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DENATURALIZATION AND THE RIGHT TO JURY TRIAL

Recently the United States brought proceedings against a naturalized citizen, Frank Walus, to revoke his naturalization.[1] The government charged that Walus had been a member of the Gestapo during World War II and that he had committed acts of brutality, including murder, which he concealed from immigration and naturalization authorities. At the conclusion of the bench trial, his certificate of naturalization was canceled and his citizenship was revoked.[2]

There appears to be a striking similarity between Walus' denaturalization proceeding and a criminal prosecution. The ultimate facts to be proved were Walus' war crimes; the government acted as prosecutor and a serious penalty awaited the losing defendant. This similarity raises the question of whether the array of protections normally given a criminal defendant should be given to a defendant in a denaturalization proceeding. Currently, those protections are not afforded. In a denaturalization proceeding the Federal Rules of Civil Procedure apply,[3] the standard of proof is lower than that which a prosecutor must meet in a criminal trial,[4] the defendant cannot refuse to take the stand,[5] and he has no right to a jury.[6]

The question of the right to a jury in a denaturalization proceeding was first raised in 1908.[7] Although the request for a jury was denied then, and has been in every denaturalization proceeding since, defendants have continued to request a jury.[8] Courts have consistently treated the denaturalization proceeding as a matter in equity which may be tried without a jury. Although this is "settled law," defendants and commentators have continued to make strong arguments that the proceeding should not be treated as a matter in equity requiring no jury.[9]

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[1] United States v. Walus, 453 F. Supp. 699 (N.D. Ill. 1978). After the conclusion of the trial, Walus moved for a new trial on the basis of newly discovered evidence that allegedly exonerated him. This motion was denied, and on appeal from that denial the Seventh Circuit reversed the trial court's decision. United States v. Walus, Nos. 78-1732, 79-1140, 79-1587, and 79-1629 (7th Cir. Feb. 13, 1980). The case was remanded for a new trial. The Seventh Circuit's opinion did not discuss the jury trial issue, which is the subject of this recent trend.

[2] 8 U.S.C. § 1451(a) (1976) imposes a duty on United States attorneys to institute such proceedings and also gives jurisdiction. It reads in part:

> It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship. . . .

Id. There are three grounds for revocation of citizenship: (1) illegal procurement of the certificate of citizenship; (2) procurement by concealment of a material fact; and (3) procurement by willful misrepresentation. *See id.*

The government's case in *Walus* was in four counts. These counts were grounded in the requirement of 8 U.S.C. § 1427 (1976) that, to be naturalized, a person must have "good moral character." Counts I and II were predicated on alleged acts of brutality and the concealment of them. Since the acts were alleged to be material to the question of moral character, concealment of them was procurement either by concealment of a material fact or by willful misrepresentation. Count III was predicated on the alleged acts alone. The acts were alleged to show bad moral character, making the procurement illegal. Count IV was predicated on the alleged concealment alone. The concealment was alleged to be evidence of bad moral character, warranting revocation by itself, or in the alternative, the concealment amounted to procurement by concealment of a material fact or by willful misrepresentation.

Of course, if there had been no acts of brutality, there would have been no concealment, so the court rightly called the acts "the heart of this litigation." 453 F. Supp. at 700. Walus' acts during the war were the "ultimate facts" of the case, and the dramatic testimony of witnesses from three continents was directed to the question of what Walus did during the war. The prosecution offered testimony that Walus had been a member of the Gestapo and had viciously beaten and murdered innocent citizens of Czestochowa and Kielce, cities in Poland. The defense offered testimony that Walus had been taken prisoner by the German army and had been forced to work on farms in Germany throughout the war.

[3] *See* United States v. Jerome, 16 F.R.D. 137 (S.D.N.Y. 1954).

[4] *See* Schneiderman v. United States, 320 U.S. 118 (1943).

[5] *See* United States v. Matles, 247 F.2d 378 (2d Cir. 1957).

[6] *See* Luria v. United States, 231 U.S. 9 (1913); Johannessen v. United States, 225 U.S. 227 (1912); United States v. Mansour, 170 F. 671 (S.D.N.Y. 1908).

[7] United States v. Mansour, 170 F. 671 (S.D.N.Y. 1908).

[8] Walus requested a jury trial. 453 F. Supp. at 702.

[9] *See* United States v. Matles, 247 F.2d at 381. *See also, e.g.*, W. VAN VLECK, THE ADMINISTRATIVE CONTROL OF ALIENS (1932) where the author states concerning deportation:

> This process should be judged in the light of the charges upon which it is instituted, the facts which

The request for a jury in any trial must be grounded in either the sixth or the seventh amendment, for these are the only sources of the right. The sixth amendment grants the right to a jury in criminal cases,[10] and the seventh amendment grants it in certain civil cases.[11] In theory, a person deciding whether a proceeding required a jury would first consider whether it was criminal or civil, and then, if it was civil, whether it was legal or equitable. But historically, the first question to come before the court was whether the proceeding was legal or equitable.

The first reported denaturalization case in which there was a demand for a jury trial was *United States v. Mansour*[12] in 1908. The government alleged that Mansour had falsely sworn that he had resided in the United States for the required length of time before naturalization. The defendant requested a jury trial. The court, noting that the act was silent as to the method of trying the case, considered the question from first principles. The court analogized the proceeding to one arising on a bill to revoke a patent, a proceeding historically heard in courts of equity. The analogy was apt because in a denaturalization proceeding the government is attempting to revoke a privilege which it granted in reliance on the defendant's representations. Indeed, the patent analogy has been relied upon and refined by all subsequent cases dealing with the question.

It should be noted that unlike *Walus*, *Mansour* did not resemble a criminal prosecution, because an essential ingredient, the crime, was not present. In *Mansour* then, the civil/criminal distinction was not at issue; instead the legal/equitable distinction was. The *Mansour* court was correct in steering the denaturalization proceeding to the equitable side. Faced with a new form of proceeding, created by statute, the court did what every court does when reasoning from stare decisis; it found the most appropriate historical analogy. *Mansour* did not pose the thorny problems that arose in later cases, such as *Walus*, because the underlying facts did not resemble a criminal case, and no one argued that they did.

On rehearing a year later a question was raised as to the correctness of the *Mansour* decision because formal equity procedure had not been followed in the trial. The court stated that in a denaturalization proceeding there was no reason to follow equity procedure formally "[n]or is it important to try to assign the petition which the act of Congress ... provides for to the category either of a complaint at common law or a bill in equity. In form it is neither, being exactly what the act calls for, a petition. ..."[13] This conclusion to the *Mansour* case and the accompanying comment by the court demonstrate that *Mansour* did not finally settle the question. Nevertheless, the case had set the tone for all future cases with its compelling analogy to the patent revocation.

In *Johannessen v. United States*[14] the Supreme Court eliminated the ambiguity created by *Mansour*. Like Mansour, Johannessen was alleged to have obtained his naturalization by falsely swearing that he had complied with the residency requirements. Johannessen did not request a jury. The precise question faced by the Court was whether Congress could authorize by statute a direct attack on the judgment of a court admitting an alien to citizenship. But the jury question was nevertheless settled by the Court's careful and deliberate denomination of the proceeding as one in equity. Again the proceeding was analogized to a revocation of a patent or other public grant that was obtained by fraud. Since there was no doubt that patents and other public grants of privilege could be revoked in actions in equity,[15] the Court had no trouble, once it had made the analogical leap, in holding that certificates of naturalization could be revoked in the same way. Thus it was settled by the Court that the matter was a proceeding in equity.

must be proved, the nature of the issues involved, and above all, by its purposes and effects upon the persons against whom it is brought. The study of departmental records and judicial decisions makes one analogy constantly recur, that of criminal proceedings. The courts have reiterated that the proceedings to expel are not criminal but administrative. These words are mere labels.... The list of causes for expulsion reads in part like a criminal code....

Id. at 219.

[10] The sixth amendment reads, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to ... an impartial jury." U.S. CONST. amend. VI.

[11] The seventh amendment reads, in pertinent part: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved...." U.S. CONST. amend. VI.

[12] 170 F. 671 (S.D.N.Y. 1908).

[13] *Id.* at 676.

[14] 225 U.S. 227 (1912).

[15] The court in *Johannessen* stated:

"It may now be accepted as settled that the United States can properly proceed by bill in equity to have a judicial decree of nullity and an order of cancellation of a patent issued in mistake or obtained by fraud, where the Government has a direct interest, or is under an obligation respecting the relief invoked."

225 U.S. at 239 (quoting United States v. Beebe, 127 U.S. 338, 342 (1887)).

While both *Mansour* and *Johannessen* held that the denaturalization proceeding was like a revocation of a patent, *Mansour* held only that this similarity made the proceeding like an equity proceeding, whereas *Johannessen* held that the proceeding was an equity proceeding.

Both *Mansour* and *Johannessen* involved violations of residency requirements. In such cases the analogy between the revocation of a patent and the revocation of naturalization is easier to grasp than in a case such as *Walus* where the revocation is sought because of the defendant's past criminal acts.[16] Granted that concealment or fraud is involved in both types of cases, the type of fact concealed in *Mansour* and *Johannessen* is a morally neutral fact. It loses its neutrality only on application for citizenship. War crimes are not morally neutral. In contrast to residency cases, the wickedness of the concealment pales before the wickedness of the fact concealed. It is Walus' alleged atrocities that inspire moral indignation, and it was for those atrocities that his American citizenship was revoked.

The denaturalization statute itself appears to recognize the distinction between acts and concealment. The statute states generally that an applicant for citizenship must be a person of good moral character and that conduct at any time of his life may be taken into consideration in determining whether his character is good.[17] In a separate section it states that no person shall be regarded as having good moral character if he gives false testimony for the purpose of obtaining citizenship.[18]

In 1913 the Supreme Court first considered a request for a jury in a denaturalization proceeding. In *Luria v. United States*[19] that request was denied on the ground that the proceeding was in equity. The Court refined the patent analogy by speaking in more abstract terms than had prior lower courts. "The right asserted and the remedy sought ... [are] essentially equitable, not legal...."[20] In its discussion of the legal/equitable distinction, the *Luria* Court quoted *Parsons v. Bedford*,[21] an 1830 case interpreting the seventh amendment. In *Parsons* the Court had said:

> By *common law*, they [the Framers] meant what the constitution denominated in the third article "law;" not merely suits, which the *common* law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered ....[22]

The *Parsons* Court thus urged that the substance of the proceeding be dispositive of the question, not merely the ancient category to which it may have belonged when circumstances were different. What seemed appropriate in *Luria*, another residency case, therefore may not be appropriate in a war crimes case.

In 1943, in *Schneiderman v. United States*,[23] the Supreme Court retreated slightly from its insistence that denaturalization was a simple equity proceeding and introduced a new standard of proof in denaturalization proceedings. The case against the defendant must be clear and convincing so as not to leave the issue in doubt.[24] This rigorous standard was introduced because the Court recognized that

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[16] This free denomination of the atrocities alleged to have been committed by Walus as criminal acts may seem to beg the question. It does not take account of the intricate questions of (1) whether the acts were technically "crimes" in the jurisdiction where they were committed, the German Reich, and (2) if they were not, whether it is fair to say that Walus's citizenship was revoked for past crimes. Yet in light of the atrocious nature of the acts alleged, it seems skittish to shy away from the word "crimes." Such acts are often called "war crimes" and it would be fair to label them mala in se. Such acts were labeled crimes by the International Tribunal at Nuremberg and, as one author wrote "to state the German lawyers' proposition [that the mass unjustified killings were not murder since no statute forbade them] is to demonstrate its mélange of impudence, cynicism, and absurdity." Glueck, *The Nuremberg Trial and Aggressive War*, 59 HARV. L. REV. 396, 440 (1946).

[17] 8 U.S.C. § 1427(a)(3), (e) (1976) states in part:

> (a) No person, except as otherwise provided in this subchapter, shall be naturalized unless such petitioner ... (3) during all the period referred to in this subsection has been and still is a person of good moral character....
>
> ....
>
> (e) In determining whether the petitioner has sustained the burden of establishing good moral character ... the court shall not be limited to the petitioner's conduct during the five years preceding the filing of the petition, but may take into consideration as a basis for such determination the petitioner's conduct and acts at any time prior to that period.

[18] 8 U.S.C. § 1101(f)(6) (1976) states in part: "No person shall be regarded as, or found to be, a person of good moral character who ... has given false testimony for the purpose of obtaining ... [citizenship]."

[19] 231 U.S. 9 (1913).

[20] *Id.* at 27–28.

[21] 28 U.S. (3 Pet.) 433 (1830).

[22] *Id.* at 447 (emphasis in original).

[23] 320 U.S. 118 (1943).

[24] *Id.* at 125, 158.

denaturalization "is more serious than a taking of one's property, or the imposition of a fine or other penalty.... [Citizenship] once conferred should not be taken away without the clearest sort of justification and proof."[25]

After *Schneiderman* other cases also recognized the uniqueness of proceedings granting and revoking citizenship. One such case was *United States v. Stromberg*.[26] The issue in *Stromberg* was unusual. While the denaturalization proceeding was pending, Congress eliminated, as a ground for denaturalization, the ground on which the government had brought the action against Stromberg. The government amended its complaint to conform to the new statute, but the court refused to allow the amendment to relate back under rule 15(c) of the Federal Rules of Civil Procedure, stating that "[i]t is questionable whether the doctrine of 'relation back' should be applied with the same liberality when it will deprive a party against whom the amendment is made of a substantial right, ... as when its purpose is simply to lift the bar of the statute of limitations."[27] The court then quoted *Schneiderman*: "'A denaturalization suit is not a criminal proceeding. But neither is it an ordinary civil action since it involves an important adjudication of status.'"[28] These words are reminiscent of the *Mansour* court's struggle nearly fifty years earlier to place the proceeding somewhere between an action at law and a bill in equity.

It should be noted that *Schneiderman* and *Stromberg* were *not* residency cases. Each involved something more serious. The government proceeded against Schneiderman because he had been a member of the Communist Party and against Stromberg because he had been engaged in an unlawful occupation, bookmaking. It is reasonable to suppose that it was these underlying facts, giving a criminal tinge to the cases, that made these courts hesitant to say that the matter should be treated simply as equitable, but if that was the case, the opinions do not acknowledge it. They only speak in terms of the importance of the privilege which will be taken away if the government wins.

In *United States v. Matles*[29] one court of appeals squarely faced the question whether denaturalization proceedings might in some circumstances be criminal in nature. In this case the defendant desired not to take the stand. If the action were criminal, there would be no question that he could refuse to do so. The court however found that the denaturalization proceedings were not sufficiently criminal to permit assertion of the fifth amendment privilege. The court gave three reasons for its finding: first, denaturalization proceedings had been labeled civil for slightly different purposes in other cases;[30] second, the proceedings are based on a theory of recission of a status obtained by fraud;[31] and third, little prejudice attaches to a defendant's refusal to answer specific questions once he takes the stand, since such refusal would be before a judge, not a jury.[32]

The judge who wrote the *Matles* opinion disclosed that he had significant reservations about all three rationales. First, this type of case had been distinguished from ordinary civil actions;[33] second, "the issues [involved were] ... close to those involved in a prosecution"[34] under the Smith Act[35] or the Internal Security Act;[36] and third, "one who takes the stand must play a dangerous game of properly timing his claims of privilege to avoid both contempt and waiver."[37]

Nevertheless, as one of the concurring opinions in *Matles* points out, there is a specific danger that the right not to take the stand is designed to guard against: it is the prejudice that might be engendered in the jury when and if the defendant refuses to answer certain questions as he is privileged to do under the fifth amendment.[38] Where there is no

[25] *Id.* at 122. The following suggestive language is in a denaturalization case decided shortly after *Schneiderman*.

> This is neither a criminal, quasicriminal or civil action, but, on the contrary, is an action in equity. The court is of the belief that the defendant is entitled to that rule of law which requires that a man shall be proved guilty beyond a reasonable doubt before he should be so found.

United States v. Wezel, 49 F. Supp. 16, 17 (S.D. Ill. 1943).

[26] 227 F.2d 903 (5th Cir. 1955).

[27] *Id.* at 906.

[28] *Id.* (quoting United States v. Schneiderman, 320 U.S. at 160).

[29] 247 F.2d 378 (2d Cir. 1957).

[30] *Id.* at 381 (citing United States v. Schneiderman, 320 U.S. at 160).

[31] 247 F.2d at 381 (citing Luria v. United States, 231 U.S. at 27-28).

[32] 247 F.2d at 381 (citing 8 WIGMORE ON EVIDENCE § 2268 (3d ed. 1940)). The first two reasons overlap substantially because it was on the recission theory that the cases cited in rationale number one relied. Yet they are not identical because one relied on the theory itself while the other relied on the unequivocal assertion that the matter was civil.

[33] 247 F.2d at 381.

[34] *Id.*

[35] 18 U.S.C. § 2385 (1976).

[36] 50 U.S.C. §§ 781-858 (1976).

[37] 247 F.2d at 382.

[38] *Id.* at 382-83 (Lumbard, J., concurring).

jury, a right not to take the stand at all seems superfluous. Thus it would seem that a defendant in a denaturalization proceeding should ask for both, the jury and the right not to take the stand, or neither.

Thus, with such minor concessions as *Schneiderman* and *Stromberg*, the courts have consistently resisted the attempts of defendants in denaturalization proceedings to avoid the rigors of an equitable proceeding. There are hints throughout the case law that there are as many as three distinct rationales tipping the scales in favor of treating the proceeding as one in equity.

The first may be the lack of a certain nexus between trial and punishment. In *Walus*, for example, the court said: "[C]ivil proceedings are not . . . considered criminal matters simply because certain allegations, if proven, would support a criminal indictment. A denaturalization proceeding is [an action] . . . to consider *only* whether the defendant's Certificate of Naturalization should be revoked and his citizenship canceled."[39] This comment underscores the fact that there is no certainty that denaturalization will be followed by deportation. And there is no way to predict what the effect of deportation on the deportee will be, even if deportation does take place. Luria, for example, had resided in South Africa for quite some time before he was denaturalized. It is absurd to call his loss of American citizenship a punishment, even if it may seem to be such in the abstract.[40] In contrast, no one is indifferent to the loss of money or liberty that follows a criminal conviction. Nor are most people indifferent to the unquantifiable but very real disgrace that follows a criminal conviction. The hard fact of a criminal conviction is that real punishment follows. Where that hard fact is lacking, as in a denaturalization proceeding, the similarity between the two is considerably weakened.

Matles gives a clue to another rationale for treating the proceeding as equitable. Where one criminal protection, such as a jury, is afforded the defendant, all such protections may then become necessary if they are viewed as interdependent. *Matles* pointed out how denaturalization proceedings would be burdened if all the safeguards of criminal trials were instituted.

Finally, the rescission theory itself may indicate a third rationale, one having to do with burdens on the respective parties in a denaturalization proceeding. The Court in *Nishimura Ekiu v. United States*[41] pointed out:

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.[42]

In other words, the United States may make the obstacles to naturalization as high as it wishes. Yet the obstacles to naturalization are not high. The requirements for naturalization, as set forth in the statute, are simple, easy to understand, not oppressive and even generous to the applicant.[43] There is a certain appropriate parallelism in the denaturalization proceeding. Since the government has not chosen to place great obstacles before an alien seeking citizenship, the courts have not seen fit to place great obstacles before the government revoking it.

Fairness to all the parties is the essence of an equitable proceeding. The government has unlimited power to keep aliens out, which it chooses not to exercise fully. In light of this fact, and the other rationales mentioned, the courts have chosen fairly and appropriately to avoid equating denaturalization proceedings with criminal proceedings, however much the unusual facts of a case like *Walus* make them appear similar on the surface.

[39] United States v. Walus, 453 F. Supp. at 703 (emphasis added).

[40] Justice Brandeis wrote that deportation may mean the "loss of both property and life; or all that makes life worth living." Ng Fung Ho v. White, 259 U.S. 276, 284 (1922). The case of Flemming v. Nestor, 363 U.S. 603 (1960), gives a rare glimpse at one kind of loss that may follow deportation. Nestor was deported for being a member of the Communist Party after living in the United States for 42 years. His social security benefits, for which he had become eligible one year before deportation, were terminated. However, in spite of the language of Justice Brandeis and the facts of *Flemming*, there is no certainty in any case that deportation will result in any legally cognizable loss to the deportee.

[41] 142 U.S. 651 (1892).

[42] *Id.* at 659.

[43] For example, even persons who have lost their U.S. citizenship and persons who are citizens of enemy countries are not precluded from naturalization. *See* 8 U.S.C. § 1435(a) and § 1442(a) (1976). The basic requirements for naturalization are: a person must (1) reside in the U.S. for five years; (2) the five years must be immediately preceding the admission to citizenship; and (3) he must be a person of good moral character. 8 U.S.C. § 1427(a) (1976). The person must have a knowledge of the English language and of the history and government of the United States. 8 U.S.C. § 1423 (1976).