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Fedorenko v. United States: A New Test for Misrepresentation in Visa Applications

In *Fedorenko v. United States*,[1] the United States Supreme Court upheld an order of the Fifth Circuit Court of Appeals revoking petitioner's certificate of naturalization when his service as a Nazi concentration camp guard was discovered. The rulings of both courts were based on Section 340(a) of the Immigration and Nationality Act of 1952,[2] which confers on the United States Attorneys the duty to sue for cancellation of citizenship if it was illegally procured or procured by concealment of a material fact or by willful misrepresentation.[3] The Fifth Circuit agreed with the litigants that the controlling legal standard was set forth by the Supreme Court in *Chaunt v. United States*.[4] To establish the materiality of a failure to disclose,[5] the *Chaunt* test requires the Government to prove

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[1] 449 U.S. 490 (1981).

[2] 8 U.S.C. § 1451(a) (1976).

[3] Id. Act of Sept. 26, 1961, Pub. L. No. 87-301, § 18, 75 Stat. 656 restored the authority to revoke an "illegally procured" naturalization. The first statute authorizing revocation of naturalization, Act of June 29, 1906, § 15, Pub. L. No. 59-338, 34 Stat. 601, allowed the Government to seek denaturalization on grounds of either "fraud" or "illegality." In 1952, the grounds for denaturalization were changed to "concealment of a material fact" or "willful misrepresentation," Immigration and Naturalization Act of 1952, Pub. L. No. 82-414, § 340(a), 66 Stat. 163, 261. In proving "concealment of a material fact" or "willful misrepresentation," the Government had to prove that the naturalized citizen acted with intent. H.R. Rep. No. 1086, 87th Cong., 1st Sess., reprinted in [1961] U.S. Code Cong. & Ad. News 2950, 2982. This was a difficult burden on the Government. Id. On the other hand, illegal naturalization has been said to occur when some statutory requirement which is a condition precedent to naturalization is absent. United States v. Ginsberg, 243 U.S. 472, 475 (1916). Illegality can be proven with objective evidence whereas fraud requires proof of the defendant's state of mind. Therefore, Congress saw a need to retain illegality as a ground for deportation so that the U.S. immigration laws could be more effectively enforced. H.R. Rep. No. 1086, 87th Cong., 1st Sess., reprinted in [1961] U.S. Code Cong. & Ad. News 2950, 2982-85.

[4] 364 U.S. 350 (1960). In *Chaunt*, the United States alleged that the defendant concealed and misrepresented his record of arrests, his membership in the Communist Party, and his intent to keep his Hungarian citizenship. See text accompanying notes 23-24 and 78-81, infra.

[5] A standard of materiality is required because some misstatements are irrelevant and deportation or denaturalization entail severe consequences. See 3 C. Gordon & H. Rosenfield, Immigration Law and Procedure, § 20.4b, at 20-13, -14 (1981) [hereinafter cited as Gordon & Rosenfield]. However, "materiality" has not been well defined. The Supreme Court in *Chaunt v. United States* said that a misstatement is material if disclosure would have justified denial of citizenship or lead to other facts that would justify denial of citizenship. 364 U.S. at 353. But, the Ninth Circuit in United States v. Rossi, 299 F.2d 650, 652 (9th Cir. 1962), stated that a misstatement was material only if the true facts would have led to denial of citizenship. See Gordon & Rosenfield, supra. Examples of material misstatements include any misrepresentation that causes the alien to be placed in a preference quota or to be exempt from quotas when the alien truthfully belongs in a nonpreference quota. Such misrepresentation would include giving a false identity, place of birth, or family status (i.e. brother, cousin, etc.). The conceal-

> either (1) that facts were suppressed which, if known, would have warranted the denial of citizenship or (2) that the disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship.[6]

The Fifth Circuit found that an accurate depiction of Fedorenko's past would have resulted in an inquiry that might have justified the denial of a visa.[7] Therefore, the nondisclosure was material under the second *Chaunt* test. The Supreme Court, however, found it unnecessary to decide whether the materiality precepts of *Chaunt*, developed in the context of citizenship applications, also govern false statements in visa applications.[8] Instead, the Court held that Fedorenko must be denaturalized because the unlawfulness of his initial entry caused his certificate of naturalization to be "illegally procured."[9]

Feodor Fedorenko was a Ukrainian who entered the Russian army in 1941 and served until his capture by the Germans. He was then selected for training as a concentration camp guard and, in 1942, was assigned to the Nazi camp at Treblinka, Poland where he worked during the years 1942 and 1943. Petitioner was transferred several times and eventually was able to pass as a civilian.[10]

In 1949, Fedorenko applied for admission to the United States under the Displaced Persons Act of 1948 (the DPA),[11] which allowed for the emigration of war refugees without regard to conventional immigration quotas. Individuals who had "assisted the enemy in persecuting civil populations . . ." or who had "voluntarily assisted the enemy forces . . . in their operations . . ." were specifically excluded from the Act's definition of eligible displaced persons.[12] To qualify under the terms of the Act, Fedorenko lied about his wartime activities on his visa application. He was granted a DPA visa and resided uneventfully in the United States from 1949 to 1969.[13]

In 1969, petitioner applied for naturalization and again failed to

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ment of conviction for crimes involving moral turpitude is also material. 1A Gordon & Rosenfield, supra, § 4.7c(4) at 4-57 to 4-64.

[6] 364 U.S. at 355.

[7] United States v. Fedorenko, 597 F.2d 946, 950-51 (5th Cir. 1979).

[8] 449 U.S. at 509.

[9] Id. at 514.

[10] Id. at 494.

[11] Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009, as amended by Act of June 16, 1950, ch. 262, 64 Stat. 219.

[12] The Displaced Persons Act incorporated the definition of eligible persons from the Constitution of the International Refugee Organization of the United Nations (IRO). See id. § 2. The IRO Const., 62 Stat. 3037-3055 (1946), was ratified by the United States on Dec. 16, 1946 (T.I.A.S. No. 1846) and became effective on Aug. 20, 1948. The definition of displaced persons excludes "any other persons who can be shown:

> (a) to have assisted the enemy in persecuting civil populations of countries, members of the United Nations; or
> (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations."

62 Stat. 3051-3052 (1946).

[13] 449 U.S. at 496.

disclose his guard service in his application and to Immigration and Naturalization Service (INS) examiners. He became an American citizen in 1970. Seven years later, the Government filed this action to revoke Fedorenko's citizenship under 8 U.S.C. § 1451(a) on the ground that he had procured it by concealment and misstatement of material facts.[14]

The District Court for the Southern District of Florida ruled for Fedorenko.[15] The court found that the actual facts concealed were not in themselves sufficient for the denial of citizenship and therefore were not material under the first *Chaunt* test. The court interpreted the second *Chaunt* test to require proof that the concealment of the facts prevented an investigation that would have revealed facts warranting a denial of citizenship. In short, the district court held that both branches required a showing that "the true facts would have warranted denial of citizenship."[16] Because the district court questioned the Government's evidence of petitioner's ineligibility for a DPA visa, it concluded that Fedorenko would not have been excluded for his involuntary guard service.[17] In addition, the court determined that disclosure would have prompted an investigation, but the investigation would not clearly have uncovered other facts justifying denial of the application.[18] Finally, the court relied on its equitable discretion to protect petitioner's citizenship. The source of such authority was found by analogizing denaturalization proceedings to judicial determinations of eligibility for citizenship, in which equitable circumstances are typically considered.[19]

The Fifth Circuit reversed, holding that the lower court's interpretation of the second *Chaunt* test was wrong as a matter of law.[20] Although the court noted the potential ambiguity in the language of the test, it reasoned that *Chaunt* should be construed so as to maintain the independence of its two components.[21] Thus, the Government must demonstrate only that an accurate disclosure would have led to an inquiry which *might* have exposed damaging facts.[22]

This analysis resembled the Supreme Court's application of the materiality standard to the facts of *Chaunt*. In that case, the appellant failed to divulge his minor arrest record but did disclose his membership in an

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[14] Id. at 497.

[15] United States v. Fedorenko, 455 F. Supp. 893 (S.D. Fla. 1978).

[16] Id. at 916. The court here adopted the interpretation of the *Chaunt* test that was applied in United States v. Rossi, 299 F.2d 650 (9th Cir. 1962) and United States v. Riela, 337 F.2d 986 (3rd Cir. 1964).

[17] Id.

[18] Id.

[19] Id. at 918-20.

[20] 597 F.2d at 951.

[21] Id. at 950-51.

[22] Id. at 951. The court noted that if it were to hold any other way, the government would be required to carry out three very difficult tasks: 1) to conduct an investigation into the past, 2) to discover ultimate facts warranting disqualification, and 3) to prove those facts in court by clear and convincing evidence.

organization strongly influenced by communism.[23] The Government neglected to follow up on his communist associations. The Court reasoned that there was no basis for believing the Government would have made further inquiry about the arrests, since they stemmed from Chaunt's political activism.[24] Thus, the relevant issue is not merely whether an ultimate basis for denial exists, but also whether disclosure would have prompted further investigation.

The court of appeals also reversed the lower court on the issue of equitable discretion in denaturalization. The Fifth Circuit ruled that a court does have authority to consider the facts and circumstances in determining whether an individual meets such requirements for naturalization as good moral character; however, once it is established that a person does not qualify, a court has no power to ignore the defect.[25]

The Supreme Court granted certiorari[26] to resolve two questions:

> whether petitioner's failure to disclose, in his application for a visa to come to this country, that he had served during the Second World War as an armed guard at the Nazi concentration camp at Treblinka, Poland, rendered his citizenship revocable as 'illegally procured' or procured by willful misrepresentation of a material fact, and if so, whether the District Court nonetheless possessed equitable discretion to refrain from entering judgment in favor of the Government under these circumstances.[27]

Although the Supreme Court affirmed the court of appeals decision cancelling Fedorenko's certificate of citizenship, the Court based its decision on different grounds.

The Court explicitly recognized that the interests of both the citizen and the Government in a denaturalization action are of the greatest import.[28] As a result, any such case must be examined within the framework of two lines of precedent. Because the right to citizenship is precious, the Government carries a heavy burden of proof.[29] To justify revocation of citizenship, the evidence must be clear, unequivocal, and convincing.[30] On the other hand, the integrity of the naturalization process demands strict compliance with the terms and conditions specified by Congress,[31] since Congress alone possesses the constitutional power to prescribe rules for naturalization.[32] Writing for the majority, Justice Marshall noted that "no alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate

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[23] 364 U.S. at 354.

[24] Id. at 355.

[25] 597 F.2d at 953-54.

[26] 444 U.S. 1070 (1980).

[27] 449 U.S. at 493.

[28] Id. at 505.

[29] Id. citing Schneiderman v. United States, 320 U.S. 118 (1943).

[30] Schneiderman v. United States, 320 U.S. at 125 (1943). The United States failed to prove with the requisite degree of certainty that petitioner illegally procured his citizenship.

[31] 449 U.S. at 506.

[32] U.S. Const. art. I, § 8, cl. 4.

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."[33]

There was no dispute that petitioner Fedorenko willfully misrepresented facts about his wartime activities in his application for a DPA visa in 1949.[34] The Court found the following DPA language to be applicable: "Any person who shall willfully make a misrepresentation for the purposes of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States."[35] Because this provision applies only to misrepresentation of *material* facts,[36] the Court had to ascertain the materiality standard by which petitioner's false statements were to be judged.

The Court first concluded that it was unnecessary to decide whether the *Chaunt* materiality test should be extended to deception in visa applications.[37] The Court implied that distinctions existed between citizenship and visa applications which may militate against employing the same rule in both situations.[38] The issue in the instant case was the lawfulness of the citizen's initial entry, a question not presented by *Chaunt*.[39]

Rather, the Court decided that materiality of deception in a visa application must be measured with regard to its effect on the applicant's admissibility into this country.[40] The Court stated 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."[41] Section 2(b) of the DPA provided that individuals who "assisted the enemy in persecuting civil populations . . ."[42] were ineligible for visas. Testimony in the district court indicated that, in practice, this provision was interpreted to include concentration camp guards, regardless of whether their service was voluntary or involuntary.[43] Moreover, the fact that the language of 2(b) contained a limitation of voluntariness compelled the conclusion that Congress deliberately omitted the limitation in 2(a), making all persons who fall within the literal wording ineligible.[44] Based on the statutory language and the testimony of a DPA expert, the Court deter-

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33 449 U.S. at 506, quoting United States v. Ginsberg, 243 U.S. 472 (1917).

34 449 U.S. at 507.

35 Act of June 25, 1948, Pub. L. No. 80-774, § 10, 62 Stat. 1009, 1013.

36 The Court stated that the principle of materiality governing the denaturalization statute should also logically govern this provision of the DPA. Both statutes are directed toward willful misrepresentation. 449 U.S. at 507 n.28.

37 449 U.S. at 508.

38 Id. at 508-09.

39 Id. at 508.

40 Id. at 509.

41 Id.

42 Section 2(b) of the Displaced Persons Act of 1948 incorporated by reference this definition of "displaced person" found in Annex 1 of the Constitution of the International Refugee Organization, supra note 12, 62 Stat. at 3051.

43 449 U.S. at 511.

44 Id. at 512.

mined that but for Fedorenko's deception, he would have been unqualified for a DPA visa as a matter of law.

Because Fedorenko's visa was invalid, the Court decided he was inadmissible under the express terms of the DPA. Section 10 of the DPA made all displaced persons applying under the Act subject to all immigration laws.[45] The Immigration and Nationality Act of 1952 required an applicant for citizenship to be lawfully admitted to the United States for permanent residence,[46] which in turn necessitated a valid visa.[47] Petitioner lacked such a visa and therefore failed to comply with the statutory prerequisites for naturalization.[48] This rendered his citizenship revocable as illegally procured under 8 U.S.C. § 1451(a).[49]

Finally, the Court agreed with the Fifth Circuit that district courts lack equitable discretion to enter judgment for a citizen whose citizenship was procured illegally or by willful misrepresentation of material facts.[50] The Court relied on prior cases, which had settled that

> [a]n alien who seeks political rights as a member of this nation can rightfully obtain them only upon the terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.[51]

Thus, the Court affirmed the judgment of the court of appeals revoking Fedorenko's citizenship as illegally procured.[52]

To understand the significance of the Supreme Court's disposition of *Fedorenko*, it is necessary to examine the development of the materiality standard in denaturalization proceedings. The Constitution confers on Congress the authority "to establish an uniform Rule of Naturalization."[53] In 1906, widespread abuses in the naturalization of aliens prompted Congress to enact procedural reforms under this power.[54] The Immigration and Nationality Act of 1906 included a specific provision permitting court actions to revoke naturalization on the ground of fraud or illegal procurement.[55] In 1952, Congress restated this critical fraud or illegal procurement language to allow for revocation of citizenship procured "by concealment of a material fact or by willful misrepresenta-

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[45] Id. at 515.

[46] 8 U.S.C. §§ 1427(a), 1429 (1976).

[47] Id. at § 1181(a) (originally enacted as Immigration and Nationality Act of 1924, ch. 90, § 13(2), 43 Stat. 161 (repealed in 1952)).

[48] 449 U.S. at 515.

[49] Id.

[50] Id. at 516.

[51] Id. quoting United States v. Ginsberg, 243 U.S. at 474-75.

[52] The Court noted that its resolution of the case made it unnecessary to decide whether the Fifth Circuit correctly interpreted the *Chaunt* materiality test. 449 U.S. at 518 n.40.

[53] U.S. Const. art. I, § 8, cl. 4.

[54] Immigration and Nationality Act of 1906, Pub. L. No. 59-338, 34 Stat. 596.

[55] Section 15 of the 1906 Act provided that naturalization could be revoked "on the ground of fraud."

tion."[56] Congress intended to make certain that intrinsic as well as extrinsic fraud was covered and to make no substantial change in the amenability to denaturalization for fraud.[57] The specific authorization to revoke for illegal procurement was then restored in 1961.[58] In 1912, the Supreme Court upheld the constitutionality of the first denaturalization statute in *Johannessen v. United States*,[59] stating "it makes nothing fraudulent or unlawful that was honest and lawful when it was done."[60] It simply deprives a person of "a privilege that was never rightfully his."[61]

Because the aim of the 1906 legislation was to deal with extensive frauds and irregularities, the courts generally were predisposed toward permitting denaturalization.[62] Courts presumed materiality was essential because of the severe consequences involved in denaturalization and deportation.[63] However, there has been little consistency in the case law concerning a standard of materiality. Even where a uniform test has been theoretically accepted, judicial application has varied in accordance with the prevailing political climate. In a few early decisions, the Supreme Court failed to focus on the degree of wrongdoing in the misstatement and approved denaturalization because the final hearing had not been held in open court,[64] or because a certificate of lawful arrival had not been attached to the naturalization petition.[65] The Court viewed naturalization as having been illegally procured when the prerequisites had no existence in fact.[66]

In 1943, a change in this trend was marked by the denaturalization case, *Schneiderman v. United States*.[67] In that case, the Court recognized that citizenship once granted should not be revoked absent the clearest sort of justification and proof. The Court placed a heavy burden on the Government: its evidence had to be clear, unequivocal, and convincing to justify revocation.[68] Since *Schneiderman*, the number of denaturalization suits has declined, in part due to the greater difficulty in meeting this stricter burden of proof.[69] The *Schneiderman* decision however has not

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[56] Immigration and Nationality Act of 1952, Pub. L. No. 83-414, § 340(a), 66 Stat. 261 (current version at 8 U.S.C. § 1451(a) (1976)).

[57] 3 Gordon & Rosenfield, supra note 5, § 20.4b at 20-13.

[58] Act of Sept. 26, 1961, Pub. L. No. 87-301, § 18, 75 Stat. 656.

[59] 225 U.S. 227 (1912).

[60] Id. at 242.

[61] Id. at 242-43.

[62] 3 Gordon & Rosenfield, supra note 5, § 20.3 at 20-11.

[63] Denaturalization is the revocation of citizenship conferred on a person after birth. Deportation involves the removal of an alien from this country. See Comment, Misrepresentation and Materiality in Immigration Law—Scouring the Melting Pot, 48 Fordham L. Rev. 471, 487-88 (1980) [hereinafter cited as Comment].

[64] See, e.g., United States v. Ginsberg, 243 U.S. 472 (1917).

[65] See Maney v. United States, 278 U.S. 17 (1928).

[66] 243 U.S. at 475.

[67] 320 U.S. 118 (1943).

[68] Id. at 125.

[69] See 3 Gordon & Rosenfield, supra note 5, § 20.5d(3) at 20-34.

helped to clarify the legal issues surrounding the determination of materiality in the citizenship process. The lower courts have failed to apply a test of materiality consistently. Moreover, these decisions did not distinguish between the types of deception specified in 8 U.S.C. § 1451(a). Charges of willful misrepresentation or concealment and illegal procurement have often been joined in one complaint,[70] and judges have not expressly identified the basis for their decisions. Nor have courts focused on the stage of the citizenship process at which the deception occurs.

The Supreme Court first grappled with the definition of materiality in *Johannessen v. United States*,[71] a 1912 denaturalization case. There the Supreme Court held 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 granted."[72] This standard did not have to be construed broadly; the concealed facts in *Johannessen* would have foreclosed the defendant's naturalization. Other courts found the pertinent test to be whether the failure to disclose obstructed an avenue of inquiry which might conceivably have led to collateral information of greater relevance.[73] Materiality consisted of more than a showing of mere potential to thwart an investigation but less than a finding that the investigation would have revealed possible grounds for denial.[74]

A similar pattern developed in deportation cases involving questions of materiality.[75] While materiality was easily established in cases where exclusion would have resulted from an accurate disclosure, conflicting standards appeared when the facts were less clear.[76] One view followed the reasoning of the denaturalization cases, emphasizing the importance of the investigative process.[77] Another concentrated on the effect of disclosure on the ultimate outcome.[78] A third approach narrowed the test by requiring the government to show that the undisclosed fact had precluded an inquiry by the INS, and that such an inquiry might have resulted in the discovery of facts relevant to a possible denial of entry.[79]

In 1960, the Supreme Court handed down the decision in *Chaunt v. United States*,[80] establishing a two-part materiality test. The Court reversed the Ninth Circuit, which had held in accordance with the general

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[70] Id. § 20.4(c) at 20-19.

[71] 225 U.S. 227 (1912).

[72] 225 U.S. at 241.

[73] See, e.g., United States v. Oddo, 314 F.2d 115 (2d Cir.), cert. denied, 375 U.S. 833 (1963); United States v. Montalbano, 236 F.2d 757 (3d Cir.), cert. denied, 352 U.S. 952 (1956); Corrado v. United States, 227 F.2d 780 (6th Cir. 1955), cert. denied, 351 U.S. 925 (1956).

[74] Comment, supra note 63, at 486-87.

[75] Id. at 488.

[76] Id.

[77] Volpe v. Smith, 62 F.2d 808, (7th Cir.), aff'd, 289 U.S. 422 (1933).

[78] Leibowitz v. Schlotfeldt, 94 F.2d 263, 265 (7th Cir. 1938).

[79] Jankowski v. Shaughnessy, 186 F.2d 580, 582 (2d Cir. 1951).

[80] 364 U.S. 350 (1960).

view that materiality existed and revocation was warranted if disclosure might have prompted further questioning.[81] The Court reaffirmed the view that materiality was present where the concealed truth would have justified denial of citizenship—the first prong of *Chaunt*. Second, it stated that a deception is material if its disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship.[82] Thus, the Court seemed to require a finding that a further inquiry *would* have occurred.[83] The Court adopted a compromise between the two extremes recognized in prior cases. Revocation of naturalization would not be permitted for every deceit that deprives the Government of an opportunity to investigate, regardless of its ultimate effect. The Government, however, would not have to prove that the false statement would have been determinative of eligibility had the truth been disclosed.

Confusion in the definition of materiality continued after the *Chaunt* holding. The first part of the Court's test in *Chaunt* had merely restated settled law. Courts differed, however, in their interpretation of the ambiguous wording of the second part of the *Chaunt* test.[84] In *United States v. Rossi*,[85] decided less than two years after *Chaunt*, the Ninth Circuit stated the test of materiality to be whether the truth would have led to denial of citizenship.[86] Rossi had used his brother's name on his visa application to avoid the Italian immigration quota. The court said materiality was to be determined by the bearing that the misrepresentation had on the right to enter the country.[87] Because the Government failed to prove that the quota had been oversubscribed or that any investigation would have occurred if Rossi had given his true name, revocation would not have been warranted under either *Chaunt* test.[88] On the other hand, the Second Circuit has held that a fact is material if the misrepresentation closes to the Government an avenue of inquiry which might conceivably lead to collateral information of greater relevance.[89]

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[81] Comment, supra note 63, at 491.

[82] 364 U.S. at 355.

[83] Comment, supra note 63, at 492.

[84] In fact, the district court in Fedorenko appeared to misapply the second *Chaunt* test by requiring the Government to prove the existence of ultimate facts warranting denial of citizenship and then prove that disclosure might have led to these ultimate facts. 455 F. Supp. 893, 915-16 (S.D. Fla. 1978).

[85] 299 F.2d 650 (9th Cir. 1962).

[86] Id. at 652 (quoting 364 U.S. at 355).

[87] 299 F.2d at 652.

[88] Id. at 653-54.

[89] 314 F.2d at 118, citing Corrado v. United States, 227 F.2d 780 (6th Cir. 1955), cert. denied, 351 U.S. 925 (1956) which stated the following:

> Upon analysis [of materiality], the 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 factors relating to his eligibility for citizenship.

227 F.2d at 784.

Courts in deportation cases have used the *Chaunt* test as well.[90] In the 1961 case of *Langhemmer v. Hamilton*,[91] the applicant concealed his membership in the Communist Party. Disclosure would have placed him in a class of aliens excluded by law from admission.[92] The First Circuit concluded that this information was material; if the applicant had revealed his membership, the resulting inquiry would have unearthed facts warranting his exclusion.[93] The court rejected the applicant's argument that a misrepresentation is not material unless the alien would definitely have been excluded on the true facts. In 1974, however, this argument was accepted by the Ninth Circuit in *La Madrid-Peraza v. INS*.[94] That court ignored the existence of the second test of *Chaunt* and cited *Chaunt* for the proposition that the fact is material only if the truth would have resulted in exclusion.[95] Moreover, the Sixth Circuit has also arguably misinterpreted *Chaunt*. In *Kassab v. INS*,[96] the court said that materiality existed if the truth might have led to further inquiry and the discovery of facts warranting exclusion.[97] The *Chaunt* test is stricter because it seems to demand proof that an investigation *would* have taken place.

The Supreme Court opinion in *Fedorenko* failed to clarify the materiality standard in immigration law. To reach a decision based on "illegal procurement" the Court had to first decide whether the misrepresentation in the visa application was material. If so, the visa was invalid and petitioner did not satisfy the essential statutory prerequisites for citizenship. The Court noted that since materiality is required under the denaturalization statute, logic dictates that it should also be a necessary finding under the DPA provision which excludes persons who make willful misrepresentations.[98] Yet in determining the proper materiality standard the Court ignored precedent which has consistently judged materiality according to *Chaunt*. Indeed, the district court, the court of appeals, petitioner, and the Government all presumed *Chaunt*'s applicability.

The Court instead adopted an approach to materiality which is indistinguishable from the first part of *Chaunt*. A misrepresentation is material under the new standard if "at the very least, . . . disclosure of the

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[90] Comment, supra note 63, at 496.

[91] 295 F.2d 642 (1st Cir. 1961).

[92] See 8 U.S.C. § 1182(a)(28)(C) (1976).

[93] 295 F.2d at 648.

[94] 492 F.2d 1297 (9th Cir. 1974). The Ninth Circuit, which had followed *Chaunt* in United States v. Rossi, 299 F.2d 650 (9th Cir. 1962), failed to do so in *La Madrid-Peraza v. INS*.

[95] Comment, supra note 63, at 498. The Ninth Circuit, while citing *Chaunt* as the controlling authority, actually based its decision on a definition of materiality found in the labor regulations. The regulation in question provided its own test of materiality: whether "if the correct facts had been known a certification could not have been issued." 29 C.F.R. § 60.5(g) (1972).

[96] 364 F.2d 806 (6th Cir. 1966).

[97] Id. at 807.

[98] 449 U.S. at 507 n.28.

true facts would have made the applicant ineligible for a visa."[99] Under *Chaunt*, materiality is present where the applicant fails to disclose facts, which, "if known, would have warranted denial of citizenship."[100] The Court could easily have reached the same result by applying *Chaunt*. The misrepresentation in the visa application could have been considered material, as was done under the new test. This would have subjected Fedorenko's certificate of citizenship to revocation under the denaturalization statute on the basis of willful misrepresentation. As Justice Blackmun stated in a concurring opinion, the Court followed "the essential teaching of *Chaunt*."[101] He expressed "regret only for its unwillingness to say so."[102]

No apparent and persuasive reasons exist for the Court's reluctance to rely on *Chaunt* here. Although the Court may be trying to avoid the confusion surrounding *Chaunt*, it was unnecessary to go this far to do it. Lower courts had agreed upon the first branch of *Chaunt* in theory and in interpretation even before its reaffirmation by the Supreme Court in the *Chaunt* decision. The ambiguity in *Chaunt* existed in its second prong, which was immaterial to the Court's determination of the *Fedorenko* case.

Although the Court found it unnecessary to resolve the question of whether *Chaunt* also governs false statements in visa applications, it raised the issue because of some perceived distinctions between the deception in *Chaunt* and in the instant case. Specifically, *Chaunt* presented "no question concerning the lawfulness of [the alien's] initial entry into the United States."[103] Justice Blackmun's concurrence answered this argument well:

> I fail to see any relevant limitation in the *Chaunt* decision or the governing statute that bars *Chaunt*'s application to this case. By its terms, the denaturalization statute at the time of *Chaunt*, as now, was not restricted to any single stage of the citizenship process . . . nothing in the language or import of the opinion suggests that omissions or false statements should be assessed differently when they are tendered upon initial entry into this country. If such a distinction was intended, it has eluded the several courts that unquestioningly have applied *Chaunt*'s materiality standard when reviewing alleged distortions in the visa request process.[104]

The distinction between deception at the visa stage and the citizenship stage is not only unpersuasive, but is also unworkable. An applicant who misrepresents facts in his visa application is likely to repeat the misrepresentation in his application for citizenship. In addition, the naturalization process is an ongoing process. It will often be impossible to pinpoint precisely when the deception occurred. If the misrepresentation has been

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[99] Id. at 509.

[100] See 364 U.S. at 355.

[101] 449 U.S. at 526 (Blackmun, J., concurring).

[102] Id.

[103] Id. at 508.

[104] Id. at 519 (Blackmun, J., concurring).

continuing, the courts will be forced to apply different standards to the visa stage and the citizenship stage.

The Court's analysis may have been based on an unexpressed distinction between misrepresentation that directly causes the denaturalization and misrepresentation that indirectly leads to denaturalization because it causes the citizenship to be "illegally procured." Charges of misrepresentation and illegal procurement have not been treated separately in prior decisions, probably as a result of their interrelationship. Such a distinction would be impractical because both charges are usually joined in one complaint. A possible justification among the grounds for denaturalization in 8 U.S.C. § 1451(a) would be the Court's belief that decisions in the lower courts could be simplified if based on matters of law rather than findings of fact. However, the inherent difficulties in attempting to draw a line between misrepresentation cases and illegal procurement cases would engender rather than alleviate confusion. For example, the Court in *Fedorenko* still had to address the issue of materiality even in deciding on illegal procurement grounds. If setting a standard of materiality is unavoidable, it seems desirable to have courts apply one uniform standard.

Another explanation for the Court's reasoning in *Fedorenko* is that the Court was retreating from the second half of *Chaunt*, at least in visa cases, and thus did not want to rely on it. This may be justified by the ambiguity in and misapplication of part two of *Chaunt*. However, *Chaunt* represented a balance struck between the interests of the alien and the Government. Reliance on only the first *Chaunt* test would upset that balance in favor of the immigrant. The second component allows the Government to denaturalize a citizen with a reduced showing of deception. The case law has recognized that this is necessary to preserve the integrity of the naturalization process. When materiality focuses on whether disclosure would have prompted an investigation rather than on whether disclosure would have affected the ultimate outcome of the process, the applicant may be punished for the act of deception apart from its effect on his citizenship. Otherwise, an applicant can profit by lying, he could avoid immediate disqualification at the minimum, and if the deception is later unearthed, the burden of proof would rest on the Government.

Justice Marshall may have drafted this narrow holding to avoid strengthening *Chaunt*, while at the same time placating the majority of the Court. By using a standard similar to the first part of *Chaunt*, the Court adhered to rigorous standard of proof. Justice Blackmun contended this was proper because citizenship rights would be in danger if "naturalization can be revoked years or decades after it is conferred, on the mere suspicion that certain undisclosed facts *might* have warranted exclusion."[105] Such an interpretation of materiality would also simplify the task of the lower courts by limiting their discretion and by permitting

[105] Id. at 525-26 (Blackmun, J., concurring).

reliance on a body of precedent in which the sole determinant would be whether the true facts justified denial.

Less significance could be drawn from *Fedorenko* if the analysis is construed to be merely a way to decide the case on the narrowest possible ground. The result may be based only on the construction of the DPA, and perhaps the majority actually did not intend to affect the future validity of *Chaunt*.

The Supreme Court in *Fedorenko v. United States* created additional uncertainty and dispelled none of the existing confusion over the effect of deception in the naturalization process. The Court ostensibly based its holding on a narrow ground: the statutory language of the Displaced Persons Act of 1948. The question of materiality nevertheless had to be confronted and instead of building on its own precedent, the Court chose to adopt a new test for misrepresentation in visa applications. By avoiding the materiality standard set forth in *Chaunt v. United States*, the Court may have cast doubt on the viability of that decision. The Court's use of a test very similar to the first part of *Chaunt* implies that the Court may be retreating from the wording of the second half of *Chaunt*, at least in regard to visa application cases.

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