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Comment

DENATURALIZATION OF NAZI WAR CRIMINALS: IS THERE SUFFICIENT JUSTICE FOR THOSE WHO WOULD NOT DISPENSE JUSTICE?*

INTRODUCTION

Following the euphoria of victory in 1945, the United States Government1 pledged with other nations to deliver Nazi war criminals2 to a swift and

* The author wishes to thank the members of the Special Investigations Unit at the Department of Justice who worked under the authority of former Attorney General Benjamin R. Civiletti, and are currently directed by Allan A. Ryan, Jr. Special appreciation is due to Jeffrey N. Mausner, Esq., Eli M. Rosenbaum, Esq., Ms. Diane Kelly, and former Deputy Director Martin Mendelsohn, all of whom energetically cooperated in this effort.

1. The terms "United States Government" and "Government" are used interchangeably herein.

2. The terms "Nazi" and "war criminal" are not synonymous. A Nazi is someone who belonged or belongs to the political party formally referred to as the National Sozialistische Deutsche Arbeiter Partei (NSDAP is translated as the National Socialist German Worker Party.). For a capsulized description of the Nazi Party at its birth and of the German regime inspired by the Party, see The Nurnberg Trial, 6 F.R.D. 69 (Nuremberg, Germany 1946).

A war criminal, according to the International Military Tribunal at Nuremberg, see note 4 infra, was someone guilty of at least one of the following: "crimes against peace," "war crimes," and "crimes against humanity." Conspiracy to commit one of the above acts also constituted a crime. The technical definitions of the charges to which the Tribunal adhered were:

(a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts committed by any persons in execution of such plan.

CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL art. 6, 59 Stat. 1544, 1547, E.A.S. No. 472 (1945) (footnote omitted). For an analysis of the scope of these crimes, see Garcia-Mora, The Present Status of Political Offenses in the Law of Extradition and Asylum, 14 U. PITT. L. REV. 371, 394–96 (1953). See also Report of June 7, 1945, to President Harry S. Truman from Justice Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals, reprinted in 39 AM. J. INT'L. L. 178, 185 (Supp. 1945) (Jackson expressed the mood and motives behind the charges: "We propose to punish acts which have been regarded as criminal since the time of Cain and

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sobering justice. While this pledge was dramatically realized at the Nuremberg Trials, the net at Nuremberg caught only a few of the many deserving to be tried for war crimes. Steadfast to its pledge, United States immigration policy barred fugitive war criminals from entering onto United States territory while

have been so written in every civilized code.

For purposes of simplicity, further references to war crimes will encompass the technical definitions employed at Nuremberg for crimes against peace, crimes against humanity, and war crimes.

At Nuremberg, a Nazi was not necessarily a war criminal because membership in the Party did not constitute a war crime. Membership in contingents of the Nazi regime, such as the Gestapo, was sufficient, however, for a guilty verdict. In attempting to justify this distinction the Tribunal said, "[i]f satisfied of the criminal guilt of any organization or group, this Tribunal should not hesitate to declare it to be criminal because the theory of 'group criminality' is new, or because it might be unjustly applied by some subsequent tribunals." The Nurnberg Trial, 6 F.R.D. 69, 132 (Nuremberg, Germany 1946). But cf. Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 178-79 (1951) (Douglas, J., concurring) ("The fact that the technique of guilt by association was used in the prosecutions at Nuremberg does not make it congenial to our constitutional scheme. Guilt under our system of government is personal. When we make guilt vicarious we borrow from systems alien to ours and ape our enemies.").


4. The Nuremberg trials, the precedent for modern international criminal law, resulted in eighteen convictions of individuals and four findings that membership in particular Nazi organizations constituted criminal activity. Subsequently, several other tribunals were formed at Nuremberg. These tribunals convicted a total of 161 persons for war crimes. H.R. REP. No. 1452, 95th Cong., 2d Sess. 6, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 4700, 4705 [hereinafter cited as LEGISLATIVE HISTORY OF THE ACT OF OCT. 30, 1978]. See generally Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Oct. 1946-Apr. 1949 (15-volume set detailing the proceedings of the bulk of the cases at Nuremberg).


5. Several major Nazi war criminals escaped to South America immediately after World War II including: Brazil, see N.Y. Times, June 22, 1979, § 1, at 7, col. 3; Argentina, see N.Y. Times, July 6, 1977, § 1, at 8, col. 2; Bolivia and Chile, see Kandell, Nazis Safer in South America Today, N.Y. Times, May 18, 1975, § 1, at 1, col. 4; and Paraguay, see Cape, Where is Dr. Mengele?, Washington Post, Sept. 4, 1979, § 1, at 19, col. 1. With the
it belatedly admitted the immigration of survivors from Nazi terror. In utter defiance of government policy, however, a surprising number of war criminals

exception of Paraguay, which revoked the citizenship of Dr. Joseph Mengele, these countries all harbor fugitive war criminals in violation of their respective extradition treaties. For an explanation of the concept of extradition, see note 38 infra.

Though less frequent and overt, the United States also has sheltered Nazi war criminals. See H. Blum, WANTED! THE SEARCH FOR NAZIS IN AMERICA (1977) (exposé of Anthony DeVito, United States Immigration and Naturalization Service (INS) investigator who relentlessly investigated the immigration cases of Ryan, Trifa, Artukovic, Maikovskis, and Soobzokov; see notes 133-140 and accompanying text infra); L.A. Times, Dec. 28, 1979, at 5, col. 1. See also Soobzokov v. CBS, Inc., No. 78-CIV-4908 (S.D.N.Y., filed Oct. 18, 1978) (pending libel action against the author and publisher of Blum's book).


Nonetheless, both political analysts and congressmen have concluded that former President Franklin Roosevelt, who knew of the atrocities which were occurring during the 1930's and 1940's, at least could have taken temporary or covert steps to protect some of the intended victims of Hitler's Final Solution. See, e.g., A. Morse, WHILE SIX MILLION DIED: A CHRONICLE OF AMERICAN APATHY 17-22, 28, 37, 60-62, 65, 130, 140, 270-88 (1968) ("The United States not only insisted upon its immigration law throughout the Nazi era, but administered it with severity and callousness." Id. at 49); Letter from William Lehman, M.C. & Hamilton Fish, Jr., M.C. to President Ronald Reagan (Feb. 6, 1981) (signed by 104 Congressmen) ("Clearly, our government must not revert to the intolerable situation of years past, when it seemed to be condoning by inaction the horrors of the Holocaust.").

7. The Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009, as amended by Act of June 16, 1950, Pub. L. No. 81-555, 64 Stat. 219, an amendment to the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1503 (1976), relaxed the quotas from 1948 to 1952 to permit the immigration of over 400,000 "displaced persons." Relaxation of the quotas was offset by the provision which charged quotas in future years for the number admitted by virtue of the Displaced Persons Act. See LEGISLATIVE HISTORY OF IMMIGRATION AND NATIONALITY ACT, supra note 6, at 1674. See also Brief for Appellee at 17-19, United States v. Fedorenko, 597 F.2d 946 (5th Cir. 1979).
managed to immigrate and establish peaceful and inconspicuous lives within our borders; most epitomize a newly-discovered role of model citizenry.

Thirty-three years after the judgment at Nuremberg, in response to resounding pressure from Congress, former Attorney General Benjamin R.


If it is proved that any of these persons who came, for example, via the Displaced Persons Act of 1948, was a war criminal, see note 2 supra, then that individual would be in violation of the Act because an amended section, Act of June 16, 1950, Pub. L. No. 81–555, § 13, 64 Stat. 219, 227, explicitly barred entrance to "any person who is or has been a member of or participated in any movement which is or has been hostile to the United States . . . or to any person who advocated or assisted in the persecution of any person because of race, religion, or national origin. . . ." Further, § 2 of the Displaced Persons Act of 1948, pub. L. No. 80–774, 62 Stat. 1009, defines "displaced person" in accordance with Annex I of the Constitution of the International Refugee Organization, which excludes from that definition persons who can be shown "(a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations." United States v. Fedorenko, 455 F. Supp. 893, 913 (S.D. Fla. 1978), rev'd, 597 F.2d 946 (5th Cir. 1979), aff'd on other grounds, 101 S. Ct. 737 (1981) (quoting part II of Annex I of the Constitution of the International Refugee Organization, the committee established by the United Nations for the purpose of resettling persons displaced by World War II).

9. See, e.g., United States v. Fedorenko, 455 F. Supp. 893, 896 (S.D. Fla. 1978), rev'd, 597 F.2d 946 (5th Cir. 1979), aff'd on other grounds, 101 S. Ct. 737 (1981) (In the district court, Judge Roettger found that the defendant, a concentration camp guard allegedly responsible for several inmate deaths, "came to America in 1949 and has been a respectable resident ever since," and that his fellow workers viewed him as an "'excellent' worker" and "'real gentleman' with no apparent prejudices of any type."); Second Amended Complaint of July 12, 1978, United States v. Trifa, No. 5–70924 (E.D. Mich., Sept. 4, 1980) (The defendant, Bishop Valerian Trifa, is a leader of the Eastern Orthodox Church. Despite his exemplary behavior today, the Government has alleged that Trifa openly encouraged and participated in the persecution of thousands of Christians and Jews in Bucharest, Romania between 1936 and 1941 in his official capacity as leader of the Iron Guard).

Civiletti closed the door on past abortive attempts by the Immigration and Naturalization Service (INS) to correct the weak enforcement of official immigration policy. On September 4, 1979, the Attorney General ordered the attachment of a Special Investigations Unit to the Criminal Division of the Department of Justice, symbolizing an enhanced and consolidated attack aimed at locating these fugitives. The Unit's limited but formidable task is to expel war criminals from the United States.

1009, as amended by Act of June 16, 1950, Pub. L. No. 81–555, 64 Stat. 219, or the Refugee Relief Act of 1953, Pub. L. No. 83–203, 67 Stat. 400; it allows the Government to bring immigration suits against an alleged war criminal who entered the United States as part of the general allotment of quotas for his country of origin. See LEGISLATIVE HISTORY OF THE ACT OF OCT. 30, 1978, supra note 4 (The Act of Oct. 30, 1978 would be "eliminating an undesirable loophole in current U.S. immigration law." Id. at 4702). Solely because of this amendment to § 1251(a), the Government was able to move to overturn a stay of deportation granted in 1959 to one war criminal who had been admitted to the United States as a temporary visitor pursuant to the 1924 version of the Act. See In re Artukovic, No. A7–095–961 (Bd. Imm. App., filed March 7, 1980); see also note 38 infra.

11. See N.Y. Times, Aug. 7, 1977, § 1, at 20, col. 1 (General Accounting Office (GAO) official charging that prior to 1973, the INS perfunctorily investigated reports of Nazi war criminals in the United States). By 1977, INS established a Special Litigation Unit to investigate alleged Nazi war criminals, see LEGISLATIVE HISTORY OF THE ACT OF OCT. 30, 1978, supra note 4, at 4702, but the Unit did not perform as efficiently as might be desired. Interview with Martin Mendelsohn, former Deputy Director of the Special Investigations Unit, Criminal Division, Department of Justice, Washington, D.C. (Nov. 4, 1979).

The poor enforcement record of the Special Litigation Unit was not entirely caused by the inefficiency of the INS. See Anderson, 'Paperclip': Some Nazis' Ticket to U.S., Washington Post, Oct. 22, 1979, § 2, at 14, col. 4 (Jack Anderson alleging that Operation Paperclip, sponsored by the Government, circumvented the immigration laws by bringing Nazi scientists — including alleged war criminals — to settle in the United States); Hunter, Report Says Ex-Nazi Aided U.S., N.Y. Times, May 17, 1978, § 1, at 19, col. 3 (Rep. Joshua Eilberg calling for a probe into GAO reports which charged that the Central Intelligence Agency and the Federal Bureau of Investigation used alleged Nazi war criminals as "sources").

12. Order of the Attorney General, Transfer of Functions of the Special Litigation Unit Within the Immigration and Naturalization Service of the Department of Justice to the Criminal Division of the Department of Justice, No. 851–79, Sept. 4, 1979.

13. Id. It must be emphasized that trying the alleged war criminals for war crimes is not within the scope of the Special Investigations Unit. Apart from Nuremberg, see note 4 supra, the United States had prosecuted alleged war criminals for the criminal charges of war crimes, see Lador-Lederer, Book Review, 13 ISRAEL L. REV. 549, 561 (1978); McCauliff, The Reach of the Constitution: American Peace-Time Court in West Berlin, 55 NOTRE DAME LAW. 682, 704–05 (1980), but its current activities with respect to war criminals are limited solely to remedying immigration violations incurred by war criminals when they entered United States territory.
Section 340 of the Immigration and Nationality Act\textsuperscript{14} establishes the civil sanction of denaturalization when the "priceless treasure\textsuperscript{15}" of American citizenship\textsuperscript{16} has been conferred illegally. When prescribed, denaturalization


(a) ... It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 [Jurisdiction to naturalize] of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and cancelling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: \textit{Provided}, That refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted of contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization under this subsection as having been procured by concealment of a material fact or by willful misrepresentation. ...

(b) ... The party to whom was granted the naturalization alleged to have been illegally procured or procured by concealment of a material fact or by willful misrepresentation shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice, unless waived by such party, in which to make answers to the petition of the United States . . .


There are various methods by which a person can claim the status of American citizenship. \textit{Jus soli} — or acquiring citizenship by birth in the country — is recognized in the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27. \textit{Jus sanguinis} — or acquiring citizenship through a natural parent who is a citizen — is also statutorily acceptable in the United States. 8 U.S.C. § 1401 (1976). \textit{See generally 3 J. Moore, A DIGEST OF INTERNATIONAL LAW} 276-89 (1906). Aside from these effortless methods, a person not tied to the United States by place of birth, nor by blood, may become a citizen in accordance with a specialized statute — the process of naturalization. See 8 U.S.C. §§ 1421-1459 (1976); \textit{Legislative History of Immigration and Nationality Act, supra} note 6, at 1735-41. Under special circumstances, a person may acquire citizenship after birth other than by judicial naturalization (e.g., marriage to a U.S. citizen). \textit{See 3 C. Gordon & H. Rosenfield, IMMIGRATION LAW AND PROCEDURE} §§ 18.1-18.7 (rev. ed. 1980) (hereinafter cited as \textit{Gordon & Rosenfield}). \textit{Cf. Select Commission on Immigration and Refugee Policy, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST} (March 1, 1981) (recommending that naturalization be conducted in an Article I administrative court).
results in severing a naturalized American from his citizenship. As is often the case, the statute is effectually silent as to the procedures required for its implementation. Thus, the burden fell to the courts to interpret the congression-

17. See note 16 supra.


Denaturalization should be distinguished from expatriation and deportation. Expatriation, a judicial procedure, deprives a native-born or naturalized citizen of the rights and privileges of American citizenship. Unlike the denaturalized alien, the expatriate is deemed to have been a citizen until he was divorced from his citizenship. On the other hand, the Government annuls the citizenship of the denaturalized individual so that he is treated as if he never became a citizen. The ramifications of this legal fiction are significant in resolving the citizenship status of those individuals who derived American citizenship solely from either the expatriate or the denaturalized person. See 8 U.S.C. § 1451(e) (1976); 3 Gordon & Rosenfield, supra note 16, at §§ 20.1–20.12. See also Note, Revocation of Citizenship and the Void Ab Initio Concept, 50 Colum. L. Rev. 674 (1950).


al intent of section 340. Accordingly, the courts have held that the
denaturalization proceeding is a suit in equity, governed by the Federal Rules
of Civil Procedure, and with a burden of proof on the Government of clear,
equivocal, and convincing evidence.

Despite this civil facade, there are elements of criminal proceedings evident
in denaturalization suits. For example, the criminal past of defendants in many
denaturalization suits is vital to the Government's proof of an immigration law
violation. The Government must prove that the defendant lied about having an
unblemished criminal record and that, as a result, the defendant obtained his
American citizenship because of this misrepresentation. By proving that the
defendant lied, the Government, in effect, must prove that the defendant
committed the crime about which he lied. But the Supreme Court has stated
that the Government is not proving crimes in this situation because the
defendant is not subject to penal sanctions; instead, proof of the crime results in
denaturalization. Denaturalization, then, is technically not a punishment —

"exclusion," "expulsion," and "deportation"). Because denaturalization merely divests a
naturalized American of citizenship, a deportation hearing is necessary before the
denaturalized person or resident alien is forced to leave the United States. Thus,
departments are much more prevalent than denaturalizations. See generally Harisiades v.
Shaughnessy, 342 U.S. 580 (1952); Fong Yue Ting v. United States, 149 U.S. 698 (1893);
LEGISLATIVE HISTORY OF IMMIGRATION AND NATIONALITY ACT, supra note 6, at 1709–33; 1A
GORDON & ROSENFIELD, supra note 16, at §§ 4.1–4.22, §§ 5.1–5.21; id. at vol. 2, §§ 7.1–7.12,
§§ 8.1–8.19; Developments in the Law, Immigration and Nationality, 66 HARV. L. REV.

The related areas of expatriation and deportation are instructive in analyzing
trends in denaturalization procedure because congressional and judicial activity in these
areas usually are of great predictive value in denaturalization cases. A more critical
analysis is required, however, before broad generalizations can be made because the
relationship between the Justice Department, Congress, and the courts is constitutionally
different in each of the three areas. See text accompanying notes 174 to 238 infra.

19. A clear majority in a Supreme Court opinion involving immigration law has been
the exception rather than the rule; splintered majorities and plurality opinions abound.
Consequently, many decisions are not binding in the traditional sense that one may feel
confident that the law in a particular area is secure from alteration in the immediate
future. See, e.g., Schneiderman v. United States, 320 U.S. 118 (1943) (Justice Murphy,
apparently joined by Justices Black and Reed, writing the plurality opinion; Justices
Douglas and Rutledge writing separate concurrences; Chief Justice Stone, joined by
Justices Roberts and Frankfurter, writing the dissent; Justice Jackson not participating)
(Justice Murphy assumed that the naturalization decree was subject to de novo review in
any denaturalization proceeding, id. at 124, a finding upon which the authors of the
remaining opinions were bitterly divided.; Knauer v. United States, 328 U.S. 654, 657
(1946) (All but two participating Justices upheld the five-man majority statement that de
novo review of the naturalization decree applied to all denaturalization cases).

20. Johannessen v. United States, 225 U.S. 227, 239 (1912); see Note, Denaturaliza-

21. United States v. Minerich, 250 F.2d 721, 726 (7th Cir. 1975); 3 GORDON &
ROSENFIELD, supra note 16, at § 20.5a.

22. Schneiderman v. United States, 320 U.S. 118, 125 (1943) (plurality opinion).
or at least not the punishment — which would be meted out to the defendant if he, indeed, would be on trial for a criminal charge directed to the same acts.

24. Klapprott v. United States, 335 U.S. 601, 616–19, modified, 336 U.S. 942 (1949) (Rutledge, J., concurring); Knauer v. United States, 328 U.S. 654, 675–79 (1946) (Rutledge, Murphy, J.J., dissenting). Aside from the inspiring contributions from Justice Rutledge, only lip-service has been paid to the severity of the sanctions on the denaturalized individual. This is somewhat astonishing in view of the fact that the courts and commentators have been embroiled in a controversy about whether the sanction of deportation legally should be recognized as a punishment. For sources arguing that deportation is a punishment, see Bullitt, Deportation as a Denial of Substantive Due Process, 28 WASH. L. REV. 205 (1953); Fragomen, Procedural Aspects of Illegal Search and Seizure in Deportation Cases, 14 SAN DIEGO L. REV. 151, 156, 158 (1976); Legomsky, The Alien Criminal Defendant: Sentencing Considerations, 15 SAN DIEGO L. REV. 105, 120–21 (1977); Mancini, Deportation as Cruel and Unusual Punishment After Furman v. Georgia, 3 U. SAN FERNANDO VALLEY L. REV. 27 (1974); Maslow, Recasting Our Deportation Law: Proposals for Reform, 56 COLUM. L. REV. 309 (1956); Navasky, Deportation as Punishment, 27 U. KAN. CITY L. REV. 213 (1959); Note, Deportation as Punishment: Penl Power Re-Examined, 52 CHI.-KENT L. REV. 466, 480–84 (1975); Comment, Deportation and the Right to Counsel, 11 HARV. INT’L L.J. 177, 185 (1970); Note, Immigrants, Aliens, and the Constitution, 49 NOTRE DAME LAW. 1075, 1095 (1974); Note, Resident Aliens and Due Process: Anatomy of a Deportation, 8 VILL. L. REV. 566, 576–85 (1963); 9 VAND. J. TRANSNAT’L L. 179, 181 (1976). But see Woodby v. INS, 385 U.S. 276, 285 (1966) ("To be sure, a deportation proceeding is not a criminal prosecution."); Flemming v. Nestor, 363 U.S. 609, 616 (1960) ("Deportation has been held to be no punishment, but an exercise of the plenary power of Congress."); Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) ("It always has been considered that what it [the Act] forbids is penal legislation which imposes or increases criminal punishment. . . . Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure. Both of these doctrines as original proposals might be debatable, but both have been considered closed for many years and a body of statute and decisional law has been built upon them.") (footnotes omitted); Bridges v. Wixon, 326 U.S. 135, 147 (1945) ("Deportation technically is not criminal punishment."); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) ("The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the Government to harbor persons whom it does not want.").


25. At one time, illegal attainment of naturalized citizenship did constitute a crime. The imposed punishment, however, was merely akin to that prescribed for a misdemeanor. See Pre-Statutory Denaturalization, supra note 18, at 129–32. For an analysis of factors considered when the Court assumed the power to declare a statute penal, see Trop v. Dulles, 356 U.S. 86, 95–99 (1958) (plurality opinion).

One of the themes of this comment is that through the guise of civil law, Congress is able to prescribe an unusual sanction which it could not prescribe if section 340 was a criminal statute. See Trop v. Dulles, 356 U.S. 86, 101 (1958) ("Use of denaturalization as a punishment is barred by the eighth amendment."); U.S. CONST. amend. VIII. This theme,
Still, the defendant in a denaturalization suit risks a loss of liberty comparable to that of a defendant accused of a violent crime, but is granted virtually none of the corresponding procedural safeguards afforded to criminal defendants by the United States Constitution. Thus, the courts have had to stretch the Federal Rules of Civil Procedure to adequately protect the defendant in a denaturalization suit who ultimately is subject to a deportation decree which could render him stateless. These Rules, however, have not proved sufficiently resilient for application in denaturalization proceedings, nor have the courts been inclined to give the Rules a more liberal interpretation.

Whether denaturalization is considered a civil proceeding, a criminal proceeding, or something in between is a determination crucial to arriving at a formula of due process which will pass fifth amendment tests. As a preface to the constitutional scrutiny, this comment will interpret the denaturalization statute, will discuss the formulation of denaturalization procedure by the Supreme Court, and will analyze the adequacy of the formulated procedures as

however, does not lead necessarily to the predictable, but mechanical, conclusion that section 340 should be re-drafted as a criminal statute. See text accompanying notes 174 to 238 infra.

26. See Statutory Denaturalization, supra note 18, at 313.


"Remove this priceless possession [citizenship] and there remains a stateless person, disgraced and degraded in the eyes of his countrymen. He has no lawful claim to protection from any nation, and no nation may assert rights on his behalf. His very existence is at the sufferance of the state within whose borders he happens to be." Id. at 64. This drastic picture may be somewhat discounted in individual cases where the defendant has a "dual citizenship" status. Cf. Vance v. Terrazas, 444 U.S. 252 (1980) (Stevens, J., concurring in part and dissenting in part) ("Since we accept dual citizenship, taking an oath of allegiance to a foreign government is not necessarily inconsistent with an intent to remain an American citizen." Id. at 272). But cf. Savorgnan v. United States, 338 U.S. 491, 500 (1950) (past efforts of Congress to discourage the acquisition of dual citizenship).

29. See, e.g., Ackermann v. United States, 340 U.S. 193, 205 (1950) (Black, J., dissenting) ("It does no good to have liberalizing rules like 60(b) if, after they are written, their arteries are hardened by this Court's resort to ancient common-law concepts."). See notes 115 to 120 and accompanying text infra.

30. The fifth amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V. It applies to persons in denaturalization proceedings because the denaturalization statute is a federal law. Although the fourteenth amendment's due process clause by its language applies only to state judicial procedures, the citizenship clause within the fourteenth amendment, however, is applicable in either state or federal judicial proceedings, and is an essential part of the analysis in this comment. See U.S. CONST. amend. XIV, § 1; text accompanying notes 174 to 238 infra.

In addition, the Supreme Court has read the equal protection language of the fourteenth amendment into the due process clause of the fifth amendment and applied equal protection considerations to federal matters involving aliens. See Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976).
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applied in the current war criminal cases. This study will reveal that the Supreme Court adheres to a strict practice of separating civil and criminal procedures in immigration affairs. This procedural method may conform with tradition, but it raises questions as a constitutionally principled approach in the value-laden field of citizenship law.

AMBIGUITIES IN THE STATUTE

Today, both naturalization and denaturalization are governed by statute. Congress derives the implied power to denaturalize from its express power set forth in the Constitution "to establish a uniform Rule of Naturalization." The

We made clear in [In re Gault] that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for "[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution."
Id. at 365–66 (quoting In re Gault, 387 U.S. 1, 6 (1967)).

32. 8 U.S.C. §§ 1421–1459 (1976). The statutory era of denaturalization can be traced to 1906. Nineteenth century denaturalization procedure differed from administration of statutory denaturalization in significant ways. For example, pre-1906 cases could be instituted in state as well as federal court. Additionally, prior to 1906, the naturalization decree was vulnerable to collateral as well as direct attack. Further, in certain periods of pre–1906 history, a naturalized citizen could be subject to the criminal penalty of denaturalization if he were found in violation of a statute unrelated to the control of immigration policy. See generally Pre-Statutory Denaturalization, supra note 18.

Under statutory denaturalization, suits may only be brought in federal court and solely by the direct attack of a United States Attorney. Additionally, the defendant in such a suit is vulnerable to a civil, not criminal, penalty. 8 U.S.C. § 1451(a) (1976). United States v. Johannessen, 225 U.S. 227 (1912).

It is noteworthy that the pre-1906 cases were suits in equity. See Burke, Interpretative Results of Wartime Denaturalization Proceedings, 18 S. CAL. L. REV. 110, 112 & n.51 (1944). In United States v. Norsch, 42 F. 417 (E.D. Mo. 1890), Judge Thayer explained that the denaturalization suit was properly in equity because evidence of fraud was presumed to vitiate a prior grant of any right. Judge Thayer arrived at this conclusion by comparing the grant of citizenship to the grant of a patent. Id. at 417. See generally Pre-Statutory Denaturalization, supra note 18; text accompanying notes 72 to 79 infra.

33. U.S. CONST., art. I, § 8, cl. 4. This implication follows either from congressional power to establish naturalization procedures, id., because the power to naturalize necessarily implies the power to denaturalize, or by means of the "necessary and proper" clause. U.S. CONST., art. I, § 8, cl. 18. But see Knauer v. United States, 328 U.S. 654 (1946), where, in a dissenting opinion, Justice Rutledge maintained:

In my opinion the power to naturalize is not the power to denaturalize. The act of admission [of the alien into citizenship] must be taken as final . . . .

If this means that some or even many disloyal foreign-born citizens cannot be deported, it is better so than to place so many loyal ones in inferior status. And there are other effective methods for dealing with those who are disloyal, just as there are for such citizens by birth.
denaturalization statute operates to strip a naturalized American of his citizenship. Once denaturalized, the person is an alien in the eyes of the law and is considered never to have been a citizen. In addition, as an alien the person is vulnerable to deportation proceedings, and in the specific case of a denaturalized war criminal, the alien is subject to extradition if a foreign government lawfully requests that he be sent abroad to be tried for war crimes.

34. See note 16 supra.


36. See Statutory Denaturalization, supra note 18, at 325:
Based on legal sophistry, the position that a denaturalized person has never been a citizen is thoroughly untenable as a practical proposition. "To make what has been done as though it had never been" is, according to the Greek poet, "the one power denied to God." But it is not a power denied to the United States courts in denaturalization cases. This void ab initio theory has been erratically applied to denaturalization procedure. See generally Note, Revocation of Citizenship and The Void Ab Initio Concept, 50 Colum. L. Rev. 674 (1950).

37. See generally 1 Gordon & Rosenfield, supra note 16, at §§ 4.1–.22, 5.1–.21; id. at vol. 2, §§ 7.1–.12, 8.1–.19; notes 18 & 35 supra.
38. 18 U.S.C. § 3184 (1976). The Supreme Court has defined extradition as "the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender." Terlinden v. Ames, 184 U.S. 270, 289 (1902). The United States Government will agree to extradite the
Naturalization, governed by statute more extensively than denaturalization, is conferred on an eligible alien who desires the benefits and obligations of American citizenship, but who does not enjoy the birthright of that status because he was born abroad to non-American parents. As early as 1824, Chief Justice Marshall stated, in dictum, that the naturalized citizen is "distinguish-
able in nothing from a native citizen, except so far as the Constitution makes the distinction." Almost a half century later, the fourteenth amendment to the Constitution was enacted, mirroring the sentiments of the former Chief Justice by declaring that persons born or naturalized in the United States are "citizens." 41 Excepting the requirement that the President and the Vice-President of the United States be native-born, 42 the language of the Constitution purportedly treats naturalized and native-born citizens alike. While equality is a venerable ideal according to Marshall in Osborn v. Bank of United States, 43 a chief criticism of the denaturalization procedure is that it is rooted in the virtual presumption that naturalized Americans are "second-class citizens." 44

To understand the basis of this criticism, the elements of naturalization and denaturalization procedure must be examined. The starting point is section 316(a) of the Act which sets forth the basic conditions precedent for naturalization. 45 The first set of conditions under this section requires that the petitioner for naturalization establish residence in the United States for a period of five years immediately preceding his petition — an objective fact easily ascertainable. 46 In addition, the applicant must satisfy various subjective criteria. He must be "of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States" — abstract beliefs not so simply determinable.

41. U.S. Const. amend. XIV, § 1. In an early interpretation of the fourteenth amendment, the Supreme Court decided that the citizenship clause should not be viewed as imposing undue restrictions on citizenship. United States v. Wong Kim Ark, 169 U.S. 649, 687-88 (1898).
42. U.S. Const. art. II, § 1; id. at amend. XII.
43. 22 U.S. (9 Wheat.) 738 (1824).
44. Schneider v. Rusk, 377 U.S. 163, 169 (1964) (dictum); Knauer v. United States, 328 U.S. 654, 676 (1946) (Rutledge, J., dissenting). In Schneiderman v. United States, 320 U.S. 118 (1943), Justice Rutledge argued, in a concurring opinion, that: [The naturalization] judgment might be affirmed on appeal and again on certiorari here. Yet the day after, or ten years later, any district judge could overthrow it, on the same evidence, if it was conflicting or gave room for contrary inferences. . . . If this is the law and the right the naturalized citizen acquires, his admission creates nothing more than citizenship in attenuated, if not suspended, animation. Id. at 166. See Countryman, Justice Douglas and American Citizenship, 15 Gonzaga L. Rev. 957, 975 (1980); Statutory Denaturalization, supra note 18, at 313; Comment, The Alien and the Constitution, 20 U. Chi. L. Rev. 547, 560-61 (1953). But see Knauer v. United States, 328 U.S. 654, 658 (1946) ("Citizenship obtained through naturalization is not second-class citizenship.").
46. Id. at § 1427(a). In addition, § 1427(a)(2) requires that the applicant reside continuously in the United States from the time of the filing of the petition until the grant of citizenship.
47. Contra, Statutory Denaturalization, supra note 18, at 308.
When the Government wishes to institute denaturalization proceedings against a naturalized citizen, section 340(a) of the Act states that a United States Attorney—and he alone—may institute a denaturalization suit by filing an affidavit of good cause in the federal district court for the judicial district in which the defendant resides. Section 340(a) further provides that the Government may base its claim either on the ground that the individual "illegally procured" his naturalization, or on the ground that he attained this status by "concealment of a material fact" or by "willful misrepresentation." These terms are not defined in the statute; thus, it has been left to the courts to resolve their ambiguities.

49. 8 U.S.C. § 1451(a) (1976). The procedure in section 340 and predecessor statutes, see note 18 supra, is considered a "self-contained, exclusive procedure." Bindczyck v. Finucane, 342 U.S. 76, 83 (1951). For example, the Court has been compelled to specifically enforce the filing requirement of the good cause affidavit. United States v. Zucca, 351 U.S. 91, 99 (1956). Contra, id. at 104 (Clark, J., dissenting) ("[T]his [holding] clearly frustrates an important congressional program, a part of the broader one designed to protect our country from Communist infiltration.").

In addition, the rationale for limiting standing to file suit to U.S. Attorneys has been to ensure the security of naturalized citizens from collateral attack by persons who might have a personal grievance to vent against the naturalized citizen. See, e.g., Soobzokov v. CBS, Inc., No. 78-CIV-4908 (S.D.N.Y., filed Oct. 18, 1978) (pending libel action by an alleged war criminal against the author of WANTED: THE SEARCH FOR NAZIS IN AMERICA (1977)); Pre-Statutory Denaturalization, supra note 18, at 124–25 & n.21. That is, the suit brought by the U.S. Attorney is considered a direct attack on the naturalization judgment. Grah v. United States, 261 F. 487, 490 (7th Cir. 1919); United States v. Dolla, 177 F. 101, 105 (5th Cir. 1910).

50. 8 U.S.C. § 1451(a) (1976). For purposes of clarity, use of the term "misrepresentation" will include both the statutory terms "concealment of a material fact" and "willful misrepresentation." See Fedorenko v. United States, 101 S. Ct. 737, 748 n.28 (1981) ("Although the denaturalization statute speaks in terms of 'willful misrepresentation' or 'concealment of a material fact,' this Court has indicated that the concealment, no less than the misrepresentation, must be willful and the misrepresentation must also relate to a material fact.") (citing Costello v. United States, 365 U.S. 265, 271–72 n.3 (1961)).

Under the original, 1906 version of the statute, Act of June 29, 1906, Pub. L. No. 59–338, § 15, 34 Stat. 601, as well as its 1940 successor, Nationality Act of 1940, Pub. L. No. 76–853, § 338, 54 Stat. 1158, the grounds for denaturalization could be based on either "fraud" or "illegal procurement." The "fraud" ground proved to be a problem for those courts interpreting the predecessor statutes because of the Supreme Court's holding in Johannessen v. United States, 225 U.S. 227 (1912), that statutory denaturalization proceedings are suits in equity. See text accompanying notes 72 to 79 infra. Traditionally, equity courts would only hear evidence of "extrinsic" fraud (i.e., collateral evidence) to nullify a prior grant, whereas evidence of "intrinsic" fraud (i.e., false swearing during the naturalization proceeding) was of no probative value for the purpose of revocation in denaturalization suits. See Burke, Interpretative Results of Wartime Denaturalization Proceedings, 18 S. CAL. L. REV. 110, 112 (1944); text accompanying note 80 infra. But see United States v. Albertini, 206 F. 133 (D. Mont. 1913).

This distinction between extrinsic and intrinsic fraud was rejected by some lower courts in denaturalization suits. See, e.g., United States v. Hauck, 155 F.2d 141 (2d Cir. 1946); United States v. Siegel, 152 F.2d 614, 615 (2d Cir. 1945). Congress adopted this latter common-law adjustment when it enacted the replacement language, "concealment of a material fact" and "willful misrepresentation" as the fraud-based ground in section
The Government may bring a suit on illegal procurement grounds if the applicant for naturalization failed to comply with one of the conditions precedent of the naturalization statute. Theoretically, an illegal procurement case can also be brought on misrepresentation grounds if the Government can prove that the applicant intended not to fulfill the particular condition precedent at issue. Thus, misrepresentation cases essentially are a subset of illegal procurement cases. Historically, however, suits which conceivably have encompassed both grounds have often resulted in decisions based on only one of the two grounds.51

During the first fifty years of statutory denaturalization, for example, the Government attempted to denaturalize citizens because of membership in the Communist Party or other organizations which espoused doctrines considered antithetical to American allegiance. These suits were brought on the ground of illegal procurement for failure to comply with the condition precedent of 340 of the 1952 Immigration and Nationality Act. 8 U.S.C. § 1451(a) (1976). See Costello v. United States, 365 U.S. 265, 271–72 n.3 (1961). However, these new, undefined terms created further problems as the courts struggled to determine their meaning, especially as to what constituted materiality. See notes 58 & 61 and accompanying text infra. In addition, when Congress enacted section 340 in the 1952 Act, it deleted "illegal procurement" as a ground for denaturalization. This imposed an even heavier burden on the Government because the effect of the deletion was that deficiencies in the naturalization petition and proceeding would only constitute grounds for denaturalization if the petitioner intentionally or knowingly violated the conditions precedent for naturalization. Prior to the deletion, the Government could avoid having to prove difficult issues of intent by bringing suit based on illegal procurement grounds. See LEGISLATIVE HISTORY OF IMMIGRATION AND NATIONALITY ACT, supra note 6, at 1741; Burke, Interpretative Results of Wartime Denaturalization Proceedings, 18 S. Cal. L. Rev. 110, 115–16 (1944) (only two denaturalization cases had been instituted solely on the ground of fraud); Developments in the Law, Immigration and Nationality, 66 Harv. L. Rev. 643, 717, 720 (1953).

But, in 1961, Congress amended section 340 to include once again the ground of "illegal procurement." Act of Sept. 26, 1961, Pub. L. No. 87–301, § 18, 75 Stat. 656. This amendment apparently was an expression of congressional disdain at the Supreme Court's imposition in 1943 of a heavy burden of proof on the Government in denaturalization cases:

Proof of concealment of material facts or willful misrepresentation (fraud) in a denaturalization case is fraught with difficulty. Although the proceeding is civil, not criminal, the Government must prove its case by "clear, convincing, and unequivocal" evidence. . . . [I]t is difficult if not impossible to prove [these intentional acts]. Thus, in the absence of such proof, there have been rendered ineffectual important sections of the naturalization laws which spell out absolute bars to the naturalization of aliens who are engaged in, or are members of, or affiliated with subversive organizations and activities during prescribed periods of time preceding their naturalization.


DENATIONALIZATION OF NAZI WAR CRIMINALS

"attachment."52 Section 340(c) states that for the first five years as a citizen, a naturalized American cannot become affiliated with an organization if membership in that organization would have precluded attainment of United States citizenship at the time of his petition for naturalization.53 According to the statutory provision, which is still in effect today,54 affiliation in a black-listed organization after naturalization is "prima facie" evidence of lack of attachment prior to naturalization. In retrospect, the attachment suits decided solely on illegal procurement grounds could also have been instituted and decided on the ground of misrepresentation if the defendant lied, when asked, about membership in subversive organizations.

Recently, the war criminal cases55 have upstaged the prevalence and drama of these attachment suits. Falsification or concealment of objective facts about one's past — or misrepresentation — is the central issue in the war criminal cases. The courts have been unanimous since 1960 that the alleged misrepresentations must be "material" to whether the citizen could have attained citizenship if the true facts of his past had been fully disclosed.56 The courts, however, did not apply a uniform standard to determine the meaning of "material" misrepresentation. Because of the Supreme Court's decision in Chaunt v. United States,57 the circuit courts are split as to whether a misrepresentation is sufficiently material if: (1) the truth would have provided leads for uncovering the "smoking gun," effectively precluding the grant of naturalization; or (2) the truth alone — without the need for further

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54. The Supreme Court has extensively criticized this provision. See, e.g., Nowak v. United States, 356 U.S. 660 (1958); Knauer v. United States, 328 U.S. 654 (1946); Baumgartner v. United States, 332 U.S. 665 (1944); Schneiderman v. United States, 320 U.S. 118 (1943). See also Statutory Denaturalization, supra note 18, at 327. See generally notes 49 & 50 supra.

55. To date, twenty-five war criminal suits have been instituted, including denaturalizations, deportations, and extraditions. See notes 133 to 140 and accompanying text infra; ADDENDUM following note 249.

56. Chaunt v. United States, 364 U.S. 350 (1960). Prior to 1960, there were only isolated cases holding materiality to be a requirement. See, e.g., United States v. Rovin, 12 F.2d 942, 944 (E.D. Mich. 1926).

investigation — would have been sufficient to bar the granting of citizenship.\(^{58}\)

In the first war criminal denaturalization suit to reach the Supreme Court, *Fedorenko v. United States*,\(^{59}\) the Court was provided with an excellent opportunity to clarify this distinction, but the majority declined to base its holding upon the confusion over interpretation of *Chaunt*.\(^{60}\) A precise deter-

58. In *Chaunt*, the Supreme Court held that a misrepresentation was material if the Government showed by the requisite burden of proof evidence either: "1) that facts were suppressed which, if known, would have warranted denial of citizenship or 2) that their disclosure might have been useful in an investigation *possibly* leading to the discovery of other facts warranting denial of citizenship." 364 U.S. at 355 (emphasis added). The disagreement among the circuit courts is vividly demonstrated by comparing the coverage of this issue in the Florida District Court opinion in *United States v. Fedorenko*, 455 F. Supp. 893 (S.D. Fla. 1978), with the opinion of the Court of Appeals for the Fifth Circuit, 597 F.2d 946 (5th Cir. 1979), *aff'd on other grounds*, 101 S. Ct. 737 (1981). In the district court, the trial judge held that the term "possibly" in the above-quoted passage from *Chaunt* modified the phrase, "leading to the discovery of other facts." 455 F. Supp. at 915. See *La Madrid-Peraza v. INS*, 492 F.2d 1297 (9th Cir. 1974); *United States v. Riela*, 337 F.2d 986 (3d Cir. 1964); *United States v. Rossi*, 299 F.2d 650 (9th Cir. 1962). If this is the correct interpretation, then the Government would have to prove that the omitted fact *would* — by itself — have resulted in a denial of citizenship if the fact had been revealed to the immigration officials. 455 F. Supp. at 914–16.

The Fifth Circuit reversed the lower court on this issue by stating that the district court had "destroyed the utility" of the second prong of the *Chaunt* test for materiality. Citing the Second Circuit's opinion in *United States v. Oddo*, 314 F.2d 115 (2d Cir.), *cert. denied*, 375 U.S. 833 (1963), Judge Wisdom, writing for the court, held that "possibly" modified the full phrase, "leading to the discovery of other facts warranting denial of citizenship." Thus, the Government only would have to show that the omitted fact *might* have resulted in a denial of citizenship if the fact had been revealed to INS officials at the outset. 597 F.2d at 949. *Accord, Corrado v. United States*, 227 F.2d 780, 784 (6th Cir.), *cert. denied*, 351 U.S. 925 (1956). See also *Langhammer v. Hamilton*, 295 F.2d 642, 648 (1st Cir. 1961). On review before the Supreme Court, *Fedorenko v. United States*, 101 S. Ct. 737 (1981), however, the majority held that the *Chaunt* test for materiality was inapplicable to the facts of this particular case. *Id.* at 748–52. Thus, the issue is still unresolved. *Cf. id.* at 757 & n.13. (Blackmun, J., concurring) ("I must join the Court in not accepting the reasoning of the Court of Appeals, which would have diluted the materiality standard.").


60. *Id.* at 748–52 ("Our decision makes it unnecessary to resolve the question whether the [Fifth Circuit] Court of Appeals correctly interpreted the materiality test enunciated in *Chaunt*." *Id.* at 753 n.40). *Cf. id.* at 753 (Blackmun, J., concurring) ("I am perplexed . . . by the Court's reluctance . . . to apply the materiality standard of *Chaunt* . . . to petitioner's circumstances."). The majority in *Fedorenko* determined that the materiality rule of *Chaunt* was inapplicable because *Chaunt* covered misrepresentations in the naturalization stage after initial legal entry had occurred. The facts in *Fedorenko* applied to misrepresentations at the visa stage, not at the time of application for naturalization. In addition, because the Court concluded that the defendant had illegally procured his citizenship in violation of § 2(a) of the Displaced Persons Act, *see note 7 supra*, Justice Marshall declined from deciding whether a misrepresentation at the visa stage could be assumed to relate forward as equivalent to misrepresentations in the naturalization stage. *Id.* at 748–52. Several circuit courts, including the Fifth Circuit opinion in *Fedorenko*, 597 F.2d 946, have assumed without question that the materiality precedent in *Chaunt* also controls misrepresentations in the visa stage. *See, e.g.*, United
mination of the nature of the burden of proof in denaturalization based on the materiality standard therefore is an issue which remains unresolved.\textsuperscript{61} In fact, the Court in \textit{Fedorenko} avoided the "materiality" conflict by deciding the war criminal case solely on the ground of illegal procurement, thereby relieving the Government of the burden of proving that Fedorenko intended to "materially" misrepresent his war criminal past.\textsuperscript{62}

Thus, the line separating an illegal procurement case from a misrepresentation suit is blurred in many denaturalization proceedings.\textsuperscript{63} Confusion prevails in the administration of denaturalization procedure because the courts are inconsistent in separating the two grounds.\textsuperscript{64} It follows that serious questions should be raised about the precedential value of holdings which relate only to one of the two types of denaturalization suits.\textsuperscript{65}

\textsuperscript{61} States v. Rossi, 299 F.2d 650 (9th Cir. 1962). There is an indication in the concurring opinion of Justice Blackmun in \textit{Fedorenko}, however, that this relation forward assumption is appropriate and that precedents in misrepresentation suits apply to the facts in \textit{Fedorenko}, 101 S. Ct. at 754. See text accompanying notes 225 to 238 infra.

\textsuperscript{62} \textit{Contra}, Fedorenko v. United States, 101 S. Ct. 737, 753–58 (1981) (Blackmun, J., concurring) (under either of the two tests in \textit{Chaunt} the Government must prove that the misrepresentations, alone, would have resulted in a denial of citizenship); \textit{id.} at 763 (Stevens, J., dissenting).

\textsuperscript{63} See note 60 supra; text accompanying notes 225 to 238 infra.

\textsuperscript{64} See text accompanying note 50 supra. The only situation in which the two grounds do not overlap is when the defendant is unaware of a deficiency in his naturalization process. In such a case of innocent mistake, only an illegal procurement suit may be brought by the Government. See note 49 supra.

\textsuperscript{65} See, e.g., Fedorenko v. United States, 101 S. Ct. 737 (1981), where the Supreme Court upheld the denaturalization of the petitioner solely on illegal procurement grounds despite the fact that both the petitioner and the Government assumed that the facts invoked precedents from misrepresentation cases. \textit{id.} at 752. See also Statutory Denaturalization, supra note 18, at 308.

In an amazing feat of legal research, Judge Peirson M. Hall, formerly of the Federal District Court in California, amassed, analyzed, and classified approximately 130 denaturalization cases into categories according to which condition precedent allegedly had been violated in each case. He further broke each of these eight categories into six subcategories specifying whether the suit was brought on grounds: a) amounting to fraud and/or illegal procurement \textit{without distinction}; b) amounting to fraud alone; c) amounting to illegal procurement alone; d) \textit{not} amounting to fraud; e) \textit{not} amounting to illegal procurement; or f) \textit{not} amounting to fraud or illegal procurement. See United States v. Kusche, 56 F. Supp. 201, 210–16 (S.D. Cal. 1944).

In laboring to compile the chart, Judge Hall noted:

A classification was . . . made by attempting to group the elements declared to be either fraud or illegal procurement. But these classifications produced neither reconciliation nor approximate uniformity with regard to any feature. . . . Nor could any view be said to be 'supported by the weight of authority.' . . . In fact, almost any conclusion which might be reached could be buttressed by an imposing array of authorities. . . . But the gravity of the matters which press for decision, indeed the very confusion which exists, will not permit that kind of an easy escape from the questions here involved.

\textit{Id.} at 210.
It is not surprising, therefore, that judicial interpretation of the congressional mandate has not always produced uniform results. In a concurring opinion, Justice Douglas observed that doubts or ambiguities in the statute should be resolved in favor of the defendant in the denaturalization suit: "[a]t least when two interpretations of the Naturalization Act are possible we should choose the one which is the more hospitable to that ideal for which American citizenship itself stands." Justice Douglas’ observation reflects the holding by the Supreme Court that a burden of proof of clear, unequivocal, and convincing evidence rests on the Government in a denaturalization proceeding.

In addition to the heavy burden of proof placed on the Government, the very language of the statute seems to temper any threshold concern that a defendant will not receive due process. Section 340(a) requires that the United States Attorney institute "proceedings," which implies that if the defendant timely answers the Government’s complaint he will be heard. Further, section 340(b) provides that a defendant will receive sixty days notice prior to any hearing. Thus, the twin procedural safeguards of notice and hearing are written into the statute. Defendants argue that although these guarantees of due process may be sufficient for a typical civil suit, they are too flimsy to protect a defendant who faces the often disastrous results of a denaturalization suit.

Attention to these statutory ambiguities provides only a first step towards the mastery of the concepts in denaturalization procedure. In addition to interpreting the express terms of the denaturalization statute, the Supreme Court has developed its own body of law governing the application of the denaturalization statute.

CONFUSION IN AND OUT OF THE COURTROOM

Soon after the commencement of statutory denaturalization in 1906, the Supreme Court reviewed the constitutionality of the statute and provided judicial guidelines for its operation. In 1912, the Court decided Johannessen v.
United States,72 setting the precedent that statutory denaturalization is a civil action in equity.73 Based on the 1906 version of the denaturalization statute, the Government alleged that Johannessen obtained his citizenship illegally when he lied about the length of time he had resided in the United States. Johannessen attacked the validity of the statute, maintaining that his naturalization judgment was res judicata74 on any later inquiries by means of the denaturalization procedures. Justice Pitney, writing for a unanimous Court, acknowledged that naturalizations are conferred by courts of law, but denied that they constituted final judgments merely because of this judicial character. The Court pointed out that a naturalization proceeding was an ex parte setting in which the Government need not be present.75 Thus, the Court dismissed the defendant's res judicata argument without considering the real possibility that a future denaturalization might attack a grant of American citizenship which had flowed from an adversary naturalization proceeding.76

Probing into the nature of the naturalization proceeding instead of the nature of the proceeding which revokes that naturalization, the Court was comfortable in comparing denaturalization to civil revocation for fraud in both property and patent law:

Such a certificate, including the "judgment" upon which it is based, is in its essence an instrument granting political privileges, and open like other public grants to be revoked if and when it shall be found to have been unlawfully or fraudulently procured. It is in this respect closely analogous to a public grant of land . . . or of the exclusive right to make, use and vend a new and useful invention . . . .77

In this way, the Court declined to distinguish loss of an interest in a public grant of land from loss of an interest in citizenship, the latter of which Justice Brandeis later described as a loss of "all that makes life worth living."78 Thus,

72. 225 U.S. 227 (1912).
73. Pre-statutory denaturalization cases were also tried in equity courts, and, therefore, were governed by rules of civil procedure. See generally Pre-Statutory Denaturalization, supra note 18; note 32 supra.
75. The petitioner for naturalization "is not required to make the Government a party nor to give any notice to its representatives." 225 U.S. at 237.
76. "What may be the effect of a judgment allowing naturalization in a case where the Government has appeared and litigated the matter does not now concern us." Id. See also Schneiderman v. United States, 320 U.S. 118, 124 (1943) (plurality opinion); United States v. Ness, 245 U.S. 319 (1917); Statutory Denaturalization, supra note 18, at 281–87.
78. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922). In examining due process issues, the danger in comparing denaturalization procedure with property revocation procedure is that the precedents for the latter procedure are based on the common law, thus ignoring the more compelling constitutional precedents of the fifth and fourteenth amendments. See, e.g., United States v. Bell Tel. Co., 128 U.S. 315, 361 (1888); cf. Luria v. United States, 231 U.S. 9, 27 (1913) (denaturalization was not a suit at common law).
the Court in Johannessen extended equity jurisdiction to citizenship revocation cases to maintain consistency with property revocation proceedings, which were in courts of equity. Requests for a jury trial by defendants in denaturalization suits have been summarily denied precisely because of this analogy to property law.\textsuperscript{79}

According to the Court, the ex parte nature of the naturalization proceeding also disposed of the petitioner's separation of powers argument. Johannessen argued that the legislature could not enact a statute authorizing denaturalization based on evidence of perjured testimony in the naturalization proceeding (\textit{intrinsic} fraud) because it was the province of the equity courts to revoke previously granted rights only upon evidence of \textit{extrinsic} fraud.\textsuperscript{80} The Court reasoned that the statute should also apply when the allegation of fraud rested on evidence intrinsic to the naturalization proceeding; otherwise, there would be no means with which to challenge perjury on the witness stand because of the ex parte nature of the naturalization proceeding.\textsuperscript{81} Hence, the Johannessen decision implies that there would be no adequate safeguard to ensure absolute compliance with the statutory conditions precedent to naturalization if the legislature had not provided for this apparently novel form of judicial review. The Court justified the legislative imposition of this form of judicial review, however, in a rather conclusory manner: "Retrospective acts of this character have often been held not to be an assumption by the legislative department of judicial powers."\textsuperscript{82}

The Court in Johannessen also thwarted the defendant's ex post facto attack on the statute. The defendant contended that the statute was unconstitutional because it applied to persons who became naturalized before its enactment. Justice Pitney stated that the ex post facto clause in the Constitution related only to those statutes imposing punishment. The Court emphasized that the sanction of denaturalization did not constitute punishment: "[The Act] simply deprives him of his ill-gotten privileges. . . . [It] makes nothing fraudulent or unlawful — that was honest and lawful when it was done. It imposes no new penalty upon the wrongdoer."\textsuperscript{83} This early determination that denaturalization is not punishment has prevented application of sixth and eighth amendment

\textsuperscript{80} See note 50 \textit{supra}.
\textsuperscript{81} Johannessen v. United States, 225 U.S. 227, 241 (1912).
\textsuperscript{82} \textit{Id}.
\textsuperscript{83} \textit{Id}. at 242.
rights and access to the Federal Rules of Criminal Procedure to defendants in later denaturalization suits. Subsequent courts, in effect, have upheld the spirit of Johannessen by denying the application of those two amendments as well as the Federal Criminal Rules. The later cases state that these procedural protections are available only to defendants who face punishment pursuant to a criminal statute per se.

Innovations in the framework of denaturalization procedure came about in 1943 with the wartime decision of Schneiderman v. United States. Under the 1906 version of the Act, the Government alleged that Schneiderman had not been "attached" to the United States when he joined the Communist Party soon after becoming a citizen. The opinion is most prominent for the finding that the "attachment" requirement was not intended as a dragnet for all Communist sympathizers, but Schneiderman is also a landmark decision for procedural reasons. This decision of the Court paved the way for infusions of greater

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84. Both amendments have been construed to apply solely in criminal proceedings. The sixth amendment, by its terms, is implicated only in criminal cases:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.


The eighth amendment, however, does not contain explicit language restricting its application solely to criminal proceedings: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Thus, in Trop v. Dulles, 356 U.S. 86 (1958), and in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), sections of the civil expatriation statute were held unconstitutional because they violated the eighth amendment safeguard against "cruel and unusual" punishment. There have been numerous instances when the Court has been criticized for not extending this eighth amendment prohibition to other civil and administrative situations, including denaturalization suits. See, e.g., Comment, Ingraham v. Wright: Corporal Punishment in Schools Passes Constitutional Tests, 37 Md. L. Rev. 594, 603–10 (1978).


87. 320 U.S. 118 (1943) (plurality opinion).

88. The substantive ruling in Schneiderman transformed the proof needed in an attachment suit from that of proving the defendant's subjective belief in subversion to that of proving the defendant's overt acts toward the actual accomplishment of subversion:

There is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil, and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time — a prediction that is
procedural safeguards to protect the civil rights of defendants by departing from the previous employment of a preponderance of the evidence burden in denaturalization proceedings. Justice Murphy, author of the plurality opinion, pronounced that the Government's burden of proof in a denaturalization suit must be one of "clear, unequivocal, and convincing" evidence.

Justice Murphy technically confined the implementation of this stricter burden to the "attachment" subcategory of illegal procurement cases: "If a finding of attachment can be so reconsidered in a denaturalization suit, our decisions make it plain that the Government needs more than a bare preponderance of the evidence to prevail." In requiring the heavier standard of proof, in a suit exclusively instituted on illegal procurement grounds, as in *Schneiderman*, the Court conceivably could have been expressing outrage at the notion that Congress had offered the Government generous means by which to triumph in an attachment suit which does not include the ground of misrepresentation. If an attachment suit is brought on illegal procurement and misrepresentation grounds, the Government would have the added burden of proving that the defendant *intended* to violate the wholly abstract condition precedent of attachment. If this interpretation is correct, this procedural "holding" in *Schneiderman* should have been restricted to pure illegal procurement suits because the requirement of proving intent in a misrepresentation case could be construed as a safeguard sufficient to ensure that a denaturalization judgment could not be obtained by the Government with relative ease. Nevertheless, in later years, the Court broadened the rule in *Schneiderman* so

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not calculated or intended to be presently acted upon, thus leaving opportunity for general discussion and the calm process of thought and reason . . . . Because of this difference we may assume that Congress intended, by the general test of "attachment" in the 1906 Act, to deny naturalization to persons falling into the first category but not to those in the second.

*Id.* at 157–58. Cf. Addington v. Texas, 441 U.S. 418, 432 (1979) (dictum) (Burger, C.J., observing that the issue in *Schneiderman* was "basically factual").


91. 320 U.S. at 125.

92. Congress perceived the imposition of the heavier burden as a major obstacle to the task of enforcing the law. See Act of Sept. 26, 1961, Pub. L. No. 87–301, § 18, 75 Stat. 656; note 50 *supra*.

93. *See* notes 49 to 51 and accompanying text *supra*. 
that the clear, unequivocal, and convincing standard of proof now pertains to all denaturalization cases.\textsuperscript{94} In all practicality, this expansive reading of \textit{Schneiderman} precludes the nightmarish results sure to have occurred if two different burdens of proof applied in a suit brought on both statutory grounds.\textsuperscript{95}

Of further precedential value, Justice Murphy indicated where the newly adopted burden of proof was to fall on the continuum between the preponderance and reasonable doubt standards.\textsuperscript{96} Justice Murphy accomplished this result without attempting the practically futile and certainly confining task of formulating a precise definition for the clear and unequivocal standard. In establishing the procedural precedent, the Court included a potentially powerful qualification that the clear and unequivocal burden would not be satisfied if the Government’s case left “the issue in doubt.”\textsuperscript{97} In presenting the substantive ruling that Schneiderman’s advocacy of Communism was protected by the first amendment, and hence, could not constitute a violation of the constitutionally sound attachment statute, the Court employed this newly adopted burden much the same as it would have employed the reasonable doubt standard in a criminal case.\textsuperscript{98}


\textsuperscript{95} See also United States v. DerManelian, 39 F. Supp. 959, 962 (D. R.I. 1941) (pre-Schneiderman case in which burden of proof for the illegal procurement ground was a version of the clear and convincing standard but preponderance of evidence standard was applied to the fraud ground); 7 U. DET. L.J. 41, 42 (1944) (assuming that the preponderance standard still applied to proving fraud ground in denaturalization suits).


\begin{quote}
. The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." . . . The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.
\end{quote}

\textit{Id.} at 423 (quoting \textit{In re} Winship, 397 U.S. 358, 370 (1970) Harlan, J., concurring)).

\textsuperscript{97} Schneiderman v. United States, 320 U.S. at 125 (quoting United States v. Maxwell Land-Grant Co., 121 U.S. 325, 381 (1887)).

\textsuperscript{98} “This burden is substantially identical with that required in criminal cases — proof beyond a reasonable doubt.” Klapprott v. United States, 335 U.S. 601, 612 (1949). Critics of \textit{Schneiderman} also viewed the burden as extremely strict. See Balch, \textit{Denaturalization Based on Disloyalty and Disbelief in Constitutional Principles}, 29 Minn. L. Rev. 405, 435 (1945); Note, Schneiderman v. United States: \textit{Nullification of Naturalization Laws?}, 12 Geo. Wash. L. Rev. 215, 221 (1943–44). In fact, one commentator stated that the inclusion of "unequivocal" made the \textit{Schneiderman} standard tougher than the reasonable doubt burden. Burke, \textit{Interpretative Results of Wartime Denaturalization Proceedings}, 18 S. Cal. L. Rev. 110, 121 n.89 (1944). \textit{Contra}, Note, supra note 20, at 46.
This implementation of a stricter burden of proof, no doubt, deceived many proponents for reform in immigration procedure. An undiscerning eye would have welcomed the language in *Schneiderman* grounded in constitutional safeguards implicitly assuring that Congress could not overturn the judicially introduced procedure without a battle:

While it is our high duty to carry out the will of Congress, in the performance of this duty we should have a jealous regard for the rights of petitioner. We should let our judgment be guided so far as the law permits by the spirit of freedom and tolerance in which our nation was founded, and by a desire to secure the blessings of liberty in thought and action to all those upon whom the right of American citizenship has been conferred by statute, as well as to the native-born. And we certainly should presume that Congress was motivated by these lofty principles.

This passage, and others similar to it, buttressed the substantive ruling in *Schneiderman* but was peripheral to the procedural result of the decision. Despite the Court's accent on the value of citizenship, Justice Murphy declined to embark on a constitutionally based route of adopting the clear and unequivocal burden upon reliance on either the citizenship or the due process clause of the Constitution. Such a route would have set a precedent for the constitutional necessity of reform in denaturalization procedure. Instead, the imposition of the burden of proof stemmed from the application of the "clear, unequivocal and convincing" standard in *United States v. Maxwell Land-Grant Co.*, an 1887 decision in which the Supreme Court revoked the grant of over one million acres of land in New Mexico and Colorado upon proof of fraud. Because the United States Government had placed its official seal of approval on the grant, the Court in *Maxwell* was determined not to overturn the prior decree without employing an exacting degree of proof.

Chief Justice Stone, writing for the dissenting justices in *Schneiderman*, criticized the plurality opinion for relying on fraudulent land grant revocations for precedent in illegal procurement suits:

As we are not here considering whether petitioner's certificate of naturalization was procured by fraud, there is no occasion, and indeed no justification, for importing into this case the rule, derived from land fraud cases, that fraud, which involves personal moral obliquity, must be proved by clear and convincing evidence. The issue is not whether petitioner committed a crime but whether he should be permitted to enjoy citizenship when he has

100. *Schneiderman* v. United States, 320 U.S. 118, 120 (1943) (plurality opinion).
102. 121 U.S. 325 (1887).
103. Id. at 381.
never satisfied the basic conditions which Congress required for the grant of that privilege. We are concerned only with the question whether petitioner's qualifications were so lacking that he was not lawfully entitled to the privilege of citizenship which he has procured.104

Justice Stone's criticism suggests that Schneiderman should have been denaturalized in an effortless fashion without a heavy burden of proof and without an onus of proving intent to violate immigration law. Although Justice Stone's conclusion runs contrary to the contention that defendants in denaturalization suits ought to be afforded a more sophisticated level of due process, his criticism is apt because it indicates difficulties inherent in analogizing denaturalization cases to property and patent suits. Schneiderman, in effect, perpetuated this ill-conceived judicial analogy first presented by the Court in Johannessen.

Despite the flawed analogy to property revocations, the Court in Schneiderman further emphasized that denaturalization is not a typical civil suit by restricting the Government to proving only the specific allegations contained in the show cause complaint. In authorizing this departure from strict civil procedure, Justice Murphy noted, "[a] denaturalization suit is not a criminal proceeding. But neither is it an ordinary civil action since it involves an important adjudication of status."105 Thus, the Court in Schneiderman qualified the restriction to avoid any inference that criminal procedures apply in denaturalization proceedings.

In the later case of Baumgartner v. United States,106 the Court further differentiated the denaturalization suit from an ordinary civil proceeding by stating that the Court would carefully review the facts found by the trial level denaturalization court. This 1944 decision held that the German-American defendant, by sympathizing with the Nazi movement, had not violated the attachment requirement.107 Justice Frankfurter stated that careful review of the lower court's "findings of fact" was necessary in order to ensure compliance with the burden of proof, established in Schneiderman, of clear and unequivocal evidence:

Deference properly due to the findings of a lower court does not preclude the review here of such judgments. This recognized scope of appellate review is usually differentiated from review of ordinary questions of fact by being called review of a question of law, but that is often not an illuminating test and is never self-executing. Suffice it to say that . . . the importance of [the burden of proof in Schneiderman], on which to rest the cancellation of a certificate of naturalization would be lost if the ascertainment by the lower courts . . . were to be deemed a "'fact'" of the same order as all other "'facts'", not open to review here.108

105. Schneiderman v. United States, 320 U.S. at 160 (dictum).
107. Id. at 677.
108. Id. at 671 (emphasis added).
This review of the lower court findings of fact somewhat neutralizes the
compromising position in which a naturalized citizen is placed by the knowledge
that his naturalization decree is perpetually open to attack. In Baumgartner,
Justice Frankfurter emphasized that careful review of denaturalization deci-
sions ensured that the Supreme Court would not be foreclosed from review of a
lower court's application of the facts to the law because the lower court
mistakenly characterized this application as a finding of fact.

This slow drift toward application of stricter standards in denaturalization
suits partially allays the concern that the Federal Rules of Civil Procedure are
inadequate to provide optimum protection for citizens in denaturalization suits.
Perhaps the Rules will suffice for the ordinary denaturalization case, but the
need for change becomes more compelling when the injustice is more apparent.
The critical alert, reflecting the need for improved denaturalization procedures,
was sounded in 1948 when a trial court attempted to fit the Federal Rules of
Civil Procedure to an unusual set of denaturalization facts.

In Klapprott v. United States, the Government filed a denaturalization
suit against the defendant under the 1940 version of the Act, alleging that
Klapprott's participation in the German Bund Movement in 1941 was "prima
facie" evidence of his lack of "attachment" to the United States. Prior to the end
of the notice period required under the denaturalization statute, the Govern-
ment arrested Klapprott for allegedly violating certain criminal provisions of
the Selective Service Act. The American Civil Liberties Union unsuccessfully
defended Klapprott in the criminal case, but did not provide for his defense in
the denaturalization suit. While still in jail, Klapprott, ill and without funds for
legal assistance, failed to appear in court and to defend in the denaturalization
suit. Predictably, pursuant to rule 55 of the Federal Rules of Civil Procedure, a
default judgment was entered against the defendant. Thus, Klapprott lost his
American citizenship without any demand on the Government to present
evidence in court to substantiate its allegations. Four years later, while

109. See text accompanying notes 72 to 86 supra. The naturalized citizen is also in a
precarious situation because the Government merely needs to compile enough evidence to
submit a show cause complaint to the court to institute an action. The potential misuse of
the process is not hard to envision.

110. 322 U.S. at 671.


112. During World War II, the general consensus was that the Bund Movement was
designed to support and promote the German-Axis Government. See Keegan v. United
1943).

113. The criminal case is unreported and the citation for the exact amended version of
the Selective Service Act with which Klapprott was charged is not contained in any of
Klapprott's reported immigration proceedings. The current version of the Selective Service

55(a) states: "When a party against whom a judgment for affirmative relief has failed to
plead or otherwise defend as provided by these rules and that fact is made to appear by
affidavit or otherwise, the clerk shall enter his default." FED. R. CIV. P. 55(a).
Klapprott was still in jail, a deportation order was entered against him. Klapprott then moved for relief from the default judgment in accordance with rule 60(b) of the Federal Rules of Civil Procedure. Relief was denied because of the time lag from the default order until his attempt to set aside that order.115

The Supreme Court granted certiorari to the defendant to review the default judgment.116 Meanwhile, Congress had amended rule 60(b)117 but the amendment had not gone into effect when the Supreme Court heard the case. If construed liberally, the amendment would have allowed the lower court more discretion in reversing a default judgment despite Klapprott's recalcitrance in seeking relief. The splintered majority in Klapprott employed the newer version of rule 60(b) even though the amended rule technically was not available. More importantly, the Court construed the purpose of the amendment so as to alleviate Klapprott of his predicament.118

While the narrow holding in Klapprott was that default judgments in denaturalization suits are valid only if the Government fulfills its burden of proof in court,119 dictum in Justice Black's majority opinion reveals an inclination toward a broader ruling: "The undenied allegations . . . show that a citizen was stripped of his citizenship by his Government, without evidence, a hearing, or the benefit of counsel, at a time when his Government was then holding the citizen in jail with no reasonable opportunity for him effectively to defend his right to citizenship."120 Nonetheless, the Klapprott decision has not been read expansively to require the free assistance of counsel for indigents in denaturalization suits.

115. United States v. Klapprott, 6 F.R.D. 450 (D. N.J. 1947), rev'd and remanded, 335 U.S. 601, modified, 336 U.S. 942 (1949). The unamended version of rule 60(b) which applied to Klapprott's case required that motions for relief from default orders had to be made within six months of the default. 6 F.R.D. at 451.
117. The amendment, which went into effect in October, 1949 (approximately nine months after the initial Supreme Court decision, 335 U.S. 601 (1949)), is the current version of rule 60(b). The amendment introduced the liberalizing language that "the court may relieve a party . . . from a final judgment . . . for . . . (6) any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b).
118. Klapprott v. United States, 335 U.S. at 613-14 ("H[e] was no more able to defend himself in the New Jersey court than he would have been had he never received notice of the charges." Id. at 614). Since Klapprott, the interpretation of rule 60(b)(6) has been narrowed. See, e.g., Ackermann v. United States, 340 U.S. 193 (1950).
119. Klapprott v. United States, 335 U.S. at 612. The Court ordered that the default judgment be set aside and that the case be remanded for a trial on the merits of the denaturalization suit. Subsequently, this holding was modified, 336 U.S. 942 (1949), to order that the case be remanded with directions to weigh the evidence in Klapprott's rule 60(b) motion to decide if the default judgment ought to be vacated. Justices Black, Douglas, Murphy, and Rutledge dissented from this modified order. Upon remand, Klapprott v. United States, 183 F.2d 474 (3d Cir.), cert. denied, 340 U.S. 896 (1950), it was decided that the default judgment should not be vacated by means of the rule 60(b) amendment.
120. Id. at 615 (emphasis added).
In his concurring opinion, Justice Rutledge implied that by straining to fit the Federal Rules of Civil Procedure to the *Klapprott* facts, Justice Black's majority opinion had missed the forest for the trees. Justice Rutledge confronted the truly vital issues which surfaced in *Klapprott*:

To treat a denaturalization proceeding, whether procedurally or otherwise, as if it were nothing more than a suit for damages for breach of contract or one to recover overtime pay ignores, in my view, every consideration of justice and of reality concerning the substance of the suit and what is at stake.

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. To lay upon the citizen the punishment of exile for committing murder, or even treason, is a penalty thus far unknown to our law and at most but doubtfully within Congress' power. U.S. Const., Amend. VIII. Yet by the device or label of a civil suit, carried forward with none of the safeguards of criminal procedure provided by the Bill of Rights, this most comprehensive and basic right of all, so it has been held, can be taken away and in its wake may follow the most cruel penalty of banishment.

If, in deference to the Court's rulings, we are to continue to have two classes of citizens in this country, one secure in their status and the other subject at every moment to its loss by proceedings not applicable to the other class . . . I cannot assent to the idea that the ordinary rules of procedure in civil causes afford any standard sufficient to safeguard the status given to naturalized citizens. If citizenship is to be defeasible for naturalized citizens, other than by voluntary renunciation or other causes applicable to native-born citizens, the defeasance it seems to me should be surrounded by no lesser protections than those securing all citizens against conviction for crime. Regardless of the name given it, the denaturalization proceeding when it is successful has all the consequences and effects of a penal or criminal conviction, except that the ensuing liability to deportation is a greater penalty than is generally inflicted for crime.

Regarding the proceeding in this light, I do not assent in principle that the judgment of *denaturalization* can be taken by default or that the rules of civil procedure applicable in ordinary civil causes apply to permit such a result.121

This lone but powerful attack on the potential injustice in a denaturalization procedure has gone virtually unnoticed.122

The Court, on occasion, has departed from its traditional method of mechanically separating strictly civil from strictly criminal procedures. Examination of the isolated instances when they have done so in a denaturalization case, however, reveals that the blending of civil and criminal procedure

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121. *Id.* at 616–19 (Rutledge, J., concurring) (emphasis added) (footnotes omitted).
runs contrary to the Court's philosophy. In fact, in Brown v. United States,\(^\text{123}\) the Court's reluctance was evidenced by its approval of a compromise method, conceived by a lower court, of applying fractions of both the civil and criminal rules on the privilege against self-incrimination within the same revocation proceeding.

During Brown's denaturalization hearing, the Government called her as an adverse (involuntary) witness. Invoking her fifth amendment privilege, Brown refused to answer questions relating to her past Communist activities. The lower court responded by applying the civil "privilege" rule for involuntary witnesses which allows the court to draw adverse inferences from her refusal to answer.\(^\text{124}\) Subsequent to the Government's questioning, Brown's defense counsel strategically was compelled to question her to overcome adverse inferences which may have been taken from her silence regarding her past Communist activities. Defense counsel chose to question her on direct rather than on cross-examination, and thus transformed Brown from an involuntary to a voluntary witness. The Government, on cross-examination, asked Brown the same questions to which she previously had asserted her self-incrimination privilege.\(^\text{125}\) At this juncture, the lower court switched procedural tracks by invoking the criminal "privilege" rule on voluntary witnesses. The criminal rule holds that a voluntary witness loses his privilege from the moment he takes the stand,\(^\text{126}\) whereas the applicable civil rule holds that the privilege is not lost until the defendant specifically commits some self-incriminating act.\(^\text{127}\) Had the lower court judge consistently applied procedural rules which blend with rather than contradict prior rulings on the same issue, Brown could not have been held in contempt. In effect, the lower court presented Brown with a no-win situation and, thus, found her in contempt for failure to answer.

By upholding the contempt judgment, the Supreme Court's five-four majority refused to recognize the purpose underlying the seemingly confining voluntary privilege rule in criminal procedure. The defendant in a criminal trial ordinarily would not become a voluntary witness in order to overcome adverse inferences drawn as an involuntary witness because adverse inferences drawn from a witness' silence are prohibited in criminal proceedings.\(^\text{128}\) The Supreme Court, in effect, dropped Brown into a procedural morass in which civil and


\(^{124}\) See Bilokumsky v. Tod, 263 U.S. 149, 153–54 (1923).


\(^{126}\) See Raffel v. United States, 271 U.S. 494, 497 (1926). In Brown, the Sixth Circuit maintained that the criminal rule was applicable because the defendant testified on direct to matters of crucial interest to the Government. 234 F.2d at 144. But see Brown v. United States, 356 U.S. 148, 157 (1958) (Black, J., dissenting).

\(^{127}\) Arndstein v. McCarthy, 254 U.S. 71 (1920).

criminal law converge to diminish rather than to enhance individual constitutional guarantees.\textsuperscript{129}

The lesson from \textit{Brown}, that the mixture of civil and criminal procedure is inappropriate in denaturalization proceedings, was clearly confirmed in an immigration case involving expatriation. In \textit{Trop v. Dulles},\textsuperscript{130} decided on the same day as \textit{Brown}, a plurality of the Court found that the sanction of expatriation, when applied to the facts in \textit{Trop}, constituted not only punishment but cruel and unusual punishment.\textsuperscript{131} The clearer expression of the implication of \textit{Brown} is found in the dicta of Chief Justice Warren's plurality opinion in \textit{Trop}: "Denaturalization is not imposed to penalize the alien for having falsified his application for citizenship; if it were, it would be a punishment."\textsuperscript{132} Thus, forty-five years after \textit{Johannessen}, the Supreme Court had not adjusted its rigid categorization of denaturalization as a civil remedy in equity to be governed by the denaturalization statute and by the rules of civil procedure, notwithstanding the hardships revealed, for example, in the \textit{Klapprott} case. Furthermore, the flaws in the procedure, evident upon reading \textit{Johannessen}, \textit{Schneiderman}, \textit{Baumgartner}, \textit{Klapprott}, \textit{Brown}, and \textit{Trop}, have lain dormant until recently. They have resurfaced in the last five years because the Government has instituted a series of denaturalization and deportation suits against alleged Nazi war criminals.

\textbf{Testing the Procedure in an Emergency — The Case of the Alleged War Criminal}

The Government's pursuit of Nazi war criminals in the United States for purposes of enforcing immigration law is just now getting under way, some thirty-five years off-schedule. At this time, legal action has been taken against twenty-five individuals.\textsuperscript{133} Several cases have been adjudicated extensively

\textsuperscript{129} In dissent, Justice Black unfortunately, but understandably, reacted by urging that the Court adhere to its tradition of separating strictly civil from strictly criminal procedure. 356 U.S. at 157. This response presumably was directed first to the result in \textit{Brown} of impinging on rather than expanding defendants' rights in denaturalization proceedings, and second, to the lack of foresight in the lower court's failure to consider the consequences of isolated rulings on the total procedural picture.

\textsuperscript{130} 356 U.S. 86 (1958) (plurality opinion).
\textsuperscript{132} 356 U.S. at 98.


135. United States v. Walus, No. 77-C-279 (N.D. Ill., Nov. 26, 1980). Newly discovered evidence was offered during the trial on remand which prompted the trial court to find Walus not liable. Hence, the Government abandoned its efforts to denaturalize Walus. See N.Y. Times, Nov. 27, 1980, §1, at 20, col. 2.
Trifa of the denaturalization consent judgment. A more surprising result arose from the deportation case of Andrija Artukovic. Artukovic, the unsuccessful defendant in the Government's first war criminal deportation in 1952, has been successful in warding off a request by the Yugoslavian Government for his extradition, as well as in receiving an official stay of deportation from the United States Government. In all, only one person, Hermine Braunsteiner Ryan, has been forced to leave the country. She voluntarily consented to relinquish her naturalized status in 1971, and was extradited to West Germany, where she is currently on trial for her wartime activities as a guard at the Ravensbrück and Majdanek concentration camps.

Although the denaturalization of war criminals is in its infancy, it is already apparent that the courts are reluctant to prevent the injustices inherent in trying a seriously violent crime within a civil setting. Caught in a dilemma comparable to that faced by previous defendants in denaturalization suits, the alleged war criminals have attempted what has proven impossible to arrange; they assert sixth and eighth amendment rights and request the infusion of several of the Federal Rules of Criminal Procedure into their respective proceedings. With few exceptions, their attempts to gain access to these safeguards have proven futile because the courts cite the Johannessen-Schneiderman holdings as the final, and only authority. Not only the fate of the citizenship status of alleged Nazi war criminals is at issue however; the value of American citizenship itself is implicated in these cases precisely because past war criminals are an undesirable group upon whom the priceless treasure of citizenship ironically has been bestowed. As citizens, they have a

139. The Ryan court held that the Government need not prove its case if the defendant consents to the surrender of citizenship. Ryan v. United States, 360 F. Supp. 265, 270 (E.D.N.Y. 1973).
140. N.Y. Times, June 17, 1978, § 1, at 17, col. 2. See Addendum following note 249.
142. See, e.g., id. at 716 (denial of sixth amendment rights); Opinion and Order Denying Defendant's Motion for Reimbursement of Travel Expenses of June 14, 1979, United States v. Trifa, No. 5–70924 (E.D. Mich., Sept. 4, 1980) (denial of access to Fed. R. Crim. P. 15(c) in a denaturalization case).
144. See Knauer v. United States, 328 U.S. at 675–76 (1946) (Rutledge, J., dissenting): My concern is not for Paul Knauer. . . . He was a thoroughgoing Nazi, addicted to philosophies altogether hostile to the democratic framework in which we believe and live. . . . Not merely Knauer's rights, but those of millions of naturalized citizens in their status and all that it implies of security and freedom, are affected by what is done in this case. By the outcome they are made either second-class citizens or citizens having equal rights and equal security with others.
right to procedures which will protect them in the short run, but which truly will protect the value of American citizenship in the long run.

Accordingly, an emergency situation reminiscent of Klapprott145 arose once again in the history of statutory denaturalization reflecting strong reasons why the use of the denaturalization process is inimical to the rights of these defendants. First, the result of the denaturalization of an alleged war criminal is that the alien is then officially labeled a "war criminal."146 The resulting public opprobrium towards the branded individual could be devastating.147 If the procedural safeguards were more protective of his rights, the public would be more confident that the alien was identified correctly, which would correspondingly enhance the public contempt towards the individual. An innocent person, however, should not have to endure this form of mental torture.

Second, there is a time factor applicable to all denaturalization suits but taken to extremes in the war criminal cases because of the thirty to forty year delays plaguing the Government's enforcement of immigration policy. There is no statute of limitations attached to the denaturalization statute,148 and the courts have uniformly rejected laches as a defense.149 Also, there is no statute of limitations barring a trial of World War II criminals on the charge of war crimes,150 although this has been the subject of much debate in Congress151 as well as in the international legal and legislative community.152 Thus, the alleged war criminal who lied in obtaining his citizenship is vulnerable not only

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146. See Amicus Curiae Brief of Sam Polur, Counsel for Jewish Defense League, United States v. Fedorenko, 597 F.2d 946 (5th Cir. 1979) (a compilation of newspaper clippings leading a reader to the conclusion that Fedorenko had been a savage war criminal).
147. See Letter from William Lehman, M.C. & Hamilton Fish, Jr., M.C. to President Ronald Reagan (Feb. 6, 1981) (signed by 104 Congressmen) ("[Continuing the appropriations for the Special Investigations Unit] will . . . serve as a warning that civilized nations will never again tolerate such base inhumanity.").
148. 3 GORDON & ROSENFIELD, supra note 16, at § 20.2e (a statute of limitations had been proposed by the House in 1973 but was never enacted).
149. E.g., Costello v. United States, 365 U.S. 265, 281–84 (1961) (traditionally, laches could not be used against the sovereign). Cf Holmberg v. Armbrecht, 327 U.S. 392 (1946) (recognizing the power of federal equity court to infuse a period of limitations into a statute when Congress had not provided for a statute of limitations).
150. See N.Y. Times, July 4, 1979, § 1, at 1, col. 2 (West German Government removing its statute of limitations for murder).
151. See N.Y. Times, May 10, 1979, § 1, at 3, col. 1 (House of Representives approving resolution which urges West Germany to extend its statute of limitations on prosecuting Nazi war criminals).
to denaturalization and eventual deportation suits in America, but also to war crime trials abroad as long as he lives.

This time factor, generally foreign to American courts, operates to the benefit or detriment of both parties in a denaturalization proceeding. Because of the delay, memories have faded and witnesses have died, thus affecting the trial strategies of the litigants. To arouse the judge's sympathy, war criminal defendants argue that equity dictates that because they are now and have been model American citizens for years, acts which they may or may not have committed more than thirty-five years ago, including the illegal attainment of American citizenship, should not be unearthed at this late date.

Practically, the time factor operates more as a handicap to the Government than to the war criminal defendant. After the decision in *Klapprott*, the Government will not be able to prevail in a denaturalization suit without first satisfying its burden of proof. This will be difficult to attain because the Nazi terror resulted in the attempted elimination of an entire race so that very few victims are alive today to retell the horror of the holocaust. The task of locating survivors who were eyewitnesses to the brutality of a particular individual, or of obtaining and being allowed to submit into evidence foreign documents which tend to incriminate an individual who may have been involved in mass

153. Although only one former United States citizen is on trial abroad, several war crime trials in Europe are in progress or have recently concluded. *E.g.*, N.Y. Times, Jan. 16, 1981, § 1, at 3, col. 5 (Dutch Supreme Court upholding conviction of Pieter Menten for guilt in the murder of Jews during World War II); N.Y. Times, March 9, 1980, § 1, at 6, col. 3 (Ernst Heinrichsohn sentenced to six years in prison by West German Government for complicity in death camp murders of over 70,000 Jews during World War II).

154. Of historical and legal interest, the alleged war criminal may also be the victim of kidnapping. For example, in 1961, Israeli agents kidnapped Adolf Eichmann in Argentina. Upon Eichmann's forced arrival in Israel, he was put on trial and found guilty of numerous war crimes. Once Argentina accepted Israel's diplomatic apology for the act, Eichmann had no legally viable complaint because an individual can only press a claim in international courts if he is represented by a nation. Further, the Israeli legal community holds that the Eichmann incident would not have been considered a violation of Argentinian sovereignty even if a claim had been pursued by that South American country. According to the consensus of the Israeli legal community, there is international jurisdiction to apprehend war criminals. Lecture by Gideon Hausner (Chief Prosecutor at the Eichmann trial), delivered at Hebrew University School of Law, Mt. Scopus campus, Jerusalem, Israel, Aug. 13, 1979. *See generally* Lasok, *The Eichmann Trial*, 11 Int'l Comp. L.Q. 355 (1962).


158. *See* L. Dawidowicz, *The War Against the Jews* 1933-1945 (1975) 341. ("The Final Solution was a new phenomenon in human history.").
executions, is even more frustrated by the passage of more than three decades.\textsuperscript{159}

A third reason why present denaturalization procedure is violative of defendants’ rights in the war criminal suits is the international nature of these actions. The cases vividly portray the hardships of a defendant who might be without funds to hire an attorney or to pay for an extensive undertaking during discovery.\textsuperscript{160} Congress, on the other hand, has allocated a considerable amount of funds to the Special Investigations Unit of the Department of Justice to try alleged war criminals on immigration matters.\textsuperscript{161} As a result, the Government has been able to locate the best witnesses and to benefit from their testimony notwithstanding the fact that the best witness may live in Romania and may require the services of a translator.\textsuperscript{162} Unless a defendant is wealthy, his finances cannot match the Government’s resources.\textsuperscript{163} It arguably follows that all needy defendants in denaturalization suits should be provided with free counsel and with Government funds to adequately prepare for their defense.\textsuperscript{164} Because immigration procedure presents a challenge even to the experienced attorney, it is ludicrous to expect that such a needy defendant could represent himself effectively without competent counsel.

A final factor in considering the war criminal denaturalization as an extreme case for needed reform is the emotional level at trial. For those who have tried to forget, or for those who have forced themselves to remember, this civil hearing is a harrowing ordeal,\textsuperscript{165} not only because of painful memories, but

\textsuperscript{159} For a discussion of the complexities involved and examples of the leeway available to trial judges, see United States v. Fedorenko, 455 F. Supp. 893 (S.D. Fla. 1978).

\textsuperscript{160} See, e.g., United States v. Fedorenko, 455 F. Supp. 893, 899 (S.D. Fla. 1978).

\textsuperscript{161} See N.Y. Times, March 25, 1979, § 1, at 21, col. 1.

\textsuperscript{162} See N.Y. Times, June 14, 1979, § 1, at 6, col. 1 (Romanian Chief Rabbi testifying that in 1941, Trifa participated in a massacre of Bucharest Jews); N.Y. Times, Jan. 10, 1979, § 1, at 12, col. 4 (Israeli woman to testify at deportation hearing of Detlavs in Balto., Md.). See also The Jewish Week, Feb. 12–18, 1981, at 6, col. 1 (Director of Special Investigations Unit, Allan A. Ryan, Jr., will attend the World Gathering of Holocaust Survivors to be held in Israel in June, 1981; he seeks to locate witnesses to testify in the Nazi immigration cases in the United States).

\textsuperscript{163} See United States v. Fedorenko, 455 F. Supp. 893, 899 (S.D. Fla. 1978) (trial judge’s attempt to fill in the gap between the Government’s ample funds and the defendant’s lack of funds).

\textsuperscript{164} Cf. Select Commission on Immigration and Refugee Policy, U.S. Immigration Policy and the National Interest (March 1, 1981) ( Recommending that indigent permanent resident aliens be provided with free counsel in deportation or exclusion hearings).


[When individuals and/or the group with which they are affiliated have been subjected to severe and repeated traumatic experience, these individuals will be prone to respond to any reminders of their persecution in a total fashion, as if they were again subjected to the totality of noxious conditions under which painful associations were originally formed.

Id. at 280–81 n.143 (quoting Collin v. Smith, 447 F. Supp. 676 (N.D. Ill. 1978) (psychiatric report)).
primarily because the immigration cases are perceived as a means to continue the Nuremberg task of punishing war criminals. This perception is shared by a number of congressmen who view funding the immigration cases of alleged Nazi war criminals "as a small price to pay for reaffirming [the American] commitment at Nuremberg that none of those who participated in Nazi atrocities should escape being called to account." Thus, the Nazi immigration cases represent an attempt to superimpose elements of justice into an interaction, between oppressors and victims, which was devoid of civilization, much less justice.

For example, the concentration camp where most of the surviving witnesses were incarcerated during World War II has been described as a "life in death." "Life" in the death camp was based on an irrational master plan which would result in the death of an inmate — who initially had been "selected" for life — if he did behave according to the rules. Survival was based on luck (or divine grace) and on acts which surreptitiously circumvented obedience. This antithesis of civilized behavior produced an interaction between victim and oppressor incomprehensible to human culture. Encouraged memories of this interaction in the American courtroom have produced shocking testimony and many emotional outbursts. Because the concentration camps were part of an overall Nazi campaign of genocide, it is difficult to compare the emotional testimony in the Nazi immigration cases to testimony in other cases where proof of violent crimes has also produced a high degree of emotion at trial.

166. Letter from William Lehman, M.C. & Hamilton Fish, Jr., M.C. to President Ronald Reagan (Feb. 6, 1981) (signed by 104 Congressmen). ("We must, in the limited time remaining, make clear to the world that the United States has not forgotten this unparalleled tragedy."). Cf. Note, supra note 20, at 48 ("[T]he wickedness of the concealment pales before the wickedness of the fact concealed.").


Never shall I forget that night, the first night in camp, which has turned my life into one long night, seven times cursed and seven times sealed. Never shall I forget that smoke. Never shall I forget the little faces of the children, whose bodies I saw turned into wreaths of smoke beneath a silent blue sky.

Never shall I forget those flames which consumed my faith forever.

Never shall I forget that nocturnal silence which deprived me, for all eternity, of the desire to live. Never shall I forget those moments which murdered my God and my soul and turned my dreams to dust. Never shall I forget these things, even if I am condemned to live as long as God Himself. Never.


169. Id. at 177–209.

170. D. RABINOWITZ, NEW LIVES: SURVIVORS OF THE HOLOCAUST LIVING IN AMERICA 5–45 (1976). Because of this problem, some judges have attempted to exclude the public from attending certain immigration cases. To date, these attempts have been unsuccessful. See, e.g., Pechter v. Lyons, 441 F. Supp. 115 (S.D.N.Y. 1977) (preliminary injunction granted because of abuse of discretion by immigration judge in barring public attendance to the deportation hearing of Boleslavs Maikovskis).
This factor of emotion will be quite difficult for the judge to control.\textsuperscript{171} Therefore, the guarantee to the defendant of a fair trial in accord with due process requirements, based on probative and compelling evidence,\textsuperscript{172} is in danger of being jeopardized. The danger is that a misplaced objective of vindicating the injustices performed by the Nazis\textsuperscript{173} will be confused with the statutory objective in these cases, which is to strip a war criminal of his ill-gotten American citizenship.

**Responding to the Emergency: Procedural Due Process in Citizenship Law**

One may argue that defendants in denaturalization suits should be protected by the identical procedures afforded to those defendants accused of a crime. This resolution might relieve the defendants from their legal predicament, but it is a shallow solution to a very real procedural dilemma. Comparing denaturalization to a criminal proceeding is invalid because the paramount congressional intent of section 340 is disregarded in this process. Former Chief Justice Warren addressed this issue in *Trop v. Dulles*,\textsuperscript{174} where he stated that Congress enacted the denaturalization statute "in the exercise of the power to make rules for the naturalization of aliens."\textsuperscript{175} This sovereign power to regulate

\textsuperscript{171} See, e.g., United States v. Fedorenko, 455 F. Supp. 893, 899 n.9 (S.D. Fla. 1978), \textit{rev'd}, 597 F.2d 946 (5th Cir. 1979), \textit{aff'd on other grounds}, 101 S. Ct. 737 (1981) ("If ever a case supported the Judicial Conference ruling barring cameras from the courtroom, this case does. From the beginning it was like a Hollywood spectacular and polarized the residents of South Florida.").

\textsuperscript{172} Critics have observed that survivor testimony is unreliable because survivors suffer from 'hyperamnesia' — remembering events in great detail which never occurred or which never occurred quite how they were remembered. \textit{See} \textit{N.Y. Times}, March 25, 1979, § IV, at 18, col. 5. \textit{But see} Nesselson & Lubet, \textit{Eyewitness Identification in War Crimes Trials}, 2 \textit{Cardozo L. Rev.} 71, 89 (1980).

\textsuperscript{173} See Fedorenko v. United States, 101 S. Ct. 737 (1981) (Stevens, J., dissenting): The gruesome facts recited in the record create what Justice Holmes described as a sort of "hydraulic pressure" that tends to distort our judgment. Perhaps my refusal to acquiesce in the conclusion reached by highly respected colleagues is attributable in part to an overreaction to that pressure. . . . That human suffering will be a consequence of today's venture is certainly predictable; that any suffering will be allayed or avoided is at best doubtful.

\textit{Id.} at 763; United States v. Walus, No. 77-C-279 (N.D. Ill., Nov. 26, 1980) (memorandum order granting Government's motion to dismiss denaturalization suit with prejudice based on newly discovered evidence offered at trial on remand from the Seventh Circuit):

In granting the Government's motion we do not forget the abominable atrocities inflicted at the hands of the Nazis on those and the families of those who testified against the defendant. But those outrages cannot be undone and certainly not by an unjust conviction of the defendant. Indeed, we are confident that those who survived the atrocities and seek vindication in the memory of those who did not would not want their honor stained by a conviction which could not withstand careful dispassionate scrutiny.

\textsuperscript{174} 356 U.S. 86 (1958) (plurality opinion).

\textsuperscript{175} \textit{Id.} at 98.
the attainment of citizenship would be emasculated in a criminal scenario in which the fundamental purpose is to punish. To de-emphasize this congressional power of regulation is to welcome a de-valuation of American citizenship itself. Hence, the attainment of a naturalization judgment should be as delicately treated a procedure as should be the revocation of the judgment.

The congressional intent of section 340, therefore, requires that denaturalization be considered a civil proceeding. Moreover, the Bill of Rights safeguards civil procedure by the fifth amendment due process clause. There is no unanimously accepted definition for "due process; the cases involving procedural due process reveal only that it is "flexible and calls for such procedural protection as the particular situation demands." If the due process clause attaches in an ordinary civil suit or an administrative grievance procedure, the Supreme Court has required that the individual whose liberty or property interest is at stake must receive notice of the threatened action and have an opportunity to be heard, usually during "some kind" of trial-type hearing. During the hearing, the due process interest of the individual is "balanced" against constitutionally derived interests of the opposing party. These minimum guarantees of notice and hearing have applied when the Government has sought to revoke the citizenship of naturalized Americans.

The Supreme Court has proclaimed, however, that denaturalization is not an ordinary civil suit, nor is it a mere administrative complaint process. The minimum standard of notice and hearing contained in the denaturalization statute, therefore, is an inadequate measure of the due process that ought to be accorded to a defendant who may well be subject to the precarious sanctions of expulsion and statelessness. The Supreme Court has paid more than lip service to the testing of the due process protection owed to the defendant in a

176. U.S. CONST. amend. V.

177. E.g., Bogen, The Supreme Court's Interpretation of the Guarantee of Freedom of Speech, 35 Md. L. Rev. 555, 556 n.16 (1976) (noting the argument that within the combination of the due process and privileges and immunities clauses, all the guarantees of the Bill of Rights are contained).

178. Morrissey v. Brewer, 406 U.S. 471, 481 (1972). See also FCC v. WJR, 337 U.S. 265, 275 & n.9 (1949) (opinion by Rutledge, J.). But see J. Ely, Democracy & Distrust: A Theory of Judicial Review 18-21 (1980) ("What has ensued has been a disaster in both practical and theoretical terms. Not only has the number of occasions on which one is entitled to any procedural protection at all been steadily constricted but the Court has made itself look quite silly in the process.").


180. See Note, Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing, 88 Harv. L. Rev. 1510 (1975) (criticism of the balance test because its implementation often has resulted in impinging on individual due process rights).

181. 8 U.S.C. § 1451(a), (b) (1976).

denaturalization proceeding by its institution of the clear and unequivocal burden of proof, by its restriction on the Government not to go beyond the four corners of the initial denaturalization complaint, and by its careful review of facts concluded by the denaturalization trial court.

The Supreme Court's innovative task of employing procedures to ensure that due process is given to defendants in denaturalization cases commensurate with the degree of liberty at stake is far from complete, but blueprinting additionally needed procedures does not dispose of the due process issue. The due process issue will be adequately addressed only when the Supreme Court adjusts its method of adopting innovative procedures so that it conforms with the Constitution. If the Court does not say that the Bill of Rights prompted the new procedure, the isolated procedure as well as the due process protection of the overall procedure is made vulnerable. That is, Congress could pass fill-in-the-gap legislation with relative ease, rendering the judicially introduced procedure inapplicable unless the legislators are aware of the constitutional challenge.

Thus far, the Supreme Court has not added procedural safeguards to the denaturalization process by this constitutionally based approach. For example, the imposition of the clear and unequivocal burden in *Schneiderman* was an outgrowth of an antiquated analogy to property revocation proceedings.\(^{183}\) Also, the dictum that the Government is restricted to proving allegations in the denaturalization complaint,\(^ {184}\) another inheritance from *Schneiderman*, appears to be grounded in the practical realization that denaturalization looks like, but is not, a criminal sanction. Finally, the careful review of lower denaturalization court findings of fact in *Baumgartner v. United States*,\(^ {185}\) though accomplished in a forthright manner, amounted to no more than a procedural innovation inferred from the institution of the burden of proof in *Schneiderman*.\(^ {186}\)

The Supreme Court, however, has introduced procedural safeguards into other types of actions in conformity with the constitutionally inspired method. In *Addington v. Texas*,\(^ {187}\) the Court held that a "clear and convincing" burden of proof must be met in civil commitment proceedings. In no effort to elude the due process issue, Chief Justice Burger's unanimous opinion emphasized that "[t]he question in this case is what standard of proof is required by the Fourteenth Amendment to the Constitution in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period . . . .\(^ {188}\) In *Addington*, the Court weighed the individual's liberty interest in remaining a free member of society against Texas' responsibility under its *parens patriae*

\(^{183}\) Id. at 125.

\(^{184}\) Id. at 160.

\(^{185}\) 322 U.S. 665 (1944).

\(^{186}\) Id. at 670–71.


\(^{188}\) 441 U.S. at 419–20.
power to care for its citizens unable to care for themselves and its police power
to protect the community from dangerous mentally ill citizens.\textsuperscript{189} The Court
tipped the scales in favor of individual rights in requiring proof stricter than
traditionally required in civil law.

Thus, the constitutionally based method is no stranger to the Court's review
of civil or administrative procedure. In fact, the Court employed this constitu-
tional approach when the interest at stake was the mere loss of a driver's
license.\textsuperscript{190} In denaturalization procedure, though, the Court has shied away
from these constitutional issues by cloaking judicially introduced procedures in
ill-fitting notions of equity.\textsuperscript{191} This deviation in denaturalization procedure from
the Court's practice of squarely confronting due process implications appears to
fit comfortably into a recent trend of backsliding set by the Court in the larger
area of immigration procedure.

In deportation procedure, for example, the Court introduced the clear,
unequivocal and convincing burden of proof in 1966. In \textit{Woodby v. INS},\textsuperscript{192} the
Government attempted to deport the defendant because of her alleged activities
as a prostitute. Justice Stewart maintained that the judicially imposed burden
of proof supplemented, rather than contradicted, the 1966 version of the
degration statute.\textsuperscript{193} Thus, an explicit balancing of the defendant's right to a
just deportation proceeding against the implied power of Congress to expel was
neatly avoided. In adopting the stricter evidentiary burden, the Court compared
this innovation in deportation procedure to the judicially introduced burden of
proof in \textit{Schneiderman},\textsuperscript{194} one which was not buttressed by the Bill of Rights.

The questionable judicial method employed by the Court in adopting the
burden of proof in \textit{Schneiderman} has also led to separation of powers conflicts in
the area of expatriation procedure. In \textit{Vance v. Tarrazas},\textsuperscript{195} the Court set a
precedent for the 1980's for constricting due process and citizenship rights. In
this expatriation case, the Court upheld the power of Congress to pass section
349(c)\textsuperscript{196} of the Immigration and Nationality Act, thus enabling the Govern-

\textsuperscript{189} \textit{Id.} at 431.
\textsuperscript{190} \textit{Bell v. Burson,} 402 U.S. 535 (1971).
\textsuperscript{191} The Court recently refused to consider traditional doctrines of equity in a
denaturalization case, but did not hold, as a result, that denaturalization should be
removed from the jurisdiction of equity. \textit{Fedorenko v. United States,} 101 S. Ct. 737,
\textsuperscript{193} \textit{Id.} at 284. \textit{Contra, id.} at 287 (Clark, J., dissenting):
The Court, by placing a higher standard of proof on the Government, in deportation
cases, has usurped the legislative function of the Congress and has in one full swoop
repealed the Congressionally established 'reasonable, substantial, and probative' burden of proof placed on the Government by specific Act of the Congress . . .
\textsuperscript{194} \textit{Id.} at 285–86.
\textsuperscript{195} 444 U.S. 252 (1980). \textit{See generally Comment, Limiting Congressional Denational-
(1980).
\textsuperscript{196} 8 U.S.C. § 1481(c) (1976).
ment to prove by a mere preponderance of the evidence that a dual national, a citizen of the United States and Mexico since birth, had voluntarily renounced his American citizenship when he took an oath of allegiance to the Mexican Government.\(^\text{197}\)

The issue of which burden of proof applies in expatriation proceedings had previously been before the Supreme Court in 1958. In *Nishikawa v. Dulles*,\(^\text{198}\) the Warren Court held that the Government's burden of proof in an expatriation proceeding must be that of a clear, unequivocal, and convincing standard. Because Congress had not legislated on this evidentiary issue prior to *Nishikawa*, there was no compulsion for the Court to ground the newly adopted standard in the Constitution; hence, the Court in *Nishikawa* relied on *Schneiderman*.\(^\text{199}\) But in 1961, Congress overruled *Nishikawa* by enacting section 349(c) which relieved the Government of the heavier burden.\(^\text{200}\) In *Terrazas v. Vance*,\(^\text{201}\) the Seventh Circuit questioned Congress' power to legislate the evidentiary issue. As a result, the Seventh Circuit reinstituted the burden of proof established in *Nishikawa* by clearly emphasizing the constitutional imperative for the procedure.\(^\text{202}\)

In reversing the Seventh Circuit, Justice White, the author of the five-man majority opinion, held that Congress derived the power to pass the statute from its constitutional grant "to create inferior federal courts."\(^\text{203}\) Upon finding this rational relationship between constitutional power and congressional action, the Court saw its task of review completed. Thus, the majority declined to balance the due process rights of Terrazas against the congressional power to pass the statute precisely because the Court refused to recognize that the due process liberty interest of the defendant was implicated: "[E]xpatriation proceedings are civil in nature and do not threaten a loss of liberty."\(^\text{204}\) Justice White supported

\(^{197}\) 444 U.S. at 270.


\(^{199}\) Id. at 135.

\(^{200}\) 444 U.S. at 467–70.

\(^{201}\) 577 F.2d 7 (7th Cir. 1978), rev'd, 444 U.S. 252 (1980).

\(^{202}\) Id. at 10.


\(^{204}\) 444 U.S. at 266 (emphasis added). Contra, id. at 271–72 (Marshall, J., concurring in part and dissenting in part):

The Court's discussion of congressional power to "prescribe rules of evidence and standards of proof in the federal courts" . . . is the beginning, not the end, of the inquiry. It remains the task of this Court to determine when those rules and standards impinge on constitutional rights. . . . And the mere fact that one who has been expatriated is not locked up in a prison does not dispose of the constitutional inquiry.

. . . .

Recognizing that a standard of proof ultimately "reflects the value society places" on the interest at stake, *Addington v. Texas* . . . I would hold that a citizen may not lose his citizenship in the absence of clear and convincing evidence that he intended to do so.

See also *Steadman v. SEC*, 101 S. Ct. 999, 1010 (1981) (Powell, J., dissenting) ("With all respect, it seems to me that the Court's decision today lacks the sensitivity that
this interpretation by reference to the Nishikawa case: "Nishikawa did not purport to be a constitutional ruling" involving confrontation with previously enacted congressional resolutions.205

According to the majority view, no liberty interest attached in the expatriation proceeding because of the rebuttable presumption in section 349(c) that the renouncing act of taking an oath of allegiance to a foreign country was done voluntarily.206 Justice White tempered this holding, however, by emphasizing that the presumption of voluntariness did not alleviate the Government’s burden of proving that the defendant intended to expatriate himself: "This in itself is a heavy burden, and we cannot hold that Congress has exceeded its powers by requiring proof of an intentional expatriating act by a preponderance of evidence."207 Thus, according to the Court’s interpretation of section 349(c), the defendant need not rebut the presumption of voluntariness if the Government cannot prove intent by the preponderance standard.

Moreover, the majority countenanced this congressional action by severely limiting the scope of the citizenship clause in the fourteenth amendment. Previously, in Afroyim v. Rusk,208 the Court had held that Congress could neither enlarge nor abridge the definition of citizenship contained in the fourteenth amendment by legislation which would substantively redefine who could be a United States citizen.209 It would seem, then, that Congress would be more limited in legislating in the area of expatriation procedure than in the area of denaturalization procedure, wherein Congress is free to ascertain who is eligible for naturalization.210 Yet, only Judge Sprecher of the Seventh Circuit in Terrazas, and Justice Brennan’s dissent to the Supreme Court’s opinion, recognized that by relying on the procedural power to "create inferior federal courts"211 (in stating that a preponderance requirement was sufficient), Congress had accomplished indirectly what it could not do directly by passage of substantive legislation redefining who could be a citizen of the United States.212 To guard against this indirect congressional abuse of power, Justice Brennan urged that the expatriation statute should apply only in the section 349(a)(6) situation in which a citizen voluntarily makes a formal renunciation of American citizenship before a diplomatic officer of the United States.213

Finally, the constitutionally based approach again failed to win the favor of the Court in Fedorenko v. United States,214 a war criminal denaturalization

traditionally has marked our review of the Government’s imposition upon citizens of severe penalties and permanent stigma.”).

205. 444 U.S. at 266. See also Fedorenko v. United States, 101 S. Ct. 737, 747 (1981) (implicit recognition that the burden of proof set in Schneiderman was not based in the Constitution).
206. 444 U.S. at 267–70.
207. Id. at 267.
209. Id. at 257.
210. U.S. Const. art. 1, § 8, cl. 4.
211. Id. at art. 1, § 1, cl. 8.
212. 444 U.S. at 274 (Brennan, J., dissenting); Terrazas v. Vance, 577 F.2d at 10.
213. 444 U.S. at 276 (Brennan, J., dissenting).
DENATIONALIZATION OF NAZI WAR CRIMINALS

Denationalization of Nazi War Criminals

Feodor Fedorenko, a native-born Ukranian, served as an armed guard at the Treblinka death camp in Poland during 1942 and 1943. In 1949, Fedorenko sought admission to the United States under the relaxed quota policy of the Displaced Persons Act of 1948 (DPA). Congress had excluded war criminals from coverage under the DPA, so Fedorenko lied to the DPA administrators when specifically asked about his wartime activities. Based on the apparent propriety of Fedorenko's visa application, the INS admitted him for permanent residence in the United States. In 1970, Fedorenko's petition for naturalization was granted on the mistaken premise that he had complied with all the statutory preconditions of the Act, including the requirement that he was the bearer of a validly obtained visa.

In 1977, the Government filed suit to divest Fedorenko of his citizenship, alleging the grounds of illegal procurement and misrepresentation. In an exhaustive but presumptuous opinion, Judge Roettger of the Southern District of Florida held that the Government failed to fulfill its burden of proof. Alternatively, the district court determined that even if the Government had met its burden, equity would compel the denaturalization court to ignore statutory deficiencies because Fedorenko had been a model American citizen.

The Fifth Circuit reversed the district court, holding that the Government had fulfilled its burden of proof to denaturalize Fedorenko as a matter of law and, alternatively, that the district court had impermissibly exercised its powers in equity to forgive the defendant for defrauding immigration officials.


216. Section 2 of the DPA explicitly denied admission to persons who "(a) have assisted the enemy in persecuting civil populations" or "(b) voluntarily assisted the enemy forces ... in operations against the United States." See note 8 supra.


218. Id. at 743. The Government contended that Fedorenko lied about his experience as a death camp guard, and, as a result, he concealed his guilt in the torture and murder of several inmates while a guard at Treblinka.


The court observed at the trial and iterates here: never in six years on the bench has the court seen the Government indulge in such expenses. ... Such expenses of the taxpayers' treasure and talent have not occurred in this court's ... serious prosecutions. ... [Yet], clearly the expenditure of the resources of the Executive Branch lies within the discretion of that branch of the Government.

220. Id. at 917-21. It is interesting that the district court tested the admissibility and probative value of the evidence against the standards imbedded in criminal law. See, e.g., id. at 905. See generally Nesselson & Lubet, Eyewitness Identification in War Crimes Trials, 2 CARDOZO L. REV. 71 (1980). Of further significance, the Supreme Court accepted, for the limited purpose of deciding the Fedorenko case, the evidentiary findings of the district court. See Fedorenko v. United States, 101 S. Ct. at n.24.

Wisdom, author of the Fifth Circuit opinion, specifically overruled the district court on the proper interpretation of the material misrepresentation standard set in the 1960 Supreme Court decision of Chaunt v. United States. The Fifth Circuit adopted a more liberal interpretation of the materiality standard, resulting in a diluted burden of proof on the Government in a denaturalization case.

In his sole appearance before the Supreme Court as Attorney General, Benjamin R. Civiletti argued that the Fifth Circuit's liberal interpretation of the materiality standard be adopted to resolve the circuit court battle over the meaning of Chaunt. The Court, however, declined to decide the ambiguities involving the materiality standard and distinguished Chaunt by noting that the facts in that case covered misrepresentations made in the actual petition for naturalization, whereas the facts in Fedorenko concerned misrepresentations made in the initial application for a visa. The Court held that if Fedorenko had revealed that he had been a death camp guard, he would never have been admitted to the United States regardless of whether he had committed war crimes while a guard, and regardless of whether his duty as a guard was voluntary or involuntary on his part.

Although this decision could be read as a misrepresentation case, advancing an interpretation of Chaunt actually at odds with the reasoning of the Fifth Circuit, Justice Marshall explicitly limited the holding of the Court within the bounds of pure illegal procurement cases. Simply, the DPA barred Fedorenko from admission to the United States; thus, he never had received a valid visa. Without a valid visa, Fedorenko did not comply with the statutory conditions precedent for naturalization. Thus, "one of the 'jurisdictional facts upon which the grant of [citizenship] is predicated' . . . was missing at the time petitioner became a citizen." Additionally, Justice Marshall agreed with Judge Wisdom of the Fifth Circuit that equity would not permit forgiving an act of fraud which violates the naturalization statute.

The precedential value of the majority opinion in Fedorenko is both limited and far-reaching. Read narrowly, the opinion realistically will be binding only in future war criminal denaturalizations because it is expressly based on
statutory interpretation of the DPA, not on interpretation of the immigration statutes which affect the majority of naturalized citizens.\textsuperscript{231}

Read broadly, however, this decision resurrects the use of the illegal procurement ground in its pure form in which proof of intentional noncompliance is unnecessary.\textsuperscript{232} Although the use of pure illegal procurement philosophy is harmless in the \textit{Fedorenko} case because the Court acknowledged that Fedorenko intentionally defrauded immigration officials,\textsuperscript{233} it is a dangerous precedent to set for future cases. The danger lies in the resurgence of a ground for denaturalization which provides the Government with a relatively burden-free method with which to denaturalize citizens. For example, in reciting the now antiquated precedent of the pure illegal procurement cases,\textsuperscript{234} Justice Marshall included \textit{United States v. Ginsberg},\textsuperscript{235} wherein the court denaturalized a citizen because the naturalization judge ordered that the naturalization hearing take place in his chambers instead of in open court as required by statute.\textsuperscript{236} The Court in \textit{Fedorenko} should have been mindful that reliance on pure illegal procurement grounds results in approval of such outrageous cases as \textit{Ginsberg}, as well as the more permissible cases such as \textit{Fedorenko}.

Moreover, the reluctance to decide the \textit{Fedorenko} case on grounds of misrepresentation is interesting because none of the Justices disagreed that the materiality standard in \textit{Chaunt} placed a heavy burden of proof on the Government.\textsuperscript{237} Because of the practical unanimity of the Court that \textit{Chaunt} proposed a strict materiality standard (i.e., a heavier burden of proof on the Government than that prescribed by the Fifth Circuit), the most troubling aspect of the case is that this strict interpretation of \textit{Chaunt} was not linked to the due process or citizenship clauses of the Constitution. Instead, this apparent interpretation of \textit{Chaunt} was disguised as a judicial gloss on a statutory

\textsuperscript{231} The method of circumscribing the scope of denaturalization cases by interpretation of statutes applicable to a minority of naturalized citizens has been previously employed in other decisions. See, e.g., \textit{Toyota v. United States}, 268 U.S. 402 (1925).

\textsuperscript{232} In the 1952 version of the Act, Congress deleted the ground of illegal procurement, thereby placing a uniform requirement that the Government must prove intent to be triumphant in a denaturalization case. In apparent reaction to the Court’s imposition of a heavy burden of proof, Congress in 1961 once again included the ground of illegal procurement in the denaturalization statute. Notwithstanding that the Court has decided few denaturalization cases since the effective date of the 1961 amendment, the \textit{Fedorenko} case is the first indication in several decades that the Court will countenance the denaturalization of a citizen based solely on the ground of illegal procurement. See note 50 supra.

\textsuperscript{233} 101 S. Ct. at 748 & n.26.

\textsuperscript{234} \textit{Id.} at 747.

\textsuperscript{235} 243 U.S. 472 (1917).

\textsuperscript{236} \textit{Id.} at 475.

\textsuperscript{237} Thus, disagreement among the Justices was directed solely to whether the Government had fulfilled its burden of proof, not on how heavy that burden is. \textit{Compare} \textit{Fedorenko v. United States}, 101 S. Ct. at 753 (Blackmun, J., concurring) \textit{with id.} at 759 (Stevens, J., dissenting).
ambiguity. While it is accepted Supreme Court practice to decide disputes on non-constitutional grounds, the Court should not resort to this practice when its non-constitutional rationale is merely a shield for a principled constitutional outcome:

Significantly, this view [of Chaunt] accords with the policy considerations informing the Court's decisions in the area of denaturalization. If naturalization can be revoked years or decades after it is conferred, on the mere suspicion that certain undisclosed facts might have warranted exclusion, I fear that the valued rights of citizenship are in danger of erosion. If the weaker standard were employed, I doubt that the denaturalization process would remain as careful as it has been in the past in situations where a citizen's allegedly material misstatements were closely tied to his expression of political beliefs or activities implicating the First Amendment. . . . [T]he judiciary's task remains the difficult one of balancing a need to safeguard admission to United States citizenship, in accord with the will of Congress, against a citizen's right to feel secure in the exercise of his constitutional freedoms. . . . The Court seems to reject [the Fifth Circuit] approach, and follows the essential teaching of Chaunt. I regret only its unwillingness to say so.238

This passage in the concurring opinion of Justice Blackmun is the only indication that the Court has not entirely shirked its responsibility to ground procedures employed in the overall area of citizenship law in the Constitution. In essence, the facts in Fedorenko called for a constitutional clarification of where the clear and unequivocal burden of proof fell on the continuum between the preponderance and reasonable doubt standards, a question apparently left unanswered by the Court in Schneiderman. Given that the precedents of Schneiderman, Woodby, and Terrazas had been woefully deficient in constitutional principles regarding the nature of the applicable burden of proof in citizenship law, it was not surprising that this clarification in Fedorenko was veiled in narrow non-constitutional reasoning.

CONCLUSION

Loyalty to the doctrine of stare decisis is a cornerstone of the American judicial system. In the field of immigration law, the United States Supreme Court has remained substantially true to the principles of that doctrine notwithstanding the injustices it many times has created. In a dissenting opinion, Justice Black aptly stated that:

courts are not omniscient. Like every other human agency, they can profit from trial and error, from experience and reflection. As others have demonstrated, the principle commonly referred to as stare decisis has never been thought to extend so far as to prevent the courts from correcting their own errors.239

238. Id. at 757–58 (Blackmun, J., concurring).
In accord with this sentiment, when the doctrine of *stare decisis* has seemingly misguided and paralyzed the United States judicial system, as it has in the vital area of citizenship rights, then judicial loyalty to *stare decisis* is misplaced.

Schneiderman is a telling instance in which the Supreme Court could have risen to the challenge of upholding citizenship rights in the area of procedural due process by a constitutionally based approach. The strength of the recent *Terrazas* opinion would have been tempered had the Court availed itself of procedural due process analysis to support past procedural innovations in citizenship law. And in *Fedorenko*, the Court again declined to set a constitutional precedent which would have protected the procedural rights of future defendants whose citizenship is at stake. The result is that defendants in denaturalization suits are forced to rely on analogies to property revocation proceedings in equity — an insufficient precedent to explain and support the institution of procedural innovations in a statutory process.

Aside from the need to change the qualitative method by which innovative procedures are infused into the denaturalization process, there is a more immediate need for the introduction of quantitatively more procedural safeguards for these defendants. In light of recent precedents set in the general area of immigration law, there is little comfort in the knowledge that the Supreme Court will correct any abuses inherent in the denaturalization procedure in the near future. Almost thirty years ago, in an entirely different context, Justice Douglas stated the need for procedural protections in a statement which transcends these constraints of time and circumstance:

> It is not enough to know that the men applying the standard are honorable and devoted men. This is a government of laws, not of men. . . . It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice.

Congress generally defers to the Court when an issue of individual rights arises; consequently, it would appear that the responsibility has fallen upon the Court to protect the rights of naturalized citizens. There is a glimmer of hope on the horizon, however, not from the Court but from Congress. In 1978, Congress

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240. 320 U.S. 118 (1943) (plurality opinion). See notes 87 to 105 and accompanying text supra.


245. See *Hertz, Limits to the Naturalization Power*, 64 Geo. L.J. 1007, 1045 (1976) (arguing that the Court has failed to assert its constitutional power to protect citizenship rights and has allowed Congress to overstep the limits of its power in this area).

established the Select Committee on Immigration and Refugee Policy. Recognizing that the Immigration and Nationality Act of 1952 warranted considerable scrutiny, the Committee's purpose included possible recommendations concerning the loss of citizenship. The Committee's final report and recommendations, however, issued in March, 1981, did not include, any proposals involving denaturalization.

In considering the Committee's report, it is hoped that Congress will recognize the constitutional weaknesses in the denaturalization procedure currently embodied in section 340 of the Act. Specifically, there are some glaring features seen most vividly in the war criminal cases that command remedy. First, the procedure should be taken out of the jurisdiction of equity to clear the way for constitutionally based procedural innovations and to give defendants the benefit of a jury trial on the factual issue of misrepresentation. Second, the ground of illegal procurement should be dropped so that the Government must prove intentional noncompliance with the Act. Third, defendants should have assistance of counsel and financial resources made available to them if they are without funds for an effective defense. Fourth, if the defendant is an "involuntary" witness, negative inferences should not flow from his exercise of privilege against self-incrimination. Finally, and most important, a code for denaturalization procedure should be established which merges appropriate elements from the traditionally separate spheres of civil and criminal law. This code would eliminate the mental gymnastics of making flexible the apparently rigid doctrine that the courts will not infuse precedents from criminal procedure into civil procedure. A loyalty to labels which sways to the detriment rather than to the betterment of individual rights makes it incumbent on the legislators to effect a procedure in which the concern is with the individual citizen and not with the threat of challenging tradition.

It is further hoped that with the aid of the Congressional response to the Committee's report and a more enlightened Court, the rights of the alleged war criminals will not be lost because of unthinking adherence to stare decisis, nor jeopardized by a race against time. The cry for retribution against war

criminals, who are guilty of inhuman brutality, must be tempered by the American ideal of justice, particularly because this ideal was conspicuously absent from the Nazi regime. In the final analysis, the paramount concern is that the concepts of due process and citizenship rights are continuously honed and forever maintained.

"The history of American freedom is, in no small measure, the history of procedure." 249

—Justice Felix Frankfurter


ADDENDUM: While this comment was at the printer, the Government was victorious in its denaturalization suits against John Demjanjuk and Wolodymir Osidach and in its deportation case against Andrija Artukovic. See United States v. Demjanjuk, No. C77-923 (N.D. Ohio, June 23, 1981); United States v. Osidach, No. 79-4212 (E.D. Pa., March 17, 1981) (Because of Osidach's death on May 26, 1981, it is doubtful that the defendant's appeal, Osidach v. United States, No. 81-1956 (3d Cir., filed May 12, 1981), will be maintained); In re Artukovic, No. A7-095-961 (Bd. Imm. App., July 1, 1981) (Artukovic's deportation cannot be enforced until resolution of his petition for review. In re Artukovic, No. 81-7415 (9th Cir., filed July 8, 1981)). Also, the Government dropped its denaturalization suit against Mykola Kowalchuk, No. 77-119 (E.D. Pa., filed Jan. 13, 1977), on June 5, 1981.

Further, the West German war crimes trial against Hermine Braunsteiner Ryan recently concluded, more than five-years since its institution. Ryan, the only former American citizen who has been forced to leave the United States to date, was convicted of murder and sentenced to life imprisonment. See Piper, 8 Nazi Guards Guilty in Thousands of Deaths, Baltimore Sun, July 1, 1981, §1, at 1, col. 2.

Additionally, the twenty-five cases referred to in the text include the following: United States v. Palciauskas, No. 81-547-CIV-T-CG (M.D. Fla., filed June 15, 1981) (denaturalization suit); United States v. von Bolschwing, No. 81-308-MLS (E.D. Cal., filed May 27, 1981) (denaturalization suit) (defendant alleged to have concealed wartime activity as alleged advisor to Eichmann on the matters of Jewish resettlement and elimination); United States v. Schellong, No. 81-C-1478 (N.D. Ill., filed March 17, 1981) (denaturalization suit) (defendant alleged to have concealed alleged wartime activity as an SS guard at the Dachau concentration camp, responsible for training SS recruits for duty in concentration camps); In re Laipenieks, No. A11-937-435 (INS, San Diego, Cal., filed June 2, 1981) (deportation suit).