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CONSTITUTIONAL LAW-DENATURALIZATION UNDER THE IMMIGRATION AND NATIONALITY ACT OF 1952

Lois H. Hambro S.Ed
University of Michigan Law School

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COMMENTS

Constitutional Law—Denaturalization Under the Immigration and Nationality Act of 1952—On June 26th and 27th of 1952, the House of Representatives and the Senate, respectively, passed
the Immigration and Nationality Act of 1952\(^1\) over the President's veto. There are substantial differences between the denaturalization provisions of this new act and those of prior acts. Before this act, the denaturalization statute provided for the bringing of suits by the attorney general to revoke the judgment of naturalization and to cancel the certificate of naturalization on the ground of fraud or on the ground that naturalization had been illegally procured.\(^2\) The basic provision for denaturalization is now section 340, which provides for denaturalization on the ground that "such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation. . ."\(^3\) Moreover, the new act adds presumptions that certain acts shall constitute concealment of a material fact or willful misrepresentation.\(^4\)

I. Denaturalization Under Prior Acts

Prior to 1906, there was no statutory provision for denaturalization. The naturalization procedure itself was extremely loose, with the result that there were many frauds, especially in connection with voting in elections. Attempts were made by private persons and public officials to cancel naturalization certificates obtained fraudulently or without compliance with the law. However, the absence of special law on the subject produced different results when suits were brought. It was not clear who had the right to bring the suit, nor was it certain whether it should be brought in the court where naturalization had been obtained, or in the court in whose jurisdiction the defendant resided.\(^5\) The recognized ground for cancellation was extrinsic fraud, which was the ground in equity for cancellation of a judgment, but one court suggested that it was not possible even to use this.\(^6\) Some courts which had the power to naturalize did not have the power to cancel their certificates of naturalization because they had no equity jurisdiction. Inasmuch as the government did not have the statutory authority to appear and contest the proceeding, and inasmuch as it was not clear for some time whether the government could appeal from the decree

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\(^4\) Id., §340(a) and (c), discussed infra in text.

\(^5\) The history of denaturalization prior to 1906 is dealt with at length in United States v. Kusche, (D.C. Cal. 1944) 56 F. Supp. 201 at 220-222.

of naturalization,\(^7\) specific provision was needed here as well as with respect to the procedure in naturalization cases. The 1906 act provided the first statutory authority for cancellation of naturalization. It also gave the government the right to appear and contest the naturalization.

It was early settled by the Supreme Court that not only was it constitutional to sue to revoke the judgment of naturalization for fraud or illegality when the government had not appeared,\(^8\) but it was also permissible for the government both to contest the naturalization proceeding, and then, upon losing, bring suit to revoke the judgment.\(^9\) The basis of the decision permitting the government to bring suit when it had not appeared was that the naturalization proceeding was not adversary, hence not res judicata, and that denaturalization took from the alien only his ill-gotten gains.\(^10\) The theoretical basis for permitting suit by the government after it had contested the naturalization proceeding was the concept of jurisdictional fact, viz., that a fulfillment of the requisites of naturalization was a prerequisite to the naturalization court’s obtaining jurisdiction.\(^11\) At the same time, the Supreme Court held that denaturalization is not a criminal proceeding and imposes no punishment, and is therefore not subject to the criminal procedural guarantees of the Constitution.\(^12\) This does not, however, settle the problem since it is also clear that naturalization is a judgment,\(^13\) and that there must therefore be some limit to the government’s power to upset the decree. Recently, the Supreme Court has held, in a case involving the full faith and credit clause, that where the jurisdictional fact is controverted by the parties, the losing party cannot institute a suit to cancel the prior judgment on the ground that the

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\(^7\) The Nationality Act of 1906 gave the government this right. See 34 Stat L. 599, 8 U.S.C. (1946) §734.

\(^8\) Johannessen v. United States, 225 U.S. 227, 32 S.Ct. 613 (1912). In this case, Johannessen was naturalized prior to 1906 after having been a resident for less than five years and upon the perjured testimony of witnesses that he had been a resident for five years. The Supreme Court held that since the government had not been a party, and had not had prior notice of the naturalization, the naturalization decree was not res judicata. The statutory provision for denaturalization on the basis of fraud and illegality was sustained in its application to a naturalization proceeding in which the government had not been a party over the objection that this was an interference with the judiciary and a violation of the ex post facto clause in the Constitution.


\(^10\) Supra note 8.

\(^11\) See Maney v. United States, 278 U.S. 17, 49 S.Ct. 15 (1928). The extent to which this theory is applicable is not clear even today.

\(^12\) Supra note 8.

court did not have jurisdiction, even though the court may have erroneously decided that it had jurisdiction. It has been suggested but not decided that this case limits the government's right to cancel where it has, in the naturalization proceeding, contested the jurisdictional fact.

The statutory provision for denaturalization raised a number of problems. The courts could not agree whether the fraud described in the statute meant extrinsic fraud or whether intrinsic fraud was sufficient to permit cancellation. A court would cancel citizenship for fraud where no scienter or intent to deceive had been shown, although scienter and intent had generally been held to be a requirement of fraud as a basis for cancelling a judgment. The term "illegally procured" also resulted in conflicts among the courts, some taking the view that it required an affirmative act by the petitioner, others holding that an erroneous finding of fact by the naturalization court or noncompliance, however slight, with the terms of the naturalization laws, was illegal procurement.

Because of the confusion as to what constituted fraud and illegal procurement the same set of facts might result in denaturalization on both grounds, or on either ground alone or even in a refusal to denaturalize at all. This meant that the citizenship of others, namely, those who had been naturalized through the naturalization of a parent or spouse, might depend on the basis of that decree, since derivative citizenship was lost if denaturalization occurred on the basis of what Congress had termed "actual fraud."

Although Congress had stipulated that good cause be shown for bringing a denaturalization suit, this requirement was ignored.

Noncompliance with the prerequisites to naturalization, such as failure to hold the final hearing in open court as required by law,

18 See 49 C.J.S., Judgments, 737-738.
23 But see United States v. Richmond, (3d Cir. 1927) 17 F. (2d) 28. This is the only case which the writer found in which the requirement of good cause was mentioned by the court.
racial ineligibility for naturalization, and failure to have five years of lawful residence prior to naturalization, were generally sufficient to permit denaturalization. The requirement that petitioners for naturalization have good moral character created difficulty because it was undefined, and if the naturalized alien did not have what another court thought was good moral character, then the naturalization was subject to cancellation. Literally the statute required good moral character for the five years previous to naturalization. This did not, however, make clear whether the naturalization court could consider behavior prior to the five year period, and the courts were therefore in disagreement. Nor was it clear whether “good moral character” meant the character of the ordinary citizen or that of an exemplary person. The courts disagreed on whether homicide conviction, liquor violations, failure to support minor children, and adultery precluded the existence of good moral character. Generally, however, perjury, running a disorderly hotel, and failing to disclose prior offenses and arrests did preclude naturalization.

The statute further required that the petitioner for naturalization be attached to the Constitution and Laws of the United States, and that he also renounce allegiance to his former sovereign and take an oath of allegiance to the United States. This section created additional difficulties because, like the term “good moral character,” it was undefined. The Supreme Court, after holding for almost twenty years that a person could not be considered attached to the Constitution and


See Turlej v. United States, (8th Cir. 1929) 31 F. (2d) 696.


Supra note 28.


Supra note 29.

Supra note 30.


Laws of the United States unless he could swear to bear arms for the United States, overruled itself and held that bearing arms was not a prerequisite to naturalization. The lower courts were, in the meantime, plagued with the question of whether an alien's claim of exemption from military service on the ground of alienage prior to the filing of the petition meant that he was not attached.

In the area of political belief, the lower courts, until the famous Schneiderman, Baumgartner and Knauer cases, were not sure of the quantum of proof necessary in a denaturalization proceeding brought for lack of attachment, nor whether activity after naturalization could be considered to determine lack of attachment, nor whether membership or affiliation in certain organizations would be sufficient to show lack of attachment. They disagreed on whether a desire to amend the Constitution meant lack of attachment. With the outbreak of World War II, the government brought mass denaturalization suits against the leading German-American bundists. Most of them were successful, the courts holding, generally, that membership in the German-American Bund, whether beginning before or after naturalization, indicated lack of attachment to the Constitution and Laws of the United States at the time of naturalization.

The first blow to the government's program came with the decision in Schneiderman v. United States. There the government had brought denaturalization proceedings for illegal procurement. Schneiderman, a leader in the Communist Party, was alleged not to have been attached to the Constitution and Laws of the United States because, when he was naturalized, he was a member of the Communist Party, whose tenets, by reason of his active participation therein, could be imputed to him. Since the Communist Party sought to overthrow the government by force and violence, there could be no attach-

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82 Cf. United States v. Siem, (9th Cir. 1924) 299 F. 582, and In re Shanin, (D.C. Mass. 1922) 278 F. 739.
86 Supra note 44.
87 Supra note 42.
The Supreme Court held that the government had not sustained the burden of proving that Schneiderman had not been attached. The burden of proof was declared to be proof which was "clear, unequivocal and convincing." Membership in the Communist Party, in the absence of proof that the defendant subscribed to its beliefs at the time he was naturalized, was insufficient. Moreover, it had not been proved that the Communist Party officially subscribed to belief in the forceful overthrow of government; it had not been proved that the defendant held these beliefs; and a belief in state ownership of the means of production or other radical changes did not preclude attachment. Furthermore, evidence from the period after naturalization was not entitled to great weight. Although the decision in the Schneiderman case should have clarified the law on this point, the lower courts in some cases distinguished it on the ground that the case had involved illegal procurement, not fraud.47

In Baumgartner v. United States,48 this distinction was dispelled when the Supreme Court, in a suit on the ground of fraud, dismissed the government’s complaint for insufficient proof. Baumgartner was a member of the German-American Bund and had expressed sympathy for and advocated the cause of Hitler. The Court held that it could not be said that he had reserved some allegiance to Hitler in taking the oath of allegiance, or in renouncing his prior allegiance, since the allegiance he had renounced was to the Weimar Republic and Hitler had not even been in power. The burden of proof was again declared to be "clear, unequivocal and convincing."

The Schneiderman and Baumgartner decisions made denaturalization more difficult for the government to obtain. Finally, in Knauer v. United States,49 the Supreme Court upheld the cancellation of naturalization for lack of attachment to the Constitution and Laws of the United States and for the taking of a false oath of allegiance. Knauer, before, during and after his naturalization, was found by the Court actively to have promoted Hitler's cause in the United States. He had been a Bund leader of long-standing; he had attempted to make an organization of German-American clubs into a Nazi front; he had tried to have the solstice ceremony and the swastika adopted; he had solicited money and personnel for the German Government. The government had proved by "clear, unequivocal and convincing" evidence that Knauer had taken a false oath of allegiance and had not been

47 United States v. Holtz, supra note 44.
48 Supra note 42.
49 Supra note 42.
attached to the Constitution and Laws when he was naturalized. Justice Rutledge dissented, with Justice Murphy concurring in the dissent. They felt that Congress did not have the power to denaturalize, that such a power created two classes of citizens, and that if Congress did have, and had exercised the power, then the trial should be accorded all of the procedural guarantees of a criminal trial.

The Schneiderman, Baumgartner and Knauer cases thus stipulated the quantum of proof required in cases involving the defendant's state of mind. The government had to prove its claim by "clear, unequivocal and convincing" evidence. And further, these cases declared that activity after naturalization was not of weight in a denaturalization proceeding, unless the same type of activity could be shown both before and during naturalization; they declared that mere membership in a group could not be used to attribute the views of that group to the naturalized citizen. The wisdom of the Court's decisions, although questioned when the nation was at war, cannot be questioned when looked at in a calmer atmosphere. The Court had prevented the division of citizens into two classes, naturalized and native-born. The cases were not, however, based on constitutional grounds, and it is not therefore clear to what extent they limit the exercise of congressional power.

The Nationality Act of 1906 created a rebuttable presumption that a naturalized citizen who returned to his native country or went to another foreign country within five years after his naturalization had, at the time of his naturalization, not had the intention to reside permanently in the United States. This presumption was retroactive to citizenship obtained prior to 1906, and it constituted grounds for revoking the decree of naturalization. In Luria v. United States, the Supreme Court held that this presumption was constitutional even as applied to persons naturalized under prior acts, since it created only a rule of evidence. Even though the defendant had been naturalized under a statute which did not require an intention to reside permanently within the United States, nevertheless the Court felt that it was an implied requisite, since the naturalized citizen could not otherwise fulfill his obligations of citizenship. The Court also answered the contention that trial by jury was necessary by declaring that denaturalization proceedings were equitable in nature and not criminal.

The extent to which persons who are naturalized by the naturalization of their parent or spouse lose their citizenship by the denaturaliza-

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51 231 U.S. 9, 34 S.Ct. 10 (1913).
tion of that person depends not only upon statute but also upon the theory upon which denaturalization rests. It has been assumed,\textsuperscript{52} without adequate discussion, that, since naturalization is a judicial decree, the cancellation of it makes it void ab initio. On this theory, all persons having derivative citizenship would lose their citizenship upon the denaturalization of the person through whom they were naturalized, except to the extent that they were protected by congressional stipulation. No case involving derivative citizenship has come before the Supreme Court. However, Congress, in the Nationality Act of 1940, stipulated that the denaturalization was to affect other persons' rights only in cases of "actual fraud."\textsuperscript{53} The lower courts which dealt with this provision leaned over backwards to protect the derivatively naturalized citizen.\textsuperscript{54} Although the void ab initio theory is extremely harsh, legal theory would seem to support the view that no rights can be derived from a judgment which is subsequently cancelled.\textsuperscript{55}

II. Interpretation and Constitutionality of the Present Provisions

A. Denaturalization upon rescission of adjustment of status: section 246 (b). Under sections 244 and 245, the attorney general may adjust the status of deportable aliens (section 244) and nonimmigrant aliens (section 245) to that of aliens lawfully admitted for permanent residence. Section 246 provides that this adjustment of status may be rescinded at any time within five years after it has been granted if it shall appear to the satisfaction of the attorney general that the person was not in fact eligible for such adjustment of status. The person whose adjustment of status is thus rescinded then returns to his prior status. Subsection (b) of section 246 provides that a person naturalized under an adjustment of status subsequently rescinded is subject to denaturalization under section 340 as a person whose naturalization was procured by concealment of a material fact or by willful misrepresentation. The wording is slightly ambiguous, in that the words "for which such person was not in fact eligible" can be interpreted to mean that a court can inquire into the question of whether the person

\textsuperscript{55} It can be argued that the derivatively naturalized citizen should not be bound by the cancellation because not a party to the suit, and that, since denaturalization is a suit in equity, the court of equity could protect the rights of innocent persons.
was eligible for adjustment. However, subsection (a) leaves the decision to the attorney general's discretion. The interpretation which is closer to the language would be that the question may not be litigated in a denaturalization proceeding. However, it may then be argued that it violates due process of law, since the defendant is unable to be heard on the legality of the attorney general's rescission. The underlying basis of the denaturalization proceeding under this section is that the attorney general made an erroneous determination. The erroneous determination of the party seeking relief is not ordinarily sufficient equitable cause for relief from a judgment, especially if that is the sole basis upon which relief is sought. Therefore, the question will arise, under either interpretation of the statute, whether cancellation of a naturalization decree can be obtained on a basis for which other judgments cannot be revoked.

B. Changes in the prerequisites to naturalization. Inasmuch as failure to meet the prerequisites to naturalization formerly, and probably today, constitutes a basis for denaturalization, changes in the prerequisites to naturalization are of significance in a study of de-naturalization.

Section 311 of the new act withdraws the much controverted racial requirements for naturalization.

Section 313 continues the political requirements of prior acts. It prohibits the naturalization of persons opposed to government or law, or who favor totalitarian forms of government. This includes persons who are members of or affiliated with the Communist Party, the Communist Political Association, which is undefined, any Communist-action organization required to register under the Subversive Activities Control Act of 1950, or any Communist-front organization at the time it is registered or required to register. However, where the alien is a member or affiliate of a Communist front, he may make himself eligible for naturalization by proving that he did not know, and had no reason to believe, during his membership or affiliation, that the organization was a Communist front. The maintenance of membership or affiliation after registration of the organization apparently precludes naturalization, regardless of lack of knowledge. The prohibition further includes persons who advocate the doctrines of world

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56 It could, however, be argued that admission for permanent residence is a jurisdictional fact and that the subsequent rescission relates back. On this theory, the naturalizing court would not have had jurisdiction. Even on this theory, though, a hearing will probably be necessary. See Kwong Hai Chew v. Colding, 344 U.S. 590, 73 S.Ct. 472 (1953), involving exclusion of resident alien. Cf. Carlson v. Landon, 342 U.S. 524, 72 S.Ct. 525 (1952).
communism or totalitarianism and members and affiliates of organizations which advocate such doctrines, persons who advocate or are members of or affiliated with organizations which advocate the violent overthrow of government, assassination, the unlawful damage of property or sabotage, and persons who publish, write or circulate writing advocating the violent overthrow of government, etc., or the doctrines of world communism or totalitarianism, or who are members of or affiliated with organizations that do so. This section of the act disqualifies persons who would fall within one of the above categories within the ten years immediately preceding the filing of the petition or the taking of the final oath of citizenship. However, persons who were members or affiliates of the above organizations may qualify for citizenship upon proof that they were members or affiliates by necessity or only before they were sixteen. Thus the entire section is keyed to the Internal Security Act of 1950.\textsuperscript{57}

Section 315 makes aliens who apply for and obtain exemption from the armed forces on ground of alienage ineligible.

Section 316 reenacts the requirements of five years lawful residence, continuous residence from the time of the petition to the time of admission, and good moral character. It defines what constitutes a break in residence and stipulates that a court, in determining whether the petitioner has good moral character, may consider the petitioner's conduct and activities prior to the five year period. Good moral character is defined by section 101 (f) to exclude persons who have committed adultery, persons who have been convicted of or have committed certain crimes, and persons whose income is derived from certain sources, such as illegal gambling activities. However, a court may find that a petitioner does not have good moral character although his activity does not fall within one of the exclusions. Section 316 also provides that a person may not be naturalized while registration proceedings are pending against an organization of which he is a member or affiliate.

Section 317 exempts from certain of the residence requirements persons performing the ministerial or priestly functions of a religious denomination or an interdenominational mission organization having a bona fide organization within the United States. This provision is a broadening of the prior provision, since it includes persons going abroad for interdenominational organizations.\textsuperscript{58} However, the present

\textsuperscript{58} Cf. the former provision at 54 Stat. L. 1143 (1940), 8 U.S.C. (1946) §707.
provision requires that the person shall have been physically present in the United States for an uninterrupted period of at least one year.

Section 318 prohibits the naturalization of persons against whom there are pending proceedings for deportation or against whom there is a final order of deportability.

Section 329 provides for the naturalization of persons in active-duty service in the armed forces during World War I or World War II. However, subsection (c) provides for denaturalization if the person is later separated from the armed forces under other than honorable conditions. This is clearly conditional citizenship, but it has not been tested before the courts. It has affected a few persons, but if it is possible to create a conditional citizenship, then this would seem to be a reasonable exercise of that power. However, since a conditional decree of citizenship is something not contemplated by a judicial system, and since it is closer to additional punishment for the act for which the persons are discharged than the ordinary revocation of a decree, the constitutional objection that it interferes with the judiciary might be posed against it.

Section 334 does away with the need for filing a declaration of intention.

Section 337 requires an oath of the petitioner renouncing his prior allegiance, swearing to support and defend the Constitution against all enemies, to bear true faith and allegiance to the same and to bear arms on behalf of the United States when required by law. However, persons opposed to the bearing of arms on religious grounds need not take an oath to bear arms.

C. Denaturalization for concealment of a material fact or willful misrepresentation: section 340. Section 340 is the primary section for denaturalization. The grounds for denaturalization are now “that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation.” “Conceal-

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59 An unusual change appears in the present provision. Whereas the prior act authorized denaturalization when the naturalized citizen was dishonorably discharged, the present provision authorizes denaturalization when the naturalized soldier was discharged under other than honorable conditions. Apparently this effects a change in the administrative application of the provision.


61 Interested persons should note the details of the oath. Apparently persons who cannot take an oath to bear arms, when that refusal is not based on religious grounds, are precluded from naturalization.
ment of a material fact" and "willful misrepresentation" are substituted for the former "fraud" and "illegally procured," which were the bases for denaturalization from 1906 until the effective date of the present act.

The reasons for the change, as stated in Senate Report 1515,⁶² which was referred to in the pending Senate Bill, are as follows:

1. Judicial conflict as to whether the fraud had to be extrinsic or whether intrinsic fraud would suffice;⁶³
2. Conflict as to whether disloyal statements made after naturalization could be used as proof to show that naturalization had been obtained fraudulently because of concealment or lack of attachment;⁶⁴
3. Conflict as to the res judicata status of naturalization proceedings where the government had appeared as an adverse party;⁶⁵
4. The lack of definition of "attachment to the Constitution," thereby raising the question whether the alien had merely to bring forth two witnesses who would testify as to his attachment or whether he had to be really attached, and raising the additional question of the evidentiary effect of the alien's membership in an organization which advocated the overthrow of the Government of the United States;⁶⁶
5. The quantum of proof required of the government by the Schneiderman, Baumgartner and Knauer cases.⁶⁷

Both the proponents and the opponents of the new legislation felt that the new wording of the denaturalization provisions would clear up these questions and make denaturalization easier to obtain.⁶⁸

The first problem created by the new section is that it has no judicial background to aid in interpretation, and that, although it was interpreted by Congress as being more stringent than the prior terms "fraud" and "illegally procured," it apparently strikes the ground of illegality from denaturalization. Thus, denaturalization probably can no longer be used where the ground is failure to file a certificate of

⁶³ Id. at 756.
⁶⁴ Ibid.
⁶⁵ Ibid.
⁶⁶ Id. at 762.
⁶⁷ Id. at 769.
⁶⁸ Ibid. See also the speech of Representative Powell of New York at 98 Cong. Rec. 4506 (1952).
arrival,\textsuperscript{69} failure of the judge to have the hearing in open court,\textsuperscript{70} or any other merely procedural defect for which the defendant was not to blame. Moreover, it would seem that where the defendant, in the naturalization proceeding, had neither concealed nor misrepresented any fact and the government had contested the proceeding but lost, then it could not bring a denaturalization proceeding under section 340, since there would be neither “concealment of a material fact” nor “willful misrepresentation.”\textsuperscript{71} It would seem that where the misrepresentation is not willful but based on the defendant’s failure to understand something, the government would be unable to cancel the certificate.\textsuperscript{72} Thus the plain effect of the new provision makes it appear that certain bases for denaturalization are no longer available to the government.

However, it is clear that the change was intended to increase the bases for denaturalization. To the extent that it makes every statement of the defendant, whether great or small in significance, material to the naturalization proceeding, it will increase the bases for denaturalization. In part, however, this will depend on the interpretation given to “concealment of a material fact.” Some courts, just as they interpreted “illegally procured” to require an affirmative act on the part of the defendant,\textsuperscript{73} may require that the concealment also be intentional. The new provision is therefore likely to cause much of the same judicial conflict that the old provision did. However, it could be strongly urged that Congress did not intend to require scienter where concealment is concerned, since it required willfulness where a misrepresentation was concerned but did not mention it in the case of concealment. It is clear that the provision extinguishes the conflict in the courts on whether denaturalization requires extrinsic rather than intrinsic fraud. Moreover, if the courts consider the legislative intent, then they will no longer exact the quantum of proof required by the Schneiderman, Baumgartner and Knauer cases when denaturalization is brought on a ground involving the naturalized citizen’s state of mind at the time of being naturalized. The present section, on the other hand, could be interpreted in the same way as the prior

\textsuperscript{69}For example under prior act, see United States v. Ness, 245 U.S. 319, 38 S.Ct. 118 (1917).

\textsuperscript{70}For example under prior act, see United States v. Ginsberg, 243 U.S. 472, 37 S.Ct. 422 (1917), in which the defendant was denaturalized because the naturalizing judge held the proceeding in his chambers.

\textsuperscript{71}For result under prior act, see United States v. Ravaret, (D.C. Mont. 1915) 222 F. 1018.

\textsuperscript{72}For result under prior act, see supra note 17.

\textsuperscript{73}United States v. Srednik, (3d Cir. 1927) 19 F. (2d) 71; supra note 19.
provisions, and this might be necessary in order to avoid constitutional questions. It could moreover be argued with some force that the congressional intent was expressed in subsection (c) of section 340, which is discussed later in this comment, and that the failure to express this intent in subsection (a) means that Congress did not intend to change the quantum of proof required by the Schneiderman, Baumgartner and Knauer decisions except as to subsection (c). To illustrate what the legislators meant, let us pose a hypothetical situation. Suppose the defendant, at the time he was naturalized, was a member of the German-American Bund. Clearly, under the Supreme Court’s interpretation of fraud and illegal procurement, he could not be denaturalized for that fact alone. Nevertheless, under the present act, he could be considered as having concealed a material fact. The constitutional question arises at this point. It is clear that, although naturalization is a judicial proceeding, the courts will go along with Congress quite far in exacting the literal requirements of the naturalization statutes. Yet, if there was no provision prohibiting the defendant’s naturalization because of his membership and if he did not willfully conceal his association, there is no way to fit the defendant’s concealment within one of the ordinary bases for the revocation of a judicial decree. The court could say that this is not a material fact in spite of the intent of Congress to authorize denaturalization in this type of case. It could hold that concealment requires an intent to conceal. Or it could hold that concealment does not require an affirmative act of concealment and thereby bring the defendant within the denaturalization provisions. If it holds the latter, then the constitutional question of interference by Congress with the decrees of courts will necessarily arise. The court could then hold, on the constitutional question, either that the ordinary bases for the revocation

74 In subsection (c) of section 340, Congress expressed its intent that activity after naturalization be considered extremely relevant to the petitioner’s state of mind; therefore, the burden of going forward with evidence of his state of mind at the time of naturalization was placed on the naturalized alien.

76 For example, see United States v. Ginsberg, 243 U.S. 472, 37 S.Ct. 422 (1917).

77 Although it is difficult to believe that a court could hold that membership in the German-American Bund or in the Communist Party is not material, nevertheless, it would be possible where the naturalized alien was a member or affiliate of a front organization, for example, the American Youth for Democracy, especially if the membership or affiliation was at an early age.

78 For analogous cases, see supra note 73.

79 For analogous cases, see supra note 72.
of judgments are inapplicable to naturalization decrees and that Congress is acting reasonably in providing for this basis of revocation, or that naturalization decrees are ordinary judicial judgments, subject to the same rules, and therefore that this is unconstitutional as an interference with the power of the judiciary. It seems out of the question to propose that a court might decide that naturalization is not a judicial decree, because the courts have been naturalizing since the first naturalization statutes, and since there is a long line of precedent that naturalization is a judicial proceeding and a case and controversy. The objection that the provision might be deemed ex post facto would not, it appears, in the light of the Supreme Court’s decision in the Johannes­sen case avail the defendant. In the light of the Supreme Court’s decisions and inasmuch as the language of this new provision is subject to different interpretations, it would seem that the provision will probably be held constitutional but will be watered down to avoid hardship and possible constitutional questions.

Subsection (a) of section 340 further provides that “... such revocation and setting aside of the order admitting such person to citizenship and such cancelling of certificate of naturalization shall be effective as of the original date of the order and certificate. ...” The Supreme Court has never discussed the question of the void ab initio doctrine as it applies to denaturalization. Lower courts have, however, discussed it in connection with derivative citizenship, and, although they have not rejected it, they have sought to mitigate its consequences. It is an extremely harsh doctrine, especially since it has been held that those deriving their citizenship through the naturalization of another cannot intervene to contest the denaturalization of that other. However, the doctrine seems to be in accord with traditional legal theory.

Subsection (a) of section 340 adds a further proviso that “refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted of contempt for such refusal,
shall be held to constitute a ground for revocation of such person’s naturalization under this subsection as having been procured by concealment of a material fact or by willful misrepresentation.” Strenuous constitutional objections can be made to this. In the first place, the term subversive is undefined by the act. Webster’s dictionary defines it as “tending to subvert; having a tendency to overthrow, upset or destroy.”\textsuperscript{85} In the \textit{Schneiderman} case,\textsuperscript{86} the Supreme Court held that charges not advanced in the complaint of the government could not be considered because denaturalization was an important adjudication of status. The reason behind the opinion must have been that there must be some notice to the defendant in denaturalization, and it seems very clear that the word “subversive” is so vague as not to give any. Therefore the provision is subject to attack under the “void for vagueness” doctrine, although that doctrine is most commonly applied in criminal proceedings.\textsuperscript{87} The second objection to this provision is that it is an unreasonable presumption and therefore contrary to due process. It does not seem reasonable to presume from the conviction of contempt of Congress for failure to answer questions concerning one’s subversive activities that one has obtained naturalization by concealment of a material fact or by willful misrepresentation. Moreover, the presumption is conclusive which would, in any case, make it even more dubious and subject to the argument that it was put in the naturalization laws solely as a weapon against persons who refused to testify before congressional committees. In \textit{Tot v. United States},\textsuperscript{88} the Supreme Court held unconstitutional a provision of the Federal Firearms Act making it unlawful for any person who had been convicted of a crime of violence or was a fugitive from justice to receive any firearms or ammunition which had been shipped or transported in interstate commerce, and creating a presumption from the prisoner’s prior conviction of a crime of violence and his present possession of a firearm or ammunition, that the article was received in interstate commerce and that such receipt occurred after the effective date of the act. The Court stated the prerequisite for the creation of a statutory

\textsuperscript{85} \textit{Webster's New International Dictionary of the English Language} 2516 (1951).
\textsuperscript{86} Supra note 42.
presumption: there had to be some rational connection between the fact proved and the ultimate fact presumed; the fact that the defendant had the better knowledge would not justify the presumption. In that statute, the presumption was rebuttable; here the presumption is conclusive. Therefore it is arguable that this provision violates due process of law. The ex post facto clause would probably not apply, unless the Johannessen case\textsuperscript{89} can be construed to mean that the Supreme Court was merely recognizing the right previously existing in the government to bring suit to revoke a judgment of naturalization obtained by fraud. This provision also interferes with the judiciary since it tests an otherwise valid judgment by events occurring subsequent to its being rendered. Moreover, even if it is argued that conditional citizenship is possible, which is unthinkable to at least some members of the Supreme Court,\textsuperscript{90} nevertheless, this is not conditional citizenship since it is made expressly retroactive to prior naturalizations by subsection (i) of section 340. Obviously there is the objection that this is the creation of two classes of citizenship, which was certainly not contemplated by our Founding Fathers when they gave Congress the power to make uniform laws for naturalization.\textsuperscript{91} The provision may also violate due process because of its inequality of operation on native-born and naturalized citizens. It is actually a criminal provision, with banishment as its end objective.

Subsection (b) of section 340 provides that where the "naturalized person is absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given either by personal service upon him or by publication in the manner provided for the service of summons by publication or upon absentees by the law of the State or place where such suit is brought." To the extent that this provision gives the government an alternative, rather than providing that the best notice possible be given to the defendant,\textsuperscript{93}

\textsuperscript{89} Supra note 8. If the Johannessen case is construed to recognize the previously existing right of the government to sue to revoke a judgment obtained by fraud, then there is no ex post facto clause involved in the case, and the Court's opinion that the ex post facto clause does not apply to denaturalization proceedings becomes dictum. For cases involving the ex post facto clause, see Cummings v. Missouri, 4 Wall. (71 U.S.) 277 (1867), and Ex parte Garland, 4 Wall. (71 U.S.) 333 (1867).

\textsuperscript{90} See dissent of Justice Rutledge in Knauer v. United States, 328 U.S. 654 at 675, 66 S.Ct. 1304 (1946).

\textsuperscript{91} The doctrine of "unconstitutional conditions" may limit the power of a legislature to impose conditions upon the grant of privileges. See, for example, Western Union Telegraph Company v. Kansas, 216 U.S. 1, 30 S.Ct. 190 (1910); Frost v. Railroad Commission of California, 271 U.S. 583, 46 S.Ct. 605 (1926).
this provision may fall within the proscription of *Mullane v. Central Hanover Bank & Trust Co.* as a denial of due process.

Subsection (c) of section 340 provides: "If a person who shall have been naturalized after the effective date of this chapter shall within five years next following such naturalization become a member of or affiliated with any organization, membership in or affiliation with which at the time of naturalization would have precluded such person from naturalization under the provisions of section 313, it shall be considered prima facie evidence that such person was not attached to the principles of the Constitution of the United States at the time of naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation. . . ." A reasonable interpretation of this subdivision is that it will cover only a person joining an organization which, at the time he was naturalized, would have fallen within one of the section 313 categories; joining an organization which was not, at the time defendant was naturalized, within one of the subsections of section 313, but which came within its scope after he was naturalized, would not affect the status of the naturalized person. Moreover, this subdivision is not retroactive to naturalizations obtained prior to this act. This subsection reverses the *Schneiderman, Baumgartner* and *Knauer* cases on the quantum of proof, the inferences which may be drawn from membership in an association, and the weight to be given to activity subsequent to naturalization. The constitutional problem thus raised is that this may violate the due process clause because of the irrationality of the presumption. It does not necessarily follow from one's affiliation, after naturalization, with an organization which was totalitarian or communistic at the time of naturalization that as long ago as perhaps five years one was not attached to the Constitution and not well disposed to the good order and peace of the United States. Moreover, when the charge is that of affiliation, which is defined in section 101 (e) (2) as including the giving of money, or that of membership or affiliation in a Communist-front organization, the presumption becomes even less rational. In the *Baumgartner* case, Justice


93 Supra note 88.
Frankfurter, in writing the opinion of the Court, said, "In short, the weakness of the proof as to Baumgartner's state of mind at the time he took the oath of allegiance can be removed, if at all, only by a presumption that disqualifying views expressed after naturalization were accurate representations of his views when he took the oath. The logical validity of such a presumption is at best dubious even were the supporting evidence less rhetorical and more conclusive." It is submitted that the same thing might be said of this statutory presumption. The recent case of *Weiman v. Updegraff*, tends to indicate that the Supreme Court adheres to its former view, as expressed in the *Schneiderman, Baumgartner* and *Knauer* cases, that beliefs are individual and that the beliefs of a group cannot be attributed to members merely on the basis of membership.

Subsection (d) of section 340 states a presumption that persons who return to their native country or go to any other country within five years after naturalization and take up permanent residence there, did not, at the time they were naturalized, intend to take up permanent residence in the United States; denaturalization is therefore authorized. A similar provision was sustained by the United States Supreme Court in *Luria v. United States*. Subsection (e) provides for the maintenance of citizenship of persons derivatively naturalized when the person through whom they obtained citizenship is denaturalized under the provisions of the Nationality Act of 1940.

In Senate Report 1515, the subcommittee stated that the term "actual fraud" had created confusion. Congress took this into consideration in subsection (f) of section 340 and provided for the derivative's loss of citizenship except in specified situations. The citizenship of the derivative is protected provided he is in the United States at the time of the denaturalization, and provided that the denaturalization is based upon membership in an organization within five years after naturalization, the establishment of permanent residence abroad within five years after naturalization, or discharge for other than honorable cause from the armed forces after naturalization was procured under section 329. The citizenship of the derivative is lost if the person through whom he is naturalized is denaturalized under the general

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98 Supra note 51.
denaturalization provisions of section 340 (a) or under the other de-

naturalization provisions. This is one of the most harsh and arbitrary

provisions of the entire act. It denaturalizes persons for acts done for

which they can on no account be considered responsible. It is enacted

on the corruption of blood concept. It is, however, in accord with the

void ab initio doctrine and will probably be sustained.

Subsection (i) makes the present denaturalization provisions retro-

active to naturalization obtained under prior laws.

In Bindczyk v. Finucane, subii the Supreme Court held that Congress,

by providing for denaturalization under section 338 of the Nationality

Act of 1940, had expressed the intent that this, and the other de-
naturalization provisions of the statute, be the exclusive methods for

cancelling the citizenship of naturalized persons. Therefore a state

court could not vacate the decree admitting an alien to citizenship with-
in its term of court and pursuant to state law. Subsection (j) overrules

this decision.

D. Cancellation of certificate of naturalization: section 342. Sec-

tion 342 of the statute provides for the cancellation of certificates of

naturalization by the attorney general and his subordinates if it appears

to his, or their, satisfaction, that the certificate was obtained by fraud

or illegality, practiced on him, the commissioner or a deputy commis-
sioner. Cancellation of the certificate has no effect on the citizenship

status of the person in whose name the document was issued, and it

affects only the document. However, although this would seem to

affect only a piece of paper, it can make difficult the establishment of

legal rights. Since it provides for no judicial proceeding, and since it

does not even set standards for the attorney general and his subordi-
nates, it would appear to deny due process to the individual affected.

Moreover, this same subsection provides for notice only at the per-

son’s last known place of residence, and may result in a denial of due

process under the doctrine of the Mullane case.

IV. Conclusions

The original thesis that led to statutory provision for denaturaliza-
tion was that there had been a great deal of fraud and illegality in the
procurement of naturalization. These provisions were upheld on the
theory that naturalization is a privilege and should not be used as a

88 342 U.S. 76, 72 S.Ct. 130 (1951).
means to obtain undeserved benefits. In decisions arising from World War II cases, the Supreme Court placed limits on the power of the government to denaturalize. These limits seem definitely desirable to protect naturalized citizens in periods of national stress. In one sweep, Congress has attempted to end these limits.

Although it is obvious from an examination of the conflicting decisions of the courts that some revision and clarification was necessary, the extent of the revision is inconsistent with the ideology of a democratic nation. Denaturalization should be available where fraud or illegality occurred in the naturalization proceeding because of the affirmative, conscious act of the naturalized citizen. It should not be available as a limit on the naturalized citizen’s beliefs and associations.

Lois H. Hambro, S.Ed.