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# Constitutional Law - Fifth Amendment - Right of Defendant in Denaturalization Proceedings to Refuse to Testify

Theodore G. Koerner
*University of Michigan Law School*

CONSTITUTIONAL LAW—FIFTH AMENDMENT—RIGHT OF DEFENDANT IN DENATURALIZATION PROCEEDINGS TO REFUSE TO TESTIFY—The United States as plaintiff instituted denaturalization proceedings alleging that deliberately false statements were made by defendant at the time of his naturalization. No "affidavit showing good cause" for such suit, required by section 340 (a) of the Immigration and Nationality Act of 1952,[1] was filed with the original complaint although one was filed with a later amended complaint. When plaintiff sought to take defendant's deposition pursuant to rule 26, Federal Rules of Civil Procedure,[2] defendant appeared for the examination but refused to be sworn. He was taken before the district court which directed that he be sworn, and he again refused. From a conviction of contempt defendant appealed, alleging that jurisdiction did not attach since the required affidavit was filed after the original complaint, and that pre-trial discovery procedures should not be applied to denaturalization proceedings since, as a defendant in such a proceeding, he was privileged to refuse to take the stand at all. The Second Circuit affirmed,[3] holding that the affidavit could permissibly be filed with an amended complaint, and that denaturalization proceedings are not sufficiently criminal in their nature to entitle a defendant to refuse to take the stand. On certiorari to the United States Supreme Court, *held,* reversed per curiam. "An affidavit showing good cause is a prerequisite to the initiation of denaturalization proceedings. The affidavit must be filed with the complaint when the proceedings are instituted." *Matles v. United States,* 26 U.S. Law Week 3282 (1958).

The Court's summary disposition of the case represents an extension of *United States v. Zucca,*[4] which held only that the government's refusal to file any affidavit at all was grounds for dismissal, and the majority of lower courts which had considered the question raised in the principal case since *Zucca* had held that the affidavit could be filed after the complaint.[5] The

1 66 Stat. 260, as amended 68 Stat. 1232 (1954), 8 U.S.C. (Supp. IV, 1957) §1451(a).
2 28 U.S.C. (1952).
3 United States v. Matles, (2d Cir. 1957) 247 F. (2d) 378.
4 351 U.S. 91 (1956).
5 See cases cited in United States v. Matles, note 3 supra, at 380, note 1; United States v. Ercole, (E.D. N.Y. 1957) 148 F. Supp. 481; United States v. Davis, (E.D. Mich. 1957) 149 F. Supp. 249.

result reached was consistent with a *dictum* in *Zucca*,[6] however, and is illustrative of the Court's special concern for defendants in denaturalization proceedings. This handling of the case, while not without significance,[7] left open the more interesting constitutional question as to the scope of the Fifth Amendment.

At common law the defendant in a criminal case was not a competent witness. This incapacity to testify has been removed by statute in the federal courts,[8] but under the privilege against self-incrimination contained in the Fifth Amendment, the accused may refuse to be sworn; the prosecution is not even allowed to call him to the stand.[9] The privilege against self-incrimination is applicable to civil as well as criminal proceedings,[10] but in the former it may not properly be invoked by a refusal to take the stand. In the ordinary civil case the privilege must be separately invoked as to each question which may tend to incriminate. There are several dangers presented by this limitation: the witness may be held to have improperly invoked the privilege and thus to be in contempt; he may already have testified sufficiently to have lost the privilege through inadvertent waiver;[11] his refusal to answer may have prejudiced the jury against him despite instructions to the contrary. In the principal case the court felt that these dangers were effectively counteracted by the special nature of denaturalization proceedings.[12] Under the Immigration and Nationality Act of 1952[13] the exclusive procedure by which a United States attorney may bring denaturalization proceedings is the filing of an equitable action to cancel the certificate of naturalization, accompanied by an affidavit.

6 "We believe that, not only in some cases but in all cases, the District Attorney must, as a prerequisite to the initiation of such proceedings, file an affidavit showing good cause." United States v. Zucca, note 4 supra, at 100.

7 If the two-sentence opinion truly means that failure to file the required affidavit with the original complaint does not give the court jurisdiction, it may become a basis for upsetting past proceedings in which a defendant was declared denaturalized.

8 18 U.S.C. (1952) §3481.

9 Calling a defendant to the stand would emphasize his refusal to testify and might lead to a drawing of inferences from this refusal which is prohibited in the federal courts and in the great majority of state courts. 8 WIGMORE, EVIDENCE, 3d ed., §§2268, 2272 (1940). The accused in a grand jury proceeding cannot refuse to take the stand since there is no final determination of guilt or innocence. United States v. Scully, (2d Cir. 1955) 225 F. (2d) 113, cert. den. 350 U.S. 897.

10 McCarthy v. Arndstein, 266 U.S. 34 (1924).

11 This is well illustrated in the recent case of Brown v. United States, 26 U.S. Law Week 4201 (1958). There a defendant in denaturalization proceedings, also under §340(a), who voluntarily took the stand for direct examination, was held to have waived his privilege against self-incrimination to the extent of relevant cross-examination, and his contempt conviction was accordingly affirmed, four justices dissenting.

12 United States v. Matles, note 3 supra, at 382 and 383, emphasizes that denaturalization proceedings are tried by the court and not to juries and that the defendant has notice of the issues in advance and the advice of counsel throughout the proceeding, thereby reducing the possibility of inadvertent waiver.

13 66 Stat. 163, 8 U.S.C. (1952) §1101.

The basis of such action has been changed by this act from procurement of naturalization by concealment of a material fact or by willful misrepresentation. Although the action is equitable in nature, it differs from the ordinary civil action in several respects. In addition to the affidavit requirement which formed the basis for the Court's reversal, the government needs more than a bare preponderance of evidence to prevail; there must be evidence that is "clear, unequivocal and convincing," which does not leave the issue in doubt.[14] In addition a minority of the Court has argued that the precious nature of the right of citizenship and the severity of the penalty of denaturalization should put these actions in a class by themselves.[15] These differences show the danger of labeling a denaturalization proceeding a "civil action" and then applying the far-reaching pre-trial discovery procedures of rule 26(a) to such an action. If these procedures are utilized by the government, the defendant faces the very real danger of being obligated to disclose information sufficient either to cause his denaturalization or to lead the government to such information. The defendant can be forced to disclose facts, even though they would be inadmissible at the hearing, so long as they are reasonably calculated to result in the discovery of admissible evidence.[16] While these consequences are not undesirable in the usual civil action for money damages or injunctive relief, they are far more serious in an action where the final judgment of the court may impose a penalty more severe than that imposed for many criminal acts. Chief Judge Clark, although joining in the decision on this point in the Second Circuit, displayed some

[14] Schneiderman v. United States, 320 U.S. 118 (1943). This requirement of proof has been followed in Baumgartner v. United States, 322 U.S. 665 (1944), and Knauer v. United States, 328 U.S. 654 (1946). However, §340 of the Immigration and Nationality Act of 1952 casts doubt upon this rule, since it provides for certain statutory presumptions of evidence which would fall short of the "clear, unequivocal and convincing" requirement. See comment, 51 MICH. L. REV. 881 (1953).

[15] Schneiderman v. United States, note 9 supra, at 125. Justice Murphy, delivering the majority opinion at 122, stated that the government was trying to deprive petitioner of the "priceless benefits" that derive from citizenship. "In its consequences it is more serious than the taking of one's property or the imposition of a fine or other penalty. For it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country." Denaturalization is not an ordinary civil action since it involves "an important adjudication of rights." See also Justice Rutledge's dissent in Knauer v. United States, note 9 supra, at 675, where he states that the drastic penalty of denaturalization requires procedural safeguards equally as effective as those employed in an action to take away a native born citizen's status.

[16] Rule 26, Fed. Rules Civ. Proc. 28 U.S.C. (1952). The extent to which a defendant can be required to answer in a pre-trial examination is illustrated in United States v. Boano, (S.D. N.Y. 1954) 16 F.R.D. 379, where the court ordered defendant to answer questions as to (1) names of persons who had invited him to communist meetings, or who were present, or whom he knew to be members of the Communist Party, (2) whether he had been or was a member of the Communist Party, or had participated in communist activities, (3) whether he had consulted a certain attorney prior to obtaining naturalization and whether he had been referred to her, and (4) whether the union of which he was an official was dominated by the Communist Party.

hesitancy in labeling denaturalization a "civil action" for all purposes[17] and in the light of the essential differences between denaturalization and other civil actions, this hesitancy is well-founded.[18]

*Theodore G. Koerner*

17 United States v. Matles, note 3 supra, at 381.

18 There is language in Brown v. United States, note 11 supra, at 4204, which indicates that the Court might permit a defendant in denaturalization proceedings to refuse to take the stand. "Such a witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all." In context, however, this statement was probably not intended to apply to procedures under which the defendant can be called involuntarily, such as rule 26 or rule 43(b), Fed. Rules Civ. Proc., 28 U.S.C. (1952).