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The "Materiality" Standard in Denaturalization Cases: Concealment by Naturalized Citizen of Service as Nazi Death Camp Guard, *United States v. Fedorenko*, 597 F.2d 946 (5th Cir. 1979), cert. granted 444 U.S. 1070 (1980)

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The Materiality Standard in Denaturalization Cases: Concealment by Naturalized Citizen of Service as Nazi Death Camp Guard

United States v. Fedorenko
597 F.2d 946 (5th Cir. 1979), *cert. granted,* 444 U.S. 1070 (1980)

The United States commenced a denaturalization proceeding,[1] pursuant to 8 U.S.C. § 1451(a),[2] against Feodor Fedorenko, a Ukrainian[3] who emmigrated to the United States in 1949[4] and was naturalized in 1970.[5] Therein, the Government alleged that the defendant had illegally procured his United States citizenship by failing to disclose on his application for Immigration Visa and Alien Registration that he had served as a guard in a Nazi death camp during World War II.[6] The Government also alleged that the defendant was ineligible for admission to the United States under the Displaced

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1. 597 F.2d 946, 947 (5th Cir. 1979).

2. *Id.* at 948. Fedorenko was admitted under the Displaced Persons Act of 1948, 62 Stat. 1009 (1948). During the two fiscal years following the passage of this Act, up to 202,000 eligible European refugees driven from their homelands during World War II would be permitted to emigrate to the United States without regard to the immigration quota limitations for those years. *Id.* at 1010.

3. *Id.* at 948. Fedorenko's petition for naturalization was granted by the Superior Court of New Haven County, Connecticut, on April 23, 1970. *See* Brief for Appellant, United States v. Fedorenko, 597 F.2d 946 (5th Cir. 1979).

4. United States v. Fedorenko, 455 F. Supp. 893 (S.D. Fla. 1978), *rev'd and remanded,* 597 F.2d 946 (5th Cir. 1979), *cert. granted,* 444 U.S. 1070 (1980). Oral argument before the Supreme Court began on October 15, 1980. The Government's case was argued by United States Attorney General Benjamin Civiletti, who termed the issuer of the case "crucial" to American immigration and naturalization policy. Miami Herald, Oct. 16, 1980, at 32, col. 1.

5. 8 U.S.C. § 1451(a) provides in part:

> It shall be the duty of the United States attorneys . . . upon affidavit showing good cause therefore, to institute proceedings . . . for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling 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,. . . .

For a detailed outline of United States Immigration Laws, *see* H.R. REP. NO. 1137, U.S. CODE CONG. & AD. NEWS 1653-82.

6. 455 F. Supp. at 897. The Government likewise alleged this omission with respect to Fedorenko's Application to File Petition for Naturalization. *Id.* at 898. Fedorenko was a draftee in the Red Army when he was captured by the Germans.

Persons Act of 1948, and the immigration laws, orders, and regulations issued thereunder, because of his participation in the commission of crimes and atrocities against civilians at the death camp.[7] The Government's final allegation was that the defendant lacked the good moral character necessary to become a citizen, both by virtue of his failure to reveal facts concerning his guard service and by his commission of atrocities at the death camp.[8] The United States District Court for the Southern District of Florida, in concluding that the Government had failed to prove by clear, unequivocal, and convincing evidence[9] both that the defendant committed the atrocities at the death camp and that he lacked the good moral character necessary to become an American citizen, found that the defendant had lawfully entered the United States.[10] Equitable and mitigating circumstances[11] weighing in the defendant's favor further supported the district court's conclusion. The Circuit Court of Appeals for the Fifth Circuit, *held*, reversed and remanded: The Government had proven by clear, unequivocal, and convincing evidence that the defendant was guilty of concealing material facts since disclosure of these facts

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7. *Id.* at 897. The Displaced Persons Act of 1948, *supra* note 2 [§§ 2b-2c], defines "eligible displaced person" largely by reference to the definition of "refugee or displaced person" found in Annex I of the Constitution of the International Refugee Organization, *open for signature* December 9, 1946, 62 Stat. 3037, which states that the following persons do not qualify for displaced persons status:

1. War criminals, quislings and traitors.
2. Any other 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.

8. 455 F. Supp. at 898. The Displaced Persons Act of 1948, *supra*, note 2, § 2(c) requires that an "eligible displaced person" be qualified under the immigration laws for admission into the United States for permanent residence. One such qualification is good moral character. *See* 8 U.S.C. § 1427(a) (1964).

9. The burden of proof in denaturalization cases has been clearly stated by the Supreme Court in Nowak v. United States, 356 U.S. 660, 663 (1958), as follows:

> Where citizenship is at stake the Government carries the heavy burden of proving its case by "'clear, unequivocal, and convincing' evidence which does not leave 'the issue in doubt' . . . ." *Schneiderman v. United States*, 320 U.S. 118, 158. Especially is this so when the attack is made long after the time when the certificate of citizenship was granted and the citizen has meanwhile met his obligations and has committed no act of lawlessness." *Id.* at 122-23.

455 F. Supp. at 898.

10. United States v. Fedorenko, 455 F. Supp. at 920.

11. *See generally*, United States v. Fedorenko, 455 F. Supp. 893, at 896 and 918-20.

would have led the Government to make an inquiry that might have uncovered other facts warranting denial of citizenship.

This Note will provide an in-depth analysis of the *Fedorenko* case, beginning with a synopsis of the lower court's decision, followed by an historical survey of the applicable law. Thereafter will follow an examination of the Fifth Circuit's *ratio decidendi* along with comments relevant to this case and to this particular area of the law.

The district court proceeding balanced the evidence offered by the Government against the defenses asserted by Fedorenko.[12] The Government called six eye-witnesses who had been working prisoners at Treblinka but had escaped during an uprising in 1943. The trial court, however, rejected their in-court identifications of the defendant for two reasons. First, the court concluded that the photo spread used prior to trial was impermissibly suggestive and likely to result in misidentification.[13] Secondly, "[t]he [district] court was convinced that the witnesses were discussing the trial among themselves, at least; and at worst someone was coaching them."[14] In addition, the court found the Government's expert witness' testimony to be consistently inaccurate.[15] As to whether Fedorenko could have made some feasible choice other than serving as a guard at Treblinka, the court found the evidence to establish that he had served involuntarily as a guard at the death camp.[16]

The district court concluded that the defendant had lawfully entered the United States,[17] in spite of misrepresentations he made in applying for citizenship.[18] In addition, equitable consideration in the defendant's favor were found to outweigh all others, thus requiring the same result.[19]

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12. Specifically, "Defendant . . . contends that he was not a guard voluntarily but he was forced to be one as a prisoner of war of Nazi Germany and denies committing any atrocities at Treblinka [the death camp] or elsewhere." 455 F. Supp. at 895-96.

13. *Id.* at 906. In addition, the court stated that this tainted the testimonial identification of defendant. *Id.*

14. United States v. Fedorenko, 455 F. Supp. at 907.

15. *Id.* at 904, 912.

16. *Id.* at 914. "It is important to bear in mind that no documentary evidence whatsoever was introduced by the Government or defendant as to the duties or conduct of Defendant at Treblinka." *Id.* at 902.

17. *Id.* at 916.

18. The court found these misrepresentations to be immaterial, and therefore not to warrant denial of citizenship, because the facts suppressed, if disclosed, would not have warranted denial of citizenship. *Id.*

19. *Id.* at 918-21. *See also* Letter No. 107 from the Dept. of Justice Circular which states in part: "If however, many years have elapsed since the judgment of

I. Background and Perspective

"Early in this century Congressional concerns in the area of immigration law focused on the economic and social problems created by an influx of immigrants."[20] "The Immigration and Naturalization Act of 1906 instituted major procedural reforms in the administration of the laws in an effort to curb the widespread abuses occurring at that time."[21] There was, however, no statutory ground for deporting aliens who had secured their entry into the United States by fraudulent means until the passage of the Displaced Persons Act of 1948.[22] Section 10 of that Act provides: "[A]ny person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States."[23] The basis of this legislation was fear of communist infiltration.[24] The language of Section 10, however, proved to be over-encompassing, for it extended to many refugees who would have been admissible without fraud, but who had made fraudulent statements out of fear of repatriation to their native communist-dominated homelands.[25]

In an effort to remedy this over-reaching effect of the Displaced Persons Act, Congress enacted 8 U.S.C. § 1451(a).[26] This Act provides relief for aliens, otherwise deportable for the perpetration of fraud on their naturalization applications, where the fact concealed is

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naturalization was . . . procured, and the party has since conducted himself as a good citizen and possesses the necessary qualifications for citizenship, cancellation proceedings should not, *as a rule*, be instituted." Dept. of Justice Circular Letter No. 107, September 20, 1909, *reprinted in* Immigration and Naturalization Service Handbook 6508 and Roach, *Statutory Denaturalization: 1906-1951*, 13 U. Pitt. L. Rev. 276, 304 (1952).

20. 455 F. Supp. at 918; *see generally* [1952] U.S. Code Cong. & Ad. News, 1653-82.

21. 455 F. Supp. at 918; *see also* C. Gordon and H. Rosenfield, Immigration Law and Procedure, §§ 20.1, 20.10-.11 (1975) [hereinafter referred to as Gordon and Rosenfield].

22. Note, *Aliens Fraudulently Entering the United States and Establishing Familial Relationships—The Scope of § 241(f) of the Immigration and Naturalization Act, 8 U.S.C. § 1251(f)*, 18 How. L.J. 761, 768 (1975) [hereinafter cited as Note].

23. Displaced Persons Act of 1948, 62 Stat. 1009, 1013 (1948).

24. S. Rep. No. 950, 80th Cong., 2d Sess., (1948); 94 Cong. Rec. 6446-47 (1948); *see also* Note, Note 22 *supra*, and Gordon & Rosenfield, note 21 *supra*.

25. Petition for Naturalization of Iwanenko, 145 F. Supp. 838 (N.D. Ill. 1956) (such misrepresentation held to be immaterial and did not require denial of petition for naturalization); *see also* Cunningham, *Deportation Based Upon Fraudulent Entry: A Limitation of the Waiver Provision*, 21 Loy. L. Rev. 1003 (Fall 1975), and Note, note 22 *supra*.

26. 8 U.S.C. § 1451(a) (1964).

considered to be immaterial. Under section 1451(a), the fraudulent concealment itself is not determinative to whether the alien is subject to denaturalization. Rather, the materiality of the concealed facts is the decisive factor. Section 1451, however, fails to define "material fact" and, as a result of this omission, lower federal courts have applied its provisions inconsistently.[27]

In *Chaunt v. United States*,[28] the United States Supreme Court addressed the question of the materiality of the facts concealed by the petitioner on his naturalization application. Reasoning that complete honesty on the petitioner's part is crucial to the naturalization procedure and to the privileges it bestows,[29] the Court stated: "Suppressed or concealed facts, if known, might in and of themselves justify denial of citizenship. Or disclosure of the true facts might have led to the discovery of other facts which would justify denial of citizenship."[30] After stressing the heavy burden of proof placed on the Government in denaturalization actions,[31] the Court stated,

> We only conclude that, in the circumstances of this case, the Government has failed to show by 'clear, unequivocal and convincing' 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.[32]

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27. *See generally* United States v. Kessler, 213 F.2d 53 (3d Cir. 1954), United States *ex rel* Jankowski v. Shaughnessy, 186 F.2d 580 (2d Cir. 1951), United States v. Galato, 171 F. Supp. 169 (M.D. Pa. 1959), United States v. Chandler, 152 F. Supp. 169 (D. Md. 1957), United States v. Marsilis, 142 F. Supp. 697 (W.D. Mich. 1956), United States v. Lumantes, 139 F. Supp. 574 (N.D. Cal. 1955), *aff'd*, 232 F.2d 216 (9th Cir. 1956).

28. 364 U.S. 350 (1960). Eleven years before the petitioner was naturalized, he was arrested on three separate occasions for distributing handbills, for violating park regulations by making an oration, and for breach of the peace. *Id.* at 352. The Government sought to denaturalize petitioner under 8 U.S.C. § 1451(a) on the ground that he had procured his naturalization by fraudulently concealing these arrests on his naturalization application. *Id.* at 351.

29. *Id.* at 352. *See generally* note 103 *infra.*

30. Chaunt v. United States, 364 U.S. 350, 352-53 (1960).

31. "[I]n view of the grave consequences to the citizen, naturalization decrees are not lightly to be set aside—the evidence must indeed be 'clear, unequivocal, and convincing' and not leave 'the issue . . . in doubt.'" *Id.* at 353 [citing Schneiderman v. United States, 320 U.S. 118, 125 (1943) *and* Baumgartner v. United States, 322 U.S. 665, 670 (1944)].

32. *Id.* at 355. It is important to note that the Court partially based its conclusion on the fact that petitioner's disclosure of his affiliation with the International Workers' Order, a communist-affiliated organization, had failed to prompt further investigation by immigration officials and any disclosure regarding petitioner's arrests would have been even less likely to prompt an investigation. *Id.*

The inherent ambiguity of the language of *Chaunt* has led to much dispute over the materiality standard set forth therein. Some courts have interpreted the standard to require that the concealed facts warrant denial of citizenship in order to be considered material.[33]

In contrast to this interpretation is the view that *Chaunt* sets forth a two-phase test for determining whether a concealed fact is material. Under this two-phase interpretation, a fact is material either if it would have warranted denial of citizenship *or* if its disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship.[34] The language of the *Chaunt* decision, later United States Supreme Court decisions,[35] and later lower court opinions[36] appear to support both the one-phase and the two-phase interpretations of *Chaunt*.

Advocates of the one-phase analysis[37] argue that the Supreme Court in *Chaunt* was merely enunciating reasons as to why honesty is essential in the naturalization process when it stated: "Suppressed or concealed facts, if known, might in and of themselves justify denial of citizenship. Or disclosure of the true facts might have led to the discovery of other facts which would justify denial of citizenship."[38] There is no reference to "materiality" either prior to or immediately after this statement by the Court.[39] Materiality, as defined in the second half of the two-phase interpretation, does not appear until two pages later in the Court's opinion: "In this case, however, we are asked [by the Government] to base materiality on the tenuous line of

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33. United States v. Rossi, 299 F.2d 650 (9th Cir. 1962) (concealment of alien's true identity held not to be concealment of a material fact where disclosure thereof would not have warranted denial of naturalization); La Madrid-Peraza v. Immigration and Naturalization Service, 492 F.2d 1297 (9th Cir. 1974) (overstatement of wages held not to be concealment of a material fact where true wages would not result in denial of alien's labor certificate); United States v. Riela, 337 F.2d 986 (3d Cir. 1964) (concealment of entry to United States as stowaway, which fact would have barred naturalization of defendant held to be concealment of a material fact).

34. Langhammer v. Hamilton, 295 F.2d 642 (1st Cir. 1961) (concealment of Communist Party membership which foreclosed further inquiry held to be concealment of a material fact); United States v. Oddo, 314 F.2d 115 (2d Cir.) *cert. denied* 375 U.S. 833 (1963) (concealment of prior arrests which foreclosed avenue of inquiry by immigration officials held to be concealment of material facts); Kassab v. Immigration and Naturalization Service, 364 F.2d 806 (6th Cir. 1966) (concealment of marital status which might have led to further action held to be concealment of material fact).

35. *See* note 42 and note 45, *infra*.

36. *Compare* cases cited in note 33 *supra*, with cases cited in note 34 *supra*.

37. Cases cited in note 33 *supra*.

38. 364 U.S. at 352-53.

39. *Id*.

investigation that might have led from the arrests to the alleged communistic affiliations. . . ."[40] The Court denied the Government's request. The Court further limited and qualified its conclusion with the words, "[O]nly in the circumstances of this case. . . . ,"[41] thus seeming to blunt the argument of those who see the case as mandating a two-step test.

Within one year after *Chaunt* was decided, the United States Supreme Court held, in *Costello v. United States*,[42] that concealment of the fact that bootlegging was the true occupation of the defendant, who was naturalized during prohibition, "would support the conclusion that he was an applicant who had suppressed or concealed facts [which] if known, might in and of themselves justify denial of citizenship."[43] The Court made no mention whatsoever of whether disclosure of this same fact might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship. The fact of such an omission, so soon after the *Chaunt* decision, has led some courts to conclude that concealment of facts, the disclosure of which might be useful in a further investigation, was not intended by the Court to be a bona fide standard of materiality.[44]

Five years later, in *Woodby v. Immigration and Naturalization Service*,[45] the United States Supreme Court held that "no deportation order may be entered unless it is found by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true."[46] The Court, in reaching its decision, analogized denaturalization cases to deportation cases.[47] Due to the "immediate hardship" suffered by the alien as a result of either denaturalization or deportation, the Court found the burden of proof required in de-

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40. 364 U.S. at 354-55. Under 8 U.S.C. § 1182(a)(28)(c) (providing aliens affiliated with the Communist Party are ineligible to receive visas and are inadmissible into the United States), the fact that petitioner was affiliated with the communist party would have warranted denial of admission into the United States.

41. *Id.* at 355.

42. 365 U.S. 265 (1961). The Government sought to denaturalize the defendant under 8 U.S.C. § 1451(a), *supra* note 5.

43. 365 U.S. at 272 (citing *Chaunt*).

44. *See generally* cases cited in note 33 *supra*.

45. 385 U.S. 276 (1966). Here, the Government instituted deportation proceedings under 8 U.S.C. § 1251(a)(12) (finding aliens who engage in prostitution in the United States are excluded from admission and deportable) against the petitioner on the grounds that she had engaged in prostitution after entry.

46. *Id.* at 286.

47. *Id.*

naturalization actions, that of "clear, unequivocal and convincing evidence," to be equally applicable in deportation actions.[48]

Considering the relatively short space of time which elapsed between the *Chaunt* and *Woodby* decisions coupled with the analogy the Supreme Court drew between deportation and denaturalization proceedings,[49] the requirement of proving true the grounds for deportation may be seen to likewise extend to denaturalization cases.[50] Any less exacting standard for denaturalization proceedings (*i.e.*, the two-phase interpretation), in light of their resemblance to deportation proceedings, would be incongruous with the Supreme Court's holding in *Woodby*.

Certain circuit courts of appeals have adopted this one-phase interpretation of the *Chaunt* materiality standard in holding that material facts are *only* those which, had they been disclosed, would have warranted denial of citizenship.[51] In *United States v. Rossi*,[52] the Ninth Circuit held that proof of Rossi's intentional misrepresentation alone was not enough to divest him of citizenship.

> The materiality of his misrepresentation may be determined by the bearing it had upon his right to enter this country; if permission rested upon the truth of the fact represented and he could not have secured a visa as Cesare Rossi, a native of Italy, then the fact was material—otherwise it was irrelevant. Stated another way, a fact suppressed or misstated is not material to an alien's entry unless it is one which, if known, would have justified a refusal to issue the visa.[53]

Again, in 1974, the Ninth Circuit reaffirmed its interpretation as set forth in *Chaunt*.[54]

> In Chaunt v. United States, . . . the Supreme Court held that in order to denaturalize a citizen on the basis of a misrepresenta-

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48. *Id.*

49. *Id.*

50. In *Woodby* there was no mention of any two-phase materiality standard as set forth in *Chaunt*. The Court failed to consider whether disclosure of the concealed facts might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship.

51. *See* cases cited in note 33 *supra*.

52. 299 F.2d 650 (9th Cir. 1962). In *Rossi*, the defendant concealed his true identity to avoid exclusion under the immigration quotas then in effect.

53. 299 F.2d at 652-53.

54. La Madrid-Peraza v. Immigration and Naturalization Service, 492 F.2d 1297 (9th Cir. 1974). The court held that petitioner was not deportable because she had overstated her prospective wages on her application for a labor certificate, absent evidence showing that the amount she was paid was below the prevailing wage rate for American workers similarly situated.

> tion or concealment of facts in his naturalization petition, the Government must prove that if the truth had been disclosed it would have warranted denial of citizenship. In United States v. Rossi, . . . we followed the Supreme Court's rationale in *Chaunt*, and held that a fact suppressed or misstated is not material to an alien's entry unless the truth would have justified a refusal to issue a visa.[55]

The Third Circuit Court of Appeals also follows this one-phase interpretation of the *Chaunt* materiality test. In *United States v. Riela*,[56] the court reasoned:

> There is ample evidence in the record that answers given by the defendant, in response to pertinent questions contained in the various documents, were knowingly false. However, this evidence, standing along, would not satisfy the requirements as to the burden of proof in the absence of further evidence that the answers were material. Chaunt v. United States, 364 U.S. 350, 355, 81 S.Ct. 147, 5 L.Ed.2d 120 (1960). The false answers given by the defendant were material if they resulted in the suppression of facts which, if known, would have warranted denial of citizenship. Ibid.[57]

The court concluded that the answers given by the defendant were material facts under this standard because disclosure thereof would have barred the naturalization of the defendant, given his obvious failure to meet the statutory requirements.[58]

Such widespread support for this interpretation of the *Chaunt* materiality standard is met by an equal amount of support for a two-phase test.[59] Advocates of the two-phase test argue that the *literal* reading of *Chaunt* favors their interpretation. For example, the Supreme Court actually numbered its conclusion, as part (1) and part (2),[60] thus indicating a two-part test for materiality. Advocates of the two-phase interpretation claim that the absence of any mention by the United States Supreme Court of the second phase thereof, *i.e.*,

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55. *Id.* at 1298. The court noted that although *Chaunt* involved denaturalization, its rationale is forceful here, where the severe remedy of deportation is at issue.

56. 337 F.2d 986 (3d Cir. 1964). In *Riela*, the Third Circuit cancelled the certificate of naturalization of defendant, who had entered the United States in violation of the law. This concealed fact of illegal entry would have barred his naturalization.

57. *Id.* at 988-89.

58. *Id.* at 989.

59. Note 34 *supra*. *See also* Appleman, *Misrepresentation in Immigration Law: Materiality* 22 FED. B.J. 267 (1962).

60. Chaunt v. United States, 364 U.S. 350, 355 (1960).

where disclosure might have been useful in an investigation, in *Costello* and *Woodby*[61] is explained by the very framework of the two-phase test. The either-or form would indicate that once the first phase is met, materiality is established and there is no reason to address the second.

In *Langhammer v. Hamilton*,[62] the First Circuit Court of Appeals rejected appellant's argument that a misrepresentation was not material unless the alien would definitely have been excluded on presentation of the actual facts. Citing *Chaunt*, the court stated: "There the Court indicated that the facts concealed would be regarded as material if either they would have warranted denial of citizenship or their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship."[63] The court found that *had* the defendant noted the facts of his Communist party membership, "the resultant inquiry — foreclosed by his lack of such a notation — would most assuredly have unearthed facts warranting his exclusion, regardless of the ultimate determination of this question when all the evidence was in."[64] The Sixth Circuit, citing both *Langhammer* and *Chaunt*, held in *Kassab v. Immigration and Naturalization Service*,[65] that "[i]t is sufficient for a finding of materiality that if the fact . . . had been revealed, it might have led to further action and the discovery of facts which would have justified refusal of the visa."[66]

In *United States v. Oddo*,[67] the Second Circuit agreed with the First and Sixth Circuits' interpretation of *Chaunt*. Affirming the order to revoke appellant's citizenship, the court stated:

> Failure to disclose a record of prior arrests, even though none of those arrests by itself would be a sufficient ground for denial of naturalization, closes to the Government an avenue of enquiry

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61. Costello v. United States, 365 U.S. 265 (1961); Woodby v. Immigration and Naturalization Service, 385 U.S. 276 (1966).

62. 295 F.2d 642 (1961). The First Circuit affirmed the final order of deportation, where the alien had concealed facts regarding his Communist Party membership and wide range of activities with respect thereto.

63. *Id.* at 648.

64. *Id.*

65. 364 F.2d 806 (6th Cir. 1966). *Kassab* involved review of deportation orders issued on grounds that the alien misrepresented the fact that he was married to an American citizen.

66. *Id.* at 807.

67. 314 F.2d 115 (2d Cir. 1963). The defendant therein a *naturalized* citizen, had concealed facts that he was arrested for burglary in 1927, disorderly conduct in 1928 and 1929, homicide in 1930, vagrancy in 1931, assault and robbery in 1931, and violation of an (illegal) occupation statute in 1931.

> which might conceivably lead to collateral information of greater relevance . . . . As the Court said in Chaunt, "An arrest, though by no means probative of any guilt or wrongdoing, is sufficiently significant as an episode in a man's life that it may often be material at least to further enquiry." 364 U.S. at 354, 81 S.Ct. at 150. Oddo denied the Government the opportunity to make that enquiry.[68]

Oddo's failure to disclose his record of prior arrests denied the Government the opportunity to further inquire into his background. This failure warranted the court's finding that he had concealed a material fact.

Amid this controversy regarding the proper interpretation of *Chaunt*, *United States v. Fedorenko* reached the Fifth Circuit on appeal from the District Court for the Southern District of Florida.

II. The Fedorenko Opinion

The four major areas of inquiry addressed by the court in the instant case were as follows: (1) the statutory provisions applicable in this denaturalization action; (2) the proper interpretation of the materiality standard as set forth in *Chaunt*;[69] (3) the proper weight to be afforded the expert testimony taken before the district court; and (4) the district court's alternative holding that equitable considerations required judgment for the defendant.[70] The circuit court initially examined the statutory provisions applicable in denaturalization proceedings. Section 1451(a) provides for denaturalization where "such order (visa) and certificate of naturalization[71] were procured illegally or were procured by concealment of a material fact or by willful misrepresentation."

For the Government to have properly brought the action against Fedorenko, the court found, the defendant must have either illegally procured his admission or concealed a material fact in the admission process. The court considered the Government's first argument, that

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68. *Id.* at 118.

69. 364 U.S. 350.

70. The court did not address the Government's argument that it had proved that the defendant had concealed his perpetration of war crimes at Treblinka, since it held that the defendant obtained his citizenship by misrepresentation. 597 F.2d at 953.

71. *See* the Displaced Persons Act of 1948, 62 Stat. 1013, § 10: "[A]ny person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." 597 F.2d 946, 949 note 1. Thus a certificate of naturalization is invalid where the visa was illegally procured.

the defendant had procured his visa by illegal means since he was not an eligible displaced person as defined by the Displaced Persons Act of 1948.[72] The court found that the defendant had "fraudulently obtained" his visa by failing to reveal, in his visa application, his whereabouts during the war years and his concentration camp service.[73] The court did not find, however, that a fraudulently obtained visa is one procured by illegal means and, therefore, the court held that the Government failed to establish the claimed violation of section 1451(a).[74]

The court, in analyzing the Government's claim that the defendant procured his visa by concealing a material fact, sought to define "material fact." The court rejected the materiality standards offered by each of the parties,[75] and adopted the following standard: "We read the second test to require only that the Government prove by clear and convincing evidence that disclosure would have led the Government to make an inquiry that might have uncovered other facts warranting denial of citizenship."[76] In rejecting the standard of materiality offered by the defendant, that of requiring the suppressed facts to warrant denial of citizenship, the court held that the district court's acceptance of this standard was an error of law because "[t]hat interpretation destroyed the utility of the second *Chaunt* test, since it would require, as does the first *Chaunt* test, that the Government prove ultimate facts warranting denial of citizenship."[77]

Despite the Fifth Circuit's claim that its interpretation "comports with the language of the *Chaunt* opinion,"[78] it literally contradicts the *Chaunt* language. The court's standard requires a fact to be considered material where "disclosure *would* have led the Government to make an inquiry that *might* have uncovered other facts warranting denial of citizenship"[79] whereas, *Chaunt* regards a fact to be considered material where "disclosure might have been useful in an investigation possibly leading to the discovery of other facts *warrant-*

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72. Defendant was issued his visa under the Displaced Persons Act of 1948 on his sworn claim that he was an "eligible displaced person." *See* note 7 *supra*.

73. 597 F.2d at 949.

74. *Id.* at 950.

75. *Id.* at 951. The defendant offered the one-phase interpretation of the *Chaunt* language, whereas the Government advocated the two-phase interpretation. *See generally* cases cited notes 33 and 34 *supra*.

76. 597 F.2d at 951.

77. *Id.*

78. *Id.*

79. *Id.* (emphasis added).

ing denial of citizenship."[80] The court fails to explain this blatant discrepancy, except perhaps in its notation, "[T]he phraseology of the two tests adopted in *Chaunt* does create some ambiguity about the meaning to be accorded the second test."[81]

The court, in bolstering its choice of the compromising materiality standard, considered both the possible ramifications of the district court's approach[82] and cited to support of commentators in the field.[83] The court rationalized its holding as an attempt to "guard the integrity of this priceless treasure (American citizenship)."[84]

The Fifth Circuit's materiality standard can be interpreted as a compromise between those standards offered by the parties. This standard may be considered more exacting than the precise language of *Chaunt* in that it requires that disclosure *would* have led the Government to conduct an inquiry as opposed to the standard where disclosure *might* have been useful in an investigation. Although the Fifth Circuit's materiality standard may, by virtue of its exacting nature, prevent the Government from bringing an action under section 1451(a) against certain naturalized aliens, the adoption of this new standard did little to resolve the confusion and uncertainty surrounding the definition of "material fact."

Finally, the circuit court criticized the lower court's refusal to accord conclusive weight to the expert testimony presented at the trial. The court found that "[t]he evidence before the district court clearly and convincingly proved that, had the defendant disclosed his guard service, the American authorities *would* have conducted an inquiry that might have resulted in denial of a visa."[85] The circuit court based its conclusion on the expert testimony which indicated that disclosure of the defendant's guard service would automatically have resulted in denial of the visa.[86] The court failed to consider that the trial transcript also revealed that the expert witness did not interview Fedorenko, had no knowledge as to what facts were before the vice-consul who processed Fedorenko's application, and thus,

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80. 364 U.S. at 355 (emphasis added).

81. 597 F.2d at 951.

82. "[This] . . . would allow an applicant for a visa or for citizenship to lie about his background and thereby prevent the government from investigating his fitness at a time when he has the burden of proving eligibility. . . .If that were the law, an applicant with something to hide would have everything to gain and nothing to lose by lying under oath to the INS." *Id.*

83. *See generally* Gordon and Rosenfield, note 21 *supra*.

84. 597 F.2d at 952.

85. *Id.* at 953.

86. *Id.* at n.7.

could only give a "good guess" as to what action the true interviewing officer might have taken.[87] Further, the expert had testified that if it could be shown that participation as a guard at a concentration camp was involuntary, such a person might be eligible under the Displaced Persons Act.[88] The circuit court's failure to consider these statements in its examination of all the evidence as offered before the district court, weakens the circuit court's finding of clear, unequivocal, and convincing proof.

Finally, the circuit court found the district court's holding that equitable considerations required judgment for the defendant to be error as matter of law.[89] In support of this conclusion the court pointed to what it found to be a "crucial distinction" between a district court's authority to grant citizenship and its authority to revoke citizenship.[90] This "crucial distinction" enunciated by the court[91] however, failed to support its finding, for it had not been determined at the district court level that Fedorenko did not qualify for citizenship, and thus, it was questionable as to whether citizenship could be revoked at all.

III. Further Considerations and Analysis

Uncertainty, ambiguity, and confusion have filled the immigration law arena since the beginning of the century, as evidenced by the following: (1) the enactment in 1906 of immigration reform laws which failed to provide statutory ground for deporting aliens who had secured their entry into the United States by fraudulent means;[92] (2) the over-encompassing nature of section 10 of the Displaced Persons Act of 1948, providing that *any* misrepresentation made by an alien for the purpose of gaining admission to the United States would result in a finding of inadmissibility;[93] (3) the enactment in 1952 of 8 U.S.C. § 1451(a), which provides that concealment of a material fact will result in denaturalization, but fails to define "material fact";[94] (4)

87. Brief for Appellee at 34, United States v. Fedorenko, 597 F.2d 946 (5th Cir. 1979).

88. *Id.*

89. 597 F.2d 953-54.

90. *Id.* at 954.

91. *Id.* "Once it has been determined that a person does not qualify for citizenship, however, the district court has no discretion to ignore the defect and grant citizenship."

92. *See generally* notes 20-22 *supra*, and accompanying text.

93. *See generally* notes 23-25 *supra*, and accompanying text.

94. *See generally* notes 26-27 *supra*, and accompanying text.

the decision in *Chaunt*, which also failed to specifically define "material fact";[95] (5) the resultant split of the circuit courts of appeal regarding the proper interpretation of *Chaunt's* materiality test;[96] and (6) the Fifth Circuit's adoption of its novel interpretation of the *Chaunt* materiality standard.[97] Adding to this confusion are two theories which have been repeatedly advanced by litigants, and acknowledged by the courts throughout the century.

The first of these theories initially received governmental support in 1909 when the Department of Justice issued its Circular Letter No. 107[98] which declared that denaturalization proceedings should not be sought "to cancel certificates of naturalization alleged to have been fraudulently or illegally procured unless some substantial results are to be achieved thereby in the way of betterment of the citizenship of the country."[99] Further,

> The [denaturalization statutes] are construed to be remedial rather than penal in nature; for the protection of the body politic rather than for the punishment of the individual concerned. Ordinarily, nothing less than the betterment of the citizenship of the country should be regarded as sufficient to justify the disturbance of personal and property rights which cancellation proceedings may occasion . . . . If however, many years have elapsed since the judgment of naturalization was apparently . . . procured [by fraud], and the party has since conducted himself as a good citizen and possesses the necessary qualifications for citizenship, cancellation proceedings should not, as a rule, be instituted.[100]

This policy enunciated by the Department of Justice is justified in part by the grave consequences implicit in every denaturalization proceeding. As stated by the Supreme Court in *Schneiderman v. United States*,

> In its consequences, [denaturalization] is more serious than a taking of one's property, or the imposition of a fine or other penalty. For it is safe to assert that nowhere in the world today is the right of citizenship of greater worth than it is in this country. It would be difficult to exaggerate its value and importance. By many it is regarded as the highest hope of civilized men.[101]

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95. *See generally* notes 28-32 *supra*, and accompanying text.
96. *See generally* notes 33-34 *supra*, and accompanying text.
97. *See generally* notes 76-85 *supra*, and accompanying text.
98. Letter No. 107 from the Dept. of Justice Circular, *supra* note 19.
99. *Id.*
100. *Id.*
101. Schneiderman v. United States, 320 U.S. 118, 122 (1943).

The severity of an order revoking citizenship has been consistently emphasized by the courts in this country.[102]

Although a failure to follow the published policy did not bar the bringing of an action against Fedorenko,[103] the underlying considerations of the policy are relevant to the outcome of the suit. No doubt, had this action been brought shortly after Fedorenko's naturalization, when the fear of infiltration by communists and other political undesirables was so prevalent as to provoke the enactment of section 10 of the Displaced Persons Act of 1948,[104] the requisite "protection of the body politic" would have necessitated the action. Moreover, not only has the rationale of section ten's enactment diminished in significance[105] but also, Fedorenko has conducted himself as a good American citizen for over twenty-nine years.[106] Under Circular Letter No. 107, Fedorenko's conduct for such a length of time would serve to bar the bringing of the action.

The second theory which has prevailed, despite uncertainty in immigration law, recognizes the similarity between denaturalization actions and deportation proceedings. Courts have consistently analogized denaturalization to deportation because of the severe potential consequences an alien faces in each. The United States Supreme Court on more than one occasion[107] has stated, "[D]enaturalization, like deportation, may result in the loss of all that makes life worth living."[108]

This analogy has in turn led courts to apply denaturalization principles to their deportation decisions,[109] and to require the same

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102. *See, e.g.*, Baumgartner v. United States, 322 U.S. 665, 670 (1944): "[S]uch gravity . . . is implied in an attempt to reduce a person to the status of alien from that of citizen."; Knauer v. United States, 328 U.S. 654, 659 (1946): "Denaturalization actions involve tremendously high stakes for the individual. [They] may result in the loss of all that makes life worth living . . . the fate of a human being is at stake . . ."; Costello v. United States, 365 U.S. 265, 296 (1961): "American citizenship is a precious right. Severe consequences may attend its loss, aggravated when the person has enjoyed his citizenship for many years."; United States v. Oddo, 314 F.2d 116 (1963): "The right to acquire American citizenship is a precious one. Once acquired, the loss of citizenship can have severe and unsettling consequences."

103. United States v. Fedorenko, 455 F. Supp. 893, 898 (S.D. Fla. 1978) [citing United States v. Nelligan, 573 F.2d 251 (5th Cir. 1978)].

104. *See generally* note 24 *supra*.

105. Gordon and Rosenfield, *supra* note 24.

106. 455 F.2d at 896.

107. Ng Fung Ho v. White, 259 U.S. 276 (1922); Knauer v. United States, 328 U.S. 654 (1946).

108. *Id.*, 259 U.S. at 281 and 328 U.S. 659.

109. "Although *Chaunt* and *Rossi* involved denaturalization proceedings, their

burden of proof from the Government in each.[110] Similarly, any fact held to be "material" in a denaturalization proceeding may, under this theory, likewise be "material" in a deportation hearing. Therefore, in reaching its decision in *Fedorenko*,[111] the Supreme Court should note that any test it enunciates regarding materiality is likely to be extended, in future judicial decisions, to deportation proceedings. Thus the Court should take into account the ramifications of its materiality standard being applied in both denaturalization proceedings and deportation hearings.

In addition to considering the two aforementioned theories in its upcoming *Fedorenko* decision, the Supreme Court should recall the high burden of proof required of the Government in denaturalization and deportation proceedings.[112] The Government must prove its allegations by clear, unequivocal, and convincing evidence[113] which does not leave the issue "to conjecture"[114] or "in doubt."[115] The test propounded by the Court must accomodate such a standard of proof, and lower courts must be given guidelines on which to support their future decisions. This may call for Congress or the Immigration and Naturalization Service to act to provide courts with such guidelines.[116] Unless the courts are provided with the guidelines necessary to apply the Supreme Court's test for materiality, confusion and ambiguity will continue to persist in this area.

IV. Conclusion

United States v. Fedorenko[117] provides the United States Supreme Court with an opportunity to end twenty years of uncer-

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rationale is forceful here, where the severe remedy of deportation is the issue." La Madrid-Peraza, *supra* notes 33 and 54.

110. "In denaturalization cases, the court has required the Government to establish its allegations by clear, unequivocal and convincing evidence . . . . No less a burden of proof is appropriate in deportation proceedings." 358 U.S. at 286.

111. 597 F.2d 946 (5th Cir. 1979), *cert. granted* 444 U.S. 1070 (1980).

112. *Supra* note 9.

113. *Id.*

114. Knauer v. United States, 328 U.S. 654, 689.

115. United States v. Riela, 337 F.2d 986, 988 (3d Cir. 1964).

116. For example, if the two-phase interpretation of *Chaunt* is endorsed by the Court, lower courts must be provided with information as to when an investigation "might" have been conducted. Note the concern regarding the proper weight to be afforded an INS officer's testimony regarding the possibility of an investigation in United States v. Montalbano, 236 F.2d 757 (3d Cir.), *cert. denied*, 352 U.S. 952 (1956); United States v. Fedorenko, 597 F.2d at 952.

117. 597 F.2d 946 (5th Cir. 1979).

tainty.[118] By explicitly stating what the definition of a material fact is under section 1451(a), the Court will permit lower courts to consistently administer justice in this area of United States immigration law.**

PATRICIA M. HEALY*

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118. The first "Question Presented" in the petition for certiorari filed on October 30, 1979 asks, "Does proof of materiality as required under 8 U.S.C. § 1451(a) and as set forth in Chaunt v. U.S., . . . require that Government must prove existence of ultimate facts that would have warranted denial of citizenship and that disclosure of suppressed or misstated facts might have led to discovery of ultimate facts?" 48 U.S.L.W. 3561 (1979).

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**On January 21, 1981, the Supreme Court affirmed the decision of the Fifth Circuit Court of Appeals revoking Fedorenko's citizenship on the grounds that it was illegally procured in contravention of § 340(a) of the Immigration and Nationality Act. *Fedorenko v. United States*, 49 U.S.L.W. 4120 (1981). The Court's reasoning included the following considerations: Failure to comply with any of the conditions for citizenship renders the certificate of citizenship illegally procured and, as such, it can be set aside. In a denaturalization proceeding the Government carries a heavy burden of proof, and evidence justifying revocation of citizenship must be clear, unequivocal, and convincing and not leave the issue in doubt. A visa obtained through a material misrepresentation is not valid. A misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa, and it would be unnecessary to determine whether the materiality test of *Chaunt* as to application for citizenship also applies to false statements in visa applications. Although a denaturalization action is a suit in equity, it is not within the discretion of a district court to refrain from entering a judgment of denaturalization against a citizen whose citizenship was procured illegally or by willful misrepresentation.