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> To deport one who so claims to be a citizen, obviously deprives him of liberty . . . . It may result also in loss of both property and life; or of all that makes life worth living.[1]

At the close of the Second World War, over eight million persons displaced by the atrocities of the Third Reich sought refuge in the countries of eastern and western Europe. Those displaced included not only civilian refugees from war-torn areas, but also liberated prisoners of war, forced laborers, and those fortunate enough to survive German concentration and death camps.[2] Pursuant to voluntary repatriation policies established at Yalta in 1945,[3] nearly seven million displaced persons were resettled. By 1948, however, one million remained homeless.[4] The International Refugee Organization (I.R.O.),[5] a United Nation's agency established to aid in the resettlement of displaced persons, partially alleviated the problem by organizing temporary camps to shelter over one half of the remaining displaced population.[6]

To aid in the relief effort,[7] the United States Congress, in 1948,

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1 Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

2 *See* S. REP. No. 950, 80th Cong., 2d Sess. 8, *reprinted in* 1948 U.S. CODE CONG. & AD. NEWS 2028, 2035.

3 The Yalta Conference took place on February 11, 1945, with American President Franklin D. Roosevelt, British Prime Minister Winston L. Churchill, and Soviet General Secretary Joseph V. Stalin participating.

4 *See* S. REP. No. 950, 80th Cong., 2d Sess. 8, *reprinted in* 1948 U.S. CODE CONG. & AD. NEWS 2028, 2035.

5 The Preparatory Commission was established by the Agreement On Interim Measures To Be Taken In Respect Of Refugees And Displaced Persons, *opened for signature* Dec. 15, 1946, 61 Stat. 2525, T.I.A.S. No. 1583 (*effective* Dec. 31, 1946). *See* Note, *Misrepresentation and Materiality in Immigration Law—Scouring the Melting Pot*, 48 FORDHAM L. REV. 471, 471 (1980).

6 The I.R.O. Preparatory Commission operated the refugee camps. For a discussion of the I.R.O., see notes 12 and 14-17 *infra* and accompanying text.

7 During the late 1930's and early 1940's, when many eventual victims of the Nazi War machine might have avoided their fate, immigration policy for the United States under President Roosevelt hampered attempts to seek refuge in the United States. Governed by 1924 immigration legislation establishing restrictive national origin quotas, the United States took little action to protect those who would suffer the cruelty of Hitler's "Final Solution." *See* Immigration Act of 1924, Pub. L. No. 68-139, § 12, 43 Stat. 153, 160-61 (repealed 1952). *See also* H.R. REP. No. 1365, 82d Cong., 2d Sess. 1, *reprinted in* 1952 U.S. CODE CONG. & AD. NEWS 1653, 1671-73; Comment, *The Denaturalization of Nazi War Criminals: Is There Sufficient Justice for Those Who Would Not Dispense Justice?*, 40 MD. L. REV. 39, 40-41 (1981) (citing A. MORSE, WHILE SIX MILLION DIED: A CHRONICLE OF AMERICAN APATHY 17-22, 28, 37, 60-62, 65, 130, 140, 270-88 (1968) ("The United States not only insisted

passed the Displaced Persons Act. The Act was emergency immigration legislation making entrance visas into the United States available for eligible persons.[8] Congress, however, having pledged to ban Axis corroborators from entering the United States, specifically excluded certain persons from assistance under the Act.[9] Despite the prohibition, many of the ineligible refugees managed to immigrate to the United States by misrepresenting or concealing their wartime activities. Once in the United States, a qualified immigrant can apply for American citizenship.[10] Because the decree of naturalization, unless revoked, unassailably establishes the naturalized person's citizenship, the otherwise ineligible immigrant is able to live inconspicuously within the borders of the United States.

Serge Kowalchuk was accused of being one such person. In 1983, a United States district court revoked Kowalchuk's citizenship and ordered the cancellation of his certificate of naturalization. The court found that he was not a genuine refugee "of concern" to the I.R.O., and therefore not entitled to the benefits of the Displaced Persons Act.[11]

This note examines the present state of denaturalization law as it applies to persons who, like Serge Kowalchuk, were admitted to the United States under the Displaced Persons Act. Part I discusses the qualifications for eligibility under the Displaced Persons Act. Part II outlines congressional authority for regulating immigration. Part III reviews judicial developments in immigration law, emphasizing the requirement of materiality for concealments and misrepresentations in immigration proceedings. Part IV analyzes the plight of persons like Serge Kowalchuk whose false statements pose questions never before addressed by the Supreme Court. Part V proposes that the Supreme Court's materiality test for false statements in the citizenship acquisition process should apply to false statements in visa applications as well. Finally, Part VI concludes that such an extension ensures that the valued rights of citizenship are protected from unwarranted revocation.

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upon its immigration law throughout the Nazi era, but administered it with severity and callousness." *Id.* at 49)). *See generally* IMMIGRATION AS A FACTOR IN AMERICAN HISTORY 192 (O. Handlin ed. 1959).

8 Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009, *amended by* Act of June 16, 1950, Pub. L. No. 81-555, 64 Stat. 219 (codified as amended at 50 U.S.C.A. app. §§ 1951-65 (1951)) (no longer in force).

9 Persons not "of concern" to the Displaced Persons Act included war criminals, persons who assisted the enemy in persecuting civilian populations, and persons who voluntarily assisted enemy forces. *See* notes 16-17 *infra* and accompanying text.

10 *See* 3 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW & PROCEDURE § 20.2c (2d rev. ed. 1979).

11 *See* United States v. Kowalchuk, 571 F. Supp. 72, 83 (E.D. Pa. 1983), *aff'd*, 773 F.2d 488 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 1188 (1986).

I. Eligibility Under the Displaced Persons Act

The United States Congress initially responded to those displaced by the second world war by accepting membership in the International Refugee Organization in 1947,[12] and by enacting the Displaced Persons Act one year later.[13] These actions opened America's borders to eligible persons displaced by World War II.

A person applying for admission to the United States pursuant to the Displaced Persons Act had to fulfill several requirements before a visa was granted. First, the party seeking to immigrate had to qualify as a displaced person under the I.R.O.[14] Second, the Act required the applicant to complete an eligibility application. Next, a staff member of the Displaced Persons Commission (Commission) would examine the party's applications to determine the applicant's eligibility under the Act.[15] Among other individuals,[16] the Act ex-

12 *See* Act of July 1, 1947, Pub. L. No. 80-146, 61 Stat. 214. For the legislative history of the Act, see 1947 U.S. CODE CONG. & AD. NEWS 1256. *See also* Constitution of the International Refugee Organization, *opened for signature* Dec. 15, 1946, 62 Stat. 3037, T.I.A.S. No. 1846 (*entered into force* Aug. 20, 1948) [hereinafter cited as *I.R.O. Const.*]. The preamble to the I.R.O. Constitution states that its purpose is to aid genuine refugees and displaced persons in returning to their countries of origin or in finding new homes. *See id.* at 3038. The I.R.O. Constitution also required participating countries to develop appropriate immigration procedures for the purpose of protecting the legitimate rights and interests of the refugees. *See id.* art. 2, § 2(j), at 3040. It was from this directive that the Displaced Persons Act was born.

13 Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009, *amended by* Act of June 16, 1950, Pub. L. No. 81-555, 64 Stat. 219 (codified as amended at 50 U.S.C.A. app. §§ 1951-65 (1951)) (no longer in force). For the legislative history of the Displaced Persons Act, see 1948 U.S. CODE CONG. & AD. NEWS 2028; 1950 U.S. CODE CONG. & AD. NEWS 2513.

Under the procedures developed by the Displaced Persons Commission, the refugee had the burden of establishing eligibility for the Act's assistance. *See* Displaced Persons Act of 1948, Pub. L. No. 80-774, § 10, 62 Stat. 1009, 1013, *amended by* Act of June 16, 1950, Pub. L. No. 81-555, § 9, 64 Stat. 219, 225 (codified as amended at 50 U.S.C.A. app. § 1959 (1951)) (no longer in force). To obtain assistance under the Act, eligible parties had to apply by December 31, 1951. *See* Act of June 16, 1950, Pub. L. No. 81-555, § 4, 64 Stat. 219, 221 (codified at 50 U.S.C.A. app. § 1952 (1951)) (no longer in force).

14 The I.R.O. determined eligibility on the basis of a written application and personal interview. I.R.O. officials paid special attention in both instances to the applicant's character and history. *See I.R.O. Const.*, *supra* note 12.

15 *See* Displaced Persons Act of 1948, Pub. L. No. 80-774, § 10, 62 Stat. 1009, 1013. Section two of the Displaced Persons Act incorporated the definition of refugees and displaced persons given in the constitution of the I.R.O. . The definition provides that:

> (b) "Displaced person" means any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization and who is the concern of the International Refugee Organization.

Id. § 2(b), at 1009. In addition to listing persons who would be "of concern," the I.R.O. Constitution contained exclusionary language exempting certain applicants. *I.R.O. Const.*, *supra* note 12, at 3051-52.

16 The I.R.O. excluded six classes of persons. In addition to those discussed in the text, the Act also excluded:

(1) War criminals, quislings, and traitors.

(2) Ordinary criminals who were extraditable by treaty.

empted any person who: "(a) . . . assisted the enemy in persecuting civil populations of countries [which are] Members of the United Nations; or (b) . . . voluntarily assisted the enemy forces since the outbreak of the second World War in their operations against the United Nations."[17]

If the Commission approved the applications, the applicant applied to an American Consulate for an immigration visa. During this final stage, a vice-consul would review the completed file, which contained the I.R.O. certificate and the Displaced Persons Commission report, and interview the applicant.[18] If the applicant fulfilled

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(3) Persons of German ethnic origin, whether German nationals or members of German minorities in other countries, who:
  (a) had been or would be transferred to Germany from other countries;
  (b) had been, during the second world war, evacuated from Germany to other countries;
  (c) had fled from, or into, Germany, or from their places of residence into countries other than Germany to avoid falling into the hands of Allied armies.
(4) Persons in receipt of financial support and protection from their country of nationality, unless their country of nationality requested international assistance for them.
(5) Persons who, since the end of hostilities in the second war:
  (a) had participated in any organization having as one of its purposes the overthrow by armed force of the Government of their country of origin, being a Member of the United Nations; or had participated in any terrorist organization;
  (b) had become leaders of movements hostile to the Government of their country of origin being a member of the United Nations or sponsors of movements encouraging refugees not to return to their country of origin;
  (c) at the time of application for assistance, were in the military or civil service of a foreign State.

See I.R.O. Const., supra note 12, at 3051-52

17 *I.R.O. Const., supra* note 12, at 3031-52. The I.R.O. stated, however, that "[m]ere continuance of normal and peaceful duties not performed with the specific purpose of aiding the enemy against the Allies or against the civil population of territory in enemy occupation, shall not be considered to constitute 'voluntary assistance.'" *Id.* at 3052 n.1.

In construing § 2 of the Displaced Persons Act, the Supreme Court stated that:

> [W]e are unable to find any basis for an "involuntary assistance" exception in the language of § 2(a), we [therefore] conclude that the . . . plain language of the Act mandates . . . the literal interpretation . . . . Under traditional principles of statutory construction, the deliberate omission of the word "voluntary" from § 2(a) [and the inclusion of the word "voluntary" in § 2(b)] compels the conclusion that the statute made *all* those who assisted in the persecution of civilians ineligible for visas.

Fedorenko v. United States, 449 U.S. 490, 512-13 (1981) (citing National R.R. Passengers Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974); Botany Worsted Mills v. United States, 278 U.S. 282, 289 (1929)) (emphasis in original) (insert added). The Court added: "We are not at liberty to imply a condition which is opposed to the explicit terms of the statute . . . . To [so] hold . . . is not to construe the Act but to amend it." *Id.* at 513 (quoting Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 38 (1934)).

18 *See* Displaced Persons Act of 1948, Pub. L. No. 80-774, § 10, 62 Stat. 1009, 1013, *as amended by* Act of June 16, 1950, Pub. L. No. 81-555, § 9, 64 Stat. 219, 225-26 (codified as amended at 50 U.S.C.A. app. § 1959 (1951)) (no longer in force). This amendment classified the duties of a vice-consul and established that the vice-consul had the final determina-

the immigration requirements, the vice consul would then grant the applicant a permanent residence visa to the United States.[19] To discourage false statements on the application, the Act provided that any person who willfully misrepresented or concealed a fact for the "purpose of gaining entrance into the United States as an eligible displaced person shall thereafter not be admissible into the United States."[20] Despite the provisions of the Act which sought to exclude war criminals, many otherwise ineligible persons gained admission into the United States by misrepresenting or concealing their wartime activities.

II. Congressional Authority and Immigration Procedure

Congress alone has the power to prescribe rules for naturalization.[21] Thus, courts insist on strict compliance with statutory mandates.[22] Congressional authority to regulate immigration, on the other hand, does not derive from an express constitutional grant; it is simply regarded as a power inherent to a sovereignty.[23] In 1952, Congress overhauled the immigration laws by passing the Immigration and Nationality Act (1952 Act),[24] which established more lib-

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tion of an applicant's eligibility. *See* H. CONF. REP. No. 2187, 81st Cong., 2d Sess., *reprinted in* 1950 U.S. CODE CONG. & AD. NEWS 2513-23.

19 *See* Displaced Persons Act of 1948, Pub. L. No. 80-774, § 3, 62 Stat. 1009, 1010. *See generally* Note, *Denaturalization of Nazi War Criminals After* Fedorenko, 15 N.Y.U. J. INT'L L. & POL. 169, 172-74 (1982).

20 Displaced Persons Act of 1948, Pub. L. No. 80-774, § 10, 62 Stat. 1009, 1013.

21 Congress derives its power to regulate naturalization from an express provision in the Constitution which calls on the legislature to "establish a uniform Rule of Naturalization." U.S. CONST. art. I, § 8, cl. 4. Denaturalization powers are derived from the necessary and proper clause. U.S. CONST. art. I, § 8, cl. 18. *See* Knauer v. United States, 328 U.S. 654 (1946). *See also* Comment, *supra* note 7, at 49.

But see Knauer v. United States, 328 U.S. 654 (1946) (Rutledge, J., dissenting) (arguing that the power to *naturalize* does not include the power to *denaturalize*, as the act of admission is final):

> If this means that some or even many disloyal foreign-born citizens cannot be deported, it is better so than to place so many loyal ones in inferior status. And there are other effective methods for dealing with those who are disloyal, just as there are for such citizens by birth.

Id. at 679 (Rutledge, J., dissenting). *See generally* Note, *Constitutional Limitations on the Naturalization Power*, 80 YALE L.J. 769 (1971).

22 *See* Fedorenko v. United States, 449 U.S. 490, 506 (1981); Polites v. United States, 364 U.S. 426, 436-37 (1960); United States v. Ness, 245 U.S. 319, 322 (1917) (cases requiring statutory compliance with legislative enactments as prerequisite to valid naturalization). *See also* Note, Fedorenko v. United States: *A New Test for Misrepresentation in Visa Applications*, 7 N.C.J. INT'L L. & COM. REG. 129, 132 (1982).

23 *See* Chinese Exclusion Case, 130 U.S. 581 (1889).

24 *See* Immigration and Nationality Act, ch. 477, §§ 101-360, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified at 8 U.S.C. §§ 1101-1557 (1982)). The act reflected the anti-Communist fervor of the McCarthy era. Although President Truman vetoed the immigration law because of the severe hardships involving exclusion, deportation, and naturaliza-

eral provisions concerning exclusion,[25] deportation,[26] and denaturalization.[27] The 1952 Act specifically requires denaturalization in certain instances:

> It shall be the duty of the United States attorneys for the respective districts . . . to institute proceedings . . . for the purpose of revoking and setting aside the order admitting such persons to citizenship and cancelling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured by concealment of a material fact or by willful misrepresentation.[28]

Denaturalization is retroactive. The process determines that a person was not eligible for citizenship at the time citizenship was granted.[29] In denaturalization cases, courts look for concealment of material facts or willful material misrepresentations.[30] The materiality requirement ensures that misstatements which are uninten-

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tion, Congress overrode Truman's veto and passed the act on June 27, 1952. *See* R. STEEL, STEEL ON IMMIGRATION LAW § 1.2 (1985).

The Act continues to be the basic immigration law for the United States. For the legislative history and purpose of the Act, see 1952 U.S. CODE CONG. & AD. NEWS 165. For a general discussion of the Act, see Note, *supra* note 5, at 473-75.

25 Grounds for exclusion are enumerated in 8 U.S.C. § 1128. *See generally* 3 C. GORDON & H. ROSENFIELD, *supra* note 10, §§ 2.27-2.41; STEEL, *supra* note 24, §§ 2.27-2.45A.

26 *See* 8 U.S.C. §§ 1251-1260 (1982). Grounds for deportation are listed in 8 U.S.C. § 1251 (1982). The deportation order may be withheld if the alien can demonstrate the threat of persecution because of race, religion, or political belief. *See* 8 U.S.C. § 1253(h) (1982). *See generally* 1 C. GORDON & H. ROSENFIELD, *supra* note 10, § 5; R. STEEL, *supra* note 24, §§ 14:1 to 14:60.

27 Denaturalization, applicable only to naturalized citizens, entails a judicial proceeding premised on impropriety in the naturalization process. *See* 8 U.S.C. §§ 1401-1503 (1982). *See generally* 3 C. GORDON & H. ROSENFIELD, *supra* note 10, § 20.4; R. STEEL, *supra* note 24, § 1:2. *See* B. HING, HANDLING IMMIGRATION CASES § 20.2a (1985).

The statutes have never established a time limitation for bringing a denaturalization suit. Consequently, a naturalized person's citizenship may be subject to revocation at any time after it is granted. *See* 3 C. GORDON & H. ROSENFIELD, *supra* note 10, § 20.2d. The courts have consistently rejected contentions that such protracted delay denies due process of law. *See, e.g.*, Costello v. United States, 365 U.S. 265, 281 (1961) (delay of 27 years).

The notion that powers of denaturalization, firmly established and repeatedly endorsed, are unlimited is a misconception. Rights of citizenship are not easily divested. Any denaturalization proceeding is subject to challenge for arbitrariness, unreasonableness, or discrimination. *See* Rogers v. Bellei, 401 U.S. 815 (1971); Schneider v. Rush, 377 U.S. 163 (1964).

28 8 U.S.C. § 1451(a) (1982). Illegal procurement, as distinguished from misrepresentation, refers to obtaining a grant of citizenship without first complying with prescribed statutory requirements. It does not require any affirmative indication of deception. *See* 3 C. GORDON & H. ROSENFIELD, *supra* note 10, § 20.4c; Note, *supra* note 5, at 474.

If a person is denaturalized on the basis of an illegally procured entrance visa, deportation proceedings are likely to result. *See* R. STEEL, *supra* note 24, § 15:9. Deportation would not result from a misrepresentation or concealment in an application for naturalization if the person held a valid, legally obtained visa. Denaturalization, however, may extinguish derivative rights to citizenship acquired by the naturalized person's dependants. *See* 8 U.S.C. § 145(a) & (f) (1982). *See also* 3 C. GORDON & H. ROSENFIELD, *supra* note 10, § 20.6.

29 *See generally* R. STEEL, *supra* note 24, § 15:26.

30 *See* B. HING, *supra* note 27, § 12.4.

tional, innocuous, or irrelevant do not jeopardize a naturalized person's citizenship.[31] In light of the severity of denaturalization, courts have refused to revoke citizenship when the defects are not substantial.[32]

III. Judicial Involvement in Denaturalization Proceedings

A. *Early Developments*

Even though the 1952 Act includes the limitation of materiality,[33] Congress never defined the term. In 1960, the Supreme Court fashioned its own definition of materiality. In *Chaunt v. United States*,[34] the Court established the test for material concealments and misrepresentations in naturalization proceedings.

In *Chaunt*, the Government sought to revoke the defendant's citizenship, contending that the defendant procured his citizenship "by concealment of a material fact or by willful misrepresentation."[35] Although Peter Chaunt had entered the United States pursuant to a valid visa, he failed to reveal a number of prior arrests when he applied for naturalization.[36] The Government charged that the suppressed information would have prompted a further investigation which would have established the absence of good moral character required of an applicant by the 1952 Act.[37]

In resolving the case, the Court first noted that Chaunt had disclosed his membership in the International Worker's Order (I.W.O.). Although Chaunt had denied affiliation with the Communist party, the Court concluded that membership in the I.W.O. should have prompted further investigation into Chaunt's political activities.[38] Because this disclosure had not prompted further inquiry by the Government, the Court found that his undisclosed

31 *See* Knauer v. United States, 328 U.S. 654, 659 (1946).

32 *See* B. HING, *supra* note 27, § 12.3. The United States Department of Justice maintains that revocation of citizenship by denaturalization is a severe measure and should only be sought in the most egregious circumstances. *See* Note, *Diminished Protection of Naturalized Citizens in Denaturalization Proceedings*, 14 TEX. INT'L L.J. 453, 454 (1979) (the Justice Department should view revocation as remedial rather than penal in nature and should not institute denaturalization proceedings unless substantial results are likely to be achieved).

33 *See* 8 U.S.C. § 1451(a) (1982).

34 364 U.S. 350 (1960).

35 *Id.* at 350-51 (quoting 8 U.S.C. § 1451(a) (1982)).

36 Chaunt had been arrested three times: once for distributing handbills in violation of a local ordinance—he was discharged; once for violating a park regulation prohibiting public demonstrations—he received a suspended sentence; and once for breach of the peace—conviction "nolled" on appeal. *See id.* at 352.

37 *See* 8 U.S.C. § 1427(a) (1982).

38 364 U.S. at 355. Generally, membership in the Communist Party is not per se grounds for establishing illegal procurement of citizenship. The Government must prove that the naturalized citizen knows that the Communist Party advocates the overthrow of the United States Government and that the naturalized citizen supports this goal. *See* Nowak v. United States, 356 U.S. 660, 665-68 (1958).

prior arrests were of slight consequence.[39] "Had [the disclosure of his membership] not been made in the application, failure to report the arrests would have had greater significance."[40] The Court concluded by stating that:

> [The] Government has failed to show by "clear, unequivocal, and convincing" evidence either (1) that facts were suppressed which, if known, would have warranted denial of citizenship, or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship.[41]

In so holding, the Supreme Court established the test for determining whether a misrepresentation or concealment is material.[42] The Court found that because Chaunt's omissions were not material, he could not be denaturalized.[43]

The first test of *Chaunt* reflects the minimum standard for judging materiality: when the suppressed fact would by itself warrant denial of citizenship. Any less restrictive standard runs counter to the fundamental policy consideration of discouraging falsehoods in the citizenship acquisition process.[44] Failure to meet this standard, however, does not render the suppressed facts immaterial. A court must apply the second *Chaunt* test. While the lower courts have consistently interpreted the first test, their application of the second test has resulted in confusion and inconsistency.[45] Some courts argue that the Government must show that the undisclosed facts *would* have led to the discovery of additional facts warranting denial of citizenship.[46] Other courts maintain that the second test

39 *Id.* at 354.

40 *Id.* at 355.

41 *Id.* The Supreme Court has established that citizenship in the United States is a precious right. Once conferred, the Government bears "a heavy burden of proof" in denaturalization proceedings. *See* Costello v. United States, 365 U.S. 265, 269 (1961), *quoted in* Fedorenko v. United States, 449 U.S. 490, 505 (1981). To revoke a grant of citizenship, the evidence must be clear, unequivocal, and convincing. *See* Schneiderman v. United States, 320 U.S. 118, 125 (1943). "Any less exacting standard would be inconsistent with the importance of the right that is at stake." *Fedorenko*, 449 U.S. at 505-06.

42 364 U.S. at 355.

43 *Id.* at 356.

44 *See* Comment, Fedorenko v. United States, 6 SUFFOLK TRANSNAT'L L.J. 163, 179 (1982).

45 For a discussion of the different interpretations of *Chaunt*, see Note, *supra* note 5, at 490-504. The basis for the varying interpretations of *Chaunt* can be traced back to the *Chaunt* decision itself where the dissent proposed its own less restrictive standard. Believing that the Court had adopted a more restrictive view, Justice Clark stated that the "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, by misleading the examining officer, forestalled an investigation which *might have resulted* in the defeat of petitioner's application for naturalization." 364 U.S. at 357 (Clark, J., dissenting) (emphasis in original).

46 *See, e.g.*, United States v. Sheshtawy, 714 F.2d 1038, 1040-41 (10th Cir. 1983); La

of *Chaunt* requires only the *possibility*, and not the certainty, of discovering disqualifying facts sufficient to warrant denial of citizenship.[47]

B. Fedorenko v. United States[48]

Twenty years after the decision in *Chaunt*, the Supreme Court granted certiorari in *Fedorenko v. United States*,[49] apparently to resolve the conflict that had arisen among the circuits regarding their interpretation of the *Chaunt* materiality test. In 1949, Feodor Fedorenko applied for a visa to the United States pursuant to the Displaced Persons Act. He falsely stated on his application that he had been a farmer from 1937-42 and that he had been deported to Germany and forced to work in a factory.[50] Actually, Fedorenko was drafted into the Russian army in 1941 and captured by the Nazis shortly thereafter. After a brief period in prisoner-of-war camps, the Germans selected Fedorenko for training as a concentration camp guard at Treblinka, Poland.[51] As a camp guard, Fedorenko wore a uniform, carried a rifle, received a stipend, obtained a "good service stripe" from the Germans,[52] and allegedly committed acts of violence against camp inmates.[53]

Madrid-Peraza v. INS, 492 F.2d 1297, 1298 (9th Cir. 1974); United States v. Rieler, 337 F.2d 986, 989 (3d Cir. 1964); United States v. Rossi, 299 F.2d 650, 652-53 (9th Cir. 1962). *See also* Fedorenko v. United States, 449 U.S. 490, 524 (1981) (Blackmun, J., concurring); United States v. Kowalchuk, 773 F.2d 488, 515-16 (3d Cir. 1985) (Aldisert, C.J., dissenting).

47 *See, e.g.*, United States v. Koziy, 728 F.2d 1314, 1319-20 (11th Cir.), *cert. denied*, 105 S. Ct. 130 (1984); United States v. Fedorenko, 597 F.2d 946, 951 (5th Cir. 1979), *aff'd on other grounds*, 449 U.S. 490 (1981); Kassab v. INS, 364 F.2d 806, 807 (6th Cir. 1966); United States v. Oddo, 314 F.2d 115, 118 (2d Cir.), *cert. denied*, 375 U.S. 833 (1963).

48 449 U.S. 490 (1981).

49 597 F.2d 946 (5th Cir. 1979), *cert. granted*, 444 U.S. 1070 (1980), *aff'd on other grounds*, 449 U.S. 490 (1981).

50 449 U.S. at 498.

51 *Id.* Historians estimate that some 800,000 people were murdered at Treblinka. *See* L. DAWIDOWICZ, THE WAR AGAINST THE JEW, 1933-1945, at 149 (1975); R. HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS 572 (1978). The district court in *Fedorenko* described Treblinka as follows:

> It contained only living facilities for the [Schutzstaffel (SS)] and the persons working there. The thousands who arrived daily on the trains had no need for barracks or mess halls; they would be dead before nightfall. It was operated with a barbarous methodology—brutally efficient—and such camps surely fill one of the darkest chapters in the annals of human existence, certainly the darkest in that which we call Western civilization.

Fedorenko v. United States, 455 F. Supp. 893, 901 n.12 (S.D. Fla. 1978). For a discussion of the conditions of Jewish ghettos established by the Nazis to aid in the implementation of their brutal pogroms, see United States v. Osidach, 513 F. Supp. 51, 59-63, 83-96 (E.D. Pa. 1981).

52 449 U.S. at 494, 500.

53 *Id.* at 498 & n.12. The Government produced eyewitnesses to testify regarding Fedorenko's acts of violence. *Id.* The defendant himself admitted, however, that as an

In affirming the lower court's decision, the *Fedorenko* Court relied on section 10 of the Displaced Persons Act, which provides that "[a]ny person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States shall thereafter not be admissible into the United States."[54] The Court had to determine whether misrepresentations or concealments about an applicant's pre-immigration activities were material in determining the lawfulness of his entry into the United States.[55] Because of the implied materiality requirement in section 10, the Court first addressed whether the materiality test announced in *Chaunt* applied to the *Fedorenko* case. The Court noted that while Peter Chaunt had legally obtained his visa before concealing facts in the naturalization process, Fedorenko had been accused of falsifying his visa application. *Fedorenko*, therefore, posed a different question than *Chaunt*.

The *Fedorenko* Court concluded that it was "unnecessary to resolve the question whether the *Chaunt* materiality test also governs false statements in visa applications."[56] The Court stated that, at a minimum, a misrepresentation must be considered material "if disclosure of the true facts would have made the applicant ineligible for a visa."[57] The Court found that the true facts about Fedorenko's service as an armed guard would have made him ineligible for a visa as a matter of law.[58] Fedorenko, therefore, under

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armed guard he followed orders as directed, including orders to shoot at escaping prisoners. *Id.* at 500.

54 Displaced Persons Act of 1948, Pub. L. No. 80-774, § 10, 62 Stat. 1009, 1013. Even though the Act uses "material" only in the context of concealments, courts have implied a similar requirement for willful misrepresentations. *See* Costello v. United States, 365 U.S. 265, 271-72 (1961).

55 449 U.S. at 509. Several circuits, including the Fifth Circuit's decision in *Fedorenko*, *see* 597 F.2d 946 (5th Cir. 1979), assumed that the *Chaunt* materiality test also controlled misrepresentations at the visa stage. *See, e.g.*, Maikovskis v. INS, 773 F.2d 435 (2d Cir. 1985); United States v. Palciauskas, 734 F.2d 625, 628 (11th Cir. 1984); 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).

56 449 U.S. at 509. Accordingly, the Court also found it unnecessary to determine whether the court of appeals, which adopted the less restrictive view of *Chaunt* (*see* text accompanying note 47 *supra*), correctly interpreted the *Chaunt* materiality test. *Cf. Fedorenko*, 449 U.S. at 523 (Blackmun, J., concurring) ("I must join the Court in not accepting the reasoning of the Court of Appeals, which would have diluted the materiality standard."). Even though the Court refused to address whether the *Chaunt* test applied to false statements in visa applications, the test established in *Fedorenko* test is effectively the same as the first test in *Chaunt*.

57 449 U.S. at 509.

58 *Id.* The Court concluded that § 2(a) of the I.R.O. constitution mandated a finding of ineligibility under the Displaced Persons Act. 449 U.S. at 512. "Section 2(b) of the [Displaced Persons Act] . . . specifically provided that individuals who 'assisted the enemy in persecuting civil[ians]' were ineligible for visas under the Act." *Id.* at 509-10. Looking to Fedorenko's activities, the Court concluded that an individual's service as an armed concentration camp guard—whether voluntary or involuntary—made him ineligible for a visa. *Id.*

the express terms of the Displaced Persons Act, was "thereafter not admissible into the United States."[59]

The Court next discussed whether the concealment of a material fact would warrant revocation of Fedorenko's citizenship. The 1952 Act provides for the revocation of a person's citizenship for failure to comply with the statutory prerequisites for naturalization.[60] To become a naturalized citizen, the 1952 Act, in effect at the time Fedorenko applied for naturalization, requires an applicant for citizenship to have been lawfully admitted to the United States for permanent residence.[61] Section 13(a) of the Immigration Act of 1924, in effect when Fedorenko received his visa to the United States, provided that "[n]o immigrant shall be admitted to the United States unless he . . . has an unexpired immigration visa."[62]

Having failed to obtain a valid visa, Fedorenko did not comply with the statutory prerequisites, and thereby subjected his citizenship to revocation.[63] In the *Fedorenko* context, therefore, illegally procured naturalization means that the party was ineligible for naturalization at the time citizenship was granted.[64]

IV. The Plight of Serge Kowalchuk

In *Chaunt*, the Supreme Court established the framework by which lower federal courts analyze misrepresentations in citizen-

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at 512. In comparison, the Court speculated that "an individual who did no more than cut the hair of [Jewish] female inmates before they were executed [by the Nazis could not] be found to have assisted in the persecution of civilians." *Id.* at 512 n.34.

59 *Id.* at 514 (quoting Displaced Persons Act of 1948, Pub. L. No. 80-774, § 10, 62 Stat. 1009, 1013).

60 *See* 8 U.S.C. § 1451(a) (1982). *See also* Note, *supra* note 22, at 130; B. HING, *supra* note 27, § 12.3.

61 *See* 8 U.S.C. §§ 1427(a), 1429 (1982). ("No person shall be naturalized unless he has been *legally admitted* into the United States for permanent residence in accordance with all applicable provisions of this chapter." *Id.* § 1429.) (emphasis added).

62 Immigration Act of 1924, Pub. L. No. 68-139, § 13(a), 43 Stat. 153, 161 (repealed in 1952). The Immigration and Nationality Act contains the same requirement. *See* 8 U.S.C. § 1181(a) (1982) ("No immigrant shall be admitted into the United States unless at the time of application for admission he . . . has a valid unexpired immigration visa."). Courts have consistently interpreted § 13(a) to require a valid visa. Visas obtained through material misrepresentations are invalid. *See Fedorenko*, 449 U.S. at 515 (citing Ablett v. Brownell, 240 F.2d 625, 629 (D.C. Cir. 1957); United States *ex rel.* Jankowski v. Shaughnessy, 186 F.2d 580, 582 (2d Cir. 1951)).

63 449 U.S. at 514-15.

64 *See* R. STEEL, *supra* note 24, § 15.26. For cases following *Fedorenko*, see Kowalchuk v. United States, 773 F.2d 488 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 1188 (1986); United States v. Palciauskas, 559 F. Supp. 1294 (M.D. Fla.), *aff'd*, 734 F.2d 625 (11th Cir. 1984); United States v. Schellong, 717 F.2d 329 (7th Cir. 1983), *cert. denied* 104 S. Ct. 1002 (1984); Demjanjuk v. United States, 518 F. Supp. 1362 (N.D. Ohio 1981), *aff'd*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982); Dercacz v. United States, 530 F. Supp. 1348 (E.D.N.Y. 1982).

ship applications. In *Fedorenko*, the Court concluded that misrepresentations in visa applications which warrant the denial of an entrance visa satisfy the materiality requirement. The Court, however, has yet to decide whether misrepresenting or concealing a fact in a visa application which would not itself warrant the denial of a visa satisfies the materiality requirement. Accordingly, citizens, like Serge Kowalchuk, suffer a miscarriage of justice when courts improperly apply *Fedorenko* to facts markedly different than *Fedorenko*.

A. *The* Kowalchuk *Decision*

Serge Kowalchuk, a Ukrainian, began his immigration process at an I.R.O. camp in Lexenfeld, Austria. After being deemed "of concern" to the I.R.O., he applied for and was granted a visa in 1949. Eleven years later, Kowalchuk became a naturalized American citizen.[65] In 1981, the United States Government brought denaturalization proceedings against Serge Kowalchuk.[66]

The Government contended that Kowalchuk had served as deputy commandant for a unit of the local militia in Lubomyl, Poland from 1941-44; that the local militia committed acts of atrocity and repression against Lubomyl Jews; and that as a member of the militia, Kowalchuk assisted the Nazi cause by allowing German soldiers to concentrate on the war effort.[67] The Government charged that throughout the entire immigration and naturalization process, Kowalchuk willfully concealed and intentionally failed to disclose these facts.[68] Kowalchuk contended that, although he was employed with the Lubomyl government, his position involved food distribution and rationing, duties performed at a local food warehouse. While Kowalchuk admitted he worked for the local militia, he characterized his duties as merely clerical, namely typing duty rosters, requisitions, and reports.[69]

The Government initiated its denaturalization suit pursuant to section 340(a) of the 1952 Act.[70] Section 340(a) provides for revocation of citizenship if the citizenship or naturalization certificates were illegally procured or procured through a concealment of a material fact or willful misrepresentation.

After evaluating the testimony of the witnesses for each side,[71]

65 United States v. Kowalchuk, 571 F. Supp. 72, 74 (E.D. Pa. 1983).

66 *See Trial of Ukrainian Immigrant Revives Bitterness on 2 Sides*, N.Y. Times, Oct. 26, 1981, at A18, col. 3.

67 *Kowalchuk*, 571 F. Supp. at 74.

68 *Id.*

69 *Id.* at 75.

70 *See* 8 U.S.C. § 1451(a) (1982).

71 Because denaturalization proceedings usually occur a considerable time after the relevant period of inquiry, the fact finder is faced with a difficult task. Kowalchuk's case was no exception: "Unlike virtually every other reported denaturalization case, there is in this

the district court made several findings. First, as a member of the local militia, or *schutzmannschaft*,[72] Kowalchuk was not a genuine refugee "of concern" to the I.R.O. because he "voluntarily assisted the enemy forces . . . in their operations against the United States."[73] As a result, he was not entitled to the benefits of the Displaced Persons Act. Second, as a member of the *schutzmannschaft*, Kowalchuk voluntarily assisted the enemy forces in their operations against the United Nations, and assisted the Nazis in persecuting civilians. Third, the defendant illegally obtained his visa by willfully misrepresenting material facts to gain admission into the United States as a permanent resident.[74] And, finally, because Kowalchuk's entry into the United States for permanent residency was illegal, the defendant illegally obtained his naturalization certificate. Accordingly, the court revoked Kowalchuk's citizenship and cancelled his certificate of naturalization.[75]

On appeal, Kowalchuk argued that the legal conclusions of ineligibility and materiality were not supported by the court's own findings of fact.[76] Focusing upon the statutory contentions raised on appeal, the Third Circuit affirmed the district court's decision to

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case not one scrap of documentary evidence relating to the pertinent facts. The fact finder is relegated entirely to the testimony of witnesses, uncorroborated by any documentary evidence, and unrefreshed by any contemporaneous or relatively early recordation of their recollections of the pertinent events." *Kowalchuk*, 571 F. Supp. at 75.

72 The Lubomyl militia was officially known as the *schutzmannschaft* but is interchangeably referred to as the Lubomyl militia or police force. *See* 773 F.2d at 490 n.2.

73 *Kowalchuk*, 571 F. Supp. at 82. The district court analyzed Kowalchuk's I.R.O. and Displaced Persons Act eligibility applications and concluded that he had made five false or misleading statements: (1) he concealed his employment with the militia; (2) he concealed his residence at Lubomyl by falsely stating that he resided in Kremianec; (3) he misrepresented his education by concealing that his schooling was provided by the Nazis; (4) he concealed his voluntary departure with the Germans; and (5) he concealed his membership with the military when asked whether he was a member of any political, non-political, or paramilitary organization. *Id.* at 492.

Although the Government's complaint cited only misrepresentations concerning Kowalchuk's militia membership and residence in Lubomyl, the court of appeals found that the other allegations were undisputed. *Id.* at 492 n.6.

74 *Kowalchuk*, 571 F. Supp. at 82-83. The district court concluded that the defendant had plainly made misrepresentations on his visa, even though the information from his personal history form was most likely merely copied onto the visa application. Such inaction, however, does not excuse a defendant from the responsibility of submitting an accurate application. *Id.* at 82.

75 *Id.* at 83.

76 773 F.2d at 492. Kowalchuk also argued that he had not been afforded due process of law as he was unable to investigate his case and interview favorable witnesses residing in Soviet controlled territory. *Id.*

Because the focus of this article is denaturalization of persons admitted under the Displaced Persons Act, and because the district and appellate court decisions were based upon statutory grounds, the due process analysis, treated at great length by the dissent, is beyond the scope of this article. This does not, however, imply that the due process claim was frivolous. *See Kowalchuk*, 773 F.2d at 498-507 (Aldisert, C.J., dissenting), *cert. denied*, 106 S. Ct. 1188 (1986).

revoke Kowalchuk's citizenship.[77] In its analysis, the court detailed the role of the local militia in Lubomyl and its crucial importance to the Germans in carrying out the policies of the Nazi army. According to the majority, the Germans organized the *schutzmannschaft* "to carry on the functions of government and to enforce the observance of restrictive edicts."[78] This enabled the German forces to carry out their repressive and brutal policies while simultaneously waging an aggressive military campaign.[79]

The Third Circuit found that Kowalchuk's membership in the Lubomyl militia constituted voluntary assistance to the enemy according to sections 22 and 27 of the I.R.O. procedure manual. These sections stated that "assistance to the enemy shall be presumed to have been voluntary" by a member of either "the police, para-military [or] auxiliary organizations."[80] An applicant had the burden to disprove the voluntary nature of his enlistment once membership in one of the organizations was established.[81]

The court of appeals found that Kowalchuk did not overcome the presumption of voluntariness. The court concluded that the provisions of the I.R.O. Constitution "convincingly demonstrate that the defendant's voluntary membership in the Ukrainian *schutzmannshaft* constituted voluntary assistance to the enemy."[82] Because he was not "of concern" to the I.R.O., Kowalchuk was not an eligible displaced person. The concealment of his membership in the *schutzmannschaft*, therefore, invalidated his visa. As a result, Kowalchuk's citizenship could be revoked under *Fedorenko v. United States*.[83]

B. *Criticism of the Court's Analysis*

The court's conclusion that disclosure of Kowalchuk's wartime

77 *Id.* at 498.

78 *Id.* at 490 (quoting United States v. Kowalchuk, 571 F. Supp. 72, 80 (E.D. Pa. 1983)).

79 *Id.*

80 773 F.2d at 494 n.7. *But see id.* at 509 n.8 (Aldisert, C.J., dissenting) ("it is not at all clear from the evidence that the presumption spawned from the manual was actually in use at the time of Kowalchuk's visa application").

81 *Id.* The restrictions were confirmed by the testimony of three Government witnesses. Michael R. Thomas, Chief Eligibility Officer for the I.R.O. in 1948, testified that membership in a police force raised a presumption of voluntary assistance to the enemy. *Id.* at 494. A.P. Conan, Senior Officer for the Displaced Person Commission in charge of activites for the British zone between 1948 and 1952, stated that a member of the Ukrainian *schutzmannschaft* would be rejected unless he overcame the presumption of ineligibility by showing that his service was involuntary. *Id.* Finally, Professor Raul Hilberg, a leading authority on the Holocaust, testified that auxiliary forces such as the Lubomyl militia were of such great importance to the German forces that the I.R.O. included police, paramilitary, and auxiliary organizations in its definition of "enemy forces," a category of individuals not "of concern" to the I.R.O. *Id.*

82 *Id.*

83 449 U.S. 490 (1981). *See* notes 60-64 *supra* and accompanying text.

activities would have warranted the denial of his visa is nothing less than intellectual bootstrapping.[84] The majority relies on the concealment of Kowalchuk's voluntary wartime activities as the basis for determining illegal procurement of the visa. As the present state of law exists, a misrepresentation or concealment must be material to be relevant to a finding of illegal procurement.[85] False statements are considered material in visa applications "if disclosure of the true facts would have made the applicant ineligible for a visa."[86] In other words, the suppressed fact must itself warrant the denial of the visa application. The Supreme Court has yet to establish the materiality standard for misrepresentations or concealments which would not by themselves warrant the denial of a visa application. Contrary to the Third Circuit's conclusion, disclosure of the true facts would not have made Kowalchuk ineligible for a visa.

The court cited the testimony of government witnesses[87] and sections 20, 22, and 27 of the I.R.O. procedure manual to support their conclusions. These sources establish that disclosure of Kowalchuk's membership in the *schutzmannschaft* would not have made him per se ineligible. As the court itself noted, disclosure of membership would have merely raised a rebuttable presumption of voluntariness,[88] or, in other words, a rebuttable presumption of ineligibility. The district court found that membership in or employment by the *schutzmannschaft* would not preclude the issuance of a visa. It did find that disclosure of Kowalchuk's membership would at least have prompted further inquiry.[89] The *Fedorenko* test for materiality, however, is limited to disclosure of facts which would have made the applicant ineligible for a visa. Because the disclosure of Serge Kowalchuk's membership in the *schutzmannschaft* would not have made him ineligible as a matter of law, the *Fedorenko* test is inapposite to the *Kowalchuk* case.

Judge Aldisert, dissenting in *Kowalchuk*, rejected the majority's analysis regarding voluntary assistance to the enemy.[90] The dissent

84 The court stated that had "Kowalchuk revealed the facts which he suppressed on December 29, 1949, the day he obtained his visa, those facts would have warranted the denial of his visa and thereby precluded him from obtaining citizenship." *Kowalchuk*, 773 F.2d at 496.

85 *See* note 54 *supra* and accompanying text.

86 *Fedorenko*, 449 U.S. at 509.

87 *See* note 81 *supra*.

88 *See Kowalchuk*, 773 F.2d at 494.

89 *Kowalchuk*, 571 F. Supp. at 82.

90 *See Kowalchuk*, 773 F.2d at 508 (Aldisert, C.J., dissenting). Judge Aldisert stated that the presumption utilized by the majority should be ignored because its application violates due process. *Id.* at 510 (Aldisert, C.J., dissenting). Judge Aldisert charges that the majority has allowed the Government to sidestep its "clear, unequivocal, and convincing" burden of proof by shifting the presumption of voluntariness onto the applicant. *Id.* at 508. He ar-

analyzed section 2(b) of the I.R.O. Constitution, focusing on an explanatory footnote regarding what constitutes voluntary assistance to the enemy:

> Mere continuance of normal and peaceful duties, not performed with the specific purpose of aiding the enemy against the Allies or against the civil population of territory in enemy occupation shall not be considered to constitute "voluntary assistance."[91]

The dissent concluded that "assistance to the enemy . . . must have been voluntary, and given deliberately and of [a person's own free will], with the specific purpose of aiding the enemy in their military

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gued that "[n]o authority sanctions such glib reallocation of Supreme Court imposed burdens of proof." *Id.*

The dissent stated that because "denaturalization procedures are akin to criminal procedures," the body of case law regarding the use of presumptions in the criminal context applies to the *Kowalchuk* case. *Id.* at 508-09. "[T]he Supreme Court has determined that the use of a presumption by the government violates due process." *Id.* (citing Sandstrom v. Montana, 442 U.S. 510, 524 (1979); Patterson v. New York, 432 U.S. 197, 215-16 (1977); Mullaney v. Wilbur, 421 U.S. 684, 701, 704 (1975)). Accordingly, the dissent found that the presumption relied upon by the majority should be ignored. *Id.* at 509.

The fundamental problem with the dissent's analysis is its premise that *Mullaney-Patterson* applies to the *Kowalchuk* case. A close reading of the *Mullaney* and *Patterson* cases suggest that the dissent's premise is incorrect. The *Mullaney-Patterson* doctrine stands for the proposition that the state must prove beyond a reasonable doubt any factor in a criminal case which was an express or implied element of the crime charged. The defendant must not carry the burden of disproving an essential element of the crime. For a general discussion of *Mullaney-Patterson*, see Dutile, *The Burden of Proof in Criminal Cases: A Comment on the* Mullaney-Patterson *Doctrine*, 55 NOTRE DAME LAW. 380 (1980).

Consequently, if *Mullaney-Patterson* applies to *Kowalchuk*, a due process violation exists. The I.R.O. excludes from consideration persons who provided voluntary assistance to the enemy. Sections 20, 22, and 27 mandate a presumption of voluntariness in the event that the government establishes membership in one of several organizations. To overcome the presumption, the applicant must prove that his membership was involuntary. Thus, the dissent argues, the applicant must disprove voluntariness, an essential element, in violation of *Mullaney-Patterson*.

According to the majority, Kowalchuk failed to overcome the presumption and was therefore ineligibile. The failure to prove eligibility, however, does not violate a statute. Kowalchuk was not a criminal nor was he punished in any legal sense. The Supreme Court has held that no person "has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the government may challenge it . . . and demand its cancellation unless issued in accordance with such requirements." United States v. Ginsberg, 243 U.S. 472, 475 (1917), *quoted in* Fedorenko v. United States, 449 U.S. 490, 506 (1982). *But see Fedorenko*, 449 U.S. at 505 ("the *right to acquire* American citizenship is a precious one and that once citizenship has been acquired, its loss can have severe and unsettling consequences") (emphasis added). Because an applicant does not possess a right to naturalization, failure to establish eligibility does not result in the deprivation of a right—a fundamental basis for a due process violation. Denaturalization merely deprives the naturalized person "of a privilege that was never rightfully his." Johannessen v. United States, 225 U.S. 227, 242 (1912). Thus *Mullaney-Patterson* does not apply to naturalization proceedings, for no criminal violation occurs when an applicant fails to overcome a presumption.

91 *Kowalchuk*, 773 F.2d at 509 (Aldisert, C.J., dissenting) (quoting *I.R.O. Const., supra* note 12, at 3052 n.1).

operations against the Allies."[92] Because the government failed to produce evidence at trial regarding "intent to assist," the dissent found that the government had not met its "heavy burden of proving voluntariness."[93] Accordingly, the dissent correctly concluded that the findings of voluntary assistance to the enemy and material misrepresentations of fact were clearly erroneous.[94]

V. The Remedy: Extending the Application of the *Chaunt* Materiality Test

The conclusion that the Government failed to meet its burden of proving the voluntariness of Serge Kowalchuk's activities does not terminate the inquiry. The question remains whether Kowalchuk's "statements about his residence and occupation during the war were misrepresentations of material fact sufficient to have denied him a visa under the [Displaced Persons Act]."[95]

When the Supreme Court decided *Fedorenko,* the Justices specifically found it "unnecessary to resolve the question whether the *Chaunt* materiality test also governs false statements in visa applications."[96] The *Fedorenko* test is limited to the disclosure of facts which "would have made the applicant ineligible for a visa."[97] Consequently, the question remains open regarding the materiality of facts which standing alone would not result in a finding of ineligibility.

Although the Supreme Court declined to extend *Chaunt* to visa applications, an analysis of that case and its progeny reveals a common concern regarding false statements in citizenship applications and visa applications: the government's unquestionable right to thoroughly investigate an applicant to avoid mistaken visa or citizenship grants.[98] Although *Chaunt* dealt with omissions in the citizenship application process, "nothing in the language or import of the statutes suggests that omissions or false statements should be assessed differently when they are tendered upon initial entry into this country."[99] No apparent reason exists for distinguishing between the various stages of the naturalization process. Accordingly, the *Chaunt* materiality test should be applied to misrepresentations and concealments in visa applications.

The *Chaunt* test for materiality requires the Government to

92 773 F.2d at 510 (Aldisert, C.J., dissenting).
93 *Id.*
94 *Id.* at 513.
95 *Id.* at 513.
96 *Fedorenko,* 449 U.S. at 509. *See* text accompanying notes 56-57 *supra.*
97 *Id.*
98 *See* Comment, *supra* note 44, at 180.
99 *Fedorenko,* 449 U.S. at 519 (Blackmun, J., concurring).

show that the suppressed or misrepresented facts "would have warranted denial of citizenship or . . . might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship."[100] The first test of *Chaunt* resembles the *Fedorenko* materiality test: where the suppressed fact itself warrants denial of citizenship. The analysis of materiality is therefore the same. Disclosure of Kowalchuk's membership in the *schutzmannschaft* would not by itself have made him ineligible for a visa.[101] The first test of *Chaunt*, therefore, is not met. The second test of *Chaunt* presents a more difficult analysis. As previously noted, the courts are divided over the interpretation of the second test.[102] The courts differ as to whether *Chaunt* requires the certainty[103] (more restrictive view) or the possibility[104] (less restrictive view) of discovering facts sufficient to warrant denial of citizenship.

An analysis of the policies and interests at stake helps resolve this dispute. The competing interests in denaturalization proceedings include those of the Government and those of the naturalized citizen. The Government is committed to supervising the citizenship process to prevent fraudulent concealments or misrepresentations which allow an otherwise ineligible party to gain admission to the United States or acquire American citizenship. The naturalized person, on the other hand, seeks to preserve his status as a citizen, "a right conferring benefits of inestimable value upon those who possess it."[105] It is necessary, therefore, to balance the need for honesty in naturalization proceedings and the need to protect the naturalized citizen,[106] especially in light of the severity of denaturalization.[107]

In denaturalization proceedings, the Government must prove its case beyond a reasonable doubt. The evidence must be clear, unequivocal, and convincing for the Government to revoke a grant of citizenship.[108] These considerations, coupled with the Supreme

100 *Chaunt*, 364 U.S. at 355.

101 *See* text accompanying notes 87-89 *supra*.

102 *See* notes 45-47 *supra* and accompanying text.

103 *See* note 46 *supra*.

104 *See* note 47 *supra*.

105 *Fedorenko*, 449 U.S. at 522 (Blackmun, J., concurring).

106 *See Chaunt*, 364 U.S. at 352-53. *See also* Note, *Concealment of Facts Forestalling an Investigation in Denaturalization Proceedings*, 47 U. CHI. L. REV. 588, 596 (1980); Comment, *supra* note 44, at 172.

107 *See* note 28 *supra*. On February 28, 1986, the Justice Department announced that Serge Kowalchuk had been arrested and that deportation proceedings would begin against him for falsifying his visa application. *See* N.Y. Times, Mar. 1, 1986, at 3, col. 4. Kowalchuk's arrest came a day after the United States Justice Department extradited John Demjanjuk to Israel to stand trial for crimes against humanity. Demjanjuk was denaturalized for concealing his involvement in the murder of thousands of Jews at the Treblinka death camp. *Id.*

108 *See* note 41 *supra*.

Court's own recognition that citizenship is a previous right,[109] dictate the adoption of the more restrictive construction of the second test of *Chaunt*. [110] That is, the Government should be required to prove that the undisclosed facts would have led to the discovery of additional facts which would warrant denial of citizenship.

Two factors indicate that the *Chaunt* Court intended to adopt the more restrictive view.[111] First is the *Chaunt* Court's own reiteration of the two tests: whether the suppressed facts "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."[112] The term "might" suggests a "possibility" standard rather than a "certainty" standard. The Court, however, uses the term "might" in its elaboration of both tests, even though it is undisputed that the first test requires the existence of facts which *would* warrant the denial of citizenship. Moreover, in the second test, the term "might" likely refers to the "discovery of other facts" which "*would* justify denial of citizenship." In other words, the second test "simply asks whether knowledge of the suppressed facts could have enabled the Government to reach the ultimate disqualifying facts whose existence is now known."[113]

Second, no decision before *Chaunt* suggested that a naturalized citizen would be reduced to alien status on the mere suspicion that certain undisclosed facts might have warranted denial of citizenship. Prior to *Chaunt*, the Supreme Court consistently maintained that denaturalization would only be possible upon a clear and convincing showing that the statutory prerequisites of citizenship had not been met.[114] By allowing revocation on less than the existence of facts which would necessitate revocation, a court places "the valid rights of citizenship in danger of erosion"[115] and reduces naturalized citizenship to nothing more than "citizenship in attenuated, if not suspended, animation."[116]

The argument that a restrictive standard which allows minor misrepresentations and concealments to go unpunished will en-

109 *See* Costello v. United States, 365 U.S. 365, 269 (1961).

110 *See* notes 45-47 *supra* and accompanying text. For further commentary on the second test of *Chaunt*, see generally Note, *supra* note 5; Appleman, *Misrepresentation in Immigration Law: Materiality*, 22 FED. B.J. 267 (1962); Note, *supra* note 19.

111 *See Fedorenko*, 449 U.S. at 523-25 (Blackmun, J., concurring).

112 *Chaunt*, 364 U.S. at 352-53.

113 *Fedorenko*, 449 U.S. at 524 n.13 (Blackmun, J., concurring).

114 *Id.* at 524 (citing Nowak v. United States, 356 U.S. 660, 663-68 (1958); Knauer v. United States, 328 U.S. 654, 656-69 (1946); Baumgartner v. United States, 322 U.S. 665, 666-78 (1944); Schneiderman v. United States, 320 U.S. 118, 131-59 (1943)). *See also* Note, *supra* note 22, at 132.

115 *Fedorenko*, 449 U.S. at 526 (Blackmun, J., concurring).

116 Schneiderman v. United States, 320 U.S. 118, 166 (1943) (Rutledge, J., concurring).

courage citizens to lie is unpersuasive. Falsifying statements in immigration proceedings is a severe matter. Indeed, the Supreme Court stated that "[f]ull and truthful response[s] to all relevant questions required by the naturalization procedure is . . . to be exacted, and temporizing with the truth must be vigorously discouraged."[117] The potential threat of encouraging citizens to lie, however, is easily outweighed by the confidence that naturalized citizenship is well beyond the danger of unwarranted revocation.[118] While this approach makes it more difficult for the government to police the naturalization process, fairness to naturalized citizens demands it.

The government should, therefore, be required to prove the "existence of disqualifying facts, not simply facts that might lead to hypothesized disqualifying facts."[119] The district court declared that it was "not at all clear that, in 1949, membership in . . . the *schutzmannschaft* at Lubomyl would have precluded the issue of a visa."[120] Government witnesses testified that membership would have raised a presumption of voluntary assistance to the enemy and prompted further investigation.[121] The Government did not establish, by clear and convincing evidence, that any investigation would have resulted in the denial of Kowalchuk's visa. Consequently, the government did not fulfill the second test of *Chaunt*.[122] Had the Third Circuit applied the *Chaunt* tests and not merely the *Fedorenko* test, it would have concluded that the district court's finding of Kowalchuk's voluntary assistance to the enemy was clearly erroneous. By applying the *Fedorenko* test, the Third Circuit effectively ignored the materiality requirement and allowed the Government to revoke Kowalchuk's citizenship on the basis of facts which were insufficient to warrant revocation.

VI. Conclusion

The *Chaunt* Court recognized that citizenship for a naturalized

117 *Chaunt*, 364 U.S. at 352.

118 *See* Comment, *supra* note 44, at 179; United States v. Sheshtawy, 714 F.2d 1038, 1041 (10th Cir. 1983); *Kowalchuk*, 773 F.2d at 515-16 (Aldisert, C.J., dissenting).

119 *Fedorenko*, 449 U.S. at 524 (Blackmun, J., concurring).

120 *Kowalchuk*, 571 F. Supp. at 82.

121 *Kowalchuk*, 773 F.2d at 494.

122 If the less restrictive (the possibility of denial) view of *Chaunt* were adopted, the Government would most likely have met its burden of proof. The proof of a rebuttable presumption of ineligibility, though not sufficient to prove that Kowalchuk would have been denied citizenship, is sufficient to meet the burden of proving the "possibility of denial." For reasons outlined above, however, the less restrictive view fails to consider important policy considerations at stake and therefore should not be adopted. Additionally, as the dissent in *Kowalchuk* notes, it was not clear from the evidence that the presumption relied upon by the majority was actually in use at the time Kowalchuk applied for his visa. *See Kowalchuk*, 773 F.2d at 509 n.8 (Aldisert, C.J., dissenting).

person is a treasured possession. Accordingly, the Court established the two rigid tests for determining the materiality of false statements in a citizenship application. Even though the Court formulated the *Fedorenko* test for visa applications, the test does not adequately address all fact situations which arise. Serge Kowalchuk's case is exemplary.

Cases like Serge Kowalchuk's mandate the extension of the materiality standard established in *Chaunt* to the visa context. Policy considerations dictate that the more restrictive view of *Chaunt* should be adopted to protect the valued rights of a naturalized person's citizenship. Any less restrictive test enables a court to revoke a naturalized person's citizenship on the basis of omitted facts which would not have warranted denial of citizenship had they been revealed in the visa application. The application of the *Chaunt* tests to visa applications ensures that the rights of citizenship are not subject to the risk of unwarranted revocation.

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