absentia* judgments, judicial orders of removal, immigration waivers in plea agreements, prohibitive legal fees). Citizens who are denaturalized are subject to removal (deportation) from the US.

Under federal law, a child or spouse who claims US citizenship through the naturalization of a parent or spouse, in whose case there is a revocation admitting such parent or spouse to citizenship, can lose her nationality.⁸ Data and information on the number of individuals who have lost, or may lose, their US citizenship due to a parent or spouse's denaturalization is not publicly available.

Denaturalization creates a risk of statelessness for those who have no other citizenship. The current administration is actively denaturalizing and aiming to denaturalize individuals in this situation. While we do not know the precise numbers of those already made stateless, the potential is enormous.

Denial of Travel Documents and other Forms of Proof of Citizenship

The federal government continues to deny and revoke passports of many US citizens. As a result, US citizens are in immigration detention centers and being processed for deportation, while others are confined to the US, unable to leave, depriving them of the opportunity to, for instance, visit family and move freely. Other US citizens are stranded abroad, sometimes in dangerous situations, unable to return home. In addition to passport denials and revocations, the USG is also delaying decisions on passport applications indefinitely, thereby evading the possibility of appeal or challenge before a court since the application is technically "pending." If a centralized policy on passport denial and revocation exists, the USG has failed to make it public. The lack of transparency and readily available information about the extent of these practices make it all the more important for international institutions to demand such information.

Denials and revocations of US passports are tied to ethnic origin, violating the right to equality and non-discrimination. For instance, the US State Department continues to question the validity of thousands of birth records of US citizens by birth in the territory (*jus soli*) along the US-Mexico border, rejecting roughly

thousands-of-citizenship/2018/06/13/2230d8a2-6f2e-11e8-afd5-778aca903bbe_story.html?noredirect=on&utm_term=.e05b30b8c9f0; Patricia Mazzei, *Congratulations, You Are Now a US Citizen. Unless Someone Decides Later You're Not*, N.Y. TIMES (July 23, 2018), <https://www.nytimes.com/2018/07/23/us/denaturalize-citizen-immigration.html>; Seth F. 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>.

⁷ In a meeting with several US senators regarding immigrants from Haiti and African countries, President Donald Trump questioned, "Why are we having all these people from shithole countries come here?." This statement was reminiscent of prior derogatory comments he made, including that Haitians "all have AIDS," and claiming that if Nigerians were admitting to the US, they would never "go back to their huts." Ibram X. Kendi, *The Day 'Shithole' Entered the Presidential Lexicon*, THE ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/shithole-countries/580054/>.

⁸ INA § 340(d); 8 USC § 1451(d).

1600 passport applications since 2017.⁹ We are also aware of cases where several naturalized citizens originally from Yemen have been denied passports.¹⁰

V. Legal Framework

Article 12: Freedom of Movement

Citizenship is the most durable status available under international law and is conceptualized as a right the holder of which is a subject of international law; citizenship is not understood, legally, as a privilege that may be taken away at will. International law prohibits deprivation of nationality where it results in the creation of statelessness, where its sole purpose is to expel (former) nationals,¹¹ and where other indicia of arbitrariness are present.¹² These restrictions inform the interpretation of ICCPR Article 12(4) and its application in respect of the deprivation and denial of nationality presently transpiring in the United States as part of a centralized policy initiative implemented by the Trump administration.

The International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary deprivation of an individual's right to enter his or her "own country," in Article 12(4), a provision that is not subject to derogation on national security grounds. In its General Comment No. 27 on Freedom of Movement, the Human Rights Committee explained that Article 12(4) severely restricts contracting states' ability to engage in denationalization leading to expulsion:

"The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country."¹³

The Americas is a region of strong legal protections in the field of nationality and statelessness. The right to nationality is codified in Article 20 of the American Convention on Human Rights, is a non-derogable right pursuant to Article 27,¹⁴ and under that framework deprivation of nationality leading to statelessness is prohibited.¹⁵

The Inter-American Commission in its *Third Report on the situation of human rights in Chile* promoted a high standard of protection:

⁹ See Roque Planas, *Bombshell Washington Post Story On Trump Passport Crackdown Withheld, Distorted Key Facts*, WASH. POST. (Sept. 17, 2018), https://www.huffingtonpost.com/entry/washington-post-trump-passport-crackdown_us_5b9ec246e4b046313fbc2bd1.

¹⁰ See e.g., STRANDED ABROAD: AMERICANS STRIPPED OF THEIR PASSPORTS IN YEMEN (Jan. 2016), <http://www.law.cuny.edu/academics/clinics/immigration/clear/Stranded-Abroad-Americans-Stripped-of-Their-Passports-in-Yemen.pdf>.

¹¹ See e.g., UNGA, International Law Commission, *Expulsion of Aliens: Texts and Titles of the Draft Articles Adopted by the Drafting Committee on Second Reading*, U.N. Doc. A/CN.4/L.832, 20 May 2014, Article 8 ("[a] State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her.").

¹² See Audrey Macklin, *Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien*, 40 Queen's L. J. 1, 15 (2014).

¹³ United Nations Human Rights Committee, *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, U.N. Doc. CCPR/C/21/Rev.1/Add.9, 2 November 1993.

¹⁴ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969.

¹⁵ Third Report on the Situation of Human Rights in Chile, IACHR OEA/Ser/L/V/II.40.

“... this right [to nationality] is properly considered to be one of the most important rights of man, after the right to life itself, because all the prerogatives, guarantees and benefits man derives from his membership in a political and social community – the State – stem from or are supported by this right. Because of its unique nature, there is almost no country in the world where the law uses or applies loss of nationality as a penalty or sanction for any kind of crime, much less for activities of a political nature.

It is generally considered that since nationality of origin is an inherent attribute of man, his natural right, and is not a gift or favor bestowed through the generosity or benevolence of the State, the State may neither impose it on anyone by force, nor withdraw it as punishment or reprisal. The deprivation of nationality ... always has the effect of leaving a citizen without a land or home of his own, forcing him to take refuge in an alien country. That is, it inevitably impinges on another jurisdiction, and no state may take upon itself the power to adopt measures of this sort. ... [T]he Commission believes that this penalty – anachronistic, outlandish and legally unjustifiable in any part of the world – is a thousand times more odious and reprehensible when applied in our own Americas, and should forever be banned from being applied by governments everywhere.”¹⁶

In expanding its use of denaturalization and arbitrary denial of travel documents and other proof of nationality, the US is out of step with the Covenant obligations and the arc of regional and international human rights law constraining these practices.

Articles 17 and 24: Family Life and Children’s Right to Nationality

The US has the power to denaturalize spouses and children who acquired nationality through a naturalized spouse or parent. As a consequence of increased denaturalization, US citizen children may well be retroactively denaturalized and rendered stateless. Citizen children are also at risk of grave interference with their right to family life and their right to a nationality. Denial and deprivation of nationality prevents family members from traveling to see one another and can cause involuntary separation as a result of expulsion or deportation.

Article 24(3) of the Covenant provides that “every child has the right to acquire a nationality.” In its General Comment No. 17, the Committee elaborated on the meaning of Article 24(3) in the context of children’s rights under the Covenant:

“Special attention should also be paid, in the context of the protection to be granted to children, to the right of every child to acquire a nationality [...]. While the purpose of this provision is to prevent a child from being afforded less protection by society and the State because he is stateless, it does not necessarily make it an obligation for States to give their nationality to every child born in their territory. However, States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born. In this connection, *no discrimination with regard to the acquisition of nationality should be admissible under internal law as between legitimate children and children born out of wedlock or of stateless parents or based on the nationality status of one or both of the parents.*”¹⁷

¹⁶ Third Report on the Situation of Human Rights in Chile, IACHR OEA/Ser/L/V/II.40.

¹⁷ UN Human Rights Committee, General Comment 17 on the Rights of the Child (Article 24), 7 April 1989, at para. 8 (*emphasis added*); see also UNHCR, *Handbook on Protection of Stateless Persons*, 30 June 2014, available at <http://www.refworld.org/docid/53b676aa4.html> at paras. 96-99 (burden of proof and cooperation between states in establishing statelessness are essential to implementation of protection).

The Human Rights Committee has emphasized in its own interpretation of Article 24 that the best interests of the child principle is a “primary consideration” and an “integral part of every child’s right to such measures of protection as required by his or her status as a minor, on the part of his or her family, society and the State, as required by article 24, paragraph 1, of the Covenant.” The Committee has stressed that Convention rights must not hinge on a minor’s ability to comply with burdensome administrative requirements.¹⁸

Articles 2(1) and 26: Discrimination

The Covenant prohibits discrimination and safeguards equal protection of the law.¹⁹ In addition, the US is a party to the International Covenant on the Elimination of All Forms of Racial Discrimination, which prohibits discrimination in the construction and application of nationality law in Article 5(d)(iii).²⁰

Denaturalization bifurcates US citizens into two classes, contrary to the Covenant and to United States Constitution’s 14th Amendment Citizenship Clause, which establishes that all citizens “born or naturalized” in the US are citizens. As only naturalized citizens face deprivation of nationality, the practice of denaturalization is inherently discriminatory.

The Committee on the Elimination of Racial Discrimination has stressed States’ obligation to ensure that their nationality laws do not discriminate in purpose or effect.²¹ The Inter-American Court of Human Rights has also considered the application of Article 20 of the American Convention in cases brought on behalf of individuals of Haitian descent in the Dominican Republic challenging that country’s nationality law and practice, chiefly on grounds of racial discrimination. In the recent judgment in the case of *Expelled Dominicans and Haitians v. Dominican Republic*, the Court stated that:

“in accordance with the current trend of international human rights law, when regulating the granting of nationality, States must take into account: (a) their obligation to prevent, to avoid and to reduce statelessness, and (b) their obligation to provide each individual with the equal and effective protection of the law without discrimination.”²²

In the *Expelled* decision and in a related case, *Yean and Bosico v. Dominican Republic*, the Inter-American Court has underlined the overriding importance of ensuring equal treatment and prohibiting discrimination in the content and application of nationality law.

¹⁸ *X.H.L. v. Netherlands*, Human Rights Committee, Views on Communication No. 1564/07, CCPR/C102/D/1564/2007, adopted 22 July 2011 (finding the Netherlands’ decision to deport an unregistered minor to China to face economic and social exclusion to be degrading treatment and contrary to the protection of children required by Articles 7 and 24 of the Covenant), available at http://www.bayefsky.com/pdf/netherlands_t5_ccpr_1564_2007.pdf.

¹⁹ See UN Human Rights Committee, General Comment 18: Non-discrimination, 10 November 1989, available at <https://www.refworld.org/docid/453883fa8.html>.

²⁰ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.

²¹ See CERD/C/AUS/Co/24, para. 14 (review of Australia’s periodic report, recommending “review of its policies, taking into consideration the fact that, under the Convention, differential treatment based on citizenship or immigration status would constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.”)

²² *Caso Personas dominicanas y haitianas expulsadas vs. República Dominicana*, Inter-American Court of Human Rights (IACrHR), 28 August 2014, para. 256.

Article 2: Positive Obligations and Effective Remedy

Citizenship is a fundamental right from which all others are derived and, as such, the process by which one's citizenship is striped or called into question must entail robust, fair and effective procedural safeguards. Article 2(2) of the Covenant requires positive measures to give effect to Covenant rights. Article 2(3) requires that each State Party undertakes: "(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."²³

The legal procedures by which one is denaturalized, including all available avenues to contest denaturalization, violate fair trial rights and due process guarantees. As noted above, individuals may be targeted, extraordinarily, under both civil and criminal statutes. The civil statute contains no statute of limitations. Criminal prosecutions trigger automatic denaturalization and institution of deportation proceedings even as criminal appeals are pending. Civil prosecutions evade basic due process guarantees available to criminal defendants including right to counsel.

The United States must ensure that it is not discriminating in purpose or effect and that its actions do not create statelessness or leave individuals at risk of statelessness. We have seen no evidence to indicate that the United States is taking any steps—much less those absolutely necessary—to ensure its fulfillment of these obligations in respect of its aggressive denaturalization program. In the case of passport denials and the denial of other forms of legal identity to citizens, the United States must afford effective and efficient avenues for relief that apply equally to all citizens irrespective of their identity, physical location or other status.

VI. Recommended Questions

1. What policies are presently in place to guarantee that the USG is not interfering with freedom of movement as reflected in ICCPR Article 12 as a result of denaturalization prosecutions and denial of identity documents to American citizens?
2. What, if any, protections does the USG presently implement to prevent the risk of statelessness arising from the prosecution of denaturalization cases and what actions or policy directives exist to prevent the creation of statelessness when a risk is identified?
3. What is the USG currently doing to ensure that its denaturalization procedures are not discriminatory?
4. Given the centrality of citizenship to ideas about democracy, freedom, and the rule of law articulated in the US Constitution, why is the USG not making information public about its denaturalization, current passport revocation, and passport denial practices?

VII. Suggested Recommendations

The United States should evaluate whether its denaturalization program is in compliance with its obligations under the Covenant as well as the US Constitution. In the event these procedures and processes are not in compliance, they must be altered or halted.

²³ UN Human Rights Committee, *Bakhtiyari v. Australia*, Communication No. 1069/2002, U.N. Doc. CCPR/C/79/D/1069/2002 (2003), at para. 9.7.

The United States should immediately make public its policies regarding the use of denaturalization and should conduct a full and transparent review and regular public oversight of the constitutionality of this program and of its operation in practice.

The USG bears the burden of proof and is required to meet the highest possible standard of proof in all cases in which a US citizen is denied documentary proof of nationality, and all citizens must have an effective and equally available remedy in cases of denial, irrespective of a person's physical presence on US territory.

The United States should accede to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.