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MISREPRESENTATION AND MATERIALITY IN IMMIGRATION LAW—SCOURING THE MELTING POT

INTRODUCTION

At the end of World War II, the Allied forces became the guardians of approximately eight million displaced persons in Germany, Austria, and Italy.1 These persons included liberated prisoners of war, forced laborers, extermination camp prisoners, and refugees who had fled the advancing Russian armies.2 By 1948, approximately seven million persons had been repatriated pursuant to the voluntary repatriation policies implicit in the Yalta agreement.3 Over one million remained unsettled, however, with many refusing to return home because they feared persecution4 or the consequences of political and social upheaval in their native countries.5 Almost one half of these people lived in camps operated by the Preparatory Commission for the International Refugee Organization (IRO),6 an interim agency established by the United Nations to perform the functions set forth in the proposed IRO constitution7 until the requisite number of countries accepted the IRO.8

2. Id.
7. Opened for signature Dec. 15, 1946, 62 Stat. 3037, T.I.A.S. No. 1846 (entered into force Aug. 20, 1948). The preamble to the IRO constitution stated that the signatories recognized the urgent international problem of refugees and displaced persons. It further provided that "genuine" refugees and displaced persons be assisted in returning to their countries of origin or in finding new homes. Germany and Japan were to pay the costs of assistance necessitated by their wartime actions. I.R.O. Const. preamble, 62 Stat. at 3038, T.I.A.S. No. 1846. Membership was open to members of the United Nations and any other states approved by the IRO General Council. I.R.O. Const. art. 4, para. 1, 62 Stat. at 3040, T.I.A.S. No. 1846.
8. It was provided that the constitution would be effective when 15 states had signed it. I.R.O. Const. art. 18, para. 2, 62 Stat. 3037, 3047, T.I.A.S. No. 1846. This occurred on August 20, 1948. 62 Stat. at 3037, No. 283, 18 U.N.T.S. 3, 4 n.1. The countries that signed, in sequence, were the United Kingdom, New Zealand, the Republic of China, Iceland, Australia, the United States, Guatemala, Canada, the Netherlands, Norway, the Dominican

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The United States Congress adopted the IRO constitution in 1947,\textsuperscript{9} and, in further response to the displaced persons problem, enacted the Displaced Persons Act of 1948 (the DPA)\textsuperscript{10} to facilitate the immigration of 202,000 displaced persons into the United States.\textsuperscript{11} The DPA specified that eligible displaced persons were those defined in the IRO constitution\textsuperscript{12} as persons who had been forced to leave their countries of origin by the Nazi or fascist regimes.\textsuperscript{13} The definition included, for example, forced laborers or persons deported for "racial, religious or political reasons."\textsuperscript{14} Originally, the DPA and the IRO constitution differed slightly in specifying ineligible persons. The DPA excluded the entry of "any person who is or has been a member of, or participated in, any movement which is or has been hostile to the United States."\textsuperscript{15} The IRO constitution, on the other hand, was specifically inapplicable to war criminals, quislings, traitors, and those who could be shown "to have assisted the enemy in persecuting civil populations of countries."\textsuperscript{16} Subsequent amendment of the DPA substantially incorporated the IRO terminology by providing that visas would not be issued to "any person who advocated or assisted in the persecution of any person because of race, religion, or national origin."\textsuperscript{17} The DPA clearly intended that each person seeking to establish his eligibility\textsuperscript{18} as a displaced person be subjected to a thorough investigation of his character, history, and eligibility,\textsuperscript{19} and that no visas be issued to persons whom the consular or immigration officer had reason to believe were not eligible under the DPA.\textsuperscript{20} It further provided that
any person who willfully misrepresented his eligibility as a displaced person would not be admitted.21 Any person admitted would be subject to all immigration laws, including those governing deportation.22

It has been claimed that despite these provisions, many alleged Nazi war criminals entered the United States by misrepresenting or concealing their whereabouts and activities during the war.23 Some of these persons subsequently became citizens through similar misrepresentations.24 Over twenty years elapsed before the United States instituted proceedings25 to deport26 or denaturalize27 several alleged war criminals for willful misrepresentations.

take an oath swearing that he was not, nor had he been, a member of any group excluded by §

See notes 13-17 supra and accompanying text. Any person found to have perjured himself because he actually was such a member was subject to prosecution for perjury and to deportation. Act of June 16, 1950, Pub. L. No. 81-555, § 11, 64 Stat. 219, 227.


22. Id. 25. Various theories have been advanced to account for the delay in the institution of proper legal proceedings. Some reasons offered include ineptitude on the part of the Immigration and Naturalization Service (INS), corruption, support of these alleged criminals by persons in high level government positions, and anti-communist sentiment in the early 1950's. See N.Y. Times, Feb. 6, 1980, § A, at 4, col. 4; note 23 supra.


Deportation is an administrative procedure conducted by a special inquiry officer, 8 U.S.C. § 1252(b) (1976), known as an immigration judge. 8 C.F.R. § 1.1(f) (1979); see 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure § 5.1, at 5-7 to -8 (1978). The proceeding is commenced by the issuance and service of an order to show cause. 8 C.F.R. § 242.1(a) (1979). Arrest of the alien pending proceedings is rare, although provided for by statute. 8 U.S.C. § 1252(a) (1976); see 1 C. Gordon & H. Rosenfield, supra, § 5.4a, at 5-3. The alien is entitled to notice, 8 U.S.C. § 1252(b) (1976), representation by counsel, 8 C.F.R. § 242.10 (1979), and the opportunity to cross-examine witnesses. Id. § 242.16(a). The alien may designate the country to which he will go if a deportation order is entered. Id. § 242.17(c). If that country refuses him entry, the inquiry officer may designate a country. Id. The deportation order may be withheld if the alien can show that he would be subject to persecution because of race, religion, or political belief. 8 U.S.C. § 1253(h) (1976). Any person against whom an order has been entered may appeal to the Board of Immigration Appeals. 8 C.F.R. § 242.21 (1979). Furthermore, a final administrative order may be subjected to judicial review, provided that administrative remedies have been exhausted. 8 U.S.C. § 1105(a) (1976); see 2 C. Gordon & H. Rosenfield, supra, § 8.4b.


Denaturalization is a suit in equity instituted by a United States attorney. 8 U.S.C. § 1451(a)
tion or concealment of material facts in procuring visas or in petitioning for naturalization. Because some misstatements may have been innocuous or

(1976); see 3 C. Gordon & H. Rosenfield, supra note 26, § 20.5a. The suit can be commenced upon an affidavit showing good cause. 8 U.S.C. § 1451(a) (1976). If the certificate of naturalization is revoked, the court enters an order cancelling the original certificate, which, if necessary, is transferred to the original court that granted it. 8 U.S.C. § 1451(h) (1976). The denaturalized citizen must surrender his certificate. Id.


Another possible ground for the deportation of alleged war criminals is the commission of crimes involving moral turpitude, which renders an alien excludable at entry. 8 U.S.C. § 1182(a)(9) (1976). A recent amendment makes any alien deportable if he "ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion" in conjunction with Nazi Germany, its allies, or the governments of Nazi-occupied countries. 8 U.S.C.A. § 1251(a)(19) (Supp. 1979). By amendment, these grounds also warrant exclusion. 8 U.S.C.A. § 1182(a)(33) (Supp. 1979). Use of the new grounds as a basis for deportation, however, may require more difficult proof than use of misrepresentation. Evidence that the truth would have led to an investigation that would have revealed substantial questions of eligibility and that might have led to exclusion would satisfy the misrepresentation test for materiality and support deportation. Use of the amendment, however, would probably require proof that the alien actually and voluntarily participated in war crimes.


29. It is the duty of the United States district attorneys to institute denaturalization proceedings on the ground that the certificate of naturalization and the order admitting the person to citizenship "were illegally procured or were procured by concealment of a material fact or by willful misrepresentation." 8 U.S.C. § 1451(a) (1976). Illegal procurement as a ground for denaturalization originally appeared in the Act of June 29, 1906, Pub. L. No. 59-338, § 15, 34 Stat. 596, 601, and in the Act of Oct. 14, 1940, Pub. L. No. 76-853, § 338(a), 54 Stat. 1137, 1158-59. It was not, however, originally included in the 1952 Act. The provision was reinstated in § 1451(a) as an alternative ground for denaturalization in 1961. Act of Sept. 26, 1961, Pub. L. No. 87-301, § 18, 75 Stat. 650, 656. It is difficult to distinguish between the grounds of misrepresentation and illegal procurement, but the specification of separate charges implies that they are not synonymous. Illegal procurement usually refers to having been granted citizenship without complying with prescribed statutory requirements "without any affirmative indication of deception." 3 C. Gordon & H. Rosenfield, supra note 26, § 20.4e, at 20-19. The common practice, however, is to join the charges of illegal procurement and misrepresentation in the same complaint. Id.

Denaturalization of Nazi war criminals who entered after the 1951 expiration date of the Displaced Persons Act might be accomplished by using both theories and claiming that the
petitioner was not a person of good moral character as required in 8 U.S.C. § 1427(a) (1976). Lack of good moral character is defined in reference to enumerated categories in 8 U.S.C. § 1101(f) (1976), but is not limited to those categories. In addition, the court is not limited in its investigation of good moral character to the prescribed periods, but may in its discretion examine good moral character at any time prior to that period. 8 U.S.C. § 1427(e) (1976); see United States v. Walus, 453 F. Supp. 699 (N.D. Ill. 1978) (denaturalization of citizen found to have been member of German Gestapo and to have committed atrocities, rev’d and remanded on presentation of newly discovered evidence, Nos. 79-1587, 79-1140 (7th Cir. Feb. 13, 1980); note 58 infra and accompanying text.

The Immigration and Nationality (McCarran-Walters) Act of 1952, 8 U.S.C. §§ 1101-1557 (1976), does not prescribe a time limit for instituting a denaturalization suit. Costello v. United States, 365, U.S. 265, 283 (1961) (“Congress has not enacted a time bar applicable to proceedings to revoke citizenship procured by fraud.”); 3 C. Gordon & H. Rosenfield, supra note 26, § 20.2e, at 20-9. Therefore, naturalization is subject to revocation at any time after citizenship is granted, and it is not unusual to revoke a naturalization obtained years earlier. Id.; see Costello v. United States, 365 U.S. at 281 (delay of 27 years); Chaunt v. United States, 364 U.S. 350, 350 (1960) (delay of 19 years); United States v. Fedorenko, 597 F.2d 946, 953 (5th Cir. 1979) (delay of 10 years), cert. granted, 48 U.S.L.W. 3535 (U.S. Feb. 19, 1980) (No. 79-5602). The Supreme Court has rejected contentions that a denaturalization proceeding instituted years after the grant of the petition is barred by laches. “[A]ny harm from the lapse of time was to the Government’s case.” Costello v. United States, 365 U.S. at 283; see United States v. Oddo, 314 F.2d 115, 119 (2d Cir. 1963); 3 C. Gordon & H. Rosenfield, supra note 26, § 20.2e, at 20-10. Similarly, res judicata is not a bar to denaturalization suits. Johannessen v. United States, 225 U.S. 227, 241 (1912); 3 C. Gordon & H. Rosenfield, supra note 26, § 20.2f. In Johannessen, the Supreme Court reasoned that denaturalization “does not purport to deprive a litigant of the fruits of a successful controversy in the courts because the proceedings for naturalization are not in any proper sense adversary proceedings, but are ex parte and conducted by the applicant for his own benefit.” 225 U.S. at 241. The Court further stated that a naturalization certificate, “like other public grants [is] to be revoked if and when it shall be found to have been unlawfully or fraudulently procured.” Id. at 238. Subsequent decisions have rejected the res judicata defense because the statute authorizing denaturalization was “designed to afford cumulative protection against fraudulent or illegal naturalization.” United States v. Ness, 245 U.S. 319, 327 (1917); see Maney v. United States, 278 U.S. 17, 23 (1923). An alternative rationale is that the fraud in obtaining the citizenship had not been in issue in the naturalization proceeding and, therefore, the fraud “was [neither] adjudicated nor could have been adjudicated.” Knauer v. United States, 328 U.S. 654, 671 (1946); see 3 C. Gordon & H. Rosenfield, supra note 26, § 20.2f.

Furthermore, the Act does not specify a period of limitation restricting the time in which deportation proceedings must be instituted. 1 C. Gordon & H. Rosenfield, supra note 26, § 4.6b, at 4-33 to -34. Moreover, mere delay in instituting deportation proceedings does not stop the United States from such action. Hamadneh v. INS, 343 F.2d 530, 532-33 (7th Cir. 1965), cert. denied, 382 U.S. 838 (1965); Circella v. Sahli, 216 F.2d 33, 39-40 (7th Cir. 1954), cert. denied, 348 U.S. 964 (1955); see 1 C. Gordon & H. Rosenfield, supra note 26, § 4.6b, at 4-34. Extended residence in the United States does not give the unnaturalized alien a special status exempting him from deportation. Id. In two cases, aliens who had been United States residents for over twenty years claimed that the length of residence indicated allegiance to the United States and thus made them “nationals” and not amenable to deportation. Oliver v. United States Dep’t of Justice, 517 F.2d 426, 427-28 (2d Cir. 1975); Carreon-Hernandez v. Levi, 409 F. Supp. 1208, 1210 (D. Minn. 1976). An alien is defined in 8 U.S.C. § 1101(a)(3) (1976), as “any person not a citizen or national of the United States,” while a national is defined as a “person who, though not a citizen of the United States, owes permanent allegiance to the United States.” 8 U.S.C. § 1101(a)(22) (1976). Both cases, however, held that the person is considered a deportable alien until naturalized. 517 F.2d at 427-28; 409 F. Supp. at 1210. All grounds for deportation retroactively apply to activities engaged in prior to the enactment of the 1952 Act. 8 U.S.C. § 1251(d) (1976); see Gardos v. INS, 324 F.2d 179, 180 (2d Cir. 1963). The Supreme Court has held that not all retroactive applications conflict with the constitutional prohibition against ex post facto laws because that prohibition applies only to criminal statutes. Harisiades v. Shaughnessy, 342 U.S. 580, 593-95 (1951).
irrelevant, and because of the severe sanctions involved in denaturalization and deportation, a standard of materiality is required. The determination of the materiality of misrepresented or concealed facts is based on a two part test formulated in 1960 by the Supreme Court in Chaunt v. United States. Materiality exists under Chaunt if it is shown either "that facts were suppressed which, if known, would have warranted denial of citizenship" or, alternatively, that disclosure of these facts "might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." Although the meaning of the first test is clear, an examination of denaturalization and deportation cases since Chaunt reveals confusion and inconsistency regarding the interpretation and application of the second test. Some courts have subsumed this second test into the first by requiring proof that the truth would have warranted denial of a visa or of naturalization. Other courts have apparently ignored the existence of the second test by holding that the first test is the only one to apply.

It is crucial to clarify the meaning of this second test because the resolution of many pending cases may depend on whether facts misrepresented or concealed were material. The seriousness of the alleged crimes and the gravity of denaturalization and deportation demand a test of materiality that is consistent. This Comment contends that the second test does have a separate and meaningful existence apart from the first. Use of the second test is necessary to determine the outcome of cases in which the alien's actions have made it impossible to prove by the required "clear, unequivocal, and convincing evidence" that the alien was ineligible to enter the United States or to be naturalized as a United States citizen. Part I of this Comment briefly examines immigration procedure. Part II discusses misrepresentation and the standard of materiality in other areas of law. Part III surveys denaturalization and deportation case law prior to Chaunt. Part IV analyzes the Chaunt decision and its interpretation by the Attorney General. Part V discusses the appli-

30. See note 65 infra.
32. 364 U.S. 350 (1960). While Chaunt involved denaturalization, the tests have been cited and used in deportation cases. See, e.g., Suite v. INS, 594 F.2d 972 (3d Cir. 1979); Casaneda-Gonzalez v. INS, 564 F.2d 417 (D.C. Cir. 1977); La Madrid-Peraza v. INS, 492 F.2d 1297 (9th Cir. 1974); Kassab v. INS, 364 F.2d 806 (6th Cir. 1966); Langhammer v. Hamilton, 295 F.2d 642 (1st Cir. 1961).
34. Id.; see notes 175-87 infra and accompanying text.
35. See Appleman, supra note 31, at 267-68.
37. E.g., United States v. Rossi, 299 F.2d 650 (9th Cir. 1962).
38. See notes 25-31 supra and accompanying text.
39. Woodby v. INS, 385 U.S. 276, 286 (1966) (deportation); Schneiderman v. United States, 320 U.S. 118, 125 (1943) (denaturalization). This standard has been described as "heavier" than the civil standard but "conceptually not quite as exacting as" the criminal. 3 C. Gordon & H. Rosenfield, supra note 26, § 20.5d, at 20-34; see notes 33, 88 infra.
cation and construction of the Chaunt test and highlights the misinterpretations that have prevented uniform application of the second, separate Chaunt test.

I. IMMIGRATION PROCEDURE

The Immigration and Nationality Act of 1952 prohibits an alien from entering the United States unless he holds a valid, unexpired immigrant visa properly issued by an American consular officer outside the United States. In his visa application, the alien is required to give information about his background in order to identify himself. The burden of proof is on the applicant to establish his eligibility to the satisfaction of the officer. No visa can be issued if statements in the application or other documentation indicate that the alien is ineligible or if the consular officer "knows or has reason to believe" that the alien is ineligible under the Act. The application is signed and sworn to before the consular officer once he is sufficiently convinced of the alien's eligibility. The alien is then registered, fingerprinted, and subjected to a physical and mental examination. Further investigation of eligibility occurs upon the alien's arrival at a United States port of entry. The alien may be detained for further inquiry by a special administration and enforcement of the Immigration and Nationality Act. His determinations and rulings on all questions of law are controlling. 8 U.S.C. § 1103(a) (1976); see pt. IV(B) infra.

41. A given fact is material in relation to the matter in question, rather than in and of itself. In immigration law, these questions involve entry into the United States through the grant of a visa, 8 U.S.C. § 1181(a) (1976), and the naturalization of an immigrant through the grant of a petition. 8 U.S.C. §§ 1445-1447 (1976). Some knowledge of immigration procedure is helpful in analogizing materiality in other areas of the law to materiality in immigration law. Knowledge of procedure also aids in determining whether a misrepresented fact might be material in relation to that procedure.


44. 8 U.S.C. § 1202(a) (1976). The information required by the statute includes, for example, the alien's name or any other name that he has used or by which he has been known, his age, date and place of birth, marital status, past and present residences, and occupation. Id. The alien must inform the officer if he has ever been arrested, convicted, or imprisoned, whether he is a member of any class of individuals excluded from admission, or if he claims to be exempt from exclusion. Id. He must also provide any other information necessary to his identification as prescribed by regulations. Id.

45. 8 U.S.C. § 1361 (1976); see note 18 supra.


inquiry officer if the immigration officer\textsuperscript{51} at the port of entry believes there is some doubt as to the alien's eligibility.\textsuperscript{52}

Naturalization is the conferral of United States citizenship on a person after birth.\textsuperscript{53} It involves a process of application and inquiry regarding eligibility similar to that for immigration. The applicant files a petition in the district court of the district in which he resides.\textsuperscript{54} He is subject to a preliminary examination and to a personal investigation\textsuperscript{55} by the Immigration and Naturalization Service (INS).\textsuperscript{56} The applicant has the burden of proving lawful entry, fulfillment of residency requirements,\textsuperscript{57} and good moral character for prescribed periods.\textsuperscript{58} Following the investigation, a final hearing is held in open court.\textsuperscript{59} A successful conclusion results in the petitioner taking an oath of allegiance\textsuperscript{60} and receiving a certificate of naturalization.\textsuperscript{61}

Immigration and naturalization determinations are not the result of simple decisions to grant or deny entry and citizenship. Rather, they are the result of complex investigatory processes designed to convince the officers that an alien is truly eligible for those privileges.\textsuperscript{62} If an alien misrepresented or concealed a material fact, an officer may have been led into making a decision he would not have made if all material facts had been revealed. Moreover, regardless of

\textsuperscript{51} An immigration officer is “any employee or class of employees of the [INS] or of the United States designated by the Attorney General, individually or by regulation, to perform the functions of an immigration officer specified by this chapter.” 8 U.S.C. § 1101(a)(18) (1976).

\textsuperscript{52} 8 U.S.C. §§ 1225(b), 1226 (1976).


\textsuperscript{54} 8 U.S.C. § 1421(b) (1976).


\textsuperscript{56} The INS was established pursuant to 8 U.S.C § 1551 (1976).

\textsuperscript{57} 8 U.S.C. § 1429 (1976). No person can be naturalized unless he has fulfilled residency requirements after being lawfully admitted for permanent residence. 8 U.S.C. § 1427(a) (1976).

\textsuperscript{58} 8 U.S.C. § 1427(a) (1976). The petitioner must have maintained a permanent residence in the United States for at least five years after lawful admission, and during the five years preceding filing of the petition, must have been physically within the United States for at least two and one half years. He must also have resided continuously in the United States from the date of the petition to the granting of the petition, and have been a person of good moral character “attached to the principles of the Constitution of the United States” during those periods. \textit{Id.} No person will be found to be of good moral character if he falls within certain enumerated categories. 8 U.S.C. § 1101(f) (1976). One ground is the giving of false testimony “for the purpose of obtaining any benefits under this chapter.” 8 U.S.C. § 1101(f)(6) (1976). In determining whether the petitioner has been of good moral character, the court has the discretion to examine his conduct at any time prior to the five year period preceding the filing of the petition. 8 U.S.C. § 1427(e) (1976).


\textsuperscript{60} 8 U.S.C. § 1448 (1976). The petitioner must swear to support and defend the United States Constitution and laws, renounce allegiance to the state of which he was formerly a citizen, and promise to bear arms on behalf of the United States unless excused by reasons of religious belief. 8 U.S.C. § 1448(a) (1976).

\textsuperscript{61} 8 U.S.C. § 1449 (1976). The certificate certifies that the petitioner has complied with naturalization law and that an order of admission as a United States citizen has been entered by the court as specified in 8 U.S.C. § 1447(a) (1976).

\textsuperscript{62} 3 C. Gordon & H. Rosenfield, \textit{supra} note 26, § 14.3; see United States v. Ginsberg, 243 U.S. 472, 475 (1917).
whether the truth would have warranted a different decision, the misrepresentation may also have effectively impeded the investigatory processes that are at the heart of the Immigration and Nationality Act by preventing other relevant inquiries bearing on admissibility. A brief examination of fraud in tort, contract, criminal, and securities law indicates that such an impediment is a sufficient basis for finding a misrepresented fact to be material.

II. Comparative Materiality

Admittedly, both tort and contract law usually involve transactions in which the primary losses and penalties are monetary. Although deportation and denaturalization involve higher stakes, it is still helpful to apply tort and contract principles to immigration law. In the tort of fraudulent misrepresentation, the fact is deemed material if a reasonable person would consider the existence or nonexistence of the fact important in determining his course of action. Although the fact must have played a substantial role in affecting the injured party's decision, it is not necessary that the representation have been the decisive factor in his choice. Contract law generally


64. See note 31 supra and accompanying text.

65. It has been said that "denaturalization, like deportation, may result in the loss 'of all that makes life worth living.' " Knauer v. United States, 328 U.S. 654, 659 (1946) (quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)). Deportation is considered "a drastic measure and at times the equivalent of banishment or exile." Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948); see Barber v. Gonzalez, 347 U.S. 637, 642 (1954). Courts have recognized that while the immediate effect of denaturalization is to divest the naturalized person of his status as a citizen and to restore him to the status and consequences of alienage, "[t]he immediate hardship of deportation is often greater than that inflicted by denaturalization, which does not, immediately at least, result in expulsion from our shores." Woodby v. INS, 385 U.S. 276, 286 (1966).

The denaturalized person is deportable for illegal entry or other impropriety in his alien status, but not, for example, for entering legally and then perjuring himself as to a material fact in his application for naturalization. 3 C. Gordon & H. Rosenfield, supra note 26, § 20.6, at 20-37. Because the denaturalization decree is effective as of the original date of the certificate of naturalization, 8 U.S.C. § 1451(a) (1976), denaturalization erases any benefits that citizenship status produced before revocation. Perhaps the most severe consequence of denaturalization is its effect on derivative rights acquired by the naturalized person's dependents. The 1952 Act provides a complicated formula to determine the extinguishment of derivative rights that is dependent on the basis of the revocation. 8 U.S.C. § 1451(f) (1976); see C. Gordon & H. Rosenfield, supra note 26, § 20.6, at 20-39 to -40.

66. See Castaneda-Gonzalez v. INS, 564 F.2d 417, 431 & n.29 (D.C. Cir. 1977) (tort and contract tests of materiality are similar to those in immigration law).

67. See Restatement (Second) of Torts §§ 525-549 (1977). Fraudulent misrepresentation requires proof of a false representation of a material fact, scienter, intent, justifiable reliance, and damage. W. Prosser, Handbook of the Law of Torts § 105, at 685-86 (4th ed. 1971). Reliance establishes the causal connection between the misrepresentation and the damage. Id. at 714. It must be shown that the fact misrepresented and relied on is material to prove that the reliance was justified. Id. at 714-15, 718; accord, Restatement (Second) of Torts § 538(1) (1977).

68. Restatement (Second) of Torts § 538(2)(a) (1977); accord, W. Prosser, supra note 67, § 105, at 718; James & Gray, Misrepresentation—Part II, 37 Md. L. Rev. 488, 497 (1978); Comment, The Element of Materiality in Deceit Cases, 29 Tex. L. Rev. 644, 645 (1951).

69. W. Prosser, supra note 67, § 105 at 715.
agrees that the misrepresented fact is considered material if it would be likely to affect the reasonable person’s conduct during the transaction.\textsuperscript{70}

The use of expressions such as “course of action” and “conduct” indicates that the fact may be considered material not only in relation to the ultimate decision, but also as it affects the entire process of decisionmaking, which encompasses the investigation necessary to arrive at the decision. If tort and contract materiality standards were applied to immigration law, the issue would be whether the official charged with determining eligibility\textsuperscript{71} would have considered the misrepresented or concealed fact important in determining his course of action.\textsuperscript{72}

Similarly, securities law differs from immigration law because the misrepresentation affects a financial transaction rather than the acquisition of privileges inherent in admission to the United States or the attainment of citizenship.\textsuperscript{73} Consideration of the materiality standard in securities law, however, is appropriate because the penalties imposed for the misrepresentation are severe,\textsuperscript{74} as are those imposed for misrepresentation in the immigration process.\textsuperscript{75} The test for materiality in securities law set forth by the Supreme Court examines whether there is a substantial likelihood that a reasonable shareholder would consider the misrepresented facts or omissions significant in his deliberations.\textsuperscript{76}

The Court has specifically rejected a stan-

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\item \textsuperscript{70} Restatement of Contracts § 470(2) (1932); accord, Restatement of Restitution § 8(2) (1937); 1 G. Palmer, The Law of Restitution §§ 3.8, 3.19, at 267, 351-52 (1978). But see Restatement (Second) of Contracts § 304(2) (Tent. Draft No. 11, 1976) (“A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent . . . .”). The view in contract law that materiality is to be judged by whether the fact is likely to affect conduct has been deemed an objective test, in contrast to a subjective test that requires a showing that the contract would not have been made had the truth been known. J. Calamari & J. Perillo, Handbook of the Law of Contracts § 9-14, at 279 & n.99 (2d ed. 1977).

\item \textsuperscript{71} The general powers of immigration officers and employees are set forth in 8 U.S.C. § 1357 (1976). Determinations of eligibility for visas are made if a consular officer is satisfied as to the alien’s eligibility. 8 U.S.C. § 1361 (1976). Similarly, a petitioner must prove his eligibility for citizenship. 8 U.S.C. § 1429 (1976).

\item \textsuperscript{72} Course of action and conduct, with respect to visas and naturalization, include not only the official’s ultimate determination, but his investigation of the applicant’s fitness. See pt. I supra. Therefore, the issue should encompass whether the official would have considered the fact important in determining the nature of the investigation or whether further investigation would have been required. For example, it is conceivable that had the truth been revealed, an official would actually have suspended his final decision pending further investigation. See, e.g., United States ex rel. Jankowski v. Shaughnessy, 186 F.2d 580, 582 (2d Cir. 1951); United States v. Chandler, 152 F. Supp. 169, 175 (D. Md. 1957).

\item \textsuperscript{73} E.g., Woodby v. INS, 385 U.S. 276, 290 (1966) (Clark, J., dissenting) (admission); Schneiderman v. United States, 320 U.S. 118, 122 (1943) (citizenship); see note 120 infra and accompanying text.

\item \textsuperscript{74} A person convicted of a violation of any provision of the Securities and Exchange Act of 1934, 15 U.S.C. §§ 78a-kk (1976), is subject to a fine of up to $10,000 and/or imprisonment for up to five years. Id. § 32(a), 15 U.S.C. § 78ff(a) (1976).

\item \textsuperscript{75} See note 65 supra.

\item \textsuperscript{76} TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). A large part of securities law enforcement has involved the fraudulent dissemination of information necessary for investing and shareholder voting. Securities and Exchange Act of 1934, §§ 10(b), 14(a), 15 U.S.C. §§ 78j(b), 78n(a) (1976); 17 C.F.R. §§ 240.10b-5, 14a-9 (1979). The Securities and Exchange
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dard of whether a person might have considered the fact important, as well as a requirement that the true facts would have actually caused the share-


78. Id.

79. Id. at 449 (emphasis added) (footnote omitted).


81. See notes 175-87 infra and accompanying text.

82. The penalties for perjury include a fine of $2,000 and/or up to five years imprisonment. 18 U.S.C. § 1621 (1976). A conviction for criminal fraud can result in a $10,000 fine and/or imprisonment for up to five years. 18 U.S.C. § 1001 (1976).

83. The standard of persuasion in civil cases is "by a preponderance of evidence." 9 J. Wigmore, Evidence § 2498, at 318 (3d ed. 1940).

84. Perjury is the willful misrepresentation of a material fact during testimony under oath before a tribunal or an officer. 18 U.S.C. § 1621 (1976).

85. The criminal fraud statute prohibits the falsification of a material fact before any federal officer in a matter within the jurisdiction of a United States department or agency. 18 U.S.C. § 1001 (1976).

86. Commentators have noted the relevance of these statutes to immigration law. See C. Gordon & H. Rosenfield, supra note 26, §§ 9.35-.36; Appleman, supra note 31, at 276. Appleman has actually suggested that the tests be used to determine materiality for deportation. Id.

87. See note 39 supra and accompanying text.

88. The standard of persuasion in civil cases is by a "preponderance of evidence." 9 J. Wigmore, supra note 83, § 2498, at 318.

89. See note 83 supra and accompanying text.

be made, or a governmental function to be performed. The comparison is
ehanced by the connection that perjury and criminal fraud have with
immigration law. For example, one who swears to false statements before an
immigration or consular officer who is authorized by federal law to administer
oaths may be guilty of perjury. The Second Circuit's test of materiality in
this situation is whether a truthful answer might have induced the institution
of an investigation. The court's focus on the false answer's potential to affect
an investigation is in accord with other perjury cases. Furthermore, this test
is broader than the Supreme Court's test for immigration law that
an investigation was actually impeded. The Second Circuit, however, also
requires, for a finding of perjury, that the potential investigation might have
resulted in the refusal of a visa. This factor narrows the perjury test and
brings it closer to the Supreme Court's requirement in immigration cases that
the potential for other facts warranting denial be present.

The inclusion of all United States officers, including immigration officials,
in the criminal fraud statute magnifies the relationship of criminal fraud to
(1972); accord, United States v. Anfield, 539 F.2d 674, 678 (9th Cir. 1976); United States v. Lardieri, 497 F.2d 317, 319 (3d Cir. 1974); United States v. Masters, 484 F.2d 1251, 1254 (10th Cir. 1973); United States v. Stone, 429 F.2d 138, 140-41 (2d Cir. 1970).


This test is broader than the test used in tort and contract law. Rather than examining whether
the fact would have influenced a course of action, the test limits its focus to whether the fact
might have influenced an investigation or governmental function. United States v. Guthartz, 573
F.2d at 228 (fraud); United States v. Howard, 560 F.2d 281, 284 (7th Cir. 1977) (perjury); United States v. Anfield, 539 F.2d 674, 678 (9th Cir. 1976) (perjury); United States v. Johnson, 530 F.2d at 54 n.3 (fraud); United States v. Masters, 484 F.2d 1251, 1254 (10th Cir. 1973) (perjury); United States v. Wesson, 478 F.2d 1180, 1181 (7th Cir. 1973) (perjury); United States v. Gremillion, 464 F.2d 901, 905 (5th Cir.), cert. denied, 409 U.S. 1085 (1972) (perjury); Poulos v. United States, 387 F.2d at 6 (fraud); Blake v. United States, 323 F.2d at 246 (fraud).

92. Embassy and consular officers are authorized to administer oaths pursuant to 22 U.S.C. §

93. Punishment for this type of perjury is imprisonment for up to three years and a fine of up

94. United States v. Flores-Rodriguez, 237 F.2d 405, 408 (2d Cir. 1956) (perjury found from
false statement by alien in application for immigrant visa that he had never been arrested or
convicted).

95. See notes 90-91 supra and accompanying text.


97. Id.; see notes 178, 187 infra and accompanying text.

98. United States v. Flores-Rodriguez, 237 F.2d 435, 408 (2d Cir. 1956).

Chaunt is whether the truth "might have been useful in an investigation possibly leading to the
discovery of other facts warranting denial of citizenship." Id.; see notes 175-87 infra and
accompanying text.

100. United States v. Bramblett, 348 U.S. 503, 509 (1955); see 2 C. Gordon & H. Rosenfield,
supra note 26, § 9.36, at 9-79.
immigration. Accordingly, the Ninth Circuit has held a false statement made before an immigration officer to be material, for purposes of criminal fraud, if it could affect or influence the exercise of the function of the INS.\textsuperscript{101} Although this "could" test is broader than the "would" tests of tort and immigration law, one commentator has suggested that the tests of materiality used in perjury and criminal fraud should also be used for deportation and denaturalization.\textsuperscript{102}

Significantly, the determination of materiality in the aforementioned areas requires neither a showing that the injured party's decision would have been altered, nor a showing that the outcome of the affected investigation would have differed had the truth been known. The important factor in determining materiality in these areas is whether the fact was so significant to the course of action that there is a substantial likelihood that it would have actually affected that course of action.\textsuperscript{103} In immigration law, a fact would clearly be material if the truth would have led to a different decision. The significance of the misrepresented fact should also be viewed in relation to the course of action that is the INS's function—conducting a series of investigations, applications, oaths, and inquiries,\textsuperscript{104} all of which are utilized in arriving at the ultimate decision.

III. PRE-Chaut Case Law

A. Denaturalization

The Constitution grants Congress the power "[t]o establish an uniform Rule of Naturalization."\textsuperscript{105} Under Article I, Congress may grant the privilege of citizenship in its discretion, limited only by the requirement of uniformity.\textsuperscript{106} Congress exercised this power in response to widespread abuses in the naturalization process affecting the masses of immigrants who came into the United States in the nineteenth century.\textsuperscript{107} It enacted legislation in 1906 to standardize naturalization procedure,\textsuperscript{108} including a provision making it the duty of the United States district attorneys to institute denaturalization proceedings "on the ground of fraud or on the ground that such certificate of

\textsuperscript{101} Tzantarmas v. United States, 402 F.2d 163, 168 (9th Cir. 1968), \textit{cert. denied}, 394 U.S. 966 (1969) (false answer given regarding marital status in INS proceeding).

\textsuperscript{102} Appleman, \textit{supra} note 31, at 276. A test that focuses only on the potential to impede investigation is too broad to be applied to deportation and denaturalization. Although the penalties imposed by the crimes deprive one of personal liberty, expulsion from the United States or deprivation of United States citizenship and its corresponding privileges require a more stringent standard. Such a standard should require a showing that an investigation was actually impeded. \textit{See} notes 178, 193, 289 \textit{infra} and accompanying text.

\textsuperscript{103} \textit{See} notes 67-102 \textit{supra} and accompanying text.

\textsuperscript{104} \textit{See} pt. I \textit{supra}.

\textsuperscript{105} U.S. Const. art. I, § 8, cl. 4.

\textsuperscript{106} Baumgartner v. United States, 322 U.S. 665, 672 (1944).


\textsuperscript{108} Act of June 29, 1906, Pub. L. No. 59-338, 34 Stat. 596. The Act was designed "[t]o establish a Bureau of Immigration and Naturalization and to provide for a uniform rule for the naturalization of aliens throughout the United States." Preamble, 34 Stat. at 596.
citizenship was illegally procured.\textsuperscript{109} The Nationality Act of 1940\textsuperscript{110} retained this provision, prescribing the same grounds of fraud and illegal procurement to warrant the revocation of citizenship.\textsuperscript{111} Although the wording was changed in the Immigration and Nationality Act of 1952\textsuperscript{112} to "concealment of a material fact or by willful misrepresentation,"\textsuperscript{113} this language has not altered the focus of the 1906 and 1940 provisions.\textsuperscript{114} Rather, this wording was adopted to clarify confusion concerning the meaning of and connotations associated with the word "fraud."\textsuperscript{115}

The first denaturalization case,\textsuperscript{116} though it did not delve into the materiality issue, may have contributed to the current uncertainty surrounding the

109. Act of June 29, 1906, Pub. L. No. 59-338, § 15, 34 Stat. 596, 601. The Supreme Court held this provision constitutional in 1912 and again in 1917. United States v. Ginsberg, 243 U.S. 472 (1917); Johannessen v. United States, 225 U.S. 227 (1912). In Johannessen, the Court held that the statute "makes nothing fraudulent or unlawful that was honest and lawful when it was done," but merely deprived the naturalized citizen "of a privilege that was never rightfully his." Id. at 242-43. The Court also rejected the contention that the statute was an ex post facto law, saying that the statute was not punitive but only served to deprive the wrongdoer of "ill-gotten privileges." Id. at 242. In Ginsberg, the Court held that "[n]o alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the Government may challenge it as provided in § 15 and demand its cancellation unless issued in accordance with such requirements." 243 U.S. at 475. The case was specifically concerned with illegal procurement rather than with fraud, and thus concentrated on the absence of compliance with statutory requirements as a ground for revocation. \textit{Id.; see note 29 supra. See also} Luria v. United States, 231 U.S. 9, 24 (1913) (statute held constitutional; it does not discriminate against naturalized citizens because it results in the annulment of rights of citizenship to which they were never entitled). The Supreme Court later upheld the statute as incidental to the constitutional power to establish a uniform rule of naturalization, U.S. Const. art. I, § 8, cl. 4, and the necessary and proper clause, U.S. Const. art. I, § 8, cl. 18. Knauer v. United States, 328 U.S. 654, 673 (1946).


111. \textit{Id.} § 338(a), 54 Stat. at 1158-59.


114. \textit{See notes 109-11 supra} and accompanying text.

115. "[T]he 1952 Act made no substantial change in the amenability to denaturalization for fraud, and . . . its changed language was intended primarily to make certain that both extrinsic and intrinsic fraud were included." 3 C. Gordon & H. Rosenfield, supra note 26, § 20.4b, at 20-13 (footnote omitted); \textit{accord}, Costello v. United States, 365 U.S. 265, 271 (1961). "Extrinsic" fraud has been described as "a fraud collateral to the issue being tried, such as the concealment of witnesses." S. Rep. No. 1515, 81st Cong., 2d Sess. 756 (1950), while "intrinsic" fraud is "fraud such as perjury of the parties or witnesses, or false swearing as to length of residence." \textit{Id.} (footnote omitted). Because of conflicts as to which type of fraud warranted revocation, the Senate subcommittee recommended that the original provision relating to fraud be changed to read "concealment of a material fact or by willful misrepresentation," as willful misrepresentation is "more easily proved than is an allegation of fraud." \textit{Id.} at 769 (emphasis added).

definition of materiality. 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 issued."117 The Court, however, did not indicate that this was the only circumstance in which revocation was possible. Because the acts showed that the truth would have foreclosed the defendant's naturalization,118 the Court did not have to reach any other test.

Later decisions tended to emphasize the importance of the investigation involved in granting citizenship.119 Stressing the great privilege granted by naturalization,120 courts required that the petitioner meet the "highest standard of rectitude."121 Thus, the petitioner has the duty to give, and the United States the right to receive, "frank, honest and unequivocal information"122 in response to questions asked by immigration officers because these questions give the government the opportunity to investigate and determine the petitioner's eligibility and fitness for citizenship.123

This emphasis on the crucial role of the investigation in granting the precious status of citizenship resulted in a test for materiality of whether the

117. Id. at 241 (emphasis added).
118. The defendant had misrepresented his fulfillment of the residency requirement. Id. at 233. The Act of June 29, 1906, Pub. L. No. 59-338, § 4, 34 Stat. 596, 597-99, required that an applicant have maintained a permanent residence in the United States for at least five years preceding the date of his application. A similar provision is found in the 1952 Act, which requires physical presence totalling two and one half years during this five year period. 8 U.S.C. § 1427(a) (1976); see note 58 supra.
119. See notes 124-32 infra and accompanying text.
123. See cases cited note 122 supra. Failure to provide honest answers results in foreclosing paths of inquiry and denying the government the opportunity to investigate fully the petitioner's qualifications. E.g., Stacher v. United States, 258 F.2d 112, 115 (9th Cir.), cert. denied, 358 U.S. 907 (1958); United States v. De Lucia, 256 F.2d 487, 490 (7th Cir.), cert. denied, 358 U.S. 836 (1958); Corrado v. United States, 227 F.2d 780, 784 (6th Cir. 1955), cert. denied, 351 U.S. 925 (1956); Sweet v. United States, 211 F.2d 118, 119 (6th Cir.), cert. denied, 348 U.S. 817 (1954); United States v. Chandler, 152 F. Supp. 169, 178 (D. Md. 1957); United States v. Lumantes, 139 F. Supp. 574, 575 (N.D. Cal. 1955), aff'd per curiam, 232 F.2d 216 (9th Cir. 1956); United States v. Title, 132 F. Supp. 185, 195 (S.D. Cal. 1955), aff'd, 263 F.2d 28 (9th Cir. 1959); see note 63 supra and accompanying text.
true facts would have led to further investigation necessary to determine eligibility. 124 In terms of actual procedure, the question has sometimes been whether the truth would have led the officer to ask for additional information, and then to refer the matter to the proper officer for further investigation. 125

Notably, the determination of the materiality of a misrepresented or concealed fact was not based on the test that examined whether naturalization would have been denied had the alien revealed the truth. 126 Thus, for example, when the petitioner had falsely answered that he was married when the fact of marriage would not have barred him from citizenship, the court held the misrepresented fact material, and denaturalized the defendant. 127 When courts actually used that test for materiality, they did not need to consider the thwarted investigation because the facts indicated that the truth would have warranted denial. 128 Frequently, however, such certainty was not apparent, thereby resulting in speculation by courts having to make such a determination. The Sixth Circuit condemned such speculation: "How could any Government official or witness say whether or not citizenship would have been denied [the petitioner] from an investigation . . . when no opportunity for investigation was afforded?" 129

The test for materiality, therefore, appears to have been broad. Although it

124. United States v. Chandler, 152 F. Supp. 169, 177 (D. Md. 1957); see cases cited note 123 supra; cf. United States v. Anastasio, 226 F.2d 912, 913-14 (3d Cir. 1955), cert. denied, 351 U.S. 931 (1956) (investigation was found not to have been prevented because examiner who approved defendant's petition had defendant's file with record of previous arrests concealed by defendant). Anastasio is somewhat similar on the facts to Chaunt, in which the Court found that the government's failure to initiate an investigation based on facts that it was aware of indicated that no investigation would have occurred had the defendant revealed his arrests. See notes 182-87 infra and accompanying text. A major difference is that in Chaunt, the defendant himself had given the critical information to the government.


127. United States v. Lumantes, 139 F. Supp. 574, 575 (N.D. Cal. 1955), aff'd per curiam, 232 F.2d 216 (9th Cir. 1956).

128. E.g., United States v. Marasilis, 142 F. Supp. 697 (W.D. Mich. 1956) (while Communist Party membership alone is not a ground for denial, belief in overthrow of United States government warrants denial and defendant admitted to having such a belief); United States v. Accardo, 113 F. Supp. 783 (D.N.J.), aff'd per curiam, 208 F.2d 632 (3d Cir. 1953), cert. denied, 347 U.S. 952 (1954) (indictment at time of petition for conspiracy to defraud United States through operation of an unregistered still would alone have warranted denial).

wented beyond the showing of a mere potential to thwart an investigation,\textsuperscript{130} it did not require a finding that the investigation might have revealed possible grounds for denial, as long as any investigation was actually precluded. The courts viewed the test's application as essential, because to decide otherwise would mean "that one may deliberately engage in a falsehood concerning required facts during naturalization proceedings without fear of consequences so long as the truth, had it been revealed, would not have resulted in refusal of citizenship."\textsuperscript{131} Thus, the concern with the importance of the investigatory function of the INS led to decisions holding material answers to all questions that "the government thinks it important enough to ask."\textsuperscript{132}

B. Deportation

As early as 1891, statutory authority existed to deport aliens for actions that occurred prior to entry that would have made them excludable at entry.\textsuperscript{133} Deportation case law concerning excludability at entry due to misrepresentation, however, developed prior to the enactment of the direct statutory authority\textsuperscript{134} that originally appeared in the DPA\textsuperscript{135} and was codified in the Immigration and Nationality Act.\textsuperscript{136} The statutory ground for deportation was similar to that for denaturalization because the majority of the denaturalization cases hinged on the materiality of the misrepresented or concealed facts.\textsuperscript{137} Although until 1966 the standard of persuasion required to deport was lower than the standard required to denaturalize,\textsuperscript{138} because the conse-

\begin{enumerate}
\item The mere potential to thwart an investigation or governmental function satisfies the test for materiality in perjury cases under 18 U.S.C. § 1621 (1976), and in criminal fraud cases under 8 U.S.C. § 1001 (1976). \textit{See} notes 90-102 supra and accompanying text.
\item Act of Mar. 3, 1891, ch. 551, §§ 1, 10, 11, 26 Stat. 1084, 1084, 1086. This act was directed at aliens who had contracted to work in the United States. \textit{Id.} § 1, 26 Stat. at 1084. All aliens who had entered to work in violation of the law were subject to deportation. \textit{Id.} at §§ 10-11, 26 Stat. at 1086. Prior to this Act, deportation was directed mainly at misconduct after entry. \textit{See} Act of June 25, 1798, ch. 58, 1 Stat. 570. Deportation of alien immigrants who were excludable at the time of entry was provided for in the Act of Feb. 5, 1917, Pub. L. No. 64-301, § 19, 39 Stat. 874, 889. \textit{See generally} 1 C. Gordon & H. Rosenfield, \textit{supra} note 26, § 4.1a; Common Council for Am. Unity, The Alien and the Immigration Law 185 (1972).
\item \textit{C. Gordon & H. Rosenfield, supra} note 26, § 4.7c, at 4-47; Fieldsteel, \textit{supra} note 31, at 3; \textit{see} \textit{United States ex rel. Volpe v. Smith}, 62 F.2d 808 (7th Cir.), \textit{aff'd}, 289 U.S. 422 (1933); \textit{United States ex rel. Iorio v. Day}, 34 F.2d 920 (2d Cir. 1929).
\item \textit{See} note 21 supra and accompanying text.
\item \textit{C. Gordon & H. Rosenfield, supra} note 26, § 4.7c, at 4-48; \textit{see} note 28 supra.
\item \textit{See} notes 116-32 supra and accompanying text.
\item \textit{United States v. Woodby} v. INS, 385 U.S. 276 (1966), the standard of persuasion in deportation cases was that of other civil cases—by the preponderance of the evidence. \textit{See} note 88 supra. This view was based on the 1952 Act, which stated that "reasonable, substantial, and probative evidence" is required for the determination of deportability. 8 U.S.C. §§ 1105a(a)(4), 1252(b)(4) (1976); \textit{Woodby} v. INS, 385 U.S. at 281. The Supreme Court held that this language referred to the quality of the evidence rather than to the burden of proof. \textit{Id.} at 283. The Court ruled that the burden required in denaturalization cases—that the government establish its
quences of deportation had long been recognized as equally severe, similar standards of materiality developed for deportation.

In early deportation cases, courts had no problem finding materiality when it was clear that exclusion would have resulted from disclosure of the truth. On the other hand, when the facts were not so clear, the proper standard of materiality became a subject of conflict. One view held a fact material only if disclosure "would have been enough to justify the refusal of a visa or exclusion upon entry." Another view followed the reasoning applied in denaturalization cases and stressed the importance of the investigation thwarted by the misrepresentation, regardless of what the inspection might have uncovered.

In later cases, by apparently emphasizing the extreme importance of the investigation into the alien's admissibility, courts considered a fact material if the alien's misrepresentation frustrated a necessary investigation of eligibility that would have resulted from the truth. The fact was considered material even if it could be shown that no other facts would have been revealed in that investigation, and regardless of whether it would have affected the ultimate outcome. Thus, concealment of a previous deportation was held material because it would have suggested further inquiry, although that fact alone would not have warranted exclusion.

Other courts adopted a middle approach. These courts narrowed the test by requiring an additional showing that the precluded inquiry might have resulted in the revelation of other facts that might have warranted denial. For example, one court, applying this standard, ordered the deportation of a resident alien because it found that concealment of an arrest that did not clearly involve moral turpitude might have prevented the discovery of another arrest. A second court did not focus on the investigating officer's ultimate decision, but, using a similar rationale, examined whether he would have

allegations by clear, unequivocal, and convincing evidence—should apply in deportation cases. Id. at 285-86; see 1 C. Gordon & H. Rosenfeld, supra note 26, § 5.10b, at 5-121.

139. See note 65 supra.
140. See notes 144-63 infra and accompanying text.
141. E.g., Hirose v. Berkshire, 73 F.2d 86 (9th Cir. 1934); Popa v. Zurbrick, 45 F.2d 583 (6th Cir. 1930); United States ex rel. Thomas v. Day, 29 F.2d 485 (2d Cir. 1928).
142. Appleman, supra note 31, at 268.
145. E.g., Duran-Garcia v. Neelly, 246 F.2d 287, 291 (5th Cir. 1957); Ablett v. Brownell, 240 F.2d 625, 629-31 (D.C. Cir. 1957); Landon v. Clarke, 239 F.2d 631, 634-35 (1st Cir. 1956).
146. See cases cited note 145 supra.
148. Landon v. Clarke, 239 F.2d 631, 634 (1st Cir. 1956).
made a "temporary refusal, pending a further inquiry, the results of which 
might well have prompted a final refusal." In a third case, the Ninth 
Circuit held that proof that the alien might have gotten a visa on the true 
facts did not vitiate the misrepresentation. A fourth court stated that "it 
might well be that any attempt to prove the [alien to be definitely excludable] 
would have been unsuccessful." Rather, the combination of a precluded 
investigation and the possibility that it might have led to a refusal was 
sufficient to warrant a finding of materiality. Using this rationale, this 
court refused to determine if the defendant was actually a 

homosexual because the investigation of his arrest for certain sexual acts would have led to 
the attempt to exclude. Otherwise, to hold 

that an alien may make a false statement in his application for a visa in order to avoid 
the raising of a substantial question as to his eligibility and then, if he is caught in the 
false statement after having successfully choked off investigation, may try out his 
eligibility just as if nothing had happened would . . . be an invitation to false 
swearing.

Such a rationale derives strong support from the congressional intent to 
eliminate false swearing. Although the Conference Committee report on the 
Immigration and Nationality Act stressed the humanitarian aims of United 
States immigration policy, it also indicated that the prevention of fraud, 
perpetrated to avoid investigation of an alien's background, was an equally 
important goal in protecting the United States' interests.

Another important rationale existed for emphasizing the relationship be-
tween the misrepresented fact and the investigation. Subsequently requiring 
proof that the alien would have been excluded on the truth "would force the 
courts into the realm of conjecture and speculation, in trying to make a 
decision only the proper authorities could have capably 

done"—a decision

152. United States ex rel. Jankowski v. Shaughnessy, 186 F.2d 580, 582 (2d Cir. 1951) 
(emphasis added); see Ablett v. Brownell, 240 F.2d 625, 629 (D.C. Cir. 1957); Landon v. Clarke, 
239 F.2d 631, 635 (1st Cir. 1956).


155. Id.; see cases cited notes 144-52 supra. But see Calvillo v. Robinson, 271 F.2d 249, 253 
(7th Cir. 1959) (rejects so-called "majority" rule because in those cases, the truth would actually 
have warranted refusal of a visa).

156. An alien "afflicted with psychopathic personality, sexual deviation, or a mental defect" is 
ineligible to receive a visa. 8 U.S.C. § 1182(a)(4) (1976). The Supreme Court has held that this 
section was intended to exclude homosexuals and that it is constitutional. Boutilier v. INS, 387 
U.S. 118 (1967).


158. Id.; see 1 C. Gordon & H. Rosenfield, supra note 26, § 4.7c, at 4-60.

267.

News at 1754.

161. Landon v. Clarke, 239 F.2d 631, 636 (1st Cir. 1956). The same concern about the need
that the alien obstructed at the proper time. Such a theory supports the idea that the proper time for investigation was the time of the original inquiry, and not the time of the deportation hearing that might occur years later. If an alien now maintains that he was in fact admissible, he should have permitted that determination to have been made when he had the burden of proving admissibility.

IV. Chaunt v. United States

A. The Supreme Court Decision

Generally, by 1960, the decisions dealing with misrepresentation as a ground for denaturalization or deportation viewed materiality in terms of the effect of the misrepresented fact on the investigation. This emphasis accorded with the congressional concern that investigation of an applicant's background not be circumvented by fraud. In Chaunt v. United States, the Supreme Court essentially reaffirmed these views by formulating a two-part test for materiality.

Chaunt had failed to reveal past arrests that, standing alone, were insufficient to warrant denial of citizenship. Although he had revealed his membership in an allegedly communist affiliated organization, the Government contended that revelation of the arrests would have led to the discovery of Chaunt's other communist affiliations. This information would have led to further investigation of an alleged lack of attachment to the

to avoid speculation was expressed in denaturalization cases. See note 129 supra and accompanying text.

162. E.g., Kassab v. INS, 364 F.2d 806 (6th Cir. 1966) (deportation hearings instituted seven years after application for visa); Langhamer v. Hamilton, 295 F.2d 642 (1st Cir. 1961) (deportation hearing nine years after visa application). The passage of time does not bar the institution of deportation proceedings. See note 29 supra.

163. See United States v. Fedorenko, 597 F.2d 946 (5th Cir. 1979), cert. granted, 48 U.S.L.W. 3535 (U.S. Feb. 19, 1980) (No. 79-5602). Although the alien has the burden of proving eligibility for a visa or citizenship, see notes 45, 57 supra and accompanying text, the burden of proof is on the government to show that deportation or denaturalization is warranted. Woodby v. INS, 385 U.S. 276 (1966); Schneiderman v. United States, 320 U.S. 118 (1943).

164. See notes 119-32, 144-63 supra and accompanying text.

165. See notes 159-60 supra and accompanying text.


167. Chaunt had been arrested for distributing handbills in violation of an ordinance, for making a public demonstration in violation of park regulations, and for a general breach of the peace. The first charge was dropped; he received a suspended sentence for the second; the conviction for the third charge was "nolled" on appeal. Id. at 352. The Court said that these crimes were of "slight consequence" and did not involve the type of activity that would disqualify one for citizenship. Id. at 354.

168. Chaunt disclosed that he had been a member of the International Workers' Order (IWO). Id. at 355. The Court found that the Government knew the IWO was controlled by the Communist Party when it granted Chaunt's petition for naturalization in 1940. Id.

169. In 1929, Chaunt had been a district organizer for the Communist Party in Connecticut. Id. at 354. It is unclear how the nature of the unrevealed arrests, see note 167 supra, would have triggered an investigation revealing this affiliation. 364 U.S. at 354-55. The only possibility is that Chaunt had been distributing communist handbills or orating on behalf of communism.
United States Constitution, a possible ground for denying naturalization.\textsuperscript{170} The Government argued, therefore, that this misrepresentation of his past arrest record was material, thereby warranting revocation of citizenship.\textsuperscript{171} The Ninth Circuit held that sufficient grounds for materiality and revocation existed if the truth \textit{might} have led the INS to make a further inquiry.\textsuperscript{172} The Supreme Court reversed, though it first acknowledged that

\textit{Full and truthful response to all relevant questions required by the naturalization procedure is, of course, to be exacted, and temporizing with the truth must be vigorously discouraged. Failure to give frank, honest, and unequivocal answers . . . is a serious matter. Complete replies are essential so that the qualifications of the applicant or his lack of them may be ascertained.}\textsuperscript{173}

The Court noted the lack of "clear, unequivocal, and convincing"\textsuperscript{174} evidence showing either "that facts were suppressed which, if known, would have warranted denial of citizenship or . . . that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship."\textsuperscript{175} Therefore, the Court held that Chaunt should not be denaturalized.\textsuperscript{176}

The Court's use of two tests was a recognition that although materiality would be present if the truth would have warranted denial, the failure to meet this standard\textsuperscript{177} does not automatically render the facts immaterial. A second standard, that disclosure might have been useful in an investigation possibly

\textsuperscript{170} A petitioner must have been of "good moral character, attached to the principles of the [United States Constitution] and well disposed to the good order and happiness of the United States." 8 U.S.C. § 1427(a) (1976). He must also swear to support and defend the Constitution. 8 U.S.C. § 1448(a) (1976); \textit{see} notes 58, 60 \textit{supra} and accompanying text. Prior to Chaunt, the Government had argued that membership in the Communist Party at the time of naturalization indicated a lack of attachment to the principles of the Constitution because the Party advocated the forcible overthrow of the United States government. In these cases, the grounds urged for revocation were misrepresentation and illegal procurement because naturalization had been procured in violation of statute. \textit{See} Maisenberg \textit{v. United States}, 356 U.S. 670 (1958); Nowak \textit{v. United States}, 356 U.S. 660 (1958); Schneiderman \textit{v. United States}, 320 U.S. 118 (1943); United States \textit{v. Chandler}, 152 F. Supp. 169 (D. Md. 1957); United States \textit{v. Marasilis}, 142 F. Supp. 697 (W.D. Mich. 1956). The Supreme Court has held, however, that mere membership in the Party is not a ground to establish illegal procurement of citizenship. Rather, it is necessary to prove that the defendant himself knew that overthrow was a goal of the Party and that he believed in that goal. Nowak \textit{v. United States}, 356 U.S. 660, 665-68 (1958); Schneiderman \textit{v. United States}, 320 U.S. 118, 136, 140, 145-56 (1943).


\textsuperscript{172} 270 F.2d 179 (9th Cir. 1959). The cases cited for this proposition, however, seemed to have based their findings of materiality on the premise that an investigation \textit{would} have occurred. \textit{See} notes 124-25, 130 \textit{supra} and accompanying text. The holding's omission of reference to the possibility of the investigation leading to a denial was in accord with the general view that the mere preclusion of an investigation alone was sufficient for a finding of materiality. \textit{Id.}; \textit{see} notes 130-32 \textit{supra} and accompanying text.

\textsuperscript{173} 364 U.S. at 352.

\textsuperscript{174} \textit{Id.} at 353; \textit{see} note 39 \textit{supra} and accompanying text.

\textsuperscript{175} 364 U.S. at 355.

\textsuperscript{176} \textit{Id.}

\textsuperscript{177} The first test was not satisfied in \textit{Chaunt} because his arrests would not have justified denial. \textit{See} note 167 \textit{supra} and accompanying text.
leading to the discovery of other facts warranting denial of citizenship, must be applied before resolving the question of materiality. The second test seems to assume that an investigation occurred. This indicates that showing that an investigation would have taken place is required, and overrules the "might" test used by the Ninth Circuit. Such an interpretation is supported by the Court's elaboration of this test as whether the truth "might have led to the discovery of other facts which would justify denial," because possible discovery of other facts would naturally occur only upon further investigation.

The added requirement of an investigation "possibly leading to the discovery of other facts warranting denial" further narrowed the holding of the Ninth Circuit and of the preceding denaturalization cases. The use of the word "possibly" indicates that it is not necessary to show that the investigation would have definitely led to the discovery of other facts. In Chaunt, the possibility of such other facts did exist, because an investigation of his minor arrests might have revealed the defendant's communist connections, a

178. The requirement of showing that an investigation would have taken place leads to the question of what kind of evidence would be necessary to prove that it would have occurred. In tort and contract law, materiality is viewed in terms of the effect a misrepresentation would have on the reasonable person. See notes 67-70 supra and accompanying text. Immigration cases do not actually refer to whether the reasonable immigration or consular officer would have initiated further investigation. The indication, however, is that the reasonable person standard would apply to immigration law as well. Evidence in these cases consists largely of testimony by naturalization examiners. Since it is unlikely that the examiner actually remembers a particular application, he usually testifies as to regular practice and procedure in conducting the inquiry. If he is dead, other officials testify as to regular practice and procedure in conducting the inquiry. See 3 C. Gordon & H. Rosenfield, supra note 26, § 20.5d, at 20-35; see United States v. D'Agostino, 338 F.2d 490 (2d Cir. 1964); United States v. Rossi, 319 F.2d 701, 702 (2d Cir. 1963); United States v. Oddo, 314 F.2d 115 (2d Cir. 1963); United States v. Profaci, 274 F.2d 289, 291 (2d Cir. 1960); Stacher v. United States, 258 F.2d 112 (9th Cir.), cert. denied, 358 U.S. 907 (1958); United States v. Montalbano, 236 F.2d 757, 759 (3d Cir.), cert. denied, 352 U.S. 952 (1956).

At first glance, the holding in Chaunt might appear to be based on a subjective test because the Court found that an investigation was not actually precluded. See notes 184-87 infra and accompanying text. The reasonable person must be viewed, however, in the context of the circumstances surrounding the misrepresentation. In Chaunt, no investigation ensued although the defendant had revealed membership in an organization known to be communist affiliated. The reasonable officer, charged with the necessity of determining the applicant's attachment to the Constitution, see note 170 supra, who did not investigate on the basis of such an obvious communist connection, would most likely not have investigated an applicant's communist affiliations on the tenuous ground of an arrest for leafleting.

179. 364 U.S. at 353.

180. See note 130 supra and accompanying text. The addition is in accord with the holdings of certain deportation cases. See notes 150-57 supra and accompanying text.

181. In Chaunt, an investigation might have led to the fact that the defendant was actually committed to the overthrow of the United States government. Such a commitment would have indicated nonattachment to the Constitution and would, therefore, have been a bar to naturalization. 8 U.S.C. § 1427(a) (1976); see notes 58, 60, 170 supra. The ultimate determination of an investigation of the defendant's affiliations, however, might have shown that he was eligible for naturalization. The significance of the test is that a ground for denial might have been revealed; the ultimate determination, however, is irrelevant to the test. See United States v. Fedorenko, 597 F.2d 946, 950-51 (5th Cir. 1979), cert. granted, 48 U.S.L.W. 3535 (U.S. Feb. 19, 1980) (No. 79-5602).
potential ground for revocation of citizenship. The Court, however, never had to deal with this possibility. It first stated that Chaunt had voluntarily revealed his membership in an organization that, the Court found, the government knew to be communist affiliated. The Court then noted that while the “nexus with the Communist Party . . . was thereby disclosed and was available for further investigation if it had been deemed appropriate at that time,” the Government failed to investigate this membership, a revealed and far “less tenuous” connection with the Communist Party than the minor arrests. The Court acknowledged that had membership in that organization not been disclosed, the misrepresentation would have taken on greater significance because there would have been nothing else to indicate to the Government the need to investigate. The failure to investigate the membership, however, indicated that there would have been no additional inquiry into those connections on the basis of an insignificant arrest record; therefore, no investigation was precluded. Further analysis leads to the conclusion that the “other facts” to which an investigation would have led were facts already known to the government because of Chaunt’s own revelations. Because Chaunt was granted citizenship without investigation, despite the government’s knowledge, it does not appear that the facts were considered material to the inquiry at the time.

Confusion arose immediately as to the meaning of this second test. In his dissent, Justice Clark appeared to have misunderstood the substance of the majority opinion. He argued that Chaunt should have been denaturalized because his “falsification . . . forestalled an investigation which might have resulted in the defeat of [his] application for naturalization.” Although Justice Clark’s language differs, it is hard to distinguish this test from the test developed by the majority. Both required a thwarted investigation and the possibility that the investigation might have led to denial of naturalization. The dispute actually seems to have centered on the factual question of the Government’s knowledge of Chaunt’s communist affiliations. Justice Clark believed the facts indicated that the Government did not know at the time that the organization Chaunt belonged to was communist affiliated. Therefore, he believed that concealment of the arrests actually forestalled an investigation of his communist connections.

B. The Attorney General’s Interpretation

An opinion rendered by the Attorney General in 1961 supports the interpretation that the second test of Chaunt requires proof that the truth would have led to an investigation that might have revealed facts warranting denial.

182. See note 181 supra.
183. See note 168 supra and accompanying text.
184. 364 U.S. at 355.
185. Id.; see notes 167, 169 supra.
186. 364 U.S. at 355; see note 181 supra.
187. 364 U.S. at 355; see note 169 supra. For this interpretation, see United States v. Fedorenko, 597 F.2d 946, 951 (5th Cir. 1979), cert. granted, 48 U.S.L.W. 3535 (U.S. Feb. 19, 1980) (No. 79-5602); note 275 infra and accompanying text.
188. 364 U.S. at 357 (Clark, J., dissenting) (emphasis deleted).
189. Id.
Pursuant to the authority granted him in the Immigration and Nationality Act, the Attorney General formulated a two part test of materiality, based on the Chaunt holding, for use in deportation cases. He stated that the Act's objectives would best be effected by finding materiality if "the alien is excludable on the true facts, or . . . the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." The Attorney General elaborated on this second test and broke it down into two parts. First, it must be determined whether the misrepresentation foreclosed a line of inquiry relevant to eligibility. In accordance with Chaunt, more than a "remote, tenuous, or fanciful connection" between the misrepresentation and the investigation is required. This implies that such a remote connection underlies the holding in Chaunt. If it is now determined that an inquiry was precluded, the second step examines whether that inquiry might have resulted in a "proper determination that the alien be excluded." The Attorney General went further than the Supreme Court did in Chaunt by elaborating on the meaning of "might." He explained that any misrepresentation may potentially cut off some opportunity for investigation. The failure of an investigation to suggest even the existence of any ground of exclusion, however, would preclude a finding of materiality. Additionally, the Attorney General indicated that more than the mere possibility of the investigation revealing other facts warranting denial is required to find materiality. Under his test, materiality is present only if the facts revealed indicate a substantial question as to eligibility. This requirement should be

191. 8 U.S.C. § 1103(a) (1976). Determinations by the Attorney General on questions of law are controlling. Id.; see note 40 supra.
192. 9 I. & N. Dec. at 447.
193. Id. at 448.
195. 9 I. & N. Dec. at 448-49.
196. See notes 182-87 supra and accompanying text.
197. No inquiry was cut off in Chaunt. See notes 184-87 supra and accompanying text.
198. 9 I. & N. Dec. at 449.
199. Id. at 449-50; see Appleman, supra note 31, at 274.
200. 9 I. & N. Dec. at 449-50; accord, Ganduxe y Marino v. Murff, 183 F. Supp. 565, 567 (S.D.N.Y. 1959), aff'd sub nom. Ganduxe y Marino v. Esperdy, 278 F.2d 330 (2d Cir.), cert. denied, 364 U.S. 824 (1950) (substantial question of eligibility). The Attorney General's requirement that the precluded investigation suggest a substantial question of eligibility, rather than a mere possibility of other facts warranting denial, may have been intended to avoid speculation. One could always say there is a possibility, however remote, that an investigation might reveal a fact bearing on eligibility. This type of conjecture leads to a test that focuses mainly on the precluded investigation and that is reminiscent of pre-Chaunt holdings. See notes 124-32, 145-49 supra and accompanying text. The additional emphasis on substantial questions of eligibility narrows the test to comport with the severity of deportation and denaturalization. Notably, the Attorney General intended that this narrower test apply to deportation which, at the time, required a lower standard of persuasion than that required for denaturalization. See note 138 supra and accompanying text. Additionally, in denaturalization, actual loss of the precious right of citizenship is at stake. See note 65 supra and accompanying text. The Attorney General opinion, therefore, should also influence the determination of materiality in denaturalization cases.
incorporated, for several reasons, into the immigration test of materiality. First, the severity of denaturalization and deportation\textsuperscript{201} demands a standard higher than that connoted by "possibly." Second, the language of this higher standard clarifies the court's task of determining whether the facts now revealed are material by minimizing the speculation that the use of "possibly" entails.

The Attorney General's requirement that a substantial question of eligibility exist caused him to reverse a Board of Immigration Appeals' holding that the use of a false name in procuring a visa constituted a misrepresentation of a material fact regardless of whether it concealed grounds of ineligibility.\textsuperscript{202} The Attorney General acknowledged that the alien's failure to give his true name precluded an investigation.\textsuperscript{203} He also recognized, however, that if the alien had given his real name, there would have been no possibility that the resulting investigation might have revealed any grounds for exclusion.\textsuperscript{204} Therefore, under the second test, the Attorney General determined that the alien had not misrepresented a material fact.\textsuperscript{205}

The opinion also differentiated the second test from the first by implying that unlike the proof required by the first test, it is unnecessary to show that this substantial question would have been ultimately resolved in the government's favor. "In close cases the government ought not to be required to speculate as to what would have been the results of an investigation which the alien has prevented."\textsuperscript{206} The reluctance to speculate is in accord with the concern expressed by courts prior to Chaunt.\textsuperscript{207} This reluctance should be embodied in the second test by further refining "possibly leading to other facts warranting denial." In addition to requiring that the investigation would have revealed facts posing a substantial question of eligibility,\textsuperscript{208} the second test for materiality should be satisfied as long as the investigation might have resulted in a determination of ineligibility.

The application of the Attorney General's test resulted in the reversal of another administrative decision.\textsuperscript{209} In that case, the alien had not revealed his membership in the Hungarian Communist Party when he applied for a visa.\textsuperscript{210} In subsequent deportation proceedings, he claimed that he had been an involuntary member. The hearing board determined that his misrepresentation was not material because only voluntary membership would have resulted in exclusion.\textsuperscript{211} The Attorney General reversed because the truth

\textsuperscript{201} See note 65 supra.
\textsuperscript{203} In re B-C-, 9 I. & N. Dec. 1168, at 450 (1961). This finding satisfied the first step in the Attorney General's breakdown of the second test.
\textsuperscript{204} Id. at 450-51.
\textsuperscript{205} Id. at 451.
\textsuperscript{206} 9 I. & N. Dec. at 450; see Appleman, supra note 31, at 274.
\textsuperscript{207} See notes 129, 161 supra and accompanying text.
\textsuperscript{208} See notes 200-01 supra and accompanying text.
\textsuperscript{210} Id. at 437.
\textsuperscript{211} Id. at 440.
would have led to an investigation into the voluntary nature of his membership, thereby raising a substantial question of eligibility. It was unnecessary under the test, however, to decide the question of voluntary membership and, therefore, whether exclusion would have actually resulted. The test focuses on the possibility of that result, not on its inevitability. The Attorney General's opinion pointed out that the test comported with the congressional intent that immigration law and the investigation of aliens' backgrounds not be circumvented by fraud. The Attorney General also stated that his test was supported by the congressional creation of an independent ground of exclusion for misrepresentation. Insistence that an alien be deportable for misrepresentation only if the truth would have made him ineligible would effectively render the independent ground meaningles and add nothing to the list of grounds for exclusion.

V. POST-CHAUNT CASE LAW

A. Deportation

Generally, post-Chaunt deportation case law has followed the Attorney General's interpretation of the second test. Thus, when an alien failed to

212. Id. at 450. The question of the voluntariness of membership in a suspect organization frequently arises as a possible ground for deportation or denaturalization. Most cases have held that the determination of whether membership was voluntary should occur at the time of application. E.g., United States v. Fedorenko, 597 F.2d 946 (5th Cir. 1979) (denaturalization of alleged Nazi war criminal), cert. granted, 48 U.S.L.W. 3535 (U.S. Feb. 19, 1980) (No. 79-5602); Langhammer v. Hamilton, 295 F.2d 642 (1st Cir. 1961) (deportation of former Communist Party member); see Fieldsteel, supra note 31, at 6. See also Berenyi v. District Director, 385 U.S. 630 (1967) (petition for naturalization denied); In re Ferenci, 217 F. Supp. 714 (E.D. Pa. 1963) (petition for naturalization granted).


215. 9 I. & N. Dec. at 446, referring to grounds listed in 8 U.S.C. § 1251(a) (1976); see note 28 supra.

216. 9 I. & N. Dec. at 444; accord, Fieldsteel, supra note 31, at 3. One could possibly extend this argument to denaturalization. The two grounds on which a suit for revocation of citizenship can be instituted are misrepresentation and illegal procurement. 8 U.S.C. § 1451(a) (1976); see note 29 supra. Revocation on proof that the naturalized citizen would have been denied citizenship for such a failure could be based on illegal procurement because illegal procurement refers to the failure to meet statutory requirements. Misrepresentation may then be a separate ground for revocation requiring a different test.

217. See Castaneda-Gonzalez v. INS, 564 F.2d 417, 431 & n.29 (D.C. Cir. 1977); Langhammer v. Hamilton, 295 F.2d 642, 648 (1st Cir. 1961); Appleman, supra note 31, at 272. The Castaneda-Gonzalez court said that this test was the one typically applied in immigration, tort, contract, and securities law. 564 F.2d at 431 n.29. It did not use this test, however, because it had to employ a test provided in a labor regulation since the misrepresentation affected the acquisition of a labor certificate. Id. at 431; see notes 238-40 infra and accompanying text; cf. Kassab v. INS, 364 F.2d 806, 807 (6th Cir. 1966) (materiality present if the truth might have led to further action and the discovery of other facts). See also Suite v. INS, 594 F.2d 972 (3d Cir. 1979) (defendant's contention that misrepresentation was not material because falsified documents were not necessary to issuance of visa held to be without merit).
reveal membership in the East German Communist Party, and in deportation proceedings claimed that his membership had been involuntary so that disclosure would not have ultimately resulted in exclusion, the First Circuit held the concealed fact material. The court stated that even if it was now determined that the alien had been an involuntary member, such a determination would not render his omission immaterial because the precluded investigation would have unearthed facts raising a question as to eligibility. The court stressed that an alien cannot avoid such a question by misrepresentation and subsequently expect the court to determine his eligibility as if no wrongdoing had occurred. The implication is that any such question should have been resolved at the time of the original investigation. This view is especially significant when the passage of time has rendered more difficult the government's burden of proving materiality by clear, unequivocal, and convincing evidence.

In Kassab v. INS, the Sixth Circuit held that materiality exists if the truth might have led to further inquiry and the discovery of facts warranting exclusion. This test is similar to the broad one used in the Ninth Circuit's disposition of Chaunt, which the Supreme Court narrowed by requiring a demonstration that an investigation would have taken place. The Sixth Circuit's decision, however, ultimately comported with the Supreme Court's holding in Chaunt because Kassab was based on a finding that the visa application would have been held in abeyance pending further inquiry.

Chaunt has erroneously been cited for the proposition that a fact is material

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218. Membership in a communist party, before or at entry, is a ground for exclusion, 8 U.S.C. § 1182(a)(28)(C) (1976), and therefore subjects the alien to deportation. 8 U.S.C. § 1251(a)(1) (1976); see note 28 supra. If the alien can establish to the satisfaction of the consular officer that membership was involuntary, or while under the age of sixteen; or in order to obtain employment and essentials of living; or that the alien has altered his beliefs, he may be found eligible for a visa. 8 U.S.C. § 1182(a)(28)(l) (1976).

219. See note 218 supra.


221. 295 F.2d at 648.


223. See notes 129, 161, 207 supra and accompanying text.

224. Id. In 1966, the Supreme Court ruled that the government's burden of proof in deportation cases is by "clear, unequivocal and convincing evidence," the same standard required in denaturalization cases. Woodby v. INS, 385 U.S. 276, 286 (1966); see notes 39, 138 supra and accompanying text.

225. 364 F.2d 806 (6th Cir. 1966).

226. Id. at 807.

227. Chaunt v. United States, 270 F.2d 179, 182 (9th Cir. 1959), rev'd, 364 U.S. 350 (1960); see note 172 supra and accompanying text.

228. 364 U.S. 350, 355 (1960); see notes 175-87 infra and accompanying text.

229. Kassab v. INS, 364 F.2d 806, 807 (6th Cir. 1966); see notes 175-79 infra and accompanying text. The visa application would have been suspended pending determination of the defendant's marital status. 364 F.2d at 807.
only if the truth would have resulted in exclusion. In *La Madrid-Peraza v. INS*, an alien overstated wages she was to receive in her prospective employment in attempting to meet the prevailing wage rate for admission. The Ninth Circuit ruled that under *Chaunt*, a misrepresented or concealed fact is not material unless the truth would have justified a refusal to issue a visa. Because no evidence indicated that she was actually paid less than the required rate, she was not deported.

The holding in *La Madrid-Peraza* ignores the existence of the second standard of materiality in *Chaunt*. The Ninth Circuit overlooked a basic reason why it had been reversed by the Supreme Court in *Chaunt*—the Ninth Circuit had used a “might” test in reference to investigation, while the Supreme Court narrowed it to a “would” test accompanied by the existence of a possibility of a determination of ineligibility. Furthermore, the Ninth Circuit test bears no relation to the carefully formulated opinion of the Attorney General that should be controlling. In fact, it appears that immateriality could have been found, because although an investigation of the alien would have occurred, there was apparently no possibility that other facts warranting denial, or any substantial question regarding her eligibility, might have been discovered. Because issuance of a labor certificate was the crux of the case, however, the decision revolved around a definition of materiality found in the labor regulations. Therefore, while the court cited the *Chaunt* test as the controlling authority, it actually employed a test specifically defined by the Secretary of Labor, rather than the immigration law test.

### B. Denaturalization

Denaturalization cases since *Chaunt* have steadfastly continued to protect citizenship once it has been granted. In determining materiality, the cases have stressed that the severity of the penalty demands that the government...
establish its case by clear, unequivocal, and convincing evidence.\textsuperscript{242} The judicial protection of naturalized citizens has resulted in construing the law, as far as is reasonably possible, in favor of the citizen.\textsuperscript{243}

In many post-\textit{Chaunt} denaturalization cases, it was clear that on the true facts, the defendant would have been denied citizenship, and, therefore, use of the second test was unnecessary.\textsuperscript{244} In the absence of facts inevitably warranting denial, the Supreme Court's formulation of a second \textit{Chaunt} test\textsuperscript{245} indicated the necessity for further consideration of materiality. Less than two years after its decision in \textit{Chaunt} had been reversed, however, the Ninth Circuit held that the test for materiality was whether the truth would have led to denial of citizenship.\textsuperscript{246} In \textit{United States v. Rossi},\textsuperscript{247} an alien had given his brother's name as his own because he feared the quota for his native country had been filled.\textsuperscript{248} The government offered no proof, beyond the personal opinion of the defendant, that the quota had been oversubscribed, nor did it show any other possible grounds for denial.\textsuperscript{249} The court explained that while the Supreme Court had condemned "'temporizing with the truth,'"\textsuperscript{250} it "did not regard [all retreats] from rectitude as sufficient . . . to strip [one] of citizenship,"\textsuperscript{251} and it therefore altered the test for materiality.\textsuperscript{252} Although the Ninth Circuit cited the two tests,\textsuperscript{253} it proceeded to hold that a finding of materiality is warranted only if the truth would have resulted in a determination of ineligibility.\textsuperscript{254} Thus, the court applied only the first test in

\begin{itemize}
  \item \textsuperscript{242} See note 39 \textit{supra} and accompanying text.
  \item \textsuperscript{243} \textit{United States v. Rossi}, 299 F.2d 650, 653 (9th Cir. 1962) (citing Schneiderman v. United States, 320 U.S. 118, 122 (1943)).
  \item \textsuperscript{244} \textit{E.g.,} Costello v. United States, 365 U.S. 265 (1961) (defendant had been engaged in the criminal profession of bootlegging); United States v. Rielo, 337 F.2d 986 (3d Cir. 1964) (defendant failed to meet all statutory requirements of lawful admission and residency); United States v. Walus, 453 F. Supp. 699 (N.D. Ill. 1978) (defendant allegedly had been a Gestapo agent who committed atrocities), rev'd and remanded on presentation of newly discovered evidence, Nos. 79-1587, 79-1140 (7th Cir. Feb. 13, 1980); United States v. Wisdom, 320 F. Supp. 286 (E.D. Tenn. 1970) (defendant had been a bigamist at the time he filed his petition for naturalization). In \textit{Walus}, the defendant's citizenship was not revoked because of illegal entry under the Displaced Persons Act, Act of June 25, 1948, Pub. L. No. 80-774, 62 Stat. 1009, as amended by Act of June 16, 1950, Pub. L. No. 81-555, 64 Stat. 219, but because of misrepresentation, and because he was held to have lacked the good moral character requisite for citizenship. 453 F. Supp. at 715-16; see \textit{8 U.S.C. § 1427(a)} (1976). The court, in its discretion, examined the defendant's acts prior to the statutory periods. 453 F. Supp. at 716; see \textit{8 U.S.C. § 1427(e)} (1976).
  \item \textsuperscript{245} See notes 175-81 \textit{supra} and accompanying text.
  \item \textsuperscript{246} \textit{United States v. Rossi}, 299 F.2d 650, 652 (9th Cir. 1962).
  \item \textsuperscript{247} 299 F.2d 650 (9th Cir. 1962).
  \item \textsuperscript{248} \textit{Rossi} was a native of Italy, a country that was subject to annual quota restrictions. \textit{Id.} at 650-51. His deceased brother was born in Chile, which, like other South American countries at the time, was not subject to such restrictions. \textit{Id.} at 651. Fearing that the Italian quota would exclude him from entry into the United States, he used his brother's name when applying for a visa. \textit{Id.} at 651, 653.
  \item \textsuperscript{249} \textit{Id.} at 653-54.
  \item \textsuperscript{250} \textit{Id.} at 652 (quoting \textit{Chaunt v. United States}, 364 U.S. 350, 352 (1960)).
  \item \textsuperscript{251} \textit{Id.}
  \item \textsuperscript{252} \textit{Id.}
  \item \textsuperscript{253} \textit{Id.}
  \item \textsuperscript{254} \textit{Id.} at 652-53.
\end{itemize}
refusing to order Rossi's deportation. Proper application of the second test would have achieved the same result because the government failed to present clear, unequivocal, and convincing evidence either that the use of Rossi's real name would have led to any investigation, or that any question of eligibility might have been revealed. 255 Although the result was not erroneous, the Ninth Circuit inaccurately stated the proper test.

Other decisions dealing with misrepresentation in denaturalization situations in which it was not clear that a visa would have been denied have employed the second test; 256 several of these decisions have also recognized that the Supreme Court refused to denaturalize Chaunt because, on the facts, no investigation would have occurred. 257 The Second Circuit has held that even though the truth itself would not provide a sufficient ground for the denial of citizenship, the fact is material if the misrepresentation "closes to the Government an avenue of enquiry which might conceivably lead to collateral

255. Id. at 653-54. Apparently, the only evidence that the quota for Italy had been filled was the personal testimony of the defendant himself. No other proof was offered, nor was there any contention that the use of his true name might have led to the discovery of other facts bearing on eligibility.


Cases in which naturalization itself is the issue have also dealt with the question of materiality. One of the categories warranting a finding that the petitioner lacks the good moral character required for citizenship is the giving of false testimony to obtain any benefits under the Immigration and Nationality Act. 8 U.S.C. § 1101(f)(6) (1976). If a petitioner is found to have given false testimony, his petition may be denied. Misrepresentation in naturalization, however, presents a qualitatively different situation than that presented by deportation or denaturalization. First, a denial of a petition does not carry with it any of the drastic consequences implicit in stripping a person of citizenship or expelling him from the United States. Second, denial of a petition for naturalization does not act as a perpetual bar to naturalization. The petitioner may renew his application if he can later prove his eligibility. 3 C. Gordon & H. Rosenfield, supra note 26, § 16.12, at 16-66. On the other hand, because the status of American citizenship is so precious and cannot easily be revoked, "the Government has a strong and legitimate interest in ensuring that only qualified persons are granted citizenship." Berenyi v. District Director, 385 U.S. 630, 637 (1967); see 3 C. Gordon & H. Rosenfield, supra note 26, § 14.3, at 14-15. This interest is enhanced by the lack of a statutory requirement that the testimony be material. Any false answer is sufficient to warrant the denial of citizenship, and strict compliance with statutory provisions is required. See Kovacs v. United States, 476 F.2d 843, 845 (2d Cir. 1973); In re Hanlatakis, 376 F.2d 728, 730-31 (3d Cir. 1967); United States v. Fedorenko, 455 F. Supp. 893, 914 (S.D. Fla. 1978), rev'd, 597 F.2d 946 (5th Cir. 1979), cert. granted, 48 U.S.L.W. 3535 (U.S. Feb. 19, 1980) (No. 79-5602); 3 C. Gordon & H. Rosenfield, supra note 26, § 15.15b, at 15-49. Nevertheless, some courts have read a materiality requirement into the statute and have employed the second Chaunt test. E.g., In re Yao Quinn Lee, 480 F.2d 673, 677 (2d Cir. 1973); Klig v. United States, 296 F.2d 343, 346-47 (2d Cir. 1961); In re Sotos, 221 F. Supp. 145, 147-48 (W.D. Pa. 1963); In re Ferenci, 217 F. Supp. 714, 716-17 (E.D. Pa. 1963). But see In re Hanlatakis, 376 F.2d 728, 730 (3d Cir. 1967) (immaterial facts include those that effectively cut off a "line of inquiry which might have revealed further facts bearing on the petitioner's eligibility for citizenship.").

information of greater relevance." Information of greater relevance can easily be seen as facts that posed questions of eligibility or that might have led to denial.

In *United States v. Fedorenko*, the Fifth Circuit denaturalized a Ukrainian-born citizen who admitted that he had lied about his whereabouts and activities during World War II when he applied for a visa under the DPA. Although he had maintained that he had been a farmer and factory worker for the Germans as a prisoner of war, he had neglected to inform the consular official that he had also been a guard at the concentration camp in Treblinka. The defendant claimed that his false statement was not material because his guard service had been involuntary, and therefore, the truth of his whereabouts would not have ultimately resulted in the denial of a visa under the DPA. The district court refused to denaturalize him. It held that no clear, unequivocal, and convincing evidence had been presented to prove that he would have been excludable, either because he had served voluntarily, or because he had committed atrocities. The court attempted to deal with the second test, but found a stumbling block in the meaning of "possibly leading to the discovery of other facts warranting denial." By reasoning that the Supreme Court did not say "leading to facts which might have warranted denial," the court maintained that the word "possibly" did not refer to the existence of such facts, but rather that their existence is presupposed. Consequently, the court held that facts warranting denial must be proved to have existed. Such an interpretation completely vitiates the second test by requiring, for both tests, proof of facts warranting denial. It effectively deletes "possibly" by ignoring what the word literally connotes—that there be a chance that such facts exist.

261. 597 F.2d at 948.
262. The Displaced Persons Act excluded war criminals and those who assisted the enemy in persecuting civilian populations, among others. See notes 12-17 supra and accompanying text. Fedorenko's contention is similar to unsuccessful claims by other aliens that the involuntary nature of their activities rendered their misrepresentations immaterial. See Langhammer v. Hamilton, 295 F.2d 642 (1st Cir. 1961); In re S- & B-C-, 9 I. & N. Dec. 1168 (1961); see notes 210-13, 218-23 supra and accompanying text.
263. 455 F. Supp. at 915-17.
265. 455 F. Supp. at 915-16; see note 181 supra and accompanying text.
266. 455 F. Supp. at 916.
267. See note 181 supra and accompanying text. The district court relied on three cases. First, it used the Ninth Circuit's holding in United States v. Rossi, 299 F.2d 650, 652 (9th Cir. 1962); see notes 246-54 supra and accompanying text. Second, it followed a denaturalization case that found it unnecessary to deal with the second test because the truth clearly would have justified denial. United States v. Rieda, 337 F.2d 986 (3d Cir. 1964); see note 244 supra and accompanying text. Third, it cited a Ninth Circuit deportation case that relied on a definition of materiality found in a labor regulation, 29 C.F.R. § 60.5(g) (1972), and not on immigration law tests. La Madrid-Peraza v. INS, 492 F.2d 1297 (9th Cir. 1974); see notes 230-40 supra and accompanying
The Fifth Circuit reversed in *Fedorenko*, 268 holding that the district court's interpretation of the second test was wrong as a matter of law.269 First, the court acknowledged the disagreement concerning the interpretation of *Chaut*, and recognized that the language of the test lent itself to some ambiguity.270 It noted that requiring the government first to prove the existence of ultimate facts that would alone justify denial of citizenship would render the second test meaningless by necessitating the same requirement as that posed by the first test.271 The Fifth Circuit implied that the Supreme Court had never intended such an interpretation, by ruling that "possibly" means only that the government must prove by clear, unequivocal, and convincing evidence that the investigation the government would have made might have uncovered other facts warranting denial.272

Second, the court noted the grave consequences attendant on losing citizenship,273 and stated that the other narrowing factor in the second test was the requirement that the government prove that investigation would have occurred, not the "less stringent alternative" of proof that it might have occurred.274 The Fifth Circuit recognized that the key to the refusal to denaturalize Chaut was not that he would not have been denied citizenship on the truth, but that there was no basis for believing that the government would have made an inquiry if Chaut had revealed his minor arrest record.275 In contrast, the evidence in *Fedorenko* indicated that there certainly would have been an investigation. A former vice-consul, who had been active in administrating the DPA,276 testified that at the time, vice-consuls believed as a matter of law that concentration camp guards were ineligible for visas under the DPA.277 If there had been any indication that Fedorenko had been involved with any concentration camp, the vice-consul would have stopped the case, suspended approval, and called for further investigation.278

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269. *Id.* at 951.

270. *Id.* at 950-51.

271. *Id.* at 947, 950-51; see note 181 *supra* and accompanying text.

272. 597 F.2d at 951.

273. See note 65 *supra*.

274. 597 F.2d at 952 n.6.

275. *Id.* at 951; see notes 182-87 *supra* and accompanying text.


277. 597 F.2d at 952-53.

278. *Id.* at 953 n.7. The vice-consul testified that vice-consuls at the time considered concentration camp service to be "a contradiction in terms [and] no person who was discovered to have been a guard ever attempted to convince the vice-consuls that his service had been involuntary; instead . . . these persons admitted that they had chosen to undertake that service rather than go into forced labor divisions because the life of a guard was more comfortable." *Id.* at 952. This type of testimony, revealing the customary and invariable practice of officers issuing
The evidence indicated that a substantial question as to his eligibility existed; therefore, if it was now determined that investigation would have revealed that Fedorenko was actually serving involuntarily, this ultimate determination would not prevent a finding that the facts Fedorenko misrepresented were material. 279

Finally, in reaching its holding in Fedorenko, the Fifth Circuit considered the ramifications of the contrary interpretations espoused in the district court 280 and in the Ninth Circuit. 281 Determining materiality on the basis of the first test alone would allow an applicant for a visa or citizenship to avoid questions of eligibility by “[lying] about his background and thereby [preventing] the government from investigating his fitness at a time when he has the burden of proving [it].” 282 Therefore, because his deception has been discovered, the government would be required to conduct an investigation of the past, discover ultimate facts warranting ineligibility, and prove those facts by clear, unequivocal, and convincing evidence years later. 283

The court further stated that Fedorenko’s claim that his guard service at Treblinka had been involuntary came thirty years too late. 284 Clearly, if he had had nothing to hide, as he now asserted, he should have revealed the truth thirty years ago when the government could have capably conducted a thorough and timely investigation. 285 To hold otherwise would mean that “an applicant with something to hide would have everything to gain and nothing to lose by lying under oath to the INS.” 286 This contention is in accord with that expressed in other cases in which the defendants claimed involuntary membership in communist organizations. 287 Those courts found not only that visas at the time, is the type of evidence indicating a reasonable person standard of materiality. See note 178 supra. In addition, the use of testimony to show that the granting of a visa would have been suspended pending investigation is in line with the holdings in other cases. See notes 125, 152 supra and accompanying text.

279. 597 F.2d at 950-51.
281. United States v. Rossi, 299 F.2d 650 (9th Cir. 1962).
283. 597 F.2d at 951. The passage of time does not bar the institution of denaturalization proceedings. See note 29 supra. In cases dealing with former Nazi war criminals, the passage of time poses a uniform and serious problem for the government—a problem that the defendant can easily take advantage of. Thirty-five to forty years have passed since the events affecting eligibility occurred. Witnesses, if still alive, are old, may have failing memories, and may live abroad. Their testimony, and any other evidence that the defendant committed atrocities or acted voluntarily may be difficult, if not impossible, to obtain. See Costello v. United States, 365 U.S. 265, 283 (1961).
284. 597 F.2d at 953.
285. Id. Courts dealing with deportation and denaturalization have indicated their concern that speculation be avoided. See notes 129, 161 supra and accompanying text.
287. See notes 210-13, 218-23, 262 supra and accompanying text.
such a determination should have been made at the time of the application, but also that a determination of involuntary membership at trial would not render the misrepresented or concealed fact immaterial because the voluntariness of membership—a substantial question of eligibility—would have been resolved in the precluded investigation, and a determination of ineligibility might have resulted.\footnote{288}

**CONCLUSION**

The severe consequences inherent in a deportation or denaturalization order denote the need for a consistent test of materiality that is narrow enough to assure that such orders are not entered indiscriminately. Nevertheless, immigration to the United States and the attainment of United States citizenship are both significant privileges that demand the highest standard of truthfulness. An alien who seeks the benefits and protections of United States laws evidences a lack of respect for those laws when he offers false information in applications. Therefore, a test must be sufficiently broad to maintain the integrity of the United States and its authorized investigatory processes. If the defendant's true activities and whereabouts\textit{would} have led to an investigation that\textit{would} have revealed facts posing a substantial question of eligibility and that\textit{might} have resulted in a determination of ineligibility, the misrepresented or concealed facts must be held to be material.\footnote{289}

The nature of the pending cases involving alleged Nazi war criminals\footnote{290} highlights the need for such a test. Thirty-five years have passed since the end of a war in which the most heinous crimes were perpetrated. Witnesses are old with frail memories; other evidence of defendants' acts may be difficult, if not impossible, to obtain. Deportation or denaturalization should result if the misrepresentation of the defendant's whereabouts and activities during the war satisfies this test. Any other result would be a travesty of the United States immigration laws and of the sentiments underlying the DPA, as well as a mockery of those who were forced into the status of displaced persons by the very people whom the DPA intended to exclude.

\textit{Irene Astrid Steiner}

\footnote{288. \textit{Id.}}

\footnote{289. This synthesis of the \textit{Chaunt} and Attorney General tests would best assure fairness to both the United States and to the defendant. \textit{See} notes 175-81, 192-201, 206-08 \textit{supra} and accompanying text. \textit{But see} Note, \textit{Citizenship}, 14 Tex. Int'l L.J. 453 (1979) (focusing only on protection of the naturalized citizen while ignoring the interest of the United States and the quid pro quo required for the conferral of the privilege of citizenship).}

\footnote{290. \textit{See} notes 26-27 \textit{supra}.}