1932

# United States vs. Macintosh: A Symposium:

John Henry Wigmore

Kenneth Craddock Sears

Ernst Freund

Frederick Green

causes of opposition to war are so various, the state of public opinion, locally and nationally, on the subject is so fluctuating that an average person cannot be expected to visualize the circumstances that will surround future wars. Then why exclude only very cautious individuals with New England consciences?

AN OATH seems to be an unsatisfactory means of testing the likelihood of good citizenship. It has broken down as a means of obtaining truth from a witness. If an oath is needed in naturalization proceedings for some formal purpose, why not make it as colorless as possible and then resort to other means to ascertain the essential facts concerning the applicant? We need a more objective method of testing. Section 4 of the Naturalization Act provides for ascertainment of the facts about a person. Probably it should be amplified. Search the man's record and ascertain how he has lived, abroad as well as in this country. If all of this is done now under departmental regulations, then nothing more can be done except to perfect the technique and so far as possible choose the best who offer themselves. Why strain at an oath which will result only in eliminating some of our best prospects?

# Part III

**By Ernst Freund**
*Professor of Law*
*University of Chicago*

TWO collateral questions are suggested by the foregoing two comments upon the decision in the Macintosh case as well as by the decision itself: First: If the law requires, as a condition precedent to admission either to citizenship or to any other position of public trust, the taking of a prescribed form of oath, is it the presumable intent of the legislature that there shall or may be an inquiry into the truth or falsity of the oath? By the common law of evidence it is legitimate to ascertain whether the sanctions of the oath are operative in point of conscience, but the power of inquiry stops at that point. The terms of the oath prescribed by the Naturalization Act are admittedly vague and fall short of any standard of legal precision. The eventuality of a defense of the Constitution and laws of the United States against all enemies, foreign and domestic, is as remote as the bearing of true faith and allegiance to the same is subjective and undefinable. Phrases such as these may be appropriate to a solemn utterance meant to impress moral sense and conscience, but defy minute and logical analysis. The statute in the fourth paragraph of section 4, where it prescribes, not the terms of the oath, but the evidence to be presented for admission, uses words of entirely different import and character; and by laying down the test of behavior in connection with the criterion of attachment to the Constitution, divests even that criterion of the ambiguity which it might have if used merely as descriptive of a state of mind. On legal principles, the statute would appear to be satisfied by the willingness to take the required oath; the difficulty is that the appeal to sentiment or emotion which the oath involves injects itself into the interpretation of the statute, and has extended the scope of the examination until it becomes a searching inquiry into the conscience of the applicant.

SECOND: It is of course conceded that the first point made has no support in any of the opinions filed in either the *Schwimmer* or the *Macintosh* cases; not only that, but all the courts that have dealt with the statute have ignored the plain fact that the statutory criterion is not attachment to the Constitution but behavior for a period of five years as a person attached to the Constitution. What we get from the wider and, it is believed, unwarranted construction placed upon the law, is a marked division of judicial opinion with the usual result that there is no general acquiescence in the final decision by a bare majority.

Whatever may be thought of the right or wrong of the decision, the law as interpreted leaves the qualifications for admission to citizenship in an undesirable state of uncertainty. True, naturalization is a privilege, but Congress never intended to make it a matter of judicial discretion. Such a criterion as attachment to the Constitution, if the behavior test is abandoned, is hopelessly uncertain. An instrument which invites amendment can demand attachment only in a qualified sense; and a close analysis of attachment leads to contradictory results when we remember that the federal and state constitutions proclaim diametrically opposite principles of administrative organization.

IF CONGRESS intended the naturalization law to mean what the courts have interpreted it to mean, the tests of admission to citizenship may vary with the political bias of the courts that administer it. It would then be more logical to adopt the English plan according to which the naturalization of an alien would lie in the absolute discretion of the Secretary of State. If the legislative policy is one of objective tests, the statute should be given a corresponding phrasing and construction.