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MATERIALITY OF MISREPRESENTATIONS MADE ON VISA APPLICATIONS IN
LIGHT OF CURRENT CONGRESSIONAL POLICY

Approximately 500,000 immigrants¹ legally enter the United States each year.² The number of undocumented aliens in the United States is estimated to be between 3.5-6 million.³ In order to be lawfully admitted to the United States, each entering alien⁴ must possess a valid unexpired immigrant visa.⁵ In order to obtain a valid visa, the Immigration and Naturalization Act of 1952 (INA)⁶ provides that an alien must, under oath, provide all information necessary to determine whether he or she is eligible to enter the United States.⁷ Once in the United States, a resi-

1. See 2 C. GORDON & E. GORDON, IMMIGRATION AND NATIONALITY LAW § 2.4a (1985). An immigrant is a person who enters the United States desiring to become a permanent resident. *Id.*; see also 8 U.S.C. § 1101(15) (1982) (defining "immigrant").

2. BUREAU OF THE CENSUS, U.S. DEP'T OF COMM., STATISTICAL ABSTRACT OF THE UNITED STATES 86 (1986). For instance, the U.S. Government reports that 449,330 immigrants legally entered the United States in 1980, and 543,903 entered in 1984. *Id.* Persons desiring to enter the United States are presumptively categorized as aliens until able to prove otherwise. See 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 2.3A (1983).

3. IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP'T JUSTICE, INS REPORTER, 1 (1983). The Senate Committee on the Judiciary noted that the Select Commission on Immigration and Refugee Policy made this determination in 1978 and the current figure is probably much higher. SENATE COMM. ON THE JUDICIARY, 99TH CONG., 1ST SESS., REPORT ON IMMIGRATION REFORM AND CONTROL ACT OF 1985, 5 (Comm. Print 1985), [hereinafter cited as COMMITTEE REPORT].

4. See 8 U.S.C. § 1101(a)(3) (1982) (defining "alien"). The Immigration and Nationality Act of 1952 (INA) defines an alien as "any person not a citizen or national of the United States." *Id.*

5. 8 U.S.C. § 1181(a) (1982). Section 1181 provides in pertinent part: "Except as provided in subsection (b) and subsection (c) of this section no immigrant shall be admitted into the United States unless at the time of application for admission he (1) has valid unexpired immigrant visa . . ." *Id.*

6. Immigration and Nationality Act of 1952 (McCarran-Walters), Pub. L. No. 82-414, 66 Stat. 163 (codified at 8 U.S.C. §§ 1101-1557 (1982)).

7. 8 U.S.C. § 1202(c) (1982). The section entitled Applications for Visa provides in pertinent part:

Every alien applying for an immigrant visa and for alien registration shall make application therefor in such form and manner and at such place as shall be by regulations prescribed. In the application the immigrant shall state his full and true name . . . age and sex; the date and places of his birth; present address and place of previous residence . . . calling or occupation; personal description . . . whether he was ever arrested [or] convicted . . . and such additional information necessary to the identification of the applicant and the enforcement of the immigration and nationality laws as may be by regulations prescribed.

Id. § 1202(a).

Section 1202(e) further provides that "each copy of an application required

dent alien may remain indefinitely "unless the government determines that he is engaging in or has engaged in activities which would render him deportable under the provisions of the INA."⁸ A lawfully admitted alien who remains within the country for five continuous years⁹ and meets all other statutory requirements¹⁰ is eligible to become a natural-

by this section shall be signed by the applicant in the presence of the consular officer, and verified by the oath of the applicant administered by the consular officer." *Id.* § 1202(e).

Regarding burden of proof, the INA provides that the burden of demonstrating eligibility to enter the United States:

[w]henver any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document If such person fails to establish to the satisfaction of the consular officer that he is eligible to receive a visa or other document required for entry, no visa or other document required for entry shall be issued to such person, nor shall such person be admitted to the United States unless he establishes to the satisfaction of the Attorney General that he is not subject to exclusion under any provision of this chapter.

8 U.S.C. § 1361 (1982).

The INA further provides that the alien will not receive a visa if:

(1) it appears to the consular officer, from statements in the application, or in the papers submitted therewith, that such alien is ineligible to receive a visa . . . or

(2) the consular officer knows or has reason to believe that such alien is ineligible to receive a visa . . . under section 1182 of this title or any other provision of law

8 U.S.C. § 1201(g) (1982).

Even if an alien is otherwise eligible for a visa, the final actual award is based on a complex system of preferences and quotas. *See* 8 U.S.C. §§ 1151-1153 (1982).

8. C. GORDON & E. GORDON, *supra* note 1, § 2.45. The Deportable Aliens provision of the INA lists a number of reasons for which an alien may be deported. 8 U.S.C. § 1251 (1982).

9. 8 U.S.C. § 1427 (1982). Section 1427 provides in pertinent part:

[n]o person, except as otherwise provided in this subchapter, shall be naturalized unless such petitioner, (1) immediately preceding the date filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the period referred to in this subsection has been and still is a person 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.

Id. § 1427(a).

10. *See* 8 U.S.C. § 1101 (1982).

ized citizen¹¹ of the United States.¹²

Once granted citizenship, the former alien receives all rights and privileges enjoyed by native-born American citizens.¹³ However, a naturalized citizen may have United States citizenship revoked if the government can prove that it was "illegally procured or . . . procured by concealment of a material fact or by willful misrepresentation. . . ."¹⁴ In *Chaunt v. United States*,¹⁵ the United States Supreme Court developed a two-prong test to be applied in determining the materiality of a misrep-

11. *See id.* § 1101(a)(23). "The term 'naturalization' means the conferring of nationality of a state upon a person after birth, by any means whatsoever." *Id.*

12. In order to become a naturalized citizen, the alien must file a sworn petition including "all facts which in the opinion of the Attorney General may be material to the applicant's naturalization." 8 U.S.C. § 1445(a) (1982). The INA provides that all petitions for naturalization shall be investigated at the discretion of the Attorney General. 8 U.S.C. § 1446(a) (1982). The Attorney General's Office then makes a recommendation on the petition to the appropriate naturalization court. *Id.* § 1446(b). A naturalization court is a court authorized under the INA to exercise naturalization jurisdiction. 8 U.S.C. § 1101(a)(24) (1982). Section 1421 of the INA indicates the specific courts authorized to exercise naturalization jurisdiction. 8 U.S.C. § 1421 (1982). The investigator of a petition may subpoena the testimony of any witness, including the applicant, and also take testimony concerning matters which may have a bearing on the applicant's eligibility. 8 U.S.C. § 1446(d) (1982). The burden of proof is on the alien to show that he or she was lawfully admitted into the United States. 8 U.S.C. § 1429 (1982).

An Alien who is declared admissible to citizenship by a naturalization court is entitled to receive a certificate of naturalization which orders that the alien be admitted as a citizen of the United States. 8 U.S.C. § 1449 (1982). The court's order is the official grant of citizenship, which becomes effective once the applicant has taken the oath of allegiance. *See* C. GORDON & E. GORDON, *supra* note 1, at §§ 16.8, 16.9; 8 C.F.R. § 337.2 (1985) ("Any person who was or shall hereafter be admitted to citizenship by the written order of a naturalization court, shall be deemed to be a citizen of the United States as of the date of taking the prescribed oath of allegiance.").

13. *See* C. GORDON & E. GORDON, *supra* note 1, § 16.12. The only exception is that under the United States Constitution only natural born Americans are eligible to become President of the United States. U.S. CONST. art. I, § 2, cl. 5.

14. 8 U.S.C. § 1451(a) (1982). Section 1451(a) provides in pertinent part:

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 of this title . . . 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. . . .

Id. It should be noted that "[n]otwithstanding the precise language of [this section], the government must demonstrate both willfulness and materiality with respect to any misrepresentation or concealment." *United States v. Kungys*, 793 F.2d 516 (3d Cir. 1986) (citing *Fedorenko v. United States*, 449 U.S. 490, 507-08 n.28 (1981); *United States v. Kowalchuk*, 773 F.2d 488, 493 (3d Cir. 1985) (en banc), *cert. denied*, 106 S. Ct. 1188 (1986)).

15. 364 U.S. 350 (1960).

resentation or concealment made in a petition for naturalization.¹⁶ If a court applying the *Chaunt* test determines that a naturalized citizen misrepresented a material fact on his Petition for Naturalization, that citizen's certificate of citizenship will be revoked and the citizen will be denaturalized.¹⁷

The effect of denaturalization is to restore the naturalized citizen to alien status.¹⁸ Nevertheless, the alien is allowed to remain in the United States unless the government can show that he or she is deportable under the INA.¹⁹ Fraudulently procuring an immigration visa through material misrepresentation is sufficient ground for deportation.²⁰ While the Supreme Court has not yet established a definitive test for determining the materiality of a misrepresentation in a visa application,²¹ all of

16. For a discussion of the *Chaunt* test, see *infra* notes 56-57 and accompanying text.

17. *United States v. Kowalchuk*, 773 F.2d 488, 494 (3d Cir. 1985) (en banc), cert. denied, 106 S. Ct. 1188 (1986). The Supreme Court has held that "failure to comply with [all the congressionally implied prerequisites to the acquisition of citizenship] renders [the] certificate of citizenship revocable as 'illegally procured,'" and naturalization that is unlawfully procured can be set aside. *Fedorenko v. United States*, 449 U.S. 490, 514-15 (1981) (interpreting 8 U.S.C. § 1451(a)).

18. See C. GORDON & E. GORDON, *supra* note 1, § 20.5. The status of a denaturalized alien is the same as that of an alien who entered the country under a valid immigrant visa. *Id.* For a discussion of the requirements for immigrating to the United States, see *supra* notes 4-7 and accompanying text.

19. C. GORDON & E. GORDON, *supra* note 1, § 20.5 (citing *Costello v. INS*, 376 U.S. 120 (1964)). An alien may be deportable under the INA for a number of reasons, including inter alia, that he or she was excludable at the time of entry. 8 U.S.C. § 1251(a)(1) (1982). An alien is excludable at time of entry if that alien "seeks to procure, or has sought to procure, or has procured a visa or other documents by fraud, or by willfully misrepresenting a material fact." 8 U.S.C. § 1182(a)(19) (1982).

20. 8 U.S.C. § 1251(c) (1982). Under § 1251, any alien who procured a visa by fraud within the meaning of § 1182(a)(19) is deportable. *Id.* Section 1182(a)(19) further provides that any alien "who seeks to procure, or has sought to procure, or has procured a visa . . . by fraud, or by willfully misrepresenting a material fact" is ineligible to receive a visa and shall be excluded from entering the United States. 8 U.S.C. § 1182(a)(19) (1982). In order to find that an alien is not eligible to obtain a visa under section 1182(a)(19), it must be determined that:

- (a) there has been a misrepresentation made by the applicant,
- (b) the misrepresentation was willfully made, and
- (c) the fact misrepresented is material.

2 Federal Immigration L. Rep. (CCH) ¶ 11,099 § 4291(a)(19), 4-43 (1983).

A misrepresentation "is an assertion or manifestation not in accordance with the facts." *Id.* For a misrepresentation to fall within § 1182(a)(19), it must have been made to an official of the United States Government. *Id.* The term "willfully" as used under § 1182(a)(19) means knowingly and intentionally. *Id.* Thus, the alien must have been "fully aware of the nature of the information sought and knowingly, intentionally, and deliberately made an untrue statement." *Id.*

21. See *Fedorenko v. United States*, 449 U.S. 490 (1981) (addressing by failure to establish definitive materiality standard); Case Comment, *Denaturaliza-*

the circuit courts of appeals addressing this issue have applied the *Chaunt* test to make such a determination.²² Those circuits remain divided only as to the proper interpretation of the second prong of the *Chaunt* test.²³ Nevertheless, the Supreme Court has suggested,²⁴ and many commentators have agreed,²⁵ that the *Chaunt* test may, in fact not be applicable to misrepresentations made on visa applications. In light of the apparent conflict in authority, this note will first address the issue of whether the *Chaunt* test may properly be applied to determine the materiality of a misrepresentation made on a visa application.²⁶ Assuming, arguendo, that the *Chaunt* test is applicable, the second issue this note will address is the appropriate interpretation of the *Chaunt* test.²⁷

II. EVOLUTION OF THE MATERIAL MISREPRESENTATION PROVISIONS

A. Deportation

Prior to the Second World War, federal court decisions had suggested that an alien who made a material misrepresentation in order to obtain an immigrant visa was subject to deportation for illegally entering

tion—Material Misrepresentation Under Displaced Person Act of 1948, 6 SUFFOLK TRANSNT'L L.J. 163, 182 (1982) (concluding *Fedorenko* Court should have clarified *Chaunt* test of materiality).

22. See, e.g., *United States v. Kowalchuk*, 773 F.2d 488 (3d Cir. 1985) (en banc) (applying the first prong of the *Chaunt* test to determine materiality of misrepresentations made at the visa application stage), *cert. denied*, 106 S. Ct. 1188 (1986); *Maikovskis v. INS*, 773 F.2d 435 (2d Cir. 1985) (applying both prongs of *Chaunt* test), *cert. denied*, 106 S. Ct. 2915 (1986); *United States v. Fedorenko*, 597 F.2d 946, 951 (5th Cir. 1979), *aff'd on other grounds*, 449 U.S. 490 (1981) (same); *Kassab v. INS*, 364 F.2d 806, 807 (6th Cir. 1966) (same); *United States v. Rossi*, 299 F.2d 650 (9th Cir. 1962) (same); *Langhammer v. Hamilton*, 295 F.2d 642, 648 (1st Cir. 1961) (same); see also *United States v. Palciauskas*, 734 F.2d 625, 628 (11th Cir. 1984) (applying test similar to that used in *Chaunt*).

23. For a discussion of the split of authority among the circuits, see *infra* note 57 and accompanying text.

24. See *Fedorenko v. United States*, 449 U.S. 490 (1981) (*Chaunt* test may not be applicable to misrepresentations made on visa applications). For a discussion of the facts of *Fedorenko*, see *infra* note 58.

25. Note, *Denaturalization of Nazi-War Criminals after Fedorenko*, 15 N.Y.U. J. INT'L L. & POL. 169 (1983) (*Chaunt* should not apply where misrepresentation is made on visa applications) [hereinafter cited as Note, *Denaturalization*]. But see, Appleman, *Misrepresentation in Immigration Law: Materiality*, 22 FED. B.J. 267 (1962) (*Chaunt* applies to determine materiality of misrepresentation "must be an application for naturalization and it recognized that a similar misrepresentation to a consul in connection with an application for a visa could be held material"); Case Comment, *supra* note 21, at 182 (criticizing Supreme Court for not applying *Chaunt* in *Fedorenko*). For a commentator's opposing views, see Note, *Misrepresentation and Materiality in Immigration Law—Scouring the Melting Pot*, 48 FORDHAM L. REV. 471 (1980) (assumes *Chaunt* applies) [hereinafter cited as Note, *Misrepresentation and Materiality*].

26. For a discussion of whether *Chaunt* applies to misrepresentations made on visa applications, see *infra* notes 110-123 and accompanying text.

27. For a discussion of the proper interpretation of the second prong of the *Chaunt* test, see *infra* notes 89-109 and accompanying text.

the United States.²⁸ Congress codified this view as part of the Displaced Persons Act of 1948 (DPA).²⁹ The DPA was enacted to authorize, for a limited period of time, the admission into the United States of certain Europeans displaced by the war for permanent residence and other purposes.³⁰ However, the DPA provided that "any 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."³¹ Although not eligible to enter

28. Note, *Misrepresentation and Materiality*, *supra* note 25, at 487 (citing *United States ex rel. Volpe v. Smith*, 62 F.2d 808 (7th Cir.), *aff'd*, 289 U.S. 472 (1933) (applicant who falsifies a statement in order to gain admission to the United States is deportable where the falsification would have led to an investigation to determine applicant's eligibility)); *see also* *United States ex rel. Fink v. Riemer*, 96 F.2d 217 (2d Cir.) (while it is true that statute does not expressly exclude those who get their papers by fraud, fraud thwarts statute's very purpose), *cert. denied*, 305 U.S. 618 (1938); C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 47.c (1978).

29. Displaced Persons Act of 1948 (DPA), Pub. L. No. 80-774, § 10, 62 Stat. 1009, 1013 (1948).

30. *Id.* The displaced persons problem in Europe coincided with the end of hostilities between Germany and the Allies. S. REP. NO. 950, 80th Cong., 2d Sess. 8, *reprinted in* 1948 U.S. CODE CONG. SERV. 2028, 2035. In 1946, approximately 1,300,000 displaced persons remained in the United States, British and French Zones of Germany, Austria and Italy as a result of losing their homes during the war. *Id.* at 2037. In order to bring about a rapid solution to this problem, the United Nations established the International Refugee Organization (IRO). *See* IRO Constitution, *opened for signature* Dec. 15, 1946 62 Stat. 3037, T.I.A.S. No. 1846 (entered into force Aug. 20, 1948). The objective of the IRO was to return persons to their native country if possible or resettle them in countries willing to accept them. *Id.* Those of concern to the IRO, generally, included displaced persons and refugees "who are or who may hereafter be out of their country of nationality or former residence and who are unwilling to return because of fear of persecution, or persons who fled from Germany or Austria because of Nazi persecution and have returned but have not been resettled." S. REP. NO. 950, 80th Cong., 2d Sess. 66, *reprinted in* 1948 U.S. CODE CONG. SERV. 2028, 2037. Persons not protected by the IRO included: "(1) War criminals and (2) Any other person who can be shown to have a) assisted the enemy in persecuting civil populations of countries . . . , or b) voluntarily assisted the enemy forces since the outbreak of the second world war in their operation against the United States." 62 Stat. §§ 3051-52 (1948).

The DPA allowed persons of concern to the IRO to be brought into the United States over and above normal quota limitations. Under the DPA, the number of immigration visas to be issued to eligible displaced persons was limited to 202,000. *See* Note, *Misrepresentation and Materiality*, *supra* note 25, at 472 n.11. Quota limitations were not totally disregarded; any immigrants allowed into the United States in excess of the annual quota "would be subtracted up to 50%, from the annual quotas in succeeding years." *Id.* (citing Act of June 25, 1948, Pub. L. No. 80-774, § 3(b), 62 Stat. 1009, 1010 (1948)). In the three and one-half years immediately following its enactment, some 400,000 persons of concern to the DPA entered the United States. *See* Note, *Denaturalization*, *supra* note 25, at 193 n.31 (citing 1 C. GORDON & H. ROSENFELD, IMMIGRATION AND PROCEDURE § 1.2d (rev. ed. 1982)).

31. DPA § 10, 62 Stat. at 1013 (1948). Any person attempting to enter the United States under the DPA had the burden of proof in establishing 1) that he

the United States under the DPA, several alleged Nazi war criminals entered in violation of this provision by failing to provide truthful accounts of their activities during the war.³² Such persons were excludable on the grounds that they misrepresented or concealed material facts concerning their alleged involvement in atrocities, since full disclosure of these facts would have precluded them from entering the United States.³³ This provision remained unchanged by the Congressional Act of 1950³⁴ which otherwise substantially amended the DPA and extended its effective date until July 1, 1952.³⁵ Subsequently, Congress adopted a similar provision as part of the present Immigration and Nationality Act, enacted in 1952.³⁶ Under the current act, any alien who misrepresents or conceals a material fact on his visa application is thereafter excluded from entering the United States,³⁷ and thus subject to deportation.³⁸

or she was a displaced person of concern to the IRO and 2) that he or she was eligible to enter the United States. *Id.*

32. See Note, *Misrepresentation and Materiality*, *supra* note 25, at 473 (citing 123 CONG. REC. 3159 (1977) (remarks of Rep. Holtzman)).

33. H.R. REP. NO. 1452, 95th Cong., 2d Sess., *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS, 4700, 4703; *see also* *United States v. Fedorenko*, 449 U.S. 490 (1981). Under the *Fedorenko* Court's interpretation of the DPA, in order to render an alien excludable, the misrepresentation must have concerned a material fact. *Id.* at 597. Initially the Court acknowledged that the DPA provision does not on its face require a showing of materiality. *Id.* at 507-08 n.28. However, after drawing a comparison between the DPA and the denaturalization statute contained in the Immigration and Nationality Act (INA), the Court reasoned that a materiality requirement may be read into the DPA provision. *Id.* The INA statute cited by the Court provides that the naturalized citizenship may be revoked "on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation." 8 U.S.C. § 1451(a) (1982). Justice Marshall, writing for the majority, further supported his position by noting that the Court had previously interpreted the provision to require that the willful misrepresentation be related to a material fact. *Fedorenko*, 449 U.S. at 507; *Costello v. United States*, 365 U.S. 265 (1961).

34. Pub. L. No. 555, 64 Stat. 219, 226 (1950).

35. *Id.* Among other changes, the 1950 Act redefined who was an "eligible displaced person." Pub. L. No. 555, § 2 c, d, 64 Stat. 219 (1950). In addition, the Act added two sections to deal with special non-quota immigrants such as orphans. *Id.* at 220. Congress also added a section dealing with appropriation of funds to finance "the reception and transportation of eligible displaced persons." *Id.* at 228.

36. Immigration and Nationality Act of 1952 (McCarran-Walters), Pub. L. No. 82-414, 66 Stat. 163 (codified at 8 U.S.C. §§ 1101-1557 (1982)). The purpose of the INA was "to enact a comprehensive, revised immigration, naturalization, and nationality code." H.R. REP. NO. 1365, 82 Cong., 2d Sess. 5, *reprinted in* 1952 U.S. CODE CONG. & AD. NEWS 1653.

37. *Id.* The INA provides: "[a]ny alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact" is ineligible to receive a visa and is excludable from admission to the United States. 8 U.S.C. § 1182(a)(19) (1982).

This provision of the INA differs from the DPA provision in that Congress required exclusion under the INA only if the misrepresentation was material. The House Reports show that Congress amended the immigration law to re-

B. *Denaturalization*

During the early 1900's, there was a mass influx of immigrants into the United States.³⁹ Along with these immigrants came widespread abuse of the naturalization process.⁴⁰ Prior to 1906, no statute allowed the government to revoke a certificate of naturalization which had been "improperly procured."⁴¹ In the Nationality Act of 1906,⁴² Congress provided that a naturalized citizen may have his citizenship revoked on two grounds: (a) fraud and (b) illegality relating to the procurement of the naturalization certificate.⁴³ This provision was retained, without substantial change, in the Nationality Act of 1940.⁴⁴ Then, in a 1950 report, a subcommittee of the Senate Committee on the Judiciary recommended that the grounds for revocation be changed from "fraud" to "concealment of a material fact or by willful misrepresentation."⁴⁵ Es-

quire showing of materiality because under the DPA, European Immigrants seeking to gain admission who had "fear of repatriation under duress or compulsion," occasionally misrepresented their birthplace or other personal data not material to their admissibility. See H.R. REP. NO. 1365, 82 Cong., 2d Sess. 5, reprinted in 1952 U.S. CODE, CONG. & AD. NEWS 1653, 1704. Where such misrepresentations did not have any effect on "the material issues involved," House members reasoned, it should not serve as a basis for exclusion. *Id.*

According to the State Department Foreign Affairs Manual, an alien who seeks to procure . . . or has procured a visa or documentation by means of fraud or willful misrepresentation is permanently ineligible to receive a visa at any time. 2 Federal Immigration L. Rep. (CCH) ¶ 11,099 § 42.91(a)(19), 4-43 (1983). Whereas, an alien who seeks to enter the United States through fraud or willful misrepresentation is ineligible only at the time of entry. *Id.*

38. Under § 5125(a) "an alien who is determined to be excludable at the time of entry is subject to deportation under the Immigration and Nationality Act." 8 U.S.C. § 5125(a)(1) (1982); see also C. GORDON & E. GORDON, *supra* note 1, § 84.79.

39. S. REP. NO. 1515, 81st Cong., 2d Sess. 53, 75 (1950).

40. See Note, *Misrepresentation and Materiality*, *supra* note 25, at 483. The commentator suggests that the immigration legislation of the early 1900's was an exercise of Congress' constitutional power "[t]o establish a uniform Rule of Naturalization" in response to perceived abuses. *Id.* (quoting U.S. CONST. art. I, § 58, cl. 4).

41. 3 C. GORDON & H. ROSENFELD, *supra* note 2, § 20.26.

42. Act of June 29, 1906, Pub. L. No. 59-338 § 18, 34 Stat. 596, 601 (1906).

43. S. REP. NO. 1515, 81st Cong., 2d Sess. 7, 54 (1950). Section 15 of the Act of 1906 provided in part:

It shall be the duty of the United States district attorneys . . . upon affidavit showing good cause therefore, to institute proceedings . . . for the purpose of setting aside and cancelling the certificate of citizenship on the ground of fraud or the ground that such certificate of citizenship was illegally procured.

34 Stat. 601 (1906).

44. Immigration and Nationality Act of 1940, Pub. L. No. 76-853, 54 Stat. 1137; see S. REP. NO. 1515, 81st Cong., 2d Sess. 7, 755.

45. S. REP. NO. 1515, 81st Cong., 2d Sess. 7, 769. The Subcommittee recognized that the Immigration and Naturalization Service (INS) already considered "fraud" to involve misrepresentations or concealment of material facts made during naturalization proceedings. *Id.* at 755. The INS interpretation was

entially the same standard is used for excluding or deporting an alien who fraudulently obtained a visa.⁴⁶ Congress adopted the change in language when it enacted the Immigration and Nationality Act of 1952.⁴⁷ Substantially the same provision is currently in effect.⁴⁸

III. CASE LAW DEVELOPMENT OF THE MATERIAL MISREPRESENTATION PROVISION

A. *Denaturalization*

The first denaturalization action under the Act of 1906⁴⁹ was brought to cancel the certificate of citizenship of one Johannessen, on the ground that the certificate "had been fraudulently and illegally procured."⁵⁰ The Supreme Court, in *Johannessen v. United States*,⁵¹ did not discuss the issue of materiality in holding that "[an] alien has no moral nor constitutional right to retain the privileges of citizenship, if by false evidence or the like, an imposition has been practiced upon the court without which the certificate of citizenship could not and would not have been issued."⁵²

preferred because of the confusion among practitioners as to whether "fraud" included both "intrinsic" and "extrinsic" fraud. *Id.* at 756.

The Subcommittee felt that the phrase "willful misrepresentation or concealment of a material fact" would clear up conflicts and, at the same time, make it easier for the government to prove its case. *Id.* at 769; see Note, *Misrepresentation and Materiality*, *supra* note 25, at 484 nn.109-15.

46. For a discussion of the history of the basis for excluding or deporting an alien for misrepresentation relating to the visa application, see *supra* notes 28-38 and accompanying text.

47. 66 Stat. 163, 260, *reprinted in* 1952 U.S. CODE CONG. & AD. NEWS 166.

48. See 8 U.S.C. § 1451(a) (1982). The current provision provides in pertinent part: "[i]t shall be the duty of the United States attorneys . . . upon affidavit showing good cause therefor, to institute proceedings . . . 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 . . ." *Id.* The 1952 Act did not include illegal procurement as a ground for denaturalization. 3 C. GORDON & H. ROSENFELD, *supra* note 2, at §§ 20.4c to 20.4d. In 1961, Congress amended the INA to include illegal procurement as a ground for denaturalization. *Id.*; see 8 U.S.C. § 1451(a), *as amended by* Act of Sept. 26, 1961, Pub. L. No. 87-301, § 18, 75 Stat. 656.

49. Act of June 29, 1906, Pub. L. No. 59-338, § 15, 34 Stat. 596, 601.

50. *Johannessen v. United States*, 225 U.S. 227, 232 (1912). Johannessen, a native of Norway, arrived in the United States in December of 1888. *Id.* at 232. In October 1892, he applied for and procured a certificate of citizenship. *Id.* at 232-33. He obtained the certificate through the perjured testimony of two witnesses who testified that Johannessen had resided in the United States for at least five years. *Id.* at 233. The government brought an action under the Act of 1906 alleging that Johannessen had obtained his citizenship by fraudulent means. *Id.*

51. 225 U.S. 227 (1912).

52. *Id.* at 241. See generally Note, *Misrepresentation and Materiality*, *supra* note 25, at 484-85 (discussing *Johannessen* and other early denaturalization cases).

In later actions, the courts' decisions tended to emphasize the issue of whether disclosure of material facts "would have led to further investigation necessary to determine eligibility."⁵³ As one commentator has noted, the test for materiality developed by the courts "appears to have been broad. Although it went beyond the showing of a mere potential to thwart an investigation, it did not require a finding that the investigation might have revealed possible grounds for denial," but only that an investigation was actually precluded.⁵⁴

The current test as defined by the Supreme Court in *Chaunt* provides that a misrepresentation or concealment is material when the government can 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."⁵⁵ The literal language of *Chaunt* suggests a broad test which would hold the naturalization applicant to strict accountability for intentional deceptions.⁵⁶ Nonetheless, circuit courts in applying the second prong have disagreed about whether the

53. See Note, *Misrepresentation and Materiality*, *supra* note 25, at 480.

The courts held that mere frustration of the investigation was a sufficient reason for the revocation of citizenship. See, e.g., *United States v. De Lucia*, 256 F.2d 487 (7th Cir. 1958) (use of an assumed name to gain entry is grounds for deportation "in as much as concealment of one's true name is an effective impediment for an investigation of inquiry relative to the person involved. Had De Lucia used his own name at all relevant times, a path of inquiry leading to his criminal record would have been opened to the government."), *cert. denied*, 358 U.S. 836 (1958); *Corrado v. United States*, 227 F.2d 780 n.84 (6th Cir. 1955) ("[t]he issue is not whether naturalization would have been denied appellant had he revealed his numerous arrests, but whether, by his false answers, the government was denied the opportunity of investigating the moral character of appellant and the facts relating to his eligibility for citizenship"), *cert. denied*, 351 U.S. 925 (1956); *United States ex rel. Volpe v. Smith*, 62 F.2d 808, 816 (7th Cir. 1933) ("[W]hat the officer would have discovered, or might have discovered, had the inspection not been thwarted is beside the question. The inspection contemplated was defeated."), *aff'd*, 289 U.S. 422 (1933).

54. See Note, *Misrepresentation and Materiality*, *supra* note 25, at 486-87 (footnote omitted).

55. *Chaunt*, 364 U.S. at 355. Peter Chaunt, a native of Hungary, became a naturalized citizen of the United States in 1940. *Id.* Later, the government discovered that Chaunt had concealed material facts on his petition for naturalization. *Id.* at 351. Specifically, the government alleged that Chaunt had procured his nationality by concealing the fact that he had been arrested three times. *Id.* at 351-52. The government contended that Chaunt's citizenship should be revoked under the INA on the ground that it had been procured "by concealment of a material fact or by willful misrepresentation." *Id.* at 350-51 (the action was brought under § 340(a) of the INA. 66 Stat. 260, as amended by 68 Stat. 1232 (codified at 8 U.S.C. § 1451(a) § 340(a) (1982)).

56. *Chaunt*, 364 U.S. at 357 (1982) (Clark, J., dissenting). Justice Clark's dissent in *Chaunt* characterized the majority's test as follows: "[t]he test is not whether the truthful answer in itself, or the facts discovered through an investigation prompted by that answer, would have justified a denial of citizenship. It is whether the falsification, the misleading of the examining officer, forestalled

Supreme Court intended to create such a broad test.⁵⁷ Despite this confusion among the circuit courts, the Supreme Court, in *Fedorenko v. United States*,⁵⁸ declined to clarify the meaning of the second prong of the *Chaunt* test.⁵⁹ Although three of the Justices provided interpreta-

an investigation which might have resulted in the defeat of petitioner's application for naturalization." *Id.* (emphasis in original).

57. A minority of courts have adopted the strict view, i.e., the government must show the undisclosed information would "have led to the discovery of facts warranting the denial of a visa." See, e.g., *United States v. Sheshtawy*, 714 F.2d 1038, 1040-41 (10th Cir. 1983) (relying on J. Blackmun's concurring opinion in *Fedorenko v. United States*, 449 U.S. 490 (1981)) (answers were material because they resulted in suppression of facts which if known would have barred naturalization of defendant).

Other courts have considered such a narrow view to be inappropriate. For instance, there is an intermediate reading of the second prong of the test which has been adopted by a number of circuits and is endorsed by the Attorney General. See Note, *Misrepresentation and Materiality*, *supra* note 25, at 493-96 (discussing the Attorney General's Opinion in *In re S- & B-C-*, 9 I. & N. Dec. 1168 (1961)); *United States v. Koziy*, 728 F.2d 1314, 1320 (11th Cir.) (facts would have led to investigation that might have warranted denial of citizenship), *cert. denied*, 105 S. Ct. 130 (1984); see also *Kassab v. INS*, 364 F.2d 806 (6th Cir. 1966). The *Kassab* court noted that

[i]t was not necessary to this finding that it be shown that petitioner would not have procured his visa if the true facts had been known. It is sufficient that if the fact . . . had been revealed, it might have led to further action and the discovery of facts which would have justified the refusal of the visa.

Id. at 807 (emphasis in original).

The Second Circuit has recently adopted a broad reading of the test, requiring only that the government show that "disclosure of the concealed information probably would have led to the discovery of facts warranting denial of a visa." *Maikovskis v. INS*, 773 F.2d 435, 442 (2d Cir. 1985) (emphasis added). *Maikovskis* involved misrepresentations made on a visa application. This reading was recently adopted by the Third Circuit. See *United States v. Kungys*, 793 F.2d 516 (3d Cir. 1986).

58. 449 U.S. 490 (1981). *Fedorenko* was born in Ukraine. *Id.* at 494. He was drafted into the Soviet Army in June 1941, but was captured shortly thereafter. *Id.* He was subsequently trained to be a concentration camp guard, and in September of 1942 was assigned to the Nazi concentration camp at Treblinka. *Id.* at 494. In 1948, Congress enacted the DPA, which allowed European war refugees to emigrate to the United States without regard to traditional immigration quotas. *Id.* at 495. In October 1949, defendant *Fedorenko* applied for admission to the United States under the DPA. *Id.* *Fedorenko* misrepresented his background on his visa application, stating that he had been a farmer in Poland for most of the war, until he was deported to Germany where he was forced to work in a factory until the end of the hostilities. *Id.* at 496-97.

The government alleged that *Fedorenko* would not have been eligible for a visa under the DPA had the immigration service known he had served as an armed guard at Treblinka. *Id.* at 498. The government charged that the defendant had willfully concealed this information both in applying for a DPA visa and in applying for citizenship, and therefore that he had procured his naturalization illegally or by willfully misrepresenting material facts. *Id.*

59. *Id.* at 509. The Court found that disclosure of the true facts would have made *Fedorenko* ineligible to receive a visa under the DPA and therefore it was not necessary to address the question of whether *Chaunt* should apply in this area. *Id.*

tions of the *Chaunt* test,⁶⁰ the majority's refusal to address the issue in *Fedorenko* has left this area of law in a state of confusion.⁶¹

B. *Deportation*

A second area of doubt has developed in the deportation cases. Specifically, courts are unclear as to whether the *Chaunt* test should apply at all in visa application cases. The early deportation decisions held that facts were material if disclosure would have excluded the alien from entering the United States.⁶² Eventually, the courts developed various tests which were very similar to the test the Supreme Court would lay down in *Chaunt* to determine the materiality of misrepresentations made on petitions for naturalization.⁶³

Thereafter, circuit courts of appeals that addressed the issue adopted the *Chaunt* test to determine the materiality of misrepresentations made on visa applications.⁶⁴

In *Fedorenko*,⁶⁵ the United States Supreme Court implied that the standard for determining "materiality" on an application for citizenship

60. Justice Blackmun in his concurring opinion stated that the government must prove disqualifying facts that *would* have made a party ineligible for citizenship at the time he executed his application. *Id.* at 523 (Blackmun, J., concurring). Justice Blackmun apparently took this strict position because he felt that the *Chaunt* Court did not intend to create two separate tests and therefore the first test is controlling. *United States v. Kungys*, 793 F.2d 516 (3d Cir. 1986).

Justice Stevens' stated a similar standard but added a third component to the *Chaunt* test: whether the disqualifying circumstances "would have been discovered by the investigation." *Id.* at 537 (Stevens, J., dissenting).

Justice White favored a broader reading of the *Chaunt* test; a fact is material if a true response *might have* "led to the discovery of revealed facts justifying denial of citizenship." *Id.* at 528 (White, J., dissenting).

61. *See United States v. Kungys*, 793 F.2d 516 (3d Cir. 1986) (noting that "[c]onsistent with Justice Blackmun's concern that *Fedorenko* would generate confusion, cases that have followed have reached different conclusions concerning the materiality requirements under *Chaunt*"). *See generally* Note, *Denaturalization, supra* note 25, at 190-94 (reviewing federal courts' application of *Chaunt* in post-*Fedorenko* denaturalization decisions); Note, *Denaturalization and Materiality at the Visa Application Stage—Fedorenko v. United States*, 22 SANTA CLARA L. REV. 255, 262-65 (1982) ("creation of a multiple standard can only further the confusion endangered by *Chaunt*.") [hereinafter Note, *Denaturalization and Materiality*].

62. *See* Note, *Misrepresentation and Materiality, supra* note 25 at 488. The commentator noted, however, that the courts disagreed as to the proper standard of materiality in cases where exclusion would not have resulted from disclosure of the truth. *Id.*

63. *See generally* Note, *Misrepresentation and Materiality, supra* note 25, at 488-90. Various courts followed the reasoning applied in many denaturalization cases by stressing the importance of the government's investigation which is hindered by the misrepresentation "regardless of what the inspection might have uncovered." *Id.*

64. For a discussion of which courts of appeal have adopted the *Chaunt* test, see *infra* note 84 and accompanying text.

65. 449 U.S. 490 (1981). For a discussion of the facts of *Fedorenko*, see *supra* note 58.

in denaturalization cases should not be used to determine materiality on an application for citizenship in deportation cases.⁶⁶ Because the *Fedorenko* decision is limited to persons who entered the United States in violation of sections 2⁶⁷ and 10⁶⁸ of the DPA, it may be read to have limited precedential value.⁶⁹ However, subsequent federal courts apply-

66. 449 U.S. at 509. Justice Marshall's majority opinion questioned whether the *Chaunt* test for materiality applies to false statements in visa applications. *Id.* In *Fedorenko*, the Court found that the defendant had violated a statutory condition precedent to naturalization, rendering his certificate of citizenship revocable as "illegally procured." *Id.* at 514. The Court held that Fedorenko had not satisfied a statutory prerequisite for obtaining citizenship by naturalization because his service as a concentration camp guard rendered him ineligible for an immigrant visa under the DPA. *Id.* at 514-15. *See generally* Note, *Denaturalization*, *supra* note 25, at 181 (Because he was originally ineligible for admission to the United States under the DPA, "the Court concluded that the petitioner had never been lawfully admitted and therefore could not have compiled five years of residency.").

However, the Court did not directly address whether the *Chaunt* test is the proper standard for determining the materiality of misrepresentations made at the visa application stage. 449 U.S. at 509. For a discussion of the *Chaunt* test, see *supra* note 56 and accompanying text. Specifically, the Court found that because the disclosure of true facts concerning Fedorenko's role as a concentration camp guard as a matter of law made him ineligible for a visa under the DPA, it was not necessary to resolve the *Chaunt* question. 449 U.S. at 509. The Supreme Court did note that "[a]t the very least, a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa." *Id.*

67. 62 Stat. 1009 (1948). Under the DPA only "refugees" or "displaced persons" who were of concern to the IRO were eligible to enter the United States. *Id.* Section 2 of the DPA adopted the definitions of "refugee" and "displaced person" contained in the IRO constitution. *Id.* The IRO constitution provides that the following persons were not of concern to the IRO (and thus not eligible to enter the United States under the DPA): "2. any person 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 States." 62 Stat. 3048, 3051 (1943).

In *Fedorenko*, the Court took a strict statutory construction approach and held that "[u]nder traditional principles of statutory construction, the deliberate omission of the word 'voluntary' from § 2(a) compels the conclusion that the statute made *all* those who assisted in the persecution of civilians [whether voluntarily or involuntarily] ineligible for visa." 449 U.S. at 512 (emphasis added) (footnotes omitted).

68. 62 Stat. 1009, 1013 (1948). Section 10 of the DPA provided: "any 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." *Id.*

69. Comment, *Denaturalization of Nazi War Criminals: Is There Sufficient Justice for Those Who Would not Dispense Justice?* 40 MD. L. REV. 39, 84-85 (1981) ("[R]ealistically the opinion will be binding only in future war criminal denaturalizations because it is expressly based on statutory interpretation of the DPA, not on the interpretation of the immigration statutes which affect the majority of naturalized citizens.")

In *Fedorenko*, the Court held that an applicant who willfully made *material* misrepresentations about his war time activities was ineligible under § 10 of the

ing *Fedorenko* have extended its holding to apply to persons who entered the United States in violation of other provisions of the DPA.⁷⁰ Furthermore, despite the contrary implication in *Fedorenko*, a number of federal courts have continued to assume that *Chaunt* is the appropriate test for determining materiality at the visa application stage.⁷¹

In *United States v. Kowalchuk*,⁷² a denaturalization case,⁷³ the Third

DPA. 449 U.S. at 507. The Court held that misrepresented or concealed facts would be material where, if the true facts were known, the applicant would have been ineligible for a visa under § 2 of the DPA. *Id.* at 512-14.

70. Note, *Denaturalization*, *supra* note 25, at 183 (citing *United States v. Linnas*, 527 F. Supp. 426, 439 (E.D.N.Y. 1981); *United States v. Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio 1981) (section 13 of the DPA rendered defendant ineligible due to his assistance in civil persecution), *aff'd*, 630 F.2d 32 (6th Cir.), *cert. denied*, 456 U.S. 1036 (1982); 8 U.S.C. § 1427(a)(3) (1982) (lack of good moral character evidenced by atrocities committed)). See also *United States v. Osidach*, 513 F. Supp. 51, 72 (E.D. Pa. 1981) (“[U]nder § 13 of the DPA mere willing membership—without proof of personal participation in acts of persecution—in a movement that persecuted civilians is sufficient to warrant a finding of ineligibility as a displaced person.”)

71. See, e.g., *United States v. Kungys*, 793 F.2d 516 (3d Cir. 1986); *United States v. Palciauskas*, 734 F.2d 625, 627-28 (11th Cir. 1984) (immigrant who cuts off government investigation into his background by failing to disclose a material fact is hereafter barred from entering the United States); *United States v. Kairys*, 600 F. Supp. 1254, 1267-68 (N.D. Ill. 1984) (*dicta*) (recognizing that *Chaunt* has been used by lower courts to define materiality in visa application stage).

72. 773 F.2d 488 (3d Cir. 1985) (en banc), *cert. denied*, 105 S. Ct. 1188 (1986). In *Kowalchuk*, the defendant's citizenship was revoked on the grounds that his naturalization had been illegally procured by concealment of a material fact or willful misrepresentation under § 1451(a) of the INA. *Id.* at 496.

In 1949, Serge Kowalchuk obtained a visa to enter the United States for permanent residence as a non-quota immigrant under the DPA. *Id.* at 492. In 1960, Kowalchuk became a United States citizen. *Id.* The government sued under the INA to revoke Kowalchuk's citizenship on the grounds that he had made false and misleading statements on his visa application. *Id.* at 492-93. Specifically the government alleged:

(1) Kowalchuk concealed his membership in the Ukrainian schutzmannschaft by falsely stating that he was a tailor's assistant in Kremianec from 1939 to 1944. [The schutzmannschaft was a branch of the Ukrainian militia organized by the Germans shortly after occupying Lubomyl, Poland in 1941. The Germans organized such forces to help carry out their brutal policies.]

...

(4) He concealed his voluntary departure with the retreating German military forces from Lubomyl to Czechoslovakia, by falsely stating that he left his homeland because he was forcibly transported by the Germans.

(5) In response to a question concerning membership in any political, non-political, or para-military organization, he falsely replied 'none,' thereby concealing his membership in the schutzmannschaft.

Id. at 492 (footnote omitted).

73. The government sought to have Kowalchuk denaturalized on the grounds that a grant of citizenship is invalid if the applicant had not been lawfully admitted into the United States pursuant to a valid visa. *Id.* at 492-93 (citing 8 U.S.C. § 1451(a) (1982)). The *Fedorenko* court had held that where the

Circuit recently had occasion to determine the “materiality” of a misrepresentation made at the visa application stage.⁷⁴ Despite the fact that the *Fedorenko* opinion contained explicit language to the contrary,⁷⁵ the Third Circuit assumed that the test for materiality developed in that case⁷⁶ was nothing more than application of the first prong of *Chaunt* which states that the Government must show by “clear, unequivocal, and convincing” evidence that “facts were suppressed which, if known, would have warranted denial of citizenship.”⁷⁷ Finding that Kowalchuk

preconditions to naturalization are not met, citizenship is “illegally procured” and may be revoked. 449 U.S. at 506. The Third Circuit found that had Kowalchuk revealed the true facts, his visa would have been denied. *Kowalchuk*, 773 F.2d at 496. Since possession of a validly obtained visa is a precondition to naturalization that denial would have “thereby precluded him from obtaining citizenship.” *Id.* at 496. Specifically, the Third Circuit found that Kowalchuk had improperly been granted an immigrant visa in violation of §§ 2 and 13 of the DPA. *Id.* at 494-97. For a discussion of § 2 of the DPA, see *supra* note 67.

Section 13 of the DPA provides: “no visa shall be issued under the provisions of the Act 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. . . .” 62 Stat. 1014 (1948).

The Third Circuit further found, among other material facts, that the defendant had willfully concealed his voluntary membership in the Ukrainian schutzmannschaft. 773 F.2d 498. An applicant who has voluntarily assisted the enemy was ineligible for a visa under § 2 of the DPA. For a discussion of § 2, see *supra* note 67. Michael R. Thomas, chief eligibility officer for the IRO, stated that an applicant who has belonged to a police force or militia would be presumed to voluntarily have assisted the enemy. 773 F.2d at 496. Thomas’ testimony was corroborated by a senior reviewing officer of the Displaced Persons Commission (DPC) as well as a former American Vice Counsel who both testified that a member of the schutzmannschaft who could not overcome the presumption of voluntariness, i.e., show that he was not involved in persecution of civilians, would have been ineligible for a visa. *Id.* at 496-97. Thus, the Third Circuit affirmed the district court’s decision revoking Kowalchuk’s citizenship. *Id.* at 498.

74. *Id.* at 494-96.

The court noted that in order to become a citizen an applicant must have entered the United States pursuant to a valid visa. *Id.* at 494. Furthermore, the court recognized that it was undisputed that Kowalchuk “willfully ma[d]e a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person.” *Id.* at 495 (quoting § 10 of the DPA). The Third Circuit recognized that under the *Fedorenko* Court’s interpretation of § 10 of the DPA, any person who misrepresented a *material* fact was thereafter not admissible into the United States. *Id.* at 495 n.8. The Third Circuit was faced with the task of determining the materiality of Kowalchuk’s misrepresentation.

75. The Supreme Court, in *Fedorenko*, held that the defendant had not satisfied a statutory requirement which was a prerequisite to becoming a naturalized citizen. 449 U.S. at 515. The Court went on to state that “[t]his conclusion . . . lead[s] us to affirm on statutory grounds (and not on the basis of our decision in *Chaunt*), the judgment of the Court of Appeals.” *Id.* at 516. Since the Court had not applied *Chaunt* it was unnecessary to reach the issue of determining the proper interpretation of the *Chaunt* test. *Id.* at 518 n.40.

76. For a discussion of the *Fedorenko* test, see *supra* note 66 and accompanying text.

77. The Third Circuit noted that in *Fedorenko* the Court did not decide

had violated the first prong of *Chaunt* by concealing facts that would have warranted denial of his visa, the Third Circuit determined that the plaintiff had failed to gain legitimate entry into the United States.⁷⁸ Following *Fedorenko*, the *Kowalchuk* court reasoned that since legitimate entry was a precondition to naturalization, failure to meet that precondition to naturalization was grounds for revoking the plaintiff's citizenship.⁷⁹ Chief Judge Aldisert, writing for the dissent, agreed that the *Chaunt* test was appropriate for use in visa application cases, but offered a variant interpretation of both prongs.⁸⁰

Similarly, the Second Circuit, in *Maikovskis v. United States*,⁸¹ an alien deportation case, recently addressed the issue of whether *Chaunt* applies to misrepresentations made on visa applications.⁸² The Second Circuit

whether *Chaunt* applies to determine the materiality of false statements made on visa applications. The court then noted the *Fedorenko* reasoning that "[a]t the very least, a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa." 773 F.2d at 496 (quoting *Fedorenko*, 449 U.S. at 509). Nevertheless, Judge Rosenn's opinion concluded that "[b]ecause . . . disclosure of the true facts concerning defendant's war-time activities would have made him ineligible for a visa, we find it unnecessary to resolve the question of whether defendant's misrepresentations were material under the second prong of the *Chaunt* test." *Id.* at 497 (emphasis added) (citing *Fedorenko*, 449 U.S. at 509). Therefore, it is submitted that the court had replaced the *Fedorenko* test with the first prong of *Chaunt* thereby applying *Chaunt* at the visa application stage. See also *United States v. Kungys*, 793 F.2d 516 (3d Cir. 1986) (clarifying that in *Kowalchuk*, Third Circuit upheld revoking of a defendant's citizenship after applying the first prong of the *Chaunt* test).

It should be noted that a number of commentators have also seen the similarity between the *Fedorenko* test and the first prong of *Chaunt*. See Note, *Denaturalization*, *supra* note 25, at 182 (noting that the "tests of *Fedorenko* and *Chaunt* seem remarkably similar"); Note, *Denaturalization and Materiality*, *supra* note 61, at 262 ("[T]he Court gave no explanation for its refusal to apply *Chaunt*, yet the standard of materiality it adopted for deportation review . . . bears a strong resemblance to the first test of *Chaunt*."); see also *Fedorenko*, 449 U.S. at 520 (Blackmun, J., concurring) (the minimal definition announced by the majority "bears no small resemblance to the first test of *Chaunt*").

78. *Kowalchuk*, 773 F.2d at 496.

79. *Id.* at 494 (citing *Fedorenko*, 449 U.S. at 506).

80. *Id.* at 514-15. (Aldisert, C.J., dissenting). Chief Judge Aldisert, in his dissent, concluded that the government did not satisfy the first prong of the *Chaunt* test. *Id.* at 514 (Aldisert, C.J., dissenting). Aldisert recognized that "[w]hat has divided the courts of appeals in visa application cases is not the applicability of *Chaunt*, but rather the import of the second prong of *Chaunt*'s denaturalization test." *Id.* at 515 (Aldisert, C.J., dissenting). Therefore, unlike the majority, Aldisert found it necessary to reach the meaning of the second prong.

Applying the known prong of *Chaunt*, Aldisert concluded that the government must prove that, "had the undisclosed facts been known, an investigation would have been conducted and disqualifying facts would have been discovered." Aldisert found that the government had not met its burden under the second prong of *Chaunt* and therefore concluded the district court should be reversed. *Id.* at 516 (Aldisert, C.J., dissenting).

81. 773 F.2d 435 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 2915 (1986).

82. *Id.* at 437. Boleslaus Maikovskis entered the United States in 1951 as a

noted that despite the *Fedorenko* Court's intimations to the contrary,⁸³ the circuit courts of appeals addressing the issue have uniformly held that *Chaunt* does so apply.⁸⁴ Accordingly, the Second Circuit relied on the *Chaunt* test in determining that Maikovskis' statements were material and thus that he was an "excludable alien."⁸⁵

Despite the uniformity among the circuit courts of appeals, it has been suggested that "[t]he *Fedorenko* standard should be applied to determine an applicant's initial entry while the *Chaunt* test is to be used to determine an applicant's eligibility for citizenship."⁸⁶ District courts allegedly adopting this position in practice have had difficulty limiting application of *Chaunt* to situations where there is no question of lawful entry.⁸⁷

For the reasons discussed below, it is submitted that the Supreme Court should dispel the doubts created by Justice Marshall's majority opinion in *Fedorenko* and recognize that the circuit courts have properly applied the *Chaunt* test to determine materiality of misrepresentations

displaced person. *Id.* On his application for an immigrant visa, Maikovskis stated that he had worked as a bookkeeper in a Latvian railway department during the war. *Id.* The government brought an action under the "excludable alien" provision of the INA to deport Maikovskis, alleging that he had actually been "chief of police in a nazi-dominated police force" and therefore that he had made materially false statements on his visa application. *Id.* at 438. The excludable alien provision provides for the deportation of any alien who "at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry." 8 U.S.C. § 1251(a) (1982).

83. *Maikovskis*, 773 F.2d at 441. For a discussion of the Court's refusal to deal with the issue whether *Chaunt* applies in deportation cases, see *supra* note 66 and accompanying text.

84. See *Maikovskis*, 773 F.2d at 441 (citing *United States v. Fedorenko*, 597 F.2d 946, 957 (5th Cir. 1979), *aff'd on other grounds*, 447 U.S. 490 (1981)); *Kowalchuk*, 773 F.2d at 488 (misrepresentations made on applicant's immigration visa were material under first prong of *Chaunt* test); *United States v. Palciauskas*, 734 F.2d 628 (11th Cir. 1984) (misrepresentation is material where disclosure would have led to further inquiry into applicant's background); *Kassab v. INS*, 364 F.2d 806, 807 (6th Cir. 1966); *United States v. Rossi*, 299 F.2d 650 (9th Cir. 1962); *Langhammer v. Hamilton*, 295 F.2d 642, 648 (1st Cir. 1961).

85. *Maikovskis*, 773 F.2d at 442. The court held that a misrepresentation is material under the second prong of *Chaunt* if the government shows that "disclosure of the concealed information probably would have led to the discovery of facts warranting the denial of a visa." *Id.*

86. Note, *Denaturalization*, *supra* note 25, at 190.

87. *Id.* at 192. In *United States v. Demjanjuk*, the court applied *Fedorenko* in order to determine the materiality of a misrepresentation made on a visa-application under the DPA. *United States v. Demjanjuk*, 518 F. Supp. 1362, 1382-83 (N.D. Ohio 1981), *aff'd*, 630 F.2d 32 (6th Cir.), *cert. denied*, 456 U.S. 1036 (1982). However, when the court examined the materiality of misrepresentations made on Demjanjuk's petition for naturalization, the court adopted the *Chaunt* test to determine whether Demjanjuk had lawfully been admitted into the United States. 518 F. Supp. at 1383; see also *United States v. Linnas*, 527 F. Supp. 426 (E.D.N.Y. 1981) (defendant's entry into United States was unlawful under *Fedorenko*; examined lawfulness of entry under *Chaunt*).

made at the visa application stage as well as at the naturalization stage.⁸⁸

IV. INTERPRETATION OF THE *CHAUNT* TEST

The Supreme Court can affect a significant change by clarifying the meaning of the second prong of the *Chaunt* test which has generated confusion among the federal courts since it was enunciated in 1961.⁸⁹ Courts, commentators and government officials have offered no less than three interpretations of the second prong of the *Chaunt* test.⁹⁰ In determining whether a broad or narrow interpretation of the test should be adopted, most courts consider the following two factors: (1) The seriousness of the consequences to the citizen or alien if a misrepresentation made at an earlier stage is found to have been material,⁹¹ or (2) Whether the misrepresentation made at an earlier stage resulted in a shift of burden of proof to the government at a point where it makes it more difficult to show the applicant's ineligibility for a visa.⁹² This note

88. See Note, *Denaturalization*, *supra* note 25, at 190-94.

89. *Maikovskis*, 773 F.2d at 435 (although courts of appeals have uniformly applied the *Chaunt* test, there is disagreement as to the meaning of the second prong of the test); cf. *United States v. Kungys*, 793 F.2d 516 (3d Cir. 1986) (noting that Supreme Court has never explained second prong of *Chaunt* test); see also Case Comment, *supra* note 21, at 182 ("[C]larification of *Chaunt* would go far toward settling the current confusion in this area of law."); Note, *Denaturalization*, *supra* note 25, at 177 ("the two-prong *Chaunt* test in particular the second prong has faced criticism as being confusing."); Note, *Misrepresentation and Materiality*, *supra* note 25, at 493 ("confusion arose immediately as to the meaning of the second test"); Note, *Denaturalization and Materiality*, *supra* note 61, at 261-63 (recognizing the confusion and disagreement which has surrounded the *Chaunt* test).

90. See *United States v. Kungys*, 793 F.2d 516 (3d Cir. 1986) (noting that the Second Circuit has recognized three possible tests under which materiality can be proven, a "might possible", a "reasonable possibility" or a "certainty" standard). For a discussion of the various interpretations of the *Chaunt* test, see *supra* note 57 and accompanying text.

91. See, e.g., Note, *Misrepresentation and Materiality*, *supra* note 25, at 495 ("[S]everity of denaturalization and deportation demands a standard higher than that connoted by 'possibly'"); *Fedorenko*, 449 U.S. at 521-23 (Blackmun, J., concurring) ("Rigorous test is necessary to preserve person's unique and treasured right to citizenship.").

92. See, e.g., *Maikovskis*, 773 F.2d at 442 ("If material facts have successfully been concealed in the visa application documents . . . the concealment has deprived the government of the opportunity to make an investigation . . . at a time when the truth would have been more easily discovered."); *Fedorenko*, 597 F.2d at 951 (district court's interpretation requiring the government to prove ultimate facts "would allow an applicant for a visa or 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."); *Langhammer v. Hamilton*, 295 F.2d 642, 648 (1st Cir. 1961) (Requiring government to show there would have been investigation that would have resulted in applicant's ineligibility "invites false swearing.").

The Third Circuit found that "although there is no controlling authority which requires us to insist that the government prove that the truth at the time would have prompted an investigation we find that this requirement is implied

will consider how these two factors should be evaluated in light of the current trends and concerns surrounding immigration policy.

Some courts have indicated that the proper interpretation of the *Chaunt* test should be determined by examining the effect that the applicant's misrepresentation has on the government's ability to assess the applicant's eligibility.⁹³ These courts generally base their reasoning on the fact that at the time of entering the United States, or at the time of petitioning for citizenship, the applicant has the burden of proving eligibility.⁹⁴ In a deportation or denaturalization hearing, the government has the burden of proving ineligibility by clear, unequivocal and convincing evidence.⁹⁵ In view of the fact that generally many years have passed since the alien's entrance into the United States and because evidence is sometimes in the hands of foreign countries, it is often very difficult for the government to meet its burden of proof.⁹⁶ A number of courts have concluded that, as a result, applicants are encouraged to lie or conceal facts concerning their eligibility.⁹⁷ Consequently, these

by the language of the second prong: 'that disclosure might have been useful in an investigation.'". *United States v. Kungys*, 793 F.2d 516, 526 (3d Cir. 1986) (citing *Chaunt*, 364 U.S. at 355).

93. For a discussion of the courts which have held that the main factor to be considered is the hindering of a government investigation, see *supra* note 92.

94. See 1A C. GORDON & H. ROSENFELD, *supra* note 2, § 3.71 (citing 8 U.S.C. § 1361 (1982)). The "Burden of Proof" section of the INA provides in pertinent part: "[w]henver any person makes application for a visa . . . or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa. . . ." 8 U.S.C. § 1361 (1982).

95. See 1A C. GORDON & H. ROSENFELD, *supra* note 2, § 5.10(b). Although the document which "initiates the deportation proceeding" asserts that the respondent must prove why he should not be deported, it is the government which seeks to expel the alien and which "therefore has the burden of proving eligibility." *Id.* However, where the lawfulness of entry is in question, "the burden of proof shall be upon such person to show the time, place, and manner of his entry into the United States . . . If such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of the law." *Id.* The burden then shifts to the government to show that the entry was unlawful. *Id.* The government must meet this burden by clear, unequivocal and convincing evidence. *Id.* (citing *Woodby v. INS*, 385 U.S. 276 (1966)).

96. See *Maikovskis*, 773 F.2d at 442. ("Maikovskis' misrepresentations cut off a relevant line of inquiry, preventing the immigration authorities from conducting a thorough investigation of his background to determine his eligibility on the basis of complete information."); *Fedorenko*, 587 F.2d at 951 (rigorous reading of *Chaunt* would force government to attempt to "conduct an investigation into the past, discover ultimate facts warranting disqualification, and prove those facts in court by clear and convincing evidence").

97. See, e.g., *Maikovskis*, 773 F.2d at 442 ("[A]pplication of a certainty standard would encourage the alien to conceal material information in his visa application documents and reward him for the initial success of his nondisclosure."); *Fedorenko*, 587 F.2d at 951 ("[If rigorous test] 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."); *Langhammer v. Hamilton*, 295 F.2d 642 (1st Cir. 1962) ("A decision that an alien may make a false statement in his application

courts have adopted a broad interpretation of the *Chaunt* test.⁹⁸ The Attorney General has offered a similar interpretation of this provision.⁹⁹

It is submitted that courts are correct in recognizing that a misrepresentation or concealment of facts by the applicant will effectively cut off government investigation since, as many courts and commentators have noted, the INS does not have adequate resources to launch an investigation of each apparently legitimate visa petition.¹⁰⁰ However, it

for a visa in order to avoid the raising of a substantial question as to his eligibility and then, if he is caught in the false statement after having successfully choked off investigation, may try out his eligibility just as if nothing happened would . . . be an invitation to false swearing." (quoting *Ganduxe Y. Marino v. Murff*, 183 F. Supp. 565, 567 (S.D.N.Y. 1959), *aff'd sub nom. Ganduxe y Marino v. Esperdy*, 278 F.2d 330 (2d Cir.) (per curiam), *cert. denied*, 364 U.S. 824 (1960)).

98. See, e.g., *United States v. Kungys*, 793 F.2d 516 (3d Cir. 1986) (After proving investigation would have transpired, government must prove that investigation "probably would have led to discovery of disqualifying facts"; court did not address whether it would be sufficient for government to show that disqualifying facts possibly would have been revealed (emphasis in original)); *Maikovskis*, 773 F.2d at 442 (in adopting the most liberal view, Second Circuit held that government must show that "disclosure of the concealed information probably would have led to the discovery of facts warranting the denial of a visa." (emphasis added)); *Fedorenko*, 597 F.2d at 951 (government must show that disclosure of true facts would have led to an inquiry that might have uncovered other facts warranting denial of citizenship); *Langhammer v. Hamilton*, 295 F.2d 642, 648 (1st Cir. 1961) (sufficient to find material if "inquiry" would "have unearthed facts warranting [defendant's] exclusion regardless of the ultimate determination of this question when all the evidence was in." (emphasis in original)).

99. See generally Federal Immigration L. Rep. ¶ 11,099 § 42.91(a)(19), 4-44 to 45 (1983). Materiality means more than an alien has lied, rather it is measured against "whether the misrepresentation was of direct and objective significance to the proper resolution of the alien's application for a visa." *Id.* at 4-44. The Attorney General has stated that the definition of materiality under § 1182 is:

A misrepresentation made in connection with an application for a visa or other documents, or with entry into the United States, is material if either

- (1) the alien is excludable on the true facts, or
- (2) the misrepresentation tends to shut a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.

Id. (citing *In re S- & B- C-*, 9 I. & N. Dec. 1168 (1961)). Part one of the definition applies where "the true facts of the matter disclose a situation rendering the alien *ipso facto* ineligible for a visa as a matter of law." *Id.* The second part of the definition applies where the alien's misrepresentation "tended to shut off a line of inquiry which is relevant to his visa eligibility." *Id.* There has developed a "rule of probability" whereby a misrepresentation is material where it was "intended to cut off a line of inquiry into facts which might have resulted in a proper refusal of a visa if the truth had been known." *Id.* The misrepresentation need not have been successful in thwarting the government's investigation, as long as "it must reasonably have had the capacity of foreclosing further investigation." *Id.*

100. See, e.g., *Maikovskis*, 773 F.2d at 442; *Fedorenko*, 597 F.2d at 951; *Langhammer v. Hamilton*, 295 F.2d 642, 648 (1st Cir. 1961). The United States has consular officers stationed in foreign countries who are responsible for "screening visa applicants and for issuing visas to those who qualify." See M.

has also been suggested that regardless of whether a broad or narrow test is adopted some applicants for entry into the United States will lie or conceal facts which would, if known, prevent admittance; as one commentator suggests "[w]here an applicant fears that the truth will result in denial or perhaps even more drastic consequences, such as repatriation to a hostile homeland . . . the incentive to lie is already strongly present. An adjustment in esoteric law will little alter real world behaviour."¹⁰¹ Therefore, although the Court in fashioning an interpretation of *Chaunt* should consider the extent to which the government's investigation is hindered, it is submitted that this should not be the determinative factor.

In determining the proper standard of materiality in denaturalization and deportation proceedings, it is submitted that the interpretation the Court chooses to give the second prong of the *Chaunt* test will depend on whether the Court emphasizes the loss of the applicant if the misrepresentation is found material, or the gain which the applicant has achieved by making a material misrepresentation.¹⁰²

In *Johnnessen v. United States*,¹⁰³ the first denaturalization case involving fraud or illegal procurement of citizenship, the Supreme Court emphasized that there is no legal right to retain citizenship which has been procured by giving "false evidence."¹⁰⁴ More recently, the Court emphasized that because the attainment of American citizenship is "a solemn affair", an applicant must give "frank, honest and unequivocal answers."¹⁰⁵ The Court went further to emphasize that failure to do so can lead to a denial of citizenship.¹⁰⁶ However, in the same opinion the

MORRIS, IMMIGRATION—THE BELEAGUED BUREAUCRACY 96 (1985). Although the number of visas issued increased by only 13 percent between 1972 and 1979, the number of applicants has grown more rapidly. *Id.* Consequently, in 1983 there was a "mounting backlog [of visa applications] that exceeded 1.4 million." *Id.* (emphasis added). Furthermore, the number of immigrant visas has steadily increased, almost tripling in number from 1972-1980. *Id.* In addition to sheer numbers, evidence suggests that fraud in visa petitions is a substantial problem in some areas. *Id.* at 98. In light of these problems, more personnel are needed as well as improved facilities before the system can function satisfactorily. *Id.*

101. See Case Comment, *supra* note 21, at 199; see also *United States v. Sheshtawy*, 714 F.2d 1038, 1090 (10th Cir. 1983) (narrow reading of *Chaunt* would not increase prevalence of lying).

102. For a discussion of the various interpretations of the *Chaunt* test, see *supra* notes 57 & 98-99 and accompanying text. See also *United States v. Kungys*, 793 F.2d 516 (3d Cir. 1986) (noting that there are three interpretations that various circuits have given to the second prong of the *Chaunt* test).

103. 225 U.S. 227 (1912).

104. *Id.* at 241. The Court concluded that if it is determined that an alien has been granted citizenship through his unlawful conduct, then denaturalization is merely depriving him "of a privilege that was never rightfully his." *Id.* at 242-43.

105. *Chaunt*, 364 U.S. at 352. Truthful answers are necessary to insure that the government can adequately assess whether the applicant is qualified to become a United States citizen. *Id.*

106. *Id.* at 352-53. The Court noted that "[s]uppressed or concealed facts,

Court also recognized that in light of the "grave consequences to the citizen, naturalization decrees are not likely to be set aside."¹⁰⁷ Lower courts that have emphasized the former view have given the second prong of *Chaunt* a broad interpretation, thus requiring the highest degree of candor from the applicant.¹⁰⁸ Courts that have emphasized the latter view, on the other hand, have given the second prong of *Chaunt* a narrow interpretation, making it much more difficult for the government to satisfy its burden of proof.¹⁰⁹

V. APPLICABILITY OF *CHAUNT* AT THE VISA APPLICATION STAGE

Notably, the first courts of appeals to apply the two prong *Chaunt* test did so in cases involving misrepresentations made on visa applications.¹¹⁰ For instance, in *Rossi v. United States*,¹¹¹ the Ninth Circuit stated that *Chaunt* applied at the visa application stage because "naturalization is the final step in the process which begins with entry, and thus what is material in completing the process depends on what was material in initiating it."¹¹² More recently, in *Fedorenko*, Justice Blackmun suggested in his concurrence that in determining the materiality of facts, the relevant consideration is not when or where the concealment or misrepresentation occurred; rather the relevant consideration is whether material facts concerning the applicant's eligibility for citizenship were

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." *Id.*

107. *Id.* at 353.

108. See, e.g., *Fedorenko*, 597 F.2d at 952 ("To guard the integrity of this priceless treasured citizenship, the government must be accorded the authority to seek the denaturalization of those who, in procuring citizenship, misstated or concealed facts that, if disclosed, would have led the government to conduct an inquiry that might have resulted in denial of citizenship."); *United States v. Oddo*, 314 F.2d 116, 118 (2d Cir. 1963) (Recognizing that right to American citizenship is a "precious one"; government meets its high burden of proof by showing that misrepresentation cut off a line of inquiry by government "which might have conceivably led to collateral information of greater relevance").

109. *United States v. Sheshtawy*, 714 F.2d 1038, 1041 (10th Cir. 1983) ("The importance of putting naturalized citizenship well beyond the danger of unwarranted revocation justifies the adoption of so severe a test," such that the government must establish facts that would have warranted denial of applicant's citizenship); *United States v. Rossi*, 299 F.2d 650, 652-53 (9th Cir. 1962).

110. See *United States v. Rossi*, 299 F.2d 650 (9th Cir. 1962) (statements made in visa applications must meet evidentiary test of *Chaunt* to be material); *Longhammer v. Hamilton*, 295 F.2d 642 (1st Cir. 1961) (defendant who lied about his communist membership on application for visa was not eligible to enter the United States under first prong of *Chaunt*).

111. 299 F.2d 650 (9th Cir. 1962). Cesare Rossi, who was admitted to the United States under a non-quota visa, became a United States citizen in 1935. *Id.* The government alleged that Rossi's actions constituted fraud and justified revocation of his citizenship. *Id.*

112. *Id.* at 652.

concealed from the government.¹¹³ It is submitted that both the Ninth Circuit and Justice Blackmun were implicitly recognizing that naturalization is the ultimate goal for a significant number of persons who enter the United States under immigrant visas.¹¹⁴ In fact, the same misrepresentation used by an applicant to obtain a visa are often repeated on the applicant's petition for United States citizenship.¹¹⁵ In addition, it is submitted that Congress has established a strong legislative policy favoring truthfulness which applies equally to representations made on petitions for citizenship.¹¹⁶

It is submitted that there is little precedent suggesting that a uniform standard of materiality should not be applied in immigration law.¹¹⁷ Shortly after the *Chaunt* decision was announced, one commentator did suggest that because of the high burden of proof required in a denaturalization action, the test might not be applicable to deportation actions brought for misrepresentations made on visa applications.¹¹⁸ However, this proposition, which was never recognized by any of the circuit courts of appeal, lost any chance of adoption when the Supreme Court held in *Woodby v. INS*¹¹⁹, that owing to the severe consequences

113. 449 U.S. at 520 (Blackmun, J., concurring).

114. See M. MORRIS, *supra* note 100, at 126. Morriss noted that although less than one third of those immigrants who legally enter the United States, i.e., who enter under immigrant visas, seek to become naturalized citizens, during the decade of the 70's, the number of persons naturalized annually increased by 46%. *Id.* Morriss further noted that as overall immigration increases, so does the demand for naturalization. *Id.* In 1980 alone, 157,938 persons were naturalized. *Id.* By 1982 the number had reached 183,000. ANNUAL REPORT OF IMMIGRATION & NATURALIZATION SERVICE 16 (1982).

115. Note, *Denaturalization*, *supra* note 25, at 181.

116. H.R. CONF. REP. NO. 2096, 82d Cong., 2d Sess., reprinted in 1952 U.S. CODE CONG. & AD. NEWS 1753, 1755. A conference report, compiled by the Managers of the Part of the House stated that in "applying fair humanitarian standards" in cases involving aliens who procured their visas by fraud or misrepresenting material facts, "every effort is made to prevent the evasions of the laws by fraud and to protect the interest of the United States." *Id.* This strong legislative policy favoring truthfulness has been recognized in naturalization cases as well. See Case Comment, *supra* note 21, at 172 (citing Appleman, *supra* note 25); see also 2 Federal Immigration L. Rep., *supra* note 37, at ¶ 11,099 § 42.91(a)(19), 43-43 ("The inclusion of [§ 1183] expresses the concern with which Congress viewed cases of aliens resorting to fraud or willful misrepresentation for the purposes of obtaining visas or otherwise effecting unauthorized entry into the United States.").

117. Justice Blackmun, in his concurring opinion in *Fedorenko*, stated that there was no reason to suggest that *Chaunt* does not apply to false statements made at the time of initial entry into the United States. 449 U.S. at 519 (Blackmun, J., concurring). Justice Blackmun went on to observe that "[i]f such a distinction was intended, it has eluded the several courts that unquestionably have applied *Chaunt's* materiality standard when reviewing alleged disturbances in the visa request process." *Id.*

118. Appleman, *supra* note 25, at 272.

119. 385 U.S. 276 (1966).

to the alien,¹²⁰ the government must meet the same high burden of proof in a deportation action that is required in an action to revoke citizenship.¹²¹

Finally, in light of the existing authority and precedent, it is submitted that the Supreme Court should follow the "will of Congress"¹²² by recognizing that the circuit courts of appeals have properly applied *Chaunt* to determine the materiality of misrepresentations made on visa applications.¹²³ In so doing, the Court can create uniformity amongst all the circuits and thus insure that all persons subject to denaturalization or deportation proceedings are treated equally.

The remainder of this note will address the question of the proper view for the court to adopt in light of the current national policy regarding immigration and naturalization.

VI. LEGISLATIVE CONCERNS UNDERLYING THE INTERPRETATION OF THE *CHAUNT* TEST

In recent years, both the Congress and the executive branch of government have determined that there must be a change in the field of immigration and naturalization.¹²⁴ Consequently, on July 30, 1981, President Reagan offered a "reform package designed to reassert control over immigration."¹²⁵ In March of 1982, Alan Simpson, the Repub-

120. *Id.* at 285-86. The Court stated that "[t]he immediate hardship of deportation is often greater than that inflicted by denaturalization which does not, immediately at least, result in expulsion from our shores." *Id.* at 286.

121. *Id.* at 285-86. In order to deport an alien, the Court held that the government must "establish its allegations by clear, unequivocal, and convincing evidence." *Id.* at 285 (footnote omitted).

122. See Comment, *Denaturalization Proceedings*, 14 CONN. L. REV. 409, 423 (1982). This commentator suggested that the *Fedorenko* Court defeated Congressional intent regarding naturalization. *Id.* The commentator concluded that had the *Fedorenko* Court "applied and interpreted the *Chaunt* materiality test, it could have followed the will of Congress and developed a uniform standard for considering all instances of material misrepresentations or omissions in denaturalization proceedings." *Id.* The commentator suggested that the Court relied on Congress' "exclusive prerogative to set standards for naturalization and the natural and plain meaning of a word in the statute." *Id.* However, in doing so, the Court actually defeated Congressional intent by not affirming that there is a uniform standard "for considering all instances of material misrepresentation or omissions in denaturalization proceedings." *Id.*

123. See, e.g., Note, *Denaturalization and Materiality*, *supra* note 61, at 262 ("ostensibly *Chaunt* should be controlling in *Fedorenko*"); Case Comment, *supra* note 21 at 174-82.

124. Abrams, *American Immigration Policy—How Straight the Gate?*, in U.S. IMMIGRATION POLICY 107 (R. Hofstetter ed. 1984). For a discussion of recent Congressional efforts in this area, see COMMITTEE REPORT, *supra* note 3, at 18-28.

125. Martin & Houston, *European and American Immigration Policies*, in U.S. IMMIGRATION POLICY 50 (R. Hofstetter ed. 1984); see 17 *Weekly Comp. of Pres. Doc.* 830 (Aug. 3, 1981). Present Reagan's proposed bill dealt almost exclusively with proposals to alleviate the problem of undocumented aliens. Martin & Houston, *supra*, at 50-51.

lican Chairman of the Immigration subcommittee of the Senate Judiciary Committee, and Romano Mazzoli, a Democrat who held the similar House position, introduced the Simpson-Mazzoli Bill, a "bipartisan response" to proposals of President Reagan.¹²⁶ Although the Simpson-Mazzoli Bill¹²⁷ has yet to be approved, there has been significant Congressional debate on the issue, focusing on a number of specific concerns.

One of the major concerns of Congress is the number of immigrants which the United States can "prudently allow."¹²⁸ In 1965, Congress established a worldwide annual quota of 290,000 immigrants.¹²⁹ The 1980 Refugee Act increased the world wide limitation to 320,000 immigrants annually.¹³⁰ In addition, the INA provides that certain persons can be admitted to the United States without regard to the quota limitations.¹³¹ In 1980 alone, over 800,000 legal immigrants entered the United States.¹³² Consequently, "[m]uch of the debate about immigration reform rests on the assumption that the country is seriously threatened by an unprecedented surge in immigration and that steps must be taken immediately to prevent dire consequences for the country."¹³³

The Simpson-Mazzoli Bill sought to control legal immigration by

126. MARTIN & HOUSTON, *supra* note 125, at 51 (citing S. 2222, 97th Cong., 2d Sess., 128 CONG. REC. S221 8-19, 4941-43 (daily ed. March 17, 1982) (Summary of Bill)). The Simpson-Mazzoli Bill went further than the administration's by seeking to control legal immigration as well as illegal immigration. *Id.* at 52.

127. The bill is currently known as the Simpson-Rodino Bill. *See* Student Lawyer 27 (Jan. 1986). The House passed the Bill June 20, 1984. *See* M. MORRIS, *supra* note 100, at 2. However, support for the Bill subsequently collapsed and it did not pass the Senate before the 98th Congress adjourned. *Id.* at 3.

128. M. MORRIS, *supra* note 100, at 3. Morriss noted that the area of immigration policy has always been controversial. *Id.* He went on to point out two major competing interests: 1) fears about potential harmful effects of immigration; and 2) commitment to the idea of an open country. *Id.* Morriss also noted that some special interest groups, e.g., certain employers, desire a liberal immigration policy. *Id.*

129. *See* Abrams, *supra* note 124, at 110.

130. 74 Stat. 102, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 141, 155.

131. 8 U.S.C. § 1151 (1982). *See also* M. MORRIS, *supra* note 100. Morriss noted that some categories of immigrants, such as spouses, children and parents of United States citizens, have always been considered for admission without regard to numerical quotas. *Id.* Additionally, Congress has authorized the admission of several groups of refugees over and above the existing ceiling. *Id.*

132. *See* Abrams, *supra* note 124, at 112 (based on Immigration and Naturalization Service statistics, cited in Time, May 18, 1981 at 4). The 800,000 figure includes 145,000 Cubans and Haitians. *See* COMMITTEE REPORT, *supra* note 3, at 4.

133. *See* M. MORRIS, *supra* note 100, at 6. Morriss stated that the Senate version of the Simpson-Mazzoli bill responded to this assumption by proposing a cap on all immigration. *Id.* However, Morriss concluded that the country "is not about to be engulfed by a great alien tide." *Id.* at 7.

capping the total number of immigrants at 425,000 annually.¹³⁴ Although the Senate and public in general have shown strong support for such proposals, the House has been reluctant to change America's current, more liberal immigration policy.¹³⁵ Despite approval by the Senate, the Simpson-Mazzoli Bill died in conference when Congress adjourned in October, 1985.¹³⁶ Recent proposed legislation has emphasized enforcing restrictions on illegal immigration rather than changing United States legal immigration policy.¹³⁷ Some authorities have argued that if such efforts are effective, the United States might actually be able to increase the quotas for legal immigrants.¹³⁸

It is submitted that the strong legislative emphasis placed on control of immigration and the strong public opinion favoring immigration controls in general could shape the Court's interpretation of *Chaunt*.

VII. CONCLUSION

The Supreme Court in two recent cases has once again refused to

134. S. 1200, 99th Cong., 1st Sess. (1985); H.R. 3080, 99th Cong., 1st Sess. (1985) (cited in Martin and Houston, *supra* note 125, at 52). This figure would include numerally unrestricted immediate relatives and other non-quota immigrants whose numbers have been steadily increasing.

135. See M. MORRIS, *supra* note 100, at 3. The Senate version of the Simpson-Mazzoli bill called for an annual ceiling of 425,000 immigrants. *Id.* However, the House version rejected any cap on immigration. *Id.* A Roper Poll, conducted in June of 1980, found that 80% of all Americans are in favor of reducing the number of legal immigrants admitted annually. *Id.* at 25.

136. Miller, "The Right Thing to Do": A History of Simpson-Mazzoli, in CLAMOR AT THE GATES 70-71 (N. Glazer ed. 1985). The bill was in the hands of the conference committee when the 98th Congress adjourned. *Id.* at 71. The conference did not officially adjourn, rather, it ran out of time for action when Congress adjourned. *Id.*

137. See generally 1 Imm. L. Serv. §§ 1:15-1:40 (1985). In May of 1985, Senator Alan Simpson introduced to the Senate the Immigration Reform and Control Act of 1985. *Id.* at § 1:15. The purpose of the bill was to "amend the Immigration and Nationality Act to effectively control authorized immigration in the United States." S. 1200, 99th Cong., 1st Sess. 131 CONG. REC. S7038 (daily ed. May 24, 1985). The bill does not contain proposals for changes in the legal immigration system which were part of the Simpson-Mazzoli bill. *Id.* at S7039 (for a summary of the bill, see *id.* at S7040-S7054). In July of 1985, Representatives Rodino and Mazzoli introduced to the House the Immigration Control and Legalization Amendments Act of 1985. 1 Imm. L. Serv. at § 1:31. The purpose of the bill is to "address the question of illegal immigration in a fair and reasonable manner." H.R. 3080, 99th Cong., 1st Sess., 131 CONG. REC. H6391 (daily ed. July 25, 1985) (emphasis added).

138. Fuchs, *The Search for a Sound Immigration Policy: A Personal View*, in CLAMOR AT THE GATES 24-26 (N. Glazer ed. 1985) (noting advantages of lawful immigration). Fuchs would favor a recommendation made by Representative Hamilton Fish of New York in 1981 and supported by the Select Commission on Immigration and Refugee Policy, to increase "numerically restricted immigration" from 270,000 to 350,000 a year. *Id.* at 23. In fact, Fuchs would prefer an even greater increase but feels that political opposition even for the proposed increase will be too great due to public concern over the number of illegal immigrants. *Id.* at 24.

address the proper standard for determining the materiality of misrepresentations on visa applications.¹³⁹ Consequently, the fate of a person who entered this country by misrepresenting a material fact depends more on which court hears the case than on the degree of misrepresentation involved.¹⁴⁰ As a result of the non-uniformity, courts remain divided as to whether to place greater emphasis on the "solemnity" of attaining United States citizenship or on the "grave consequences" of denaturalizing and ultimately deporting those who misrepresent their backgrounds.¹⁴¹ Ultimately, this issue must be resolved in favor of the former view.

This conclusion is inescapable in light of the current policy concerning immigration. Americans favor a strict immigration policy. Congress is currently considering proposals that will further limit those who may legally enter the United States and at the same time make it more difficult to enter illegally. Thus, United States citizenship obtained through naturalization might in the future become even more precious. This right, out of fairness, should be reserved for those aliens who have entered the United States by complying with all statutory requirements.

Accordingly, it is submitted that the Court should adopt a broad reading of the *Chaunt* test and thus insure that only those who have complied with the United States Immigration and Naturalization Laws are allowed to remain in the country and retain the "priceless treasure" of United States citizenship.

Esther L. Bachrach

139. See *Maikovskis*, 106 S. Ct. 2915 (1986); *Kowalchuk*, 105 S. Ct. 1188 (1986).

140. See Note, *Denaturalization and Materiality*, *supra* note 61, at 265.

141. The consequences of deportation can indeed be grave. Feodor Fedorenko was ordered denaturalized after the Fifth Circuit upheld the district court's finding that he had made a misrepresentation on his application for visa. 597 F.2d 946 (5th Cir. 1979), *aff'd*, 449 U.S. 490 (1981). For a discussion of the facts of *Fedorenko*, see *supra* note 57. In 1983, an immigration judge ordered that he be deported to the Soviet Union. 598 F. Supp. 1525, 1526 (1984). In December of 1984, he was arrested and deported to the Soviet Union. *Id.* at 1526. One June 19, 1986, Fedorenko was sentenced to death after being found guilty of committing war crimes during the Second World War. N.Y. Times, June 20, 1986, at A2, col. 3.

John Demjanjuk was stripped of his American citizenship in 1981. In March of 1986, after more than five years of denaturalization, deportation and extradition hearings, Demjanjuk was extradited to Israel. N.Y. Times, March 1, 1986, at A3, col. 2. At the time of this writing, it is expected that Demjanjuk will be convicted of Nazi war crimes and sentenced to death. *Id.*

Serge Kowalchuk, who was found guilty of making false statements on his visa application is facing deportation to the Soviet Union where he would stand trial as a Nazi war criminal. At the time of this article, the Justice Department has started deportation proceedings against Kowalchuk. Philadelphia Inquirer, March 1, 1986, at B5, col. 1. For a discussion of the facts of *Kowalchuk*, see *supra* note 72.