ORIGINAL

In the

Supreme Court of the United States

FEODOR FEDERENKO,	)	
	)	
PETITIONER,	)	
	)	
v.	)	No. 79-5602
	)	
UNITED STATES,	)	
	)	
RESPONDENT.	)	
	)	

Washington, D. C.
October 15, 1980

Pages 1 thru 38.

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - :

3 FEODOR FEDORENKO, :

4 Petitioner, :

5 v. : No. 79-5602

6 UNITED STATES, :

7 Respondent. :

8 - :

9 Washington, D. C.

10 Wednesday, October 15, 1980

11 The above-entitled matter came on for oral argument

12 at 10:03 o'clock a.m.

13 BEFORE:

14 HON. WARREN E. BURGER, Chief Justice of the United States
HON. WILLIAM J. BRENNAN, JR., Associate Justice
15 HON. POTTER STEWART, Associate Justice
HON. BYRON R. WHITE, Associate Justice
16 HON. THURGOOD MARSHALL, Associate Justice
HON. HARRY A. BLACKMUN, Associate Justice
17 HON. LEWIS F. POWELL, JR., Associate Justice
HON. WILLIAM H. REHNQUIST, Associate Justice
18 HON. JOHN PAUL STEVENS, Associate Justice

19 APPEARANCES:

20 BRIAN M. GILDEA, ESQ., Celentano & Gildea, 265 Church Street, New Haven, Connecticut 06510; on behalf of
21 the Petitioner.

22 BENJAMIN R. CIVILETTI, Attorney General of the United States, Department of Justice, Washington, D.C. 20530;
23 on behalf of the Respondent.

24

25

C O N T E N T S

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BRIAN M. GILDEA, ESQ.,
on behalf of the Petitioner 3

BENJAMIN R. CIVILETTI, ESQ.,
on behalf of the Respondent 21

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COTTON CONTENT

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in Fedorenko v. United States.

Mr. Gildea, you may proceed whenever you are ready.

ORAL ARGUMENT OF BRIAN M. GILDEA

ON BEHALF OF THE PETITIONER

MR. GILDEA: Mr. Chief Justice, and may it please the Court:

The case of Feodor Fedorenko v. United States, which is now before this Court, is an appeal from the 5th Circuit Court of Appeals, which reversed the judgment of the District Court for the Southern District of Florida in a denaturalization proceeding on grounds that the District Court erred in its interpretation of 8 United States Code 1451(a), and because that court also erred in finding an equitable alternative basis for its holding in that lower court decision.

Although three challenges were raised by the Government in its appeal before the 5th Circuit, the 5th Circuit decision was limited to whether or not the court erred in its interpretation and application of the second standard in Chaunt, which comes out of 8 United States Code 1451(a), and whether that court had no basis for an equitable holding, which it did find.

Precedent for this case arises out of the 1969 Supreme Court decision of Chaunt v. United States. In that

1 case the Supreme Court was asked to interpret the meaning of
2 the materiality standard as imposed by the statute. The
3 District Court, in following the precedent, and the Supreme
4 Court's determination of what was a materiality question, held
5 that the Government in the lower court failed to prove by
6 clear, unequivocal, and convincing evidence that the peti-
7 tioner's visa was illegally procured by material misrepresenta-
8 tion under 8 U.S.C. 1451(a).

9 The Court of Appeals disagreed with the lower court
10 as to its meaning of Chaunt, and held that the Government did
11 in fact meet its burden of proof under the second materiality
12 standard as set forth in Chaunt. The Court of Appeals agreed
13 with the District Court in its finding in holding that the
14 Government had not met its burden in the first materiality
15 standard test.

16 The Court of Appeals also disagreed with the District
17 Court in that there was no precedent for the District Court
18 to hold that it could consider equitable grounds as an alterna-
19 tive holding in its case. The Court of Appeals then reversed
20 and remanded the appeal back to the District Court.

21 QUESTION: Counsel, just as a matter of practical
22 information, if Mr. Fedorenko loses this appeal or this review,
23 what happens to him? Is he deportable?

24 MR. GILDEA: Your Honor, if his citizenship is taken
25 away, he would be subject to further proceedings under the

1 Deportation Section of the Immigration and Naturalization Act,
2 which would require further proceedings. He just simply loses
3 his citizenship at this juncture, if the Supreme Court so holds
4 that the appellate court was correct.

5 By way of background, the petitioner in this action,
6 Mr. Feodor Fedorenko, was born in 1907 in Sivasch, Ukraine,
7 subject of the USSR, and received a third-grade education.
8 In 1941 he was mobilized into the Russian army along with his
9 truck and while serving in the Russian army, his group was
10 overrun by the German forces --

11 QUESTION: Within three weeks of his induction?

12 MR. GILDEA: That's correct, Your Honor. -- and taken
13 prisoner by the Germans. Subsequently he was transported to
14 five different camps, which are cited in the brief. And in
15 those camps he was starved, he was beaten, and he was forced
16 to work or die. He was then trained at Travnicki to serve as
17 a guard and was given a uniform, boots, and trained to operate
18 and handle a weapon. That was a rifle. He was then sent to
19 the Treblinka Camp, where he serveed involuntarily as a guard
20 for 10 months. After the uprising in Treblinka in August,
21 1943, he was assigned back to Travnicki, then to Poelitz,
22 and then to Hamburg, all while under the control of the German
23 army.

24 QUESTION: Mr. Gildea, just so I can follow this cor-
25 rectly, are you telling us what the District Court found or

1 what your client testified to? Are these undisputed facts?
2 As I understand it, there is some controversy about the facts.
3 MR. GILDEA: These are facts that I'm stating to the
4 Court are not only the testimony of my client but the finding
5 of the lower court that he did in fact serve involuntarily and
6 that he did, in fact, go to these various camps.
7 QUESTION: Why is that relevant now, here?
8 MR. GILDEA: Your Honor, it's only relevant in the
9 sense --
10 QUESTION: The question here is whether he concealed
11 relevant information, is it not?
12 MR. GILDEA: That is correct, Your Honor. The reason
13 why I bring this fact out to Your Honors is that in his move-
14 ment he was transferred not only to Treblinka but also to
15 Poelitz, which was a labor camp. That fact was ultimately
16 revealed to the immigration authorities, although Treblinka
17 was concealed. And that becomes an important issue in this
18 case, as I will get to.
19 When the war ended the petitioner worked for the
20 British forces until 1949 and thereafter applied for immigra-
21 tion into the United States through the vice-consular office
22 in Germany, was accepted, and came to the United States in 1949.
23 From that point on he resided in Waterbury, Connecti-
24 cut, up until the time of his retirement from his place of
25 employment and in 1970 he received his naturalization after

his application filed in 1969, and in 1977 the Government commenced these proceedings against Mr. Fedorenko, seeking to strip him of his naturalization, claiming that he had made a material misrepresentation in procuring his visa to the United States, that he had committed atrocities at the Treblinka death camp, and that he had been in service in the German army.

After a trial which was conducted in part in Waterbury, Connecticut, and then in Fort Lauderdale, Florida, the District Court in a 54-page decision rendered judgment for the petitioner. The District Court rejected the testimony of Treblinka survivors, who testified at that trial regarding Mr. Fedorenko and his activities at the Treblinka death camp.

Mr. Fedorenko, in marked contrast to the testimony of the witnesses who testified who came over from Israel, denied all of the allegations and denied all of the testimony against him with the exception of the fact that he was indeed a guard in Death Camp No. 1, but only a perimeter guard and had nothing to do with the actual operation of the gas chambers.

The Court also found, in its 54-page decision, that the petitioner served involuntarily as a guard under a threat of death, and that his misrepresentations were not material under either of the tests in Chaunt v. United States. The District Court also found an alternative holding for its decision on equitable grounds.

The Government appealed, claiming the District Court

erred in rejecting testimony of witnesses, and in applying the materality standard, and in using equitable considerations as an alternative holding.

The 5th Circuit Court of Appeals did not rule on the District Court's rejection of the testimony of the Treblinka witnesses. It simply ruled only on the grounds as to whether or not the Government had met its burden of proof as to the second materiality standard and whether the District Court had authority to enter an alternative holding on equitable grounds.

It was, indeed, critical to the Government's appeal before the 5th Circuit to convince that court that the testimony of one Kempton Jenkins established the clear, unequivocal, and convincing standard required by Chaunt. The testimony of Mr. Jenkins was the only testimony offered by the Government in an attempt to satisfy that standard.

The District Court rejected a substantial portion of Mr. Jenkins' testimony because it was circumstantial, inaccurate, and not clear, unequivocal, and convincing to prove a material misrepresentation under either of the Chaunt standards. As in Chaunt, the Government here was given one fact and that was the petitioner's presence at Poelitz, which was a known labor camp. And that fact should have, according to the testimony of Mr. Jenkins, triggered an investigation into Mr. Fedorenko's background. Either it did not or the

investigation which was conducted did not disqualify the petitioner.

The record is unclear as to what specifically happened with Mr. Fedorenko at the time that he filed his petition for visa to the United States in 1949, because the Government did not produce as an essential witness in this case Mr. Ralph G. Clark, the vice consul who processed his visa.

QUESTION: Now, as I understand it, Mr. Gildea, Jenkins was also a vice consul, was he not?

MR. GILDEA: That is correct, Your Honor.

QUESTION: And he testified, did he not, that a guard who served in a concentration camp was ineligible as a matter of law for a visa, did he not?

MR. GILDEA: That is correct, Your Honor.

QUESTION: And that's what he testified. I know that the district judge did not accept -- he testified as an expert, as I recall, wasn't it? And the -- that was not accepted, or made a finding of fact by the district judge. But had it been Jenkins' testimony to that effect, would that not be the end of the case? Wouldn't that satisfy the first Chaunt test?

MR. GILDEA: I believe it would. If I may direct a comment to your question, Justice Brennan, in reference to that. It should be noted that Mr. Jenkins' testimony with reference to voluntariness, that is, whether or not Mr. Fedorenko's service was voluntary, was based upon his opinion from hearsay

evidence or conversation that he had with other vice consuls, and because of only a very limited contact with three other guards, whether they were personal contacts or contacts with the other consuls, I'm not sure. But he did not at any time ever interview or refuse admittance by way of visa for any guard who served at the Treblinka camp.

Furthermore, the District Court rejected his interpretation of voluntary because to accept his opinion of voluntary status would mean that those survivors of Treblinka who have found their way to the United States would have been rejected by his standard, because they in some way served at the Treblinka death camp and processed other Jews and Christians to their death.

Now if one accepts the fact that the kapos that were at the Treblinka camp and that the laborers who were forced to perform mechanical tasks in processing these people into the gas chambers, according to Jenkins' standards, committed voluntary acts or acquiesced in the German efforts to annihilate people because of their religion, that is, the Jews; to annihilate people because of their inferior background, that is, the Ukrainians, the Poles, the Eastern Europeans; then they would not be admitted to the United States. Their service would have been considered voluntary and not involuntary.
And the District Court felt that involuntary was a very crucial key to this case, and ruled, after listening to the testimony

of Mr. Jenkins and after listening to the testimony of all the survivors of Treblinka, and Mr. Fedorenko, that his definition of voluntary should be rejected.

QUESTION: Well, didn't the 5th Circuit hold, though, that, "We have held that the defendant obtained his citizenship by misrepresentation, concealment of his whereabouts during the war years, and his service as a concentration camp guard"?

MR. GILDEA: Excuse me, I'm sorry; I didn't --

QUESTION: Didn't the 5th Circuit hold at page 118 of the Appendix, "We have held, however, that the defendant obtained his citizenship by misrepresentation and concealment of his whereabouts during the war years, and his service as a concentration camp guard"?

MR. GILDEA: That is correct, Your Honor. That was the holding of the 5th Circuit Court of Appeals but not the District Court.

QUESTION: Well, isn't that the only issue here now?

MR. GILDEA: That's correct, Your Honor. The issue --

QUESTION: The concealment. The concealment.

MR. GILDEA: That's correct. And the issue is whether or not the concealment of his whereabouts during World War II, that is, his presence at the Treblinka concentration camp, was a fact that would have denied him admission under either the first or the second test.

Now, the Government claims that the nondisclosed fact,

that is, Treblinka or his presence at Treblinka as a guard would have triggered an investigation resulting in the denial of his visa.

This case is distinguishable from the Chaunt case in some minor respects. And one of the respects I wish to point out is this. In the Chaunt case the Supreme Court had ruled that the nondisclosed membership of Mr. Chaunt in the Communist Party was a fact in and of itself that should have denied citizenship, whereas this petitioner's nondisclosed guard duty at Treblinka was found by the District Court as nondisqualifying, that that fact in and of itself would not have denied him admission to the United States. In Chaunt the Supreme Court also considered additional facts to see whether the second test had been satisfied.

In Chaunt the Supreme Court considered whether the nondisclosure of an arrest record was a material misrepresentation under the second test of Chaunt. It ruled, no, because the ultimate facts, that is, the cause for the basis for arrest, although involving convictions of minor crimes, was of an extremely slight consequence.

The District Court also looked into the background of Mr. Fedorenko, the petitioner, in this matter, and in the evidence that was offered by the Government, evidence to establish those ultimate facts -- that is, his presence at Treblinka, the voluntariness of his services, and the commission of

atrocities, were ultimate facts that the court ruled upon -- worked in favor of the petitioner, and the court concluded that the petitioner had not committed atrocities, had not served voluntarily, and that these facts would not have denied him a visa, and therefore no material misrepresentation had been committed.

It is interesting to note that the 5th Circuit Court of Appeals dropped from its decision the essential term that had been contained in the Supreme Court's decision of Chaunt, and that was the term, "unequivocal." The Supreme Court had held in Chaunt that the Government must prove by clear, unequivocal, and convincing evidence, that there was a material misrepresentation.

The District Court used the full meaning of Chaunt in its application to the facts in this case, whereas the 5th Circuit Court of Appeals slightly modified the meaning of Chaunt, not only by dropping that term from the standard that the Government must establish in its proof, but also modified some of the words in the Chaunt decision.

The Court of Appeals in its interpretation of Chaunt said that "the test of Chaunt, including, had the petitioner disclosed his presence at Treblinka, would have conducted an inquiry that might have resulted in a denial of a visa." The Supreme Court in the last few words of its second standard in Chaunt did not use the term "might, but used the term "would."

Thus the 5th Circuit Court of Appeals really disagreed with the District Court by saying, the Government need only prove or establish that there is a possibility of an investigation and that possibility --

QUESTION: Mr. Gildea, I fell off the wagon in your last comment. I have Chaunt in front of me. "We only conclude that in the circumstances of this case the Government has failed to show by clear, unequivocal, and convincing evidence either (1) or (2), that their disclosure might have been useful." Did you say that they said it would have been useful?

MR. GILDEA: That is, the 5th Circuit Court of Appeals said that the Government "would have conducted an inquiry that might have resulted in a denial of a visa." So, in other words, the 5th Circuit Court of Appeals creates a burden of saying that fact, nondisclosure, absolutely would have caused an investigation. Instead of saying the term "might" or "possibly," it said it would have.

QUESTION: That's a test more favorable to you, isn't it?

MR. GILDEA: The first half of it is, Your Honor.

QUESTION: Yes.

MR. GILDEA: That's correct, but the second half isn't. That is, where it says, it "might have resulted in a denial of a visa," whereas the Supreme Court --

QUESTION: What's the difference between that, and

"possibly leading --

MR. GILDEA: All right.

QUESTION: -- to the discovery of other facts"?

MR. GILDEA: But the last few words of the Supreme Court's decision says that it "would have justified denial of citizenship or that the facts would have warranted denial of citizenship." Those are --

QUESTION: Yes -- now, that's from what?

MR. GILDEA: That is from Chaunt, Your Honor, the second standard in Chaunt. The Supreme Court commented on --

QUESTION: Well, I'll read (2) again, that "their disclosure might have been useful." Reading on --

MR. GILDEA: Excuse me, Your Honor. Are you reading from the first section of Chaunt or from the conclusions of Chaunt?

QUESTION: I'm reading from the next to the last paragraph of the majority opinion.

MR. GILDEA: All right. Earlier in the decision of the Supreme Court, it also talked in terms of the two standards of Chaunt and it used this word -- that would be the third page of its opinion -- and it said, "True facts might have led to the disclosure of other facts which would justify denial of citizenship." And then in its --

QUESTION: Well then, you're saying that the Court's opinion is somewhat ambiguous. This is not the first time but --

1 MR. GILDEA: That apparently has resulted in the
2 choice of words in that decision and because there did seem to
3 be a change in the opinion as you go along, that caused some
4 of the confusion that exists between the District Court's
5 interpretation and the interpretation given by the 5th Circuit
6 Court of Appeals.
7 QUESTION: Mr. Gildea, let me see if I understand
8 what your interpretation of Chaunt is. If I understand what
9 you're saying, it is that there might have -- had the fact been
10 disclosed there might have been an investigation, but the
11 Government has the burden of proving that had the investigation
12 been thorough and successful and all the rest, there were facts
13 in existence which would have warranted the denial of citi-
14 zenship, so the "might" goes to whether there would have been
15 any -- There are two doubtful facts -- One, there may or may
16 not have been an investigation; two they may or may not have
17 discovered the facts. But you say, if I understand you cor-
18 rectly, had everything been done properly there were facts to
19 be discovered, which would have warranted the denial of citi-
20 zenship. They had to prove that.
21 MR. GILDEA: That's correct. That was their burden,
22 they would have to prove that. And because, as in Chaunt, what
23 was the reason or the purpose for the Supreme Court to
24 look into Mr. Chaunt's background? Why did the Supreme Court
25 examine his arrest record? To determine that those ultimate

1 facts would not have denied him his citizenship.

2 QUESTION: And the reason that the proof failed in

3 Chaunt was that when you get to the whole bottom of the story

4 the Government failed to establish any fact which -- he failed

5 to establish membership in the Communist Party, which would

6 have been a fact warranting denial of citizenship.

7 MR. GILDEA: That would have satisfied the first test

8 but as to the second test, the Government failed to prove that

9 the ultimate fact, that is the basis, the reason for his ar-

10 rests would have led the Government to information about his

11 activities and involvement in the Communist Party.

12 QUESTION: And that those activities would have

13 justified a denial of citizenship.

14 MR. GILDEA: Absolutely.

15 QUESTION: I take it then you think a court dealing

16 with a case like this must decide whether or not the facts

17 about your client, if they had been revealed or if an investi-

18 gation had revealed all the facts, the true facts, the courts

19 would have to decide whether those facts would warrant the

20 denial of citizenship.

21 MR. GILDEA: That's correct, sir.

22 QUESTION: But if you look at it the other way,

23 Mr. Gildea, if the test is that it would have triggered an

24 investigation that might have led to the discovery of facts,

25 whether or not it in fact did, that's all the Government's

burden is. That's very different, isn't it, from what you insist on? You put the "would" at the place I suggested maybe should be read "might."

MR. GILDEA: I feel that the District Court's opinion, its interpretation of Chaunt, and the argument that I'm trying to make before this Court, is a middle road argument. I don't feel it's an extreme argument, whereas I think the Government's argument that says --

QUESTION: You do wind up, that the investigation must uncover facts the Government must prove, that the investigation would have uncovered facts which would have resulted in the denial of naturalization. Isn't that your position?

MR. GILDEA: I would think that --

QUESTION: Whereas, it's a lesser burden for the Government if all they have to prove is that it would have triggered an investigation that might have led to facts.

MR. GILDEA: That's right.

QUESTION: Well, isn't that what the difference between you and the Government is?

MR. GILDEA: I think so.

QUESTION: But pursuing my question, assume you're right on what the standard is, is it clear that his service as a guard would not have disqualified him for citizenship as a matter of law?

MR. GILDEA: That was the opinion of the District

1 Court.

2 QUESTION: And one which the Court of Appeals didn't

3 have to reach, I take it?

4 MR. GILDEA: Well, the Court of Appeals found facts

5 concerning Mr. Jenkins' testimony which were rejected by the

6 District Court. It read more into his testimony. It felt that

7 his testimony was entirely supported --

8 QUESTION: So did the Court of Appeals find facts

9 which it decided would have denied him citizenship?

10 MR. GILDEA: That's correct.

11 QUESTION: Well, then --

12 MR. GILDEA: That was, the Court of Appeals substi-

13 tuted its judgment for that of the District Court, which sat

14 there listening to all the witnesses.

15 QUESTION: Well, and suppose the Court of Appeals,

16 we accept that, then, then the difference between you and

17 the Government is sort of irrelevant as to what the standard

18 is because the Court of Appeals found some new facts, but it

19 also found that those facts would have denied him citizenship?

20 Is that what they did?

21 MR. GILDEA: No, I don't think so. I think that --

22 QUESTION: Well, you just said it was.

23 MR. GILDEA: Well, maybe I misstated it. I'm sorry,

24 Justice. In effect -- I want to point out that the 5th

25 Circuit Court of Appeals expressed the same confusion that may

have resulted in the reading of Chaunt itself, because the 5th Circuit Court of Appeals in its own decision on the same page interposed the terms "might" and "would."

QUESTION: So you -- you're suggesting, then, that the Court of Appeals didn't reach the question of whether the facts as found by them would have?

MR. GILDEA: That's correct. I think the District Court simply ruled that there was a possibiity --

QUESTION: The Court of Appeals.

MR. GILDEA: The Court of Appeals; correct. The Court of Appeals ruled that there was a possibility, and certainly that's all the government had to prove, just the possibility.

QUESTION: No, but did it -- it found some facts. Did it say that on these facts, which we think the record reveals, these facts would have resulted in his denial of citizenship?

MR. GILDEA: Yes, I think they did come to that conclusion.

QUESTION: When you're talking about something that would have triggered an investigation 30 years ago or 40 years ago or 20 years ago and say that the standard is that the Government must prove that the investigation would have resulted in the denial of naturalization, you're really going way back into the cases of missing witnesses and difficult information to come by, aren't you?

MR. GILDEA: That's correct, Your Honor. The burden is two-fold, the burden of the petitioner not being able to offer the witnesses that would support his claim of involuntary service. Those were witnesses that were in the Soviet Union, and which the District Court moved were not essential in its decision in this case. And the burden of the Government in establishing witnesses that were present at the time, being able to give evidence to the Court as to the circumstances then and there existing.

MR. CHIEF JUSTICE BURGER: Mr. Attorney General.

ORAL ARGUMENT OF ATTORNEY GENERAL BENJAMIN R. CIVILETTI
ON BEHALF OF THE RESPONDENT

MR. CIVILETTI: Mr. Chief Justice, and may it please the Court:

Although the facts in this case stretch back ten years, 35 years, those facts, and the issues presented in the case, have been relevant throughout that time, are important today, and I suggest are important for the future.

Over 150,000 people were naturalized in the United States in 1980 and in the decade between 1970 and 1980 about 1,500,000 people were naturalized. The question as to fraud in procurement of citizenship rights, and the process by which the Government is permitted or allowed to determine that fraud, and the standard under which misrepresentations or concealments are determined to be material are relevant and

important to the underlying facts of this case, of course, but to the entire operation of questions dealing with entry, resident alienship status, and denaturalization as well as deportation.

It is true, as Justice Murphy speaking for the Court said, today perhaps more than in 1943 when he stated it in Schneiderman, that "Many regard citizenship of the United States as the highest hope for civilized man." And for that reason we exercise great care in the review, the application, of the law and the standards by which we are to deprive someone of that great privilege.

I wish to discuss and address two points in my argument. One, the meaning of materiality as applied in Chaunt and derived from the Immigration and Nationality Act of 1952 in Section 1451(a), as applied to either a willful misrepresentation or concealment of a material fact, the grounds in this case on denaturalization was ordered by the 5th Circuit.

And the second point I wish to address will go to whether or not the Government in the District Court by clear, unequivocal and convincing evidence proved even evidence sufficient to meet and satisfactorily meet the first test in Chaunt.

With regard to the first point, the issue as I see it before the Court is whether 1451 and materiality applied to it requires the Government to prove that the facts if known,

facts which were concealed or misrepresented, if known, warranted denial of citizenship, an ultimate fact or test; or whether the second and alternative test in Chaunt, which I refer to as the investigative or investigation test, allows the Government to prove materiality by showing that if the facts, if known, would have been useful in an investigation which might discover grounds or facts warranting denial of citizenship.

QUESTION: General Civiletti, when you say the facts would have been useful, is that the equivalent of meaning that they would have triggered an investigation?

MR. CIVILETTI: I think so, Your Honor.

QUESTION: But the second half, Mr. Attorney General, is "might", not "would", have discovered fact which would have led to the denial of citizenship.

MR. CIVILETTI: I think that the Court stated in Chaunt the second investigative test in two separate ways which, I think, have the same meaning. It said, early in the opinion, in the first statement of the test, language to the effect: the facts, if known, which would be useful in an investigation to determine whether or not there were grounds for denial of citizenship. In the second part of the test, the second statement, a restatement, I think it dropped the "useful" language and said: facts which, if known, might possibly lead to -- in an investigation -- lead to the discovery of facts warranting

1 denial of an investigation.

2 I think both statements assume or presume an investi-
3 gation, a concealment of facts sufficient that, if known, they
4 would trigger an investigation, and then pose the scope or
5 focus of the investigation to be, in order to be relevant and
6 material, to the eligibility, the possibility, or that might
7 disclose facts, other facts, different from the concealed
8 facts --

9 QUESTION: As I understand the Government's position,
10 it is not that the Government has to prove that the investiga-
11 tion would have turned up facts that would have required the
12 denial of citizenship, but rather that it might have required
13 a denial of citizenship after an investigation.

14 MR. CIVILETTI: That's exactly right, Justice
15 Brennan. The Government feels that the thrust, purpose, and
16 intent of 1451 is to prevent fraud, to prevent material mis-
17 representations, to allow the Government to rely on the accu-
18 racy and truth of the statements, and that therefore if the
19 concealment thwarts an investigation, that had the facts
20 revealed it, then the Government has a right to denaturalize
21 the person if it further shows that within the focus of the
22 investigation there were facts which might have warranted
23 denial of citizenship or eligibility. And that's exactly --

24 QUESTION: While I have you interrupted, Mr. Attorney
25 General, if Jenkins' testimony had been believed, namely,

that had it been known at the time a visa was applied for that this chap had been a guard at the camp, he would not have been given a visa. If that had been found as a fact, is it the Government's position that the first part of the Chaunt test would have been satisfied?

MR. CIVILETTI: Yes, and I think --

QUESTION: Are you urging here that this Court turn this case on that testimony?

MR. CIVILETTI: I will urge in my second point that the District Court erred in substituting its judgment as to what would have happened back in 1950 under the application and interpretation of the law then and practice then, as testified to by Jenkins, that a guard at an extermination camp would not have been found to have been eligible under the Displaced Persons Act; yes.

QUESTION: Mr. Attorney General, as I listen to your statement of the test for which the Government contends on the second half of Chaunt, I think it is this -- and you tell me if I'm wrong. The test is whether the falsification by misleading the examining officer forestalled an investigation which might have resulted in the defeat of petitioner's application for naturalization.

MR. CIVILETTI: Substantially.

QUESTION: That is the test for which Justice Clark in dissent in Chaunt contended should apply. And it was his

1 view that the majority squarely rejected that test.

2 MR. CIVILETTI: I do not think that they rejected

3 the test. I think that they applied the test in finding that

4 the concealed facts of arrest in Chaunt were so unrelated to

5 the possible discovery of the membership in the Communist

6 Party that they were too remote and too tenuous, even if there

7 had been an investigation and been discovered, to provide

8 any probability that they would have formed a basis for dis-

9 covering facts which would have warranted denial of citizenship

10 -- particularly in light of the fact that facts closer to

11 the bone, the membership in the communist front organization,

12 were revealed in the papers -- and that therefore there was an

13 insufficient proof of the two elements necessary in the second

14 investigative test in Chaunt. One, there was an insufficient

15 proof that there would have been an investigation, since the

16 revelation of the communist front organization participation

17 did not trigger an investigation. And secondly, had there been

18 an investigation, the elements of the facts in the arrest were

19 insufficient to have been within the scope of the focus of the

20 investigation to lead the Government into a discovery of the

21 Communist membership.

22 QUESTION: Is it your view that Justice Clark in

23 dissent and the majority in Chaunt were applying the same test?

24 MR. CIVILETTI: No. I think probably Justice Clark

25 in the dissent was reading the Chaunt test closely or narrowly

and quarreling with it by restating and reciting the test that he felt was rejected by the second investigative test stated in Chaunt. But I don't think that in the discussion by Justice Douglas of the connection, the relationship between the investigation -- the concealed facts and potential ultimate facts -- can suggest at all that what was meant by the second investigative test, that the Government had to in effect prove by clear, unequivocal, convincing evidence other, ultimate facts indicated a denial of citizenship.

Because, if that were the case, there's no need for two tests. If the Government must prove that there were existent "facts" --

QUESTION: There'd still be a difference because the first test is very simple: if the concealed fact itself would result in denial, that's it. The second test would be, there are somewhere in the background facts not specifically called for by the application but which might have been discovered, and would have warranted a denial, but there's doubt as to whether they would have been discovered. And then the test would be whether the concealed fact would have triggered investigation which might have led to the discovery of a disqualifying circumstance; that's a different test. Now, I know you don't agree with it but at least it's a different test than the first test.

MR. CIVILETTI: Oh, I don't think so. If the Government actually has to prove ultimate disqualifying facts in its case, what relationship back does it have to concealment? It has

none. If it can find those facts or develop those facts under the test advocated by the petitioner which bears little relationship to concealment --

QUESTION: Is there a statutory authority for denaturalizing a person on the ground that even though his application was completely true, there was at the time of the application a fact in existence which if known would have disqualified him?

MR. CIVILETTI: I think so; yes. Illegal procurement.

QUESTION: Well, that was not the basis, in any event, on which this person was denaturalized.

MR. CIVILETTI: That's right.

QUESTION: This petitioner was denaturalized for concealment of material facts or deliberate misrepresentation, was he not?

MR. CIVILETTI: That's correct. Deliberate misrepresentation with regard to his birthplace, with regard to the place of his education, with regard to his --

QUESTION: But in the statutory language he was denaturalized on the grounds that I stated, was he not?

MR. CIVILETTI: On the grounds, what, Your Honof?

QUESTION: That I stated; denaturalized.

MR. CIVILETTI: Yes, Your Honor, he was. He was denaturalized on the grounds of the concealment of material facts.

1 QUESTION: Well, Mr. Attorney General, the Court of
2 Appeals for the 5th Circuit said that "the evidence before the
3 District Court clearly and convincingly proved that had the
4 defendant disclosed his guard service the American authorities
5 would have conducted an inquiry that might have resulted in
6 denial of a visa." Now, you must believe and must urge that
7 that is consistent with the majority in the Chaunt case.
8 MR. CIVILETTI: It is perfectly consistent with it --
9 QUESTION: Even though Justice Clark suggested that
10 the majority had rejected a very similar test.
11 MR. CIVILETTI: Yes. Stated in different language
12 and from a different -- advocating a different standard.
13 QUESTION: But in any event this test that the Court
14 of Appeals applied wouldn't require actual proof of facts that
15 would have resulted in denial of citizenship but it would
16 require the Government to prove that they might have found
17 facts, and the burden of the Court of Appeals argument as I
18 understand it is that the Government must need some protection
19 from the disappearance of facts.
20 MR. CIVILETTI: Certainly many of these cases, both
21 this case and many other cases in the field, are cases brought
22 six, eight, ten, 15, 20 years or more after the operative
23 facts, particularly if the concealment and misrepresentation
24 takes place and is not only perpetuated in the naturalization
25 but takes place at the time of entry or the time of establishing

1 eligibility under Displaced Persons Act or under immigration
2 quotas or other facts. And the Government can't be denied, it
3 seems to me, and the petitioner or the defrauder permitted the
4 opportunity to benefit to the extent he would benefit under
5 the petitioner's point of view for 10 or 20 or 30 years, based
6 on his fraud, and then be in no less position than he would
7 have been in had he not committed fraud, since the Government
8 still has this very onerous burden of proof and proper burden
9 of proof, and the petitioner has enjoyed 10 or 20 years of
10 residence and some of citizenship in the United States, and in
11 the process has shifted the burden of proving eligibility and
12 establishing eligibility to the Government because the
13 Government bears the full burden in a denaturalization case,
14 of course, to prove by the standard of proof that either there
15 are facts which it establishes, which show denial of citizen-
16 ship, or a material misrepresentation or concealment by facts
17 which, if known, would have triggered an investigation which
18 might have or possibly have shown facts warranting a denial of
19 citizenship.
20 The Government must go further than simply say that
21 there might be facts out there somewhere from which a denial
22 of citizenship could be gathered. The Government must show --
23 QUESTION: Well, first of all the Government has to
24 show that there was concealment, doesn't it?
25 MR. CIVILETTI: Exactly.

QUESTION: Now, this isn't a case -- and I don't know if there is a statute which says that regardless of how honest the applicant was, if there were in fact circumstances that would have made him ineligible for citizenship he can be denaturalized. This is not such a case?

MR. CIVILETTI: This is not such a case.

QUESTION: This case is based upon his concealment.

MR. CIVILETTI: Yes. This is not an illegal procurement case. It is a fraud case, and that's what we're guarding against and protecting against and which we think the statutory provisions of 1451(a) call for and require the Government to do.

QUESTION: Mr. Attorney General, one other minor question. Under your view of the facts, did the applicant commit a crime at the time he filled out his application? Is this a criminal penalty? Is this a criminal offense?

MR. CIVILETTI: Yes, he did commit a crime at the time he filled out and made his statements under oath in 1949 to the Commissioner of Displaced Persons.

QUESTION: And is there a statute of limitations on that offense, do you happen to know?

MR. CIVILETTI: I'm certain there must be.

QUESTION: But there's no statute of limitations on the right to denaturalize?

MR. CIVILETTI: There is no statute of limitations

on the right to denaturalize; that's correct.

QUESTION: Mr. Attorney General, Justice Clark was not alone in deciding Chaunt, was he?

MR. CIVILETTI: No.

QUESTION: I think I'm the only survivor.

QUESTION: But there were three.

MR. CIVILETTI: Let me move to the second point, which is essentially that the lower court found facts and the 5th Circuit affirmed those facts without articulating it, which in and of themselves were proved by clear and convincing evidence, which would have amounted to or warranted a denial of citizenship. And that essentially is the argument, that the guard service -- armed guard service, in a hat and shirt and jacket with epaulets and with stripes, with a black tie, with boots, with a pistol, and with a rifle -- was of -- in an extermination or death camp, as opposed to all other varieties of camps -- was such conduct that under the Displaced Persons Act definitions, adopting the International Refugee Organization definitions in Appendix 1 of its constitution, that it amounted to assistance of the enemy in the persecution of a civilian population.

Jenkins' testimony was uncontradicted and unequivocal and based on over 5,000 applications, the interviews of many survivors, the exchange of information among other like vice consuls -- and there were some 30 or 40 of them operating in

Europe at the time -- that no death guard, no armed death guard would have been granted eligibility under the Displaced Persons Act by a vice consul.

QUESTION: General Civiletti, I refer you to page 117 of the Appendix which is a part of the 5th Circuit's opinion, and it's difficult for me to tell whether the Government is arguing that the 5th Circuit found the District Court's findings were clearly erroneous or whether they simply took part of them and rejected another part of them; particularly if you look at that footnote there.

MR. CIVILETTI: On 117?

QUESTION: On Jenkins' testimony about what would have triggered an investigation, on page 117 of the Appendix.

MR. CIVILETTI: At that point --

QUESTION: Because the District Court didn't credit all of Jenkins' testimony.

MR. CIVILETTI: Yes. The testimony there cited, the Q & A there cited, related to establishing Jenkins' testimony at the time, establishing that there would have been an investigation and then further question and answer was:

"And what if the investigation had shown that he had been a guard at an extermination camp or death camp?"

And the answer then was:

"Displaced person eligibility or a visa would have been denied."

1 The lower court found that part of, expressly found
2 that that part of Jenkins' testimony with regard to the finding
3 that if he had been a guard the process would have been
4 stopped and that there would have been an investigation -- was
5 credible, gave it full weight, found that fact; which satisfies
6 test 2 of Chaunt as far as the Government's proof of clear and
7 convincing evidence.
8 The District Court went further, though, and found --
9 and this is where I think the 5th Circuit Court of Appeals did
10 not alter the finding, it simply found it unnecessary to deter-
11 mine. The District Court found that as a matter of either fact
12 or misapplication of law by Jenkins, that the testimony of
13 Fedorenko was such that the service as an armed guard in an
14 extermination camp was so involuntary on Fedorenko's part that
15 it would not have disqualified him from eligibility as a dis-
16 placed person. That's what the District Court found. It in
17 fact interpreted or substituted its view of the definition of
18 voluntariness and the definition within, assisting the perse-
19 cution of civil population, at the trial; and with Fedorenko's
20 testimony to come to the conclusion that the application by
21 Jenkins of the Displaced Persons Act with the fact and the con-
22 duct and all the relevant evidence and knowledge that he had
23 as to the nature of the armed guard participation at a death
24 camp, was -- his conclusion that that was sufficient alone to
25 deny a visa or eligibility as a displaced person, was incorrect

1 and not credible or not believable.

2 I suggest that that was at least a mixed question of

3 law and facts; that the evidence was uncontroverted on the

4 point, from Jenkins; that the voluntary testimony, or the testi-

5 mony with regard to involuntariness by Fedorenko, was insuffi-

6 cient to establish or to change what would have happened;

7 and the only evidence as to what would have happened with

8 regard, and properly happened with regard to a denial of a visa

9 in 1949.

10 QUESTION: Mr. Attorney General, can I ask you a

11 question about the the first theory. In the Chaunt case we

12 were concerned with misrepresentation in an application for

13 naturalization, and the question whether it was a fact in exis-

14 tence would have resulted in denial of citizenship.

15 Here, as I understand it, we're concerned with a

16 misrepresentation in an application for a visa. There is no

17 claim of misrepresentation in the application for naturaliza-

18 tion, as I understand it.

19 MR. CIVILETTI: Oh, sure. It was part and parcel of

20 it. It was perpetuated in the papers, in the underlying docu-

21 ments in the representations to the immigration officer who

22 did the interview for the naturalization.

23 QUESTION: But let me just finish my point. The

24 point is that the concealed fact, assuming -- is one which

25 would have resulted in a denial of his visa?

1 MR. CIVILETTI: Initially --

2 QUESTION: And isn't it true that any --

3 MR. CIVILETTI: -- and then would have resulted in

4 the denial of his naturalization if it had been revealed at

5 the time of his application for naturalization.

6 QUESTION: Well, he would never have been in a posi-

7 tion to apply for naturalization.

8 QUESTION: Supposing for example that at the time he

9 applied for a visa they were only issuing visas to college

10 graduates or married persons or something like that, and he

11 had concealed his marital status or his educational status, and

12 therefore got a visa; then came over and lived here for 20 or

13 30 years, and then filed the same kind of application for

14 naturalization he did here. Would the Government be entitled

15 to denaturalize that person?

16 MR. CIVILETTI: Depending on whether or not the --

17 QUESTION: It was a material fact because it would

18 have prevented his getting the visa.

19 MR. CIVILETTI: It depended on whether or not that

20 continued until the present time and there was no change or

21 no modification.

22 QUESTION: But it was never revealed. The same

23 thing continued.

24 MR. CIVILETTI: I think the answer to that question is

25 the Government feels that fraud conducted at that time, which

1 ties and relates to the ground for his lawfully being in the
2 United States for five years -- which is a condition for
3 naturalization, we can reach back and denaturalize him for that
4 fraud and that that is the scheme and structure of the statute
5 in 12- -- 1451.

6 QUESTION: So the test in the denaturalization pro-
7 ceeding is whether the concealed fact in the application for
8 visa would have resulted in the denial of the visa. It doesn't
9 have to be a fact which would result in the denial of citizen-
10 ship in and of itself.

11 MR. CIVILETTI: I think it would relate if you are
12 unlawfully here because your visa is unlawful, that is --

13 QUESTION: Right; you didn't admit you were married --

14 MR. CIVILETTI: -- a precondition to, and one of the
15 criteria for naturalization. And therefore it relates to
16 naturalization and it would produce a failure warranting a
17 denial of naturalization. So it's not totally unrelated.
18 Now, that's not this case, because there was a perpetuation of
19 the concealment and of the misrepresentation directly and
20 specifically throughout not only the visa circumstances in
21 1949 and 1950 but then on into and through 1969 and 1970.

22 QUESTION: Well, I assume that in my case. The man
23 never has admitted that he was married or whatever it was.

24 MR. CIVILETTI: Thank you, Your Honors.

25 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

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The case is submitted.

(Whereupon, at 11:29 o'clock a.m., the case in the above-entitled matter was submitted.)

MILLERS FALLS
EZERASE
COTTON CONTENT

CERTIFICATE

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No. 79-900

Feodor Federenko,

v

United States

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