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I. INTRODUCTION

In 1979, Congress created the Office of Special Investigations (OSI),\(^1\) as a branch of the Department of Justice, to investigate and prosecute individuals living in the United States who actively took part in the Nazi persecution of civilians during World War II.\(^2\) Allan A. Ryan, Jr., former Director of OSI, estimates that, of the 400,000 European refugees who came to the United States after the war under the Displaced Persons Act (DPA) of 1948,\(^3\)

1 The OSI was created within the Department of Justice by the Appropriation Authorization Act, Fiscal Year 1980, Pub. L. No. 132, § 22, 93 Stat. 1040, 1050, see 8 U.S.C. § 1551 (1982); see also 28 C.F.R. § 0.55(f) (1985).

2 See id. The term "Nazi war criminal" is widely used to describe individuals who actively took part in the Nazi persecution of civilians during World War II. The majority of such individuals who live in the United States, however, unlike the Nazi war criminals prosecuted by the Nuremberg war crime tribunals, were neither directly involved in the war nor part of the upper echelon of the Nazi hierarchy. See Taylor, The Nuremberg War Crimes Trials, 450 INT'L CONC. 241, 249–50 (1949). Rather, these "Nazi war criminals" are, for the most part, individuals who directly participated or assisted with the Nazi persecution of civilian populations on the basis of race, religion, national origin, or political opinion. The Immigration and Nationality (Holtzman) Amendment of 1978, Pub. L. No. 549, 92 Stat. 2065 (codified at 8 U.S.C. §§ 1182(a)(33); 1182(d)(3); 1251(a)(19); 1255(h); and 1254(e) (1982)) [hereinafter cited as the Holtzman Amendment] added the following category of individuals to both excludable and deportable classes of aliens:

Any alien who during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with

(A) the Nazi government in Germany,

(B) any government in any area occupied by the military forces of the Nazi government of Germany,

(C) any government established with the assistance or cooperation of the Nazi government of Germany, or

(D) any government which was an ally of the Nazi government of Germany, ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

8 U.S.C. §§ 1182(a)(33); 1251(a)(19). Therefore, throughout this Comment the individuals in question are referred to as Nazi persecutors. For a comprehensive documentation of the Nazi persecution and mass murder during World War II, see R. HILBERG, THE DESTRUCTION OF EUROPEAN JEWRY (1963) [hereinafter cited as HILBERG].

3 Displaced Persons Act of 1948, Pub. L. No. 774, 62 Stat. 1009 [hereinafter cited as DPA]. This original version of the DPA was enacted for a two-year period. DPA, § 5(a), supra, at 1010. In 1950, Congress extended it for another two years. Act to Amend the Displaced Persons Act of 1948, Pub. L. No. 555, 64 Stat. 219 [hereinafter cited as Act to Amend the Displaced Persons Act of 1948]. An estimated one million people were homeless after World War II, either unwilling or unable to return to their native lands; most fled to displaced person camps set up within the Allied Zones of Europe.
two and one-half percent had likely been Nazi persecutors. Therefore,

See S. Rep. No. 950, 80th Cong., 2d Sess. (1948), reprinted in 1948 U.S. Code Cong. & Ad. News 2028, 2035 [hereinafter cited as S. Rep. No. 950]. The United States reacted to this influx of displaced persons by enacting the DPA in 1948. See DPA, supra. This Act bypassed existing quota restrictions, thereby enabling 200,000 refugees to immigrate to the United States from Europe over a two-year period. A. Ryan, Jr., Quiet Neighbors: Prosecuting Nazi War Criminals in America 15-16 (1984) [hereinafter cited as Ryan]. In enacting the DPA, Congress adopted an exclusionary section from the Constitution of the International Relief Organization (IRO), which was set up by the United Nations in 1946 to address the displaced persons problem. See S. Rep. No. 950, supra, at 2029. This section excluded the following individuals from eligibility under the DPA:

1. War criminals, quislings and traitors.
2. Any other person who can be shown:
   (a) to have assisted the enemy in persecuting civil populations of countries, members of the United Nations; or
   (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.


Ryan, supra note 3, at 26. The DPA did not prevent the entry of Nazi persecutors into the United States for two reasons. First, the DPA itself was inherently skewed in favor of probable Nazi persecutors and against those individuals who were most likely to be victims of such Nazi persecution. Ryan, supra note 3, at 16. Whether such a result was actually premeditated or was unintentional, is at best left to historical consideration of the legislation. See Ryan, supra note 3, at 26-28. Nevertheless, this beneficial outcome for Nazi persecutors was a direct consequence of the operation of four provisions in the DPA. Section 2(c), which defined those displaced persons who were eligible under the Act, included only those persons who had arrived at the displaced person camps on or before December 22, 1945. This automatically excluded over 100,000 Jews who were released from Polish concentration camps in 1946, thereby rendering 85 percent of all Jews who stayed in the displaced person camps ineligible to qualify under the DPA. DPA, supra note 3, § 2(c), at 1009. See also Ryan, supra note 3, at 16. See generally L. Dinnerstein, America and the Survivors of the Holocaust (1982).

Section 3(a) provided that not less than 40 percent of the visas issued were to be available exclusively to persons "whose place of origin or country of nationality has been de facto annexed by a foreign power." DPA, supra note 3, § 3(a), at 1010. Thus, the DPA in effect gave special preference to all fleeing Eastern Europeans and Baltics. This inevitably favored Nazi persecutors. Of those fleeing Eastern Europe after the war, a significant portion were most certainly Nazi collaborators since their lives depended on escape to the West. See Ryan, supra note 3, at 13-14.

Finally, despite an IRO provision explicitly excluding from visa eligibility "Volkdeutsches" (German ethnicity of Eastern Europe) Congress included within the DPA a special preference for 50,000 of such people. See DPA, supra note 3, § 12, at 1015; see also Ryan, supra note 3, at 17.

The second reason for the failure of the DPA to exclude Nazi persecutors from immigrating to the United States was the administration of the statute itself. Congress created a Displaced Persons Commission (DPC), which delegated the responsibility for implementing and policing the DPA provisions to the Counter Intelligence Corps (CIC) of the U.S. Army. See DPA, supra note 3, § 8, at 1012; Ryan, supra note 3, at 21. Despite security checks conducted on DPA applicants, Nazi persecutors nonetheless slipped by in great numbers. Ryan, supra note 3, at 21-22. The task of granting entry visas was enormous, involving the processing of hundreds of thousands of people, and many applicants were given clearance on their backgrounds merely on the basis of a calculated risk that they would qualify. See Nazi War Criminals (Part II): Hearings Before the Subcommittee on Immigration, Citizenship and International Law of the Committee on the Judiciary, House of Representatives, 95th Cong., 2d Sess. 154 (1978) (testimony of Mario DeCapua, Former Chief, Security & Investigations Displaced Persons Commission (Europe)).

By 1949, the failings of the DPA had become apparent; thus, when Congress amended the Act in 1950, extending it for another two years, it eliminated the 1945 cutoff date, removed the preferences for Eastern Europeans and farmers (but not for persons of German origin), and added a provision
approximately 10,000 Nazi perpetrators entered the United States illegally.  

Until the creation of OSI in 1979, the U.S. government had done little to respond to repeated requests to investigate this consequence of U.S. immigration law. The current U.S. government policy, as implemented by OSI, mandates that individuals who directly participated in Nazi persecution are neither entitled to live in the United States, nor qualified to enjoy the rights and privileges of U.S. citizenship. Thus, these individuals should be removed from the country through the sanctions of denaturalization and deportation.

which explicitly excluded anyone who had taken part in persecution. Act to Amend the Displaced Persons Act of 1948, supra note 3, §§ 4, 6, 12(a), 13, at 219.

When the DPA expired on June 30, 1952, almost 400,000 immigrants had come to the United States. Id. at 25. In assessing the overall impact of the DPA, Allan Ryan, Jr., noted:

[T]he facts are undeniable: in many areas of Europe occupied by the Nazis, there was widespread collaboration. As the war ended, many of the collaborators fled rather than remain to endure the retribution of the victors. They ended up in [displaced person] camps with the victims of war. The United States took in hundreds of thousands of the camps' inhabitants, and the preferences went to groups with known patterns of collaboration. The pressure to move bodies, to stimulate production, was intense, and individual investigations were cursory and unreliable. As a result, the applicants were sifted through a screen of very coarse mesh. RYAN, supra note 3, at 27.

In 1952, Congress redrafted the permanent immigration and nationality statutes by enacting the Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 163 (codified at 8 U.S.C. §§ 1101-1155 (1982)) [hereinafter cited as INA], which contained no specific exclusion for Nazis or for those who had assisted in persecution of civilians. RYAN, supra note 3, at 264. This statutory loophole, under the permanent immigration law, was closed by the Holtzman Amendment in 1978. See supra note 2.

Despite the liberal provisions of the INA, the State Department retained great discretion over the issuance of visas. See RYAN, supra note 3, at 264. And between 1952 and 1956, State Department regulations pertaining to the issuance of visas under the INA, did bar aliens who either were charged or convicted of being war criminals, or who had engaged in "conduct contrary to civilization and human decency." See 22 C.F.R. § 42.42(j) (1953); § 53.33(j) (1949).

A subsequent special refugee measure was also enacted by Congress in 1953, entitled the Refugee Relief Act of 1953, Pub. L. No. 203, 67 Stat. 400 [hereinafter cited as RRA]. This Act, which was in effect from 1953 to 1956, contained a section excluding former persecutors. RRA, supra, § 14(a), at 406. Despite this prohibition, the RRA did not provide for any effective means of enforcement. RYAN, supra note 3, at 327. U.S. officials entrusted to police these exclusive provisions tended to use "communism" as the dispositive factor and did little in investigating the visa applicants' activities during the Nazi era. Id.

See RYAN, supra note 3, at 261. Neil Sher, the current Director of OSI, in a recent interview stated his view of the U.S. government policy toward Nazi perpetrators:

These people were involved in acts of genocide, murder and persecution unparalleled in history... [those] involved in these types of activities are simply not fit to live here, not fit to have the rights of United States citizenship, and to do nothing about it would be to condone those activities.

though a Nazi persecutor who has entered the United States illegally may be subject to deportation immediately, this is not possible where the individual is a U.S. citizen. Since most former Nazi persecutors acquired U.S. citizenship through naturalization, OSI must, in order to revoke the citizenship status of these discovered Nazi persecutors, bring denaturalization actions prior to instituting deportation hearings.

Denaturalization and deportation involve two separate legal processes within immigration and nationalization law. In a denaturalization action, the defendant is entitled to an initial trial in federal district court with the right of appeal to a circuit court of appeals and ultimately, if certiorari is granted, to the U.S. Supreme Court. A deportation action entails an initial administrative hearing before an immigration judge, an administrative appeal to the Board of Immigration Appeals (BIA), and then a subsequent right to judicial review by a circuit court of appeals and by the U.S. Supreme Court, upon a grant of certiorari. Under current immigration and nationalization law, it is not possible to combine these two processes. Together, excluding time delays and the actual implementation of the alien's departure, these two procedures can take up to seven years to complete. Consequently, the existing procedure for handling

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8 One who has entered the United States in violation of the INA or any other law of the United States, or who at the time of entry was within a class of aliens excludable by the law existing at the time of entry, is deportable. 8 U.S.C. § 1251. The deportation provisions enacted by Congress in the INA pertain to only "[a]ny alien in the United States . . . ." 8 U.S.C. § 1251(a). The term "alien" means any person not a citizen or national of the United States. 8 U.S.C. § 1101(a)(3) (1982). Therefore, the alienage of an individual must be proved in order to establish jurisdiction to order his deportation. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922). See also infra text accompanying notes 247–51.

9 See OSI, U.S. Department of Justice, Digest of Cases in Litigation, May 24, 1985 [hereinafter cited as OSI, Digest of Cases]. Between 1979 and 1984, the U.S. government, through the OSI, has reviewed about 850 individuals of whom approximately 300 are currently still under investigation. With Late Start, Nazi-Hunters Running Out of Time, Chi. Daily L. Bull., Jan. 21, 1985, at 1, col. 1. Out of 44 cases initiated by OSI since 1979, 23 have been denaturalization cases and 19 have been deportation cases, while two others resulted in agreements to relinquish citizenship and depart the United States. See generally OSI, Digest of Cases, supra, at 1–36. Of these 19 deportation cases, 12 have been against individuals who never acquired naturalized United States citizenship. Id. Approximately 25 denaturalization and deportation cases are still pending at various stages of litigation. Id. The denaturalization actions have resulted in 12 revocations of citizenship; deportation actions have resulted in 10 orders of deportation. Id. In 1983 and 1984, six Nazi persecutors departed the United States permanently; three of them left voluntarily, without being deported. Id. It is the OSI policy to file deportation charges against every competent defendant whose citizenship has been revoked. See 8 U.S.C. § 1252 (1982); see also RYAN, supra note 3, at 258.


13 RYAN, supra note 3, at 259.

14 See RYAN, supra note 3, at 259–60. The process can take from five to seven years, assuming that
OSI's cases against naturalized Nazi persecutors unnecessarily delays the imposition of justice. In addition, such delay can circumvent the final adjudication of these cases. Many Nazi persecutors have died before a final determination on their case is made, thereby they enjoy the privileges of U.S. citizenship and residence and live out their lives in the United States.\[^{15}\]

The requirement of two separate proceedings, with separate layers of appeal, is inefficient because much of the litigation is repetitive.\[^{16}\] Both proceedings involve the use of the same evidence against the alleged Nazi persecutor; specifically, evidence pertaining to the individual's prior conduct during the Holocaust and subsequent immigration to the United States.\[^{17}\]

The five to seven years of protracted litigation and seven separate layers of initial adjudications and appeals cause delay which is unfair to both the government and the individual defendant involved. A defendant determined to postpone the outcome of these procedures has an inordinate number of opportunities to do so.\[^{18}\] At the same time, defendants who prolong the process in their

\[^{15}\] See OSI, Digest of Cases, supra note 9, at 36–56 (cases no longer active: eight out of eighteen cases (45 percent) because the defendants died prior to final disposition of their cases; two were suicides).

\[^{16}\] Matter of Fedorenko, Interim Decision No. 2963 (Board of Immigration Appeals 1984), at 14 [hereinafter cited as Matter of Fedorenko] (the BIA held that the facts and conclusions of law in the prior denaturalization case are also dispositive in the subsequent deportation hearing involving a former Nazi persecutor).

\[^{17}\] Id. at 11.

\[^{18}\] See Ryan, supra note 3, at 142–98 & 218–44. The cases against Andrija Artukovic and Viorel Trifa are two of the most notorious examples of how a defendant may manipulate the process in his favor. Artukovic arrived in the United States in 1948 under a false name. Artukovic v. INS, 693 F.2d 894, 896 (9th Cir. 1982). Although he was ordered deported in 1952, he obtained a pre-Holtzman Amendment withholding of deportation in 1959, see infra note 132, upon a determination that deportation back to his home country, Yugoslavia, would subject him to "persecution." Artukovic, 693 F.2d at 896. In addition, Artukovic also successfully avoided a nine-year attempt by Yugoslavia to extradite him in order to face charges for ordering the execution and persecution of thousands of Serbs, Jews, Gypsies and other civilians. Artukovic v. Boyle, 107 F. Supp. 11 (S.D. Cal. 1952), rev'd sub. nom. Ivancevic v. Artukovic, 211 F.2d 565 (9th Cir. 1954), cert. denied, 348 U.S. 818 (1955), remanded with order to discharge, 140 F. Supp. 245 (S.D. Cal. 1956), aff'd sub. nom. Karadzole v. Artukovic, 247 F.2d 198 (9th Cir. 1957), vacated, 355 U.S. 393 (1958), remanded sub. nom. United States v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959). A Commissioner for the district court finally found him non-extraditable in 1959 on the basis of insufficient evidence, and because of the "political character" of the alleged offenses. Artukovic, 170 F. Supp. at 392–93. OSI reinitiated the deportation process against Artukovic after the Holtzman Amendment was passed and precluded him from
own self-interest are burdened with the cost in time and legal fees incurred by these proceedings.\(^\text{19}\) The excessive delay resulting from the existing process is unnecessary, because Congress has the power to amend immigration and naturalization law and consolidate the denaturalization and deportation proceedings.\(^\text{20}\) Moreover, Congress could provide such a consolidated procedure without infringing on any constitutional protections afforded to the defendant.\(^\text{21}\)

This Comment examines the feasibility of such a proposed consolidated denaturalization/deportation procedure, beginning with a consideration of the two separate processes under existing law. The Comment delineates the policies

continued eligibility for the discretionary relief. \(^\text{19}\) Ryan, supra note 3, at 271. On appeal, however, the Ninth Circuit held that OSI could not rely on the original order of deportation and must retry the case. Artukovic, 693 F.2d at 899. Deportation hearings were scheduled, and a new request was filed by Yugoslavia for Artukovic's extradition to stand charges for murder. \(^\text{19}\) U.S. Seizes Artukovic as Nazi War Criminal, L.A. Times, Nov. 15, 1984, at 1, col. 1. After being arrested and held in custody, the extradition request for Artukovic was granted in 1985. Artukovic v. Rison, 784 F.2d 1354, 1355 (9th Cir. 1986) (motion to stay extradition to Yugoslavia pending appeal on habeas petition denied). He was extradited to Yugoslavia and put on trial for murder in early 1986. \(^\text{19}\) Accused Nazi Criminal Extradited to Yugoslavia, Boston Globe, Feb. 13, 1986, at 7, col. 1. Artukovic subsequently was convicted and sentenced to death for ordering mass killings and deportations, as Minister of the Interior of the Nazi-supported government from 1941 to 1945. His sentence will not be carried out until he is allowed to appeal through both local and federal Yugoslavian court systems. \(^\text{19}\) Croatian War Criminal Sentenced to Firing Squad, N.Y. Times, May 15, 1986, at A2, col. 3.

Unlike Artukovic, Trifa obtained naturalized U.S. citizenship. OSI, Digest of Cases, supra note 9, at 52. Denaturalization charges were filed against him by the INS in 1975. \(^\text{19}\) Id. In 1980, Trifa consented by agreement with the OSI to denaturalization. \(^\text{19}\) Id. See also Ryan, supra note 3, at 240–41. Nevertheless, within a month he appealed this consent judgment, which served to delay the process by a year. \(^\text{19}\) See OSI, Digest of Cases, supra note 9, at 52. In 1981, the Sixth Circuit affirmed Trifa's denaturalization, United States v. Trifa, 662 F.2d 447 (6th Cir. 1981), and in 1982, the Supreme Court denied his petition for certiorari. \(^\text{19}\) Trifa v. United States, 456 U.S. 975 (1982). On the third day of his deportation trial held in October 1982, Trifa conceded deportability and waived all appeals. OSI, Digest of Cases, supra note 9, at 53; \(^\text{19}\) see also Ryan, supra note 3, at 241–43. Nevertheless, he made two subsequent attempts to obtain a suspension of his deportation. OSI, Digest of Cases, supra note 9, at 53. It was not until August of 1984, that Portugal took Trifa on a temporary basis and he departed. \(^\text{19}\) Id. See also infra note 166.

This has been a complaint of many of the Nazi persecutor/defendants. \(^\text{19}\) See Hunting Nazis: Trying Task for Immigration, Nat'l L.J. Nov. 6, 1978, at 5, col. 3.

Congress has the power, granted by the U.S. Constitution, to establish a uniform rule of naturalization. \(^\text{20}\) U.S. Const. art. 1, § 8, cl. 4. Congress has the power to prescribe grounds for denaturalization from this power and the power derived from the necessary and proper clause of the U.S. Constitution, art. 1, § 8, cl. 18. Knauer v. United States, 328 U.S. 654, 673 (1945). Additionally, Congress' power to prescribe grounds for deportation has been deemed both absolute and unqualified, Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893), and plenary. \(^\text{20}\) Carlson v. Landon, 342 U.S. 524, 534 (1952). The fact that the formulation of these policies is entrusted exclusively to Congress, has become "as firmly embedded in the legislative and judicial issues of our body politic as any aspect of our government." \(^\text{20}\) Galvan v. Press, 347 U.S. 522, 531 (1954). Thus, even though deportation is administered through the offices of the executive branch, the requirement for separate proceedings to denaturalize and deport Nazi persecutors could be changed by Congress without infringing on the separation of powers. \(^\text{20}\) See infra text accompanying notes 111–20.

\(^\text{21}\) See infra notes 237–97 and accompanying text. Congress' power to enact and amend immigration and naturalization law appears to be limitless, if not plenary. \(^\text{21}\) See Galvan, 347 U.S. at 530–32; \(^\text{21}\) see also Fiallo v. Bell, 430 U.S. 787, 792 (1977).
underlying the denaturalization and deportation procedures, and discusses their application against alleged Nazi persecutors. The author then proposes a statutory addition to the immigration and nationality law found in Title VIII of the United States Code, which would combine these two procedures into a single action with a bifurcated initial hearing and consolidated appeal. This new procedure could apply to actions brought against alleged Nazi persecutors through any of three alternative legislative classifications. Next, the author analyzes the constitutionality of such a proposed procedure, and its possible applications, focusing on the due process, equal protection and citizenship clause ramifications. Finally, the author considers the practicality of joining these judicial and administrative functions together.

II. Denaturalization

A. Purpose and Use of Procedure

In order for an alien to become a naturalized citizen of the United States, specific statutory preconditions must be met.22 Most importantly, the alien must have been lawfully admitted for permanent residence, followed by actual continuous residence for five years preceding the filing of a petition for naturalization.23 The petitioner must also be a person of good moral character.24 Once a person becomes a naturalized citizen through judicial decree, that person is entitled to nearly all the rights and privileges bestowed upon the natural born citizen.25

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22 An applicant must strictly comply with all congressionally imposed prerequisites to acquire naturalized citizenship. United States v. Kovalchuk, 773 F.2d 488, 493 (3d Cir. 1985). One must petition the proper court, 8 U.S.C. § 1445 (1982); have an understanding of the English language, 8 U.S.C. § 1423 (1982); not advocate, be a member of, or affiliate with any organization that advocates or teaches opposition to all organized government (including prohibitions on Communist association), 8 U.S.C. § 1424 (1982); and, not be a deserter from the armed forces, 8 U.S.C. § 1425 (1982). In addition, the petitioner must meet the specific preconditions for naturalization, including lawful admittance for permanent residence followed by continuous residence for five years before filing a petition for naturalization, and standing as a person of good moral character, 8 U.S.C. § 1427(a) (1982). The petitioner may be subject to an investigation, 8 U.S.C. § 1446 (1982), examined under oath in open court, 8 U.S.C. § 1447(a) (1982), and must take an oath of renunciation and allegiance, 8 U.S.C. § 1448 (1982). The Supreme Court has long viewed the grant of naturalization as a privilege, and not an absolute right. See United States v. Ginsberg, 243 U.S. 472, 475 (1917).


24 8 U.S.C. § 1427(a). The application for naturalization must show that during the five-year statutory period before the filing, and until the final hearing, the petitioner "has been and still is a person of good moral character . . . ." Id. Although Congress enumerated specific classes of individuals deemed not to be of good moral character, 8 U.S.C. § 1101(f)(8) (1982), "[t]he fact that any person is not within any of [these] classes [does] not preclude that for other reasons such person is or was not of good moral character." Id. Despite exclusion by this statute, courts have held that an individual cannot satisfy this precondition to valid naturalization if he participated in Nazi persecution. United States v. Linnas, 527 F. Supp. 426, 439–40 (E.D.N.Y. 1981), aff'd, 685 F.2d 427 (2d Cir. 1982), cert. denied, 459 U.S. 883 (1982).
citizen. The fourteenth amendment states that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States ...." The Supreme Court has interpreted this clause as bestowing upon the naturalized citizen who has met all the statutory preconditions the right not to have one's citizenship taken away. The one exception to this right, however, applies where it is shown that the person either engaged in fraud in the naturalization process, or was never lawfully entitled to the grant of citizenship because all conditions precedent were not met.

Congressional power to create the statutory prerequisites necessary to acquire naturalized citizenship is derived from article I of the Constitution, which provides that Congress has sole constitutional authority to "establish a uniform rule of naturalization." Congress may also create a procedure, such as denaturalization, for annulling a grant of naturalized citizenship where the preconditions are later discovered to be unfulfilled. Denaturalization "makes nothing

25 Knauer, 328 U.S. at 658 quoting Luria v. United States, 231 U.S. 9, 22 (1913). "Citizenship obtained through naturalization is not a second-class citizenship. It has been said that citizenship carries with it all of the rights and prerogatives of citizenship obtained by birth in this country 'save that of eligibility to the presidency.'" Id. U.S. citizenship has consistently been viewed by the Supreme Court as a precious basic right. See Perez v. Brownwell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting); Knauer, 328 U.S. at 659 quoting Ng Fung Ho, 259 U.S. at 284.

26 U.S. Const. amend. XIV, § 1.


28 Id. at 267 n.23. See also 8 U.S.C. § 1451(a). Congress has enacted provisions which make a citizen's voluntary action result in a surrender of his or her citizenship. 8 U.S.C. § 1481 (1982). These are known as expatriation statutes, which include, inter alia, provisions for U.S. citizens who obtain naturalized citizenship in a foreign state, 8 U.S.C. § 1481(a)(1); take an oath of allegiance to a foreign state, § 1481(a)(2); serve in the armed forces of a foreign state without proper authorization, § 1481(a)(3); take employment with a foreign government, § 1481(a)(4); make a formal renunciation of citizenship, § 1481(a)(5); and commit treason, § 1481(a)(7). The expatriation provisions have come under frequent constitutional attack. See generally Afroyim, 387 U.S. 253 (repealed as unconstitutional expatriation provision for voting in a foreign election because Congress has no power to expatriate without the citizen's assent). Cf. Vance v. Terrazas, 444 U.S. 252 (1980) (although Congress has no general power to expatriate without requiring a showing of citizen's specific intent to relinquish voluntarily his U.S. citizenship, statute providing that the government need only prove such intent by preponderance of the evidence standard was not unconstitutional). See also 8 U.S.C. § 1483 (1982).

29 U.S. Const. art. I, § 8, cl. 4. See also Trujillo-Hernandez v. Farrell, 503 F.2d 954, 958 (5th Cir.), cert. denied, 421 U.S. 977 (1974) (Congress' power to establish conditions precedent to naturalization is not subject to judicial review because Congress has the exclusive constitutional authority to do so, thus the district court dismissed class action challenging 8 U.S.C. § 1423(i) as a nonjusticiablc controversy).

30 United States v. Jerome, 115 F. Supp. 818 (S.D.N.Y. 1953) (upheld the constitutionality of 8 U.S.C. § 1451 and recognized that an alien has no moral or constitutional right to retain privileges of citizenship if fraud was practiced upon the court). The Supreme Court has upheld denaturalization statutes on the basis of both Congress' power to establish a uniform rule of naturalization, and the necessary and proper clause. U.S. Const. art. I, § 8, cl. 18. See, e.g., Knauer, 328 U.S. at 673. See also Schneiderman v. United States, 320 U.S. 118, 124 (1943)(despite the serious consequences of the loss of citizenship, "[i]t does not mean that once granted to an alien, citizenship cannot be revoked or
fraudulent or unlawful that was honest and lawful when it was done . . . " but simply revokes from the naturalized person, "a privilege that was never rightfully [that person's]."31

Denaturalization serves as a safeguard for the integrity of both the naturalization process and U.S. citizenship itself.32 Through a denaturalization action, the government may revoke a prior grant of naturalized citizenship to an individual, such as a former Nazi persecutor, who has failed to meet the statutory prerequisites and therefore has procured his certificate of naturalization fraudulently and illegally.33 The denaturalization process entails a direct attack upon the original naturalization judgment.34

Congress and the courts have created some special procedures for use in denaturalization hearings. For example, the denaturalization procedure applies retroactively to any improperly obtained certificate of naturalization.35 In addition, no statute of limitations applies to denaturalization suits and the government may at any time challenge an improperly acquired naturalization.36 There-

33 8 U.S.C. § 1451(a). See also infra notes 38–51 and accompanying text.
34 Gordon & Rosenfield, supra note 32, § 20.2, at 20–24.1. A judicial grant of naturalization cannot be attacked collaterally if it is valid on its face. Tutun v. United States, 270 U.S. 568, 577 (1926). Congress may, however, prescribe a direct attack on the prior judgment through an independent denaturalization proceeding. 8 U.S.C. § 1451(a). See also supra note 32.
35 United States v. Kairys, 782 F.2d 1374, 1381–82 (7th Cir. 1986) (Congress intended the denaturalization statute to apply retroactively); see 8 U.S.C. § 1451(a) & (i); see also Gordon & Rosenfield, supra note 32, § 20.2d, at 8–9. The Supreme Court rejected an ex post facto challenge to one of the INA's predecessors, the Act of June 29, 1906, Pub. L. No. 338, § 15, 34 Stat. 596, 601, on the grounds that the law did not entail a punishment. Johanessen, 225 U.S. at 241–42. The Supreme Court has also upheld the validity of the current statute against such challenges. Costello v. United States, 365 U.S. 265 (1961). See also Kairys, 782 F.2d at 1382–83 (retroactive application of the statute does not violate prohibition against ex post facto laws, since denaturalization does not punish naturalized citizens for post-naturalization acts); United States v. Koziy, 728 F.2d 1314, 1320 (11th Cir. 1984) (rejected an ex post facto challenge to the denaturalization statute in a case brought against a former Nazi persecutor).
36 United States v. Walus, 453 F. Supp. 699, 716 (N.D.Ill. 1978), rev'd on other grounds, 616 F.2d 283 (7th Cir. 1980) (a certificate of naturalization obtained illegally is void ab initio, and thus no statute of limitations is applicable to the denaturalization process). See also Kairys, 782 F.2d at 1384 (since government was unaware of defendant's illegal presence until 1977, and brought suit in 1980 after an investigation, the defendant did not demonstrate lack of diligence and prejudice necessary to give rise to the doctrine of laches); Costello, 365 U.S. at 281–83 (1961) (a delay of 27 years before a denaturalization action was commenced did not justify a defense of laches, where the delay did not cause defendant any prejudice or denial of due process); United States v. Oddo, 314 F.2d 115, 118 (2d Cir. 1963).
fore, denaturalization cases have been successfully brought against Nazi persecutors despite the fact that their certificates of naturalization were granted over twenty years prior to the commencement of the revocation action. 37

B. **Grounds**

The current denaturalization statute, 8 U.S.C. § 1451(a), provides that citizenship may be invalidated if procured illegally, or by concealment or willful misrepresentation of a material fact. 38 Although both of these offenses are commonly charged together in the same complaint, the illegal procurement charge has become more useful and better suited to denaturalization cases against alleged Nazi persecutors, particularly after the Supreme Court's ruling in *Fedorenko v. United States*. 39

The *Fedorenko* Court, in ruling on the denaturalization of a former guard at Treblinka, 40 upheld the revocation of his citizenship on the illegal pro-
curement offense alone. Fedorenko indicates that a denaturalization case may be litigated successfully against an alleged Nazi persecutor on the basis of illegal procurement without pointing to a specific instance of misrepresentation or concealment. The government can prove illegal procurement through evidence of the defendant's conduct prior to either his naturalization or his arrival in the United States. By showing the defendant's personal involvement with Nazi persecution, the government can prove that the defendant was ineligible for a visa under the law which existed at the time of entry. Because of the illegal entry, the government can prove that the later grant of citizenship

41 Fedorenko, 449 U.S. at 515. The Court based its decision on the illegal procurement ground alone, despite the fact that the parties had agreed that the issue involved was the proper standard of materiality to be applied in considering the ground of misrepresentation. Id. at 508–10. See also Note, Denaturalization of Nazi War Criminals After Fedorenko, 15 N.Y.U. J. INT'L L. & POL. 169, 178–80 (1982). The Court did not find it necessary to rule on the issue of materiality for two reasons. First, it found that the case rested upon the lawfulness of the initial entry, and not on false statements in the application for naturalization. Fedorenko, 449 U.S. at 509–10. Second, the Court concluded that, as a matter of law, the true facts about the defendant's past history would have made him ineligible for a visa under the DPA. Id.

Courts have differed as to the proper standard of materiality applicable to false statements made in the naturalization process. Compare United States v. Rossi, 299 F.2d 650 (9th Cir. 1962) (a concealed fact is material only if disclosure would have led to a refusal to issue a visa) with Kassab v. INS, 364 F.2d 806 (6th Cir. 1966) (it is enough if revealed facts might have led to discovery of additional facts justifying the refusal of a visa). The disagreement stems from the two tests enunciated in Chaunt v. United States, 364 U.S. 350, 355 (1960). The Chaunt court held that a misstatement is material if either knowledge of the facts would have warranted denial of citizenship, or "disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." Id. The confusion stems from the Chaunt court's wording of the second prong: does materiality have to come from the concealed facts themselves, or can it also come from other facts obtained through additional discovery, which is prompted by disclosure of these concealed facts? See Fedorenko v. United States, 597 F.2d 946, 951 (5th Cir. 1979), aff'd on other grounds, 449 U.S. 490 (1981) (the circuit court of appeals adopted the latter view stating that otherwise an applicant would be encouraged to lie, and the government would have to investigate his past and prove the ultimate facts warranting his ineligibility, to succeed on this ground in a denaturalization action). The inconsistency continues in the lower courts because this debate has not yet been resolved by the U.S. Supreme Court. Maikovskis v. INS, 773 F.2d 435, 441–42 (2d Cir. 1985). See, e.g., United States v. Sheshstawy, 714 F.2d 1038, 1039–40 (10th Cir. 1983); Kosiy, 540 F. Supp. at 36.

42 Kowalchuk, 773 F.2d at 497 (since disclosure of the true facts would have made former Nazi persecutor ineligible for citizenship, court followed Fedorenko and held there was no need to resolve whether defendant's misrepresentations were material under second prong of Chaunt). The misrepresentation offense requires the government to point to a specific statement that shows the defendant's misrepresentation or willful concealment. United States v. Osidach, 513 F. Supp. 51, 103 (E.D.Pa. 1981) (court found the government's theory on the concealment and misrepresentation ground in a denaturalization case, against a former Ukrainian commander who took part in the extermination of Jews in Rawa-Ruska, to be legally and factually without merit, because the form utilized by the INS at the time of the defendant's visa application did not include any specific questions regarding his activity during World War II. The defendant was, nevertheless, denaturalized on the grounds of illegal procurement). See also supra note 41.

was procured illegally.\textsuperscript{44} Illegal procurement can also be shown by proving the lack of good moral character, a statutory prerequisite to obtaining naturalization.\textsuperscript{45}

Despite the continued use of the fraudulent procurement ground in denaturation actions against alleged Nazi persecutors, the illegal procurement ground is better suited to establishing the feasibility of consolidating denaturalization and deportation charges against such defendants.\textsuperscript{46} An individual who is denaturalized for having fraudulently obtained citizenship may not necessarily be deportable, since the individual may have entered the United States legally.\textsuperscript{47} On the other hand, an individual denaturalized on grounds of illegal procurement whose past history reveals a lack of eligibility to enter the United States (such as a former Nazi persecutor), can face deportation charges on grounds of excludability.\textsuperscript{48} In addition, litigation on an illegal procurement theory will better elicit the facts needed to prove the individual's deportability.\textsuperscript{49}

\textit{Fedorenko} also made the illegal procurement means of proof more effective for prosecuting Nazi persecutors. The Court upheld the Eleventh Circuit's ruling that a district court judge has no equitable power to take subsequent good behavior into account, or to overlook the failure to meet all the required conditions precedent, and thereby not revoke the grant of citizenship.\textsuperscript{50} The Court recognized that Congress did not grant to the district courts the discretion to pardon an individual who has obtained his citizenship illegally and is now facing denaturalization.\textsuperscript{51}

\begin{itemize}
\item \textsuperscript{44} See 8 U.S.C. § 1427(a). \textit{See also supra} notes 22-23.
\item \textsuperscript{46} See \textit{supra} note 42. In addition to having to pinpoint a specific instance of concealment, the government also has to show that the defendant intentionally engaged in deception, in order to establish misrepresentation under 8 U.S.C. § 1451(a). \textit{See Maisenberg v. United States}, 356 U.S. 670, 673 (1958). A defendant's past involvement with Nazi persecution can also serve as a basis for revocation based on the fraudulent procurement prong of § 1451(a). United States v. Palciauskas, 734 F.2d 625, 628 (11th Cir. 1984) (defendant's certificate of naturalization was revoked and his U.S. citizenship was cancelled under § 1451(a) where he misrepresented on his visa application that he was a clerk in a food camp during the Nazi occupation of Lithuania, since the evidence showed that he actually assisted with Nazi persecution of the local Jewish population as mayor of his city).
\item \textsuperscript{47} \textit{Gordon & Rosenfield, supra} note 32, § 20.6, at 37.
\item \textsuperscript{48} See 8 U.S.C. § 1251(a)(1) (makes deportable aliens who were excludable from entering the United States); 8 U.S.C. § 1182(a)(33) (makes Nazi persecutors excludable at entry); 8 U.S.C. § 1251(a)(19) (makes Nazi persecutors deportable).
\item \textsuperscript{49} See \textit{supra} note 16.
\item \textsuperscript{50} \textit{Fedorenko}, 449 U.S. at 517. The district court has no discretion to utilize its equitable powers if the government proves that the defendant obtained his certificate of naturalization illegally or fraudulently. \textit{Id.} The district court cannot ignore, excuse, or overlook such facts and uphold the grant as valid. \textit{Id.} Where the defendant has failed to comply with all the preconditions, the court must annul the grant upon adequate proof. \textit{Id.}
\item \textsuperscript{51} \textit{Id. See also H.R. Rep. No. 1086, supra} note 38, at 2983.
\end{itemize}
C. Procedure

A U.S. attorney initiates a denaturalization case pursuant to 8 U.S.C. § 1451(a). In addition, OSI may also investigate and initiate actions against alleged former Nazi persecutors. The suit is adjudicated as a civil case in a federal district court. The denaturalization action has been considered a suit in equity. Nevertheless, the U.S. Supreme Court ruled in Fedorenko, that the district court has no equitable discretion "to excuse illegal or fraudulent procurement of citizenship." A denaturalization trial also adheres to the Federal Rules of Civil Procedure and Evidence, as do all civil trials in a federal district court.

An explicit procedural protection provided by Congress in 8 U.S.C. § 1451(a) is the requirement of filing an affidavit showing good cause in order to commence the denaturalization suit. The affidavit serves to protect the naturalized citizen by requiring the government to show that a prima facie evidentiary basis for the suit exists. The affidavit must disclose the evidence from which the government concluded that denaturalization proceedings are warranted, so that the judge may detect any reckless categorization or noncritical selection of defendants for such action. Failure to file this required document, which is separate from the complaint, will subject the suit to dismissal. A defendant in a denaturalization case may similarly protect himself through the liberal discovery provisions of the Federal Rules of Civil Procedure.

Although a denaturalization suit may be brought in any naturalization court, which includes both state and federal courts, in practice the suit is always filed in a U.S. district court. The federal district court in which the suit is commenced has jurisdiction to revoke the certificate of naturalization even when

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53 See supra note 1. Pursuant to 28 C.F.R. § 0.55(f) (1985), all litigation under immigration and nationality laws, including any civil actions against alleged Nazi persecutors, is handled by OSI through the Assistant Attorney General of the Criminal Division within the Department of Justice. See GORDON & ROSENFIELD, supra note 32, § 20.5(b)(3), at 27.
56 Fedorenko, 449 U.S. at 517.
57 GORDON & ROSENFIELD, supra note 32, §§ 20.5a, 20.5c(5) & (6), at 24–32.
60 United States v. Minerach, 250 F.2d 721, 725–26 (7th Cir. 1957); DeRoma, 603 F. Supp. at 132.
61 Castello, 365 U.S. at 284.
63 8 U.S.C. § 1451(a). See also 8 U.S.C. § 1421 (1982), which grants jurisdiction to naturalize upon the following courts: U.S. district courts, state and territorial courts of record. These courts have jurisdiction to naturalize only persons who reside within the specific jurisdiction of the court. Id.
64 GORDON & ROSENFIELD, supra note 32, § 20.5c, at 29.
the original decree was issued by another naturalization court. The denaturalization action is filed in the judicial district where the naturalized individual resides at the time the suit is filed.

As with all other civil suits, process must be served personally on the defendant. If the defendant is not in either the United States or the judicial district in which he last resided, he can be served by publication or by any manner provided by the laws of the state where the suit is brought. The denaturalization decree will not be valid unless service of process was made in conformity with the law.

The trial is the same as in all civil litigation; however, because it is a suit in equity, the case is not heard by a jury. Defendants in denaturalization suits frequently move for the right to a jury trial. They argue that the proceeding is sufficiently criminal in nature to require a jury verdict, but all such arguments have been unsuccessful. The defendant may be compelled to testify unless he has a recognizable claim of privilege against self-incrimination.

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70 See, e.g., Luria, 231 U.S. at 27–28; United States v. Walus, 453 F. Supp. 699, 702–03 (N.D.Ill. 1978), rev'd on other grounds, 616 F.2d 283 (7th Cir. 1979). See generally Denaturalization and the Right to Jury Trial, 71 J. CRIM. L. & CRIMINOLOGY 46 (1980). Although a jury trial could expedite the adjudication of Nazi persecution cases since a jury verdict can be rendered much sooner than a determination by a judge, there are two disadvantages to trial by jury. First, the defendant would have to be afforded a greater scope of privilege against self-incrimination and, conceivably, even the right to refuse to take the stand, since a greater potential for prejudice would attach to a defendant’s refusal to respond to specific questions in front of a jury, instead of in front of a judge. See United States v. Maltes, 247 F.2d 378, 381 (2d Cir. 1957). Second, unlike a decision by a judge, a jury verdict does not include a written opinion, and this could therefore preclude the existing wide scope of review allowed on appeal in the denaturalization cases, particularly if the record in the lower court was unclear or sparse. See infra text accompanying notes 73–75.
71 Brown v. United States, 356 U.S. 148, 154–55 (1958). In a recent Nazi denaturalization case, a limited fifth amendment privilege was recognized. United States v. Trucis, 89 F.R.D. 671, 673–74 (E.D.Pa. 1981). This privilege extends to questions which pose a real threat of incrimination stemming from a defendant’s alleged participation in Nazi persecution during World War II, because a defendant’s responses may be used by a foreign government for possible foreign prosecution if the defendant
civil trial, the defendant's refusal to testify may be noted and thus subject to adverse inferences.72

The denaturalization judgment by the district court, like all judgments in a civil proceeding, may be appealed by either side to the circuit court of appeals, and subsequently, if certiorari is granted, to the U.S. Supreme Court.73 On appeal, extensive review of the findings of fact and conclusions of law is permitted by the court, since "[t]he issue in these cases is so important to the liberty of the citizen that the weight normally given . . . findings of . . . lower courts does not preclude [their reconsideration]."74 Accordingly, district court judges give considerable detail to their findings of fact and conclusions of law.75

D. Proof

The burden of proof which must be shouldered by the government in making its case is an added procedural protection for the defendant, and the most unique aspect of the denaturalization suit. In Schneiderman v. United States,76 the U.S. Supreme Court held that naturalized citizenship can be revoked only upon the standard of proof of clear, unequivocal, and convincing evidence.77 The Court decided that this burden, higher than the preponderance of evidence standard normally required in a civil proceeding, was necessary in a denaturalization suit because of the potentially grave outcome—the loss of U.S. citizenship.78 The government's burden of proof must leave no doubt that citizenship had not been granted in accordance with the strict legal preconditions.79

A consequence of this high burden of proof has been administrative reluctance to bring denaturalization suits, except in the most flagrant cases.80 The

were to be deported. Id. The Trucis court denied the existence of any privilege as to questions concerning the defendant's identity and all other matters pertaining to his entry and subsequent naturalization. Id. at 674. See also Klimavicius, 620 F. Supp. at 667 (defendant failed to establish the threat of foreign prosecution substantial enough to justify his invocation of the fifth amendment privilege against self-incrimination).

72 GORDON & ROSENFIELD, supra note 32, § 20.5d(2), at 34.
74 Costello, 365 U.S. at 269 (quoting Chaunt, 364 U.S. at 352). See also Fedorenko, 449 U.S. at 506 (the Supreme Court noted that, "in reviewing denaturalization cases, we have carefully examined the record ourselves").
75 See Fed. R. Civ. P. 52.
76 Schneiderman v. United States, 320 U.S. 118 (1943).
77 Id. at 125. See also Koziy, 540 F. Supp. at 34.
78 Schneiderman, 320 U.S. at 122–23, 125.
79 Baumgartner v. United States, 322 U.S. 665, 675–76 (1944); see also Schneiderman, 320 U.S. at 122–23, 125. The standard does not surpass the beyond a reasonable doubt standard applicable in a criminal case. Kairys, 782 F.2d at 1378 n.8. For practical purposes, however, the standard is basically the same because the government will not succeed where any doubt exists.
80 GORDON & ROSENFIELD, supra note 32, § 20.3, at 11–12.
OSI's cases represent an exception to this trend of infrequent litigation. The heightened standard of proof required in these cases has been a formidable, yet not insurmountable, challenge in revoking the citizenship of former Nazi persecutors. The testimony and evidence necessary to prove the government's case is often elusive, since the events in question occurred in other countries over forty years ago.\textsuperscript{81}

E. Effect of a Denaturalization Judgment

A judgment against the defendant in a denaturalization suit renders the grant of citizenship void \textit{ab initio}.\textsuperscript{82} Under 8 U.S.C. § 1451(a) revocation of citizenship is effective from the original date of the certificate of naturalization.\textsuperscript{83} Therefore, the judgment of invalidity relates back to the date of the original grant of naturalization, making it a nullity.\textsuperscript{84}

By divesting the naturalized person of his illegally obtained citizenship status, the denaturalization order restores the individual's former status as an alien.\textsuperscript{85} One of the prime consequences an alien then faces is amenability to charges of deportation if the individual is within a class, as the denaturalized Nazi persecutor, of either excludable or deportable aliens.\textsuperscript{86}

\textsuperscript{81} See Ryan, supra note 3, at 340.
\textsuperscript{82} Johanessen, 225 U.S. at 240–42.
\textsuperscript{83} 8 U.S.C. § 1451(a). See also 8 U.S.C. § 1451(b) & (h). The order of denaturalization, in effect, revokes and vacates the original order granting the defendant U.S. citizenship, and cancels the certificate of naturalization, ordering its surrender to the Attorney General. 8 U.S.C. § 1451(h). The clerk of the court must send a certified copy of the memorandum decision to the Attorney General, whereupon the order is filed with the original court of naturalization. See Gordon & Rosenfield, supra note 32, § 20.5d, at 36. Denaturalization permanently restrains and enjoins an individual from claiming any citizenship rights, privileges, or advantages, under or through any document which evidences citizenship. Id. § 20.6, at 37.
\textsuperscript{84} Johanessen, 225 U.S. at 240–42. Although this \textit{nunc pro tunc} concept has been used to determine the derivative rights of citizenship, Battaglino v. Marshall, 172 F.2d 979, 981–82 (2d Cir. 1949), the U.S. Supreme Court has determined that Congress did not intend that the concept apply to the INA's provisions of deportation. Costello v. INS, 376 U.S. 120, 130–32 (1963) (two criminal convictions in the United States could not be relied upon to support alien's deportation, both occurring prior to the alien's denaturalization, since the statute only permits deportation of those who were aliens at the time of their convictions). Cf. Eichenlaub v. Shaughnessy, 338 U.S. 521, 531 (1950). The facts in these cases can be distinguished from those discussed in this article, since the relation-back theory, see supra text accompanying notes 83–84, as utilized against a denaturalized Nazi persecutor, makes the individual immediately amenable to deportation for conduct which transpired prior to, and not after, the individual's invalid acquisition of citizenship. See, e.g., Squires v. INS, 689 F.2d 1276, 1283 (6th Cir. 1982) (Congress expressly designed 8 U.S.C. § 1251(a)(1) to reflect changes in the law of excludability, therefore, there is explicit authority for applying the relation-back concept to effect a deportation of an initially excludable alien).
\textsuperscript{85} Gordon & Rosenfield, supra note 32, § 20.6, at 37.
\textsuperscript{86} 8 U.S.C. § 1251(a); Bilokumsky v. Tod, 263 U.S. 149 (1923). See also infra note 89.
III. DEPORTATION

A. Purpose and Use of Procedure

The government may invoke the sanction of deportation to expel aliens from the United States who fall into two basic categories.87 The first category includes those aliens who were excludable at the time of their entry, or who succeeded in entering the country without inspection.88 The second class encompasses aliens who are deemed to be deportable for a variety of reasons despite an initial legal entry. These reasons include violations of temporary immigration status conditions, and certain types of misconduct while in the country.89 These two categories can also be viewed as distinct from each other. One category includes acts committed prior to or at the time of entry, and the other includes acts committed subsequent to arrival in the United States.

Congress determines which classes of aliens are excludable and deportable.90 The Supreme Court has found the power of Congress to prescribe grounds for deportation to be exclusive and free from judicial scrutiny because of its political nature.91 Although there is no direct constitutional edict by which Congress may exercise its power over deportation, the Court has held that such authority is inherent in the exercise of national sovereignty and synonymous with acknowledged congressional power to exclude aliens.92

In 1952, Congress enacted the current deportation statute, 8 U.S.C. § 1251, as part of the INA.93 There are two important aspects to the deportation statute's operation which make it possible to bring deportation charges against denaturalized or noncitizen former Nazi persecutors living in the United States. First, in determining whether aliens are subject to deportation because they are within an excludable class, Congress made dispositive the exclusion law which existed at the time of entry.94 Therefore, immigration laws that are no longer in effect, such as the DPA or RRA, may be used to prove an alien's initial excludability at the time of entry, and, thus, the alien's deportability.95

87 See Gordon & Rosenfield, supra note 32, § 4.1, at 6–8.
88 8 U.S.C. § 1251(a)(1) & (2). § 1251(a)(1) includes, by implication, the 33 excludable classes in 8 U.S.C. § 1182(a)(1)–(33). Once an alien who falls within one or more of the excludable classes enters the United States, the alien is deportable. See, e.g., Reid v. INS, 420 U.S. 619, 623 (1975); Santiago v. INS, 526 F.2d 488 (9th Cir. 1975), cert. denied, 425 U.S. 971 (1976). See also infra note 95 and accompanying text.
90 See generally Fong Yue Ting, 149 U.S. at 713–14.
92 See Carlson, 342 U.S. at 536. See also Bugajewitz v. Adams, 228 U.S. 585, 591 (1913); Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 97 (1903); Chae Chan Ping v. United States (The Chinese Exclusion Case), 150 U.S. 581, 601 (1889).
93 See supra note 4.
95 Id. Under this section, all current and previous exclusionary provisions are used in determining
Second, Congress expressly provided that the grounds included within the deportation statute, 8 U.S.C. § 1251, would apply retroactively.96 This retroactive application affected later amendments to 8 U.S.C. § 1251, such as the Holtzman Amendment, which included specific provisions for the exclusion and deportation of persons who participated in Nazi persecution.97 Federal courts have upheld congressional amendments that create such new classes of excludable and deportable aliens.98 The courts' retroactive application of these amendments does not violate either the prohibitions against ex post facto laws or bills of attainder, because deportation does not involve a recognized punishment.99 The courts have consistently deemed deportation not to be a form of punishment but rather a refusal by the federal government to harbor persons it considers undesirable.100 In addition, since there is no general statute of limitations to bring a deportation action, an alien, such as a former Nazi persecutor, is always amenable to deportation for illegal entry or for any other conduct deemed deportable by Congress.101

B. Grounds

Deportation charges may be brought against an alien who appears to be within a legislatively determined class of either originally excludable or specifically deportable aliens. The classes of deportable aliens include those who were excludable at the time of their entry, or who entered in violation of any law of the United States.102 Specific laws were in effect at the time Nazi persecutors entered the United States under either the DPA or RRA.103 Therefore, charges of initial excludability and violation of law at the time of entry may provide the basis for deportation.104 Prior to the enactment of the Holtzman

an individual's status. GORDON & ROSENFIELD, supra note 32, § 4.7a, at 44–46. Thus, anyone who entered the United States in violation of an existing congressional edict may be deported after his unlawful entry is discovered. Id. This includes exclusive provisions of laws, such as the DPA or RRA, which are no longer in effect. See, e.g., Matter of Fedorenko, supra note 16, in which the defendant was charged with violation of 8 U.S.C. § 1251(a)(1) because he fell within an excludable class at entry under § 2 & § 10 of the DPA.

96 8 U.S.C. § 1251(d).
97 Id. See, e.g., Artukovic, 693 F.2d at 897, citing Lehmann v. Carson, 353 U.S. 685, 690 (1957) (Congress may establish grounds for deportation that apply retroactively). See also supra note 2.
98 See, e.g., Artukovic, 693 F.2d at 897 (upholding the constitutionality of the Holtzman Amendment and affirming its retroactive application).
100 Harrisiades, 342 U.S. at 594, citing Bugajewitz, 228 U.S. at 591 (opinion by Holmes, J.).
101 GORDON & ROSENFIELD, supra note 32, at 5–6 § 4.1(a). See also supra notes 96–98 and accompanying text.
103 See supra notes 4 & 95.
Amendment in 1978, the permanent excludable and deportable statutory classifications within the INA did not contain any specific provision directed at Nazi persecutors. Thus, until the Holtzman Amendment in 1978, a statutory loophole existed by which any Nazi persecutor was neither specifically excludable nor deportable if he entered the United States after the operative dates of the DPA and RRA. The Holtzman Amendment added to both classes of aliens, those "who . . . under the direction or in association with [Nazis and their collaborators] ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin or political opinion." The amendment effectively closed the loophole. The retroactive application of 8 U.S.C. § 1251(a)(19) makes any former Nazi persecutor who has entered the United States deportable, no matter what exclusive provision existed at the time of entry.

In deportation actions brought against denaturalized Nazi persecutors, standard OSI charges include first, excludability at entry under applicable sections of the INA, DPA or RRA pursuant to 8 U.S.C. § 1251(a)(1); second, entrance in violation of the same sections of these refugee laws pursuant to 8 U.S.C. § 1251(a)(2); and third, participation in Nazi persecution pursuant to 8 U.S.C. § 1251(a)(19). In a deportation proceeding brought against an alleged Nazi

106 Id. There were, however, State Department regulations in effect during the 1950's which interpreted 8 U.S.C. § 1182(a)(27) (excludes aliens who seek to enter the United States to engage in activities which would be prejudicial to the United States), and § 1182(a)(29) (excludes aliens who would engage in various subversive activity after entry) as prohibiting the entry of charged or convicted war criminals, and also individuals who had "engaged in conduct contrary to civilization and human decency." 22 C.F.R. § 42.42(j) (1953). See also supra note 4.
107 8 U.S.C. § 1182(a)(33); 8 U.S.C. § 1251(a)(19). See also supra note 4. Although the use of the term "persecution" was controversial, Congress incorporated the term but declined to give it a specific statutory definition. The term was defined in accordance with the administrative and judicial case law developed in interpreting other provisions contained in the INA. House Report, supra note 105, at 7–9. This language has been held not to be unconstitutionally vague. Artukovic, 693 F.2d at 897. Enactment of the Holtzman Amendment reestablished a provision which was in the post-World War II refugee measures under U.S. immigration law. House Report, supra note 105, at 2–7.
108 See Maikowski, 773 F.2d at 446 (a police chief who, on Nazis' orders had his men arrest all inhabitants of a village and burn it, has assisted in persecution and his personal motivations are not paramount in determination under 8 U.S.C. § 1251(a)(19)); Laieniekas v. INS, 750 F.2d 1427, 1430 (9th Cir. 1985) (interpreted § 1251(a)(19) as requiring evidence which establishes that the alien personally ordered, incited, assisted, or otherwise participated in the persecution of individuals, in order to find the alien deportable as a former Nazi persecutor). See also Note, United States Exclusion and Deportation of Nazi War Criminals: The Act of October 30, 1978, 13 N.Y.U. J. Int'l L. & Pol. 101, 115–16 (1980).
persecutor who entered the United States without procuring his visa by fraud, at a time when no existing law would have excluded him, the charge may consist only of an allegation of deportability based on 8 U.S.C. § 1251(a)(19).

C. Procedure

While Congress determines which classes of aliens may be deported, it entrusts the enforcement of these legislative policies to the offices of the executive branch. Specifically, 8 U.S.C. § 1103 empowers the Attorney General to administer and enforce the immigration laws. In turn, the Attorney General has delegated this power to the Immigration and Naturalization Service (INS), a surrogate agency of the Department of Justice.

The statutory provisions concerning the deportation procedure are set forth in 8 U.S.C. § 1252(b). Additional provisions regarding the proceeding are

1985) at 1–2, aff’d Linnas v. INS, No. 85-4163 (2d. Cir. 1986) (available on Lexis) [hereinafter cited as Linnas].

Laipenieks, 750 F.2d at 1429. Another possible ground of excludability, which has been used against Nazi persecutors in deportation proceedings, is proof that the alien procured his visa through fraud or willful misrepresentation of a material fact under 8 U.S.C. § 1182(a)(19). See Matter of Laipenieks, 18 I&N Dec. 433, 434 (Interim Decision No. 2849) (B.I.A. 1983), rev’d on other grounds, Laipenieks, 750 F.2d at 1437. This ground, like the similar ground in a denaturalization action (see supra note 41 and accompanying text) requires proof of a specific instance of initial fraud or misrepresentation. 750 F.2d at 1429. It is subject to the same confusion regarding the standard of materiality, since the Chaunt test (see supra note 41) has been held to apply in a deportation proceeding as to the materiality of misstatements at the visa application stage. Maskovskis, 773 F.2d at 441. See also GORDON & ROSENFIELD, supra note 32, § 4.7c(4), at 58–58.2.


The deportation procedure statute states, in relevant part, that an: [Immigration judge] shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before [an immigration judge], at which the alien shall have reasonable opportunity to be present ... the Attorney General shall prescribe ... regulations ... [including] requirements that:

(1) the alien shall be given [reasonable] notice ...;
(2) the alien shall have the privilege of being represented [by counsel] ...;
(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and
(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.
also established by INS regulations. The procedure itself is initially adjudicated at an administrative hearing before an immigration judge. The immigration judge is neither a judicial officer nor an administrative law judge as defined by the Administrative Procedure Act, but is merely an employee of the INS, the agency responsible for investigating and initiating deportation cases. The Attorney General is empowered to select immigration judges, who preside over specific types of proceedings, namely deportation and exclusion hearings. The immigration judge is responsible for determining whether an administrative finding of deportability is warranted based upon the evidence presented.

The government initiates the proceeding through the issuance of an order to show cause. The order must specify, among other items, the statutory provisions allegedly violated and the factual allegations upon which the action is based. The order requests the respondent to show cause why he should not be deported and asks him to appear before an immigration judge for a hearing at a designated time and place.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section.


116 See 8 U.S.C. § 1252(b); 8 C.F.R. §§ 1.1(b), 242.8 (1986). Immigration judges, and the Board of Immigration Appeals (B.I.A.) (see infra note 157) are under the authority of the Executive Office of Immigration Review, which is part of the Department of Justice. 8 C.F.R. §§ 3.0, 3.1 (1986).

117 Lopez-Telles v. INS, 564 F.2d 1302, 1303-04 (9th Cir. 1977).

118 Id. See generally LeTourneur v. INS, 538 F.2d 1368 (9th Cir. 1976). The dual role played by the immigration judge as both administrative and judicial officer has come under strong criticism by commentators and congressional commission. See THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, THE FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMMITTEE ON IMMIGRATION AND REFUGEE POLICY at 248-50 (1981) (Commission recommends that existing law be amended to create an immigration court under article I of the U.S. Constitution). Levinson, A Specialized Court for Immigration Hearings and Appeals, 56 NOTRE DAME LAW. 644 (1981) [hereinafter cited as Levinson]; Roberts, Proposed: A Specialized Statutory Immigration Court, 18 S.D.L. REV. 1 (1980). Under the various versions of the proposed Simpson-Mazzoli bills, the immigration judge's status would have been upgraded to the more independent administrative law judge level. GORDON & ROSENFIELD, supra note 32, § 1.41, at 32.6 (1985 Supp.). The legislation, however, expired when the 98th Congress adjourned without resolving the differences between the two final proposed versions, S. 529, 98th Cong., 1st Sess. (1984), and H.R. 1510, 98th Cong., 1st Sess. (1984). Id. Two differing bills which incorporate provisions of these proposed amendments have been filed in the 99th Congress.


121 Id. at § 242.1.

122 Id. at § 242.1(a) & (b).

123 Id. at § 242.1(b).
The deportation proceeding is civil rather than criminal in nature. For this reason, and because deportation is not considered a form of punishment, the Supreme Court has determined that the requirements of procedural due process only entitle an alien to a fundamentally fair proceeding in a deportation hearing. In applying this lower standard, the Supreme Court has ruled that great deference should be given to executive authority to interpret and implement deportation statutes. The statutes and regulations include such protections as adequate notice, the opportunity to obtain counsel, the opportunity to present evidence and to cross-examine witnesses, and the right to have a preference regarding the country to which the alien would be deported. Finally, the rules of evidence are not applicable in the hearing, and any type of evidence is admissible if it is deemed material and relevant.

The deportation hearing actually consists of a series of hearings conducted within a certain time period, which can last for many months. In the deportation proceeding, the alien is permitted to apply for certain categories of discretionary relief prior to or during the hearing. In this way, humanitarian

124 Harisiades, 342 U.S. at 594–95. See also Bugajewitz, 228 U.S. at 591.
125 Japanese Immigrant Case, 189 U.S. at 100–02. See also Galvan, 347 U.S. at 530–32.
126 INS v. Miranda, 459 U.S. 12, 19 (1982); see generally INS v. Wang, 450 U.S. 139, 145–46 (1981). These two recent U.S. Supreme Court decisions affirm that the proper way to determine whether a defendant has been afforded due process in a deportation proceeding is to question whether statutory requirements were met, rather than to judicially impose due process standards. Miranda, 459 U.S. at 19; Wang, 450 U.S. at 145. See also Wong Yang Sung v. McGrath, 339 U.S. 33, 49–50 (1950); Japanese Immigrant Case, 189 U.S. at 100–02.
127 8 U.S.C. §§ 1252(b), 1253(a); 8 C.F.R. §§ 242.10, 242.16(a), 242.17(c).
129 See Ryan, supra note 3, at 50–51.
130 See 8 C.F.R. §§ 242.17; 244 (1986). The forms of relief available through the Attorney General's discretionary power include: withholding of deportation on the basis that such alien's life or freedom would be threatened in a country on account of race, religion, nationality, membership in a particular social group or political opinions. 8 U.S.C. § 1253(h)(1). When such a request for asylum is made after initiation of a deportation hearing, it is considered under § 1253(h). 8 C.F.R. § 208.3(b) (1986). If the alien meets the criteria under § 1253(h), the Attorney General is prohibited from deporting the alien, despite his discretionary power. Bolanos-Hernandez v. INS, 749 F.2d 1316, 1319 (9th Cir. 1984). Certain aliens may also be eligible for asylum after a deportation hearing. 8 C.F.R. § 208.10 & 11 (1986). The Attorney General has the discretion to grant or deny asylum to any alien who is entitled to refugee status, under the Refugee Relief Act of 1980. 8 U.S.C. §§ 1101(a)(42), 1158(a); see also infra notes 186–90 and accompanying text. An alien deportable as a Nazi persecutor is automatically ineligible for refugee status, since the definition of a "refugee" under § 1101(a)(42) specifically excludes anyone who has engaged in persecution. See also 8 C.F.R. § 207.3(a) (1986). Suspension of deportation under 8 U.S.C. § 1254(a), is another form of statutory discretionary relief, used to ameliorate harsh consequences of deportation for aliens who have been in the United States for a long time. The Attorney General has discretion to waive deportation for fraudulent entry in cases where the alien has close family ties to a U.S. citizen, or was otherwise admissible except for the fraud. 8 U.S.C. § 1251(f). The Attorney General may also choose to permit an alien to depart from the United States voluntarily, in order to avoid the customary formal deportation procedures. 8 U.S.C. § 1254(e). All of these forms of relief do not apply to aliens deportable for participating with Nazi persecution under 8 U.S.C.
considerations may be raised and an alien who is deportable may be allowed to stay in the United States. However, Congress excluded Nazi persecutors from eligibility for all substantial forms of discretionary relief through both the 1978 Holtzman Amendment and a subsequent 1981 amendment to the INA. Thus, discretionary relief is unavailable to any alien deportable under 8 U.S.C. § 1251(a)(19) who participated in Nazi persecution.

Therefore, to prevent consideration of any discretionary relief in a deportation action against an alleged former Nazi persecutor, the charge must include an allegation of deportability based on 8 U.S.C. § 1251(a)(19). Discretionary relief is precluded only upon an initial finding of involvement with Nazi persecution between 1933 and 1945.

An alien, who an immigration judge orders deported, has several avenues of appeal. First, the alien must appeal, within ten days of the decision, to the Board of Immigration Appeals (BIA), a quasi-judicial agency which is under the authority of the Attorney General. If the BIA upholds the finding of deportability, then the deportation order becomes administratively final and the alien may seek judicial review. The procedure for judicial review of final


In addition, some aliens are also entitled to apply for adjustment of status under 8 U.S.C. § 1255(a). Since eligibility for this form of relief precludes any alien who was excludable under 8 U.S.C. § 1182(a), Nazi persecutors are not entitled to apply.

Consideration of a request for discretionary relief involves a two-step process. First, the immigration judge decides whether the alien is, in fact, eligible for the particular form of relief. 8 C.F.R. § 242.17(e). Next, even if the alien is eligible, the judge, exercises the discretionary power of the Attorney General, and decides whether such relief should be granted or denied. Patel, 638 F.2d at 1205–06. But see supra note 130 (mandatory relief for asylum requests under 8 U.S.C. § 1253(h)).


See Matter of Fedorenko, supra note 16, at 18–19.

8 U.S.C. § 1105a, 8 C.F.R. §§ 3.1(d)(2), 242.21. An alien can also file a motion to reopen or reconsider the case. 8 C.F.R. § 242.2. See also Gordon & Rosenfield, supra note 32, § 5.13a, at 160–64. If such a motion is granted, a stay of execution of the pending deportation order is not automatically granted, and thus the alien must make a separate motion for a stay. 8 C.F.R. §§ 3.6, 242.22, 243.4.

See 8 C.F.R. § 242.21. Because the BIA exists pursuant to regulation, its lack of independence has been criticized as prohibiting its ability to make impartial and fair decisions. Levinson, supra note 118, at 649–51.

See 8 C.F.R. § 3.1(d)(2). For the court of appeals to have jurisdiction under 8 U.S.C. § 1105a, the alien must have exhausted all administrative remedies available. Cheng Yong Chew v. Boyd, 309 F.2d
orders of deportation is provided by 8 U.S.C. § 1105a(a), which directs the circuit courts of appeals to hear all such appeals. An alien has six months from a final administrative determination of deportation to appeal for judicial review. The findings of fact are conclusive if they are found to be supported by reasonable, substantial, and probative evidence on the record in its entirety.

Overall, an appeals court's review is limited to a consideration of whether the administrative proceeding conformed with the requirements of due process. The court of appeals can only pass upon issues raised in the hearing and which are part of the administrative record. Since neither the immigration judge nor the BIA have the authority to pass upon the constitutionality of the applicable statutes and regulations, this exclusive review by the circuit court of appeals affords the alien the means of challenging these provisions. The decision rendered by the circuit court of appeals, as with all other decisions, may be appealed to the Supreme Court, if certiorari is granted.

857.861 (9th Cir. 1962). The BIA decision is deemed administratively final, except in instances where a case is referred to the Attorney General. 8 C.F.R. § 3.1(d)(2). The BIA can refer cases for this type of review, if directed to by the Attorney General, decided by the Chairman or a majority of the BIA, or upon such a request by the Commissioner of Immigration and Naturalization. 8 C.F.R. § 3.1(b)(1).

See 8 U.S.C. § 1105a(a), added by 1961 Amendment to the INA, Pub. L. No. 87-301, § 5(a), 75 Stat. 651: "The procedure ... shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under [8 U.S.C. § 1252(b)]." 8 U.S.C. § 1105a(a). This jurisdictional statute is intended to prescribe exclusively and regulate a portion of the jurisdiction of the federal courts. Cheng Fan Kwok v. INS, 392 U.S. 206, 212 (1968). The purpose behind its enactment was to "create a single, separate, statutory form of judicial review of administrative orders for the deportation ... of aliens from the United States ...." HOUSE REPORT No. 1086, supra note 38, at 2966. Congress sought to expedite the deportation process through this device of direct petition to the courts of appeals in order to prevent "successive dilatory appeals to various federal courts ...." Foti v. INS, 375 U.S. 217, 226 (1963).

While § 1105a withdrew from the district courts jurisdiction to review final orders of deportation entered during an 8 U.S.C. § 1252 proceeding, the broad grant of jurisdiction contained in 8 U.S.C. § 1329 is not otherwise circumscribed by the exclusive provision over deportation. Nason v. INS, 449 F. Supp. 244 (D.C. Ill. 1978). See also Acosta v. Gaffney, 558 F.2d 1153, 1155–56 (3d Cir. 1977) (district courts still have jurisdiction to review denial by the INS of a stay of a deportation order). Also, the right of review by a district court through a writ of habeas corpus for those aliens held in custody who have been ordered deported, was preserved by this 1961 amendment to the INA. See 8 U.S.C. § 1105a(b). But where the issue of deportability is in question, exclusive appellate jurisdiction rests with the circuit courts of appeals, even if the alien is raising the constitutionality of a statute itself. Daneshivar v. Chauvin, 644 F.2d 1248, 1250–51 (8th Cir. 1981).

101 Maskovskis, 773 F.2d at 446. 8 U.S.C. § 1105a(a)(4).
102 Biggin v. INS, 479 F.2d 569, 572 (3d Cir. 1973).
There is one notable exception to this process of judicial review, which occurs when the alien on appeal asserts a nonfrivolous claim of citizenship.\textsuperscript{146} Congress has provided for a \textit{de novo} hearing in the appropriate district court where such a claim is made.\textsuperscript{147} This provision followed the Supreme Court's decision in \textit{Ng Fung Ho v. White},\textsuperscript{148} in which the Court ruled that the fifth amendment's guarantee of due process requires all citizenship claims to be subject to judicial determination.\textsuperscript{149}

D. \textit{Proof}

At the initial administrative hearing, two basic elements form the prima facie case of an individual's deportability from the United States. The government's evidence must prove that first, the individual in question is in fact an alien, and second, that the individual falls within one or more categories of deportability.\textsuperscript{150}

The standard of proof which the government must meet in a deportation hearing is the same burden as that in a denaturalization trial: clear, unequivocal, and convincing evidence.\textsuperscript{151} Despite this heightened burden on the government, there is a statutory burden on the respondent to show the time, place, and manner of entry into the United States.\textsuperscript{152} This burden creates a statutory presumption of deportability in cases involving an alleged illegal entry, where the government proves that the individual is an alien and where the individual is either unable or unwilling to offer evidence or testify regarding entry.\textsuperscript{153} When this occurs, the individual is statutorily presumed to be present unlawfully in the United States and may be ordered deported on this finding alone.\textsuperscript{154}

E. \textit{Effect of the Deportation-Order}

Once a final order of deportation has become administratively final, has withstood all appellate challenges to its validity, and no discretionary relief has

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\textsuperscript{146} Agosto v. INS, 436 U.S. 748, 752–54 (1978).
\textsuperscript{147} 8 U.S.C. § 1105a(a)(5).
\textsuperscript{148} Ng Fung Ho v. White, 259 U.S. 276 (1922).
\textsuperscript{149} Id. at 284–85. \textit{See also} Kessler v. Strecker, 307 U.S. 22, 34–35 (1939); \textit{Bilokumsky}, 263 U.S. at 152–53; 8 U.S.C. § 1105a(a)(5).
\textsuperscript{150} GORDON \& ROSENFIELD, supra note 32, § 5.10b, at 118.4–23.
\textsuperscript{151} Woodby v. INS, 385 U.S. 276 (1966).
\textsuperscript{152} 8 U.S.C. § 1361 (1982).
\textsuperscript{153} \textit{See} Iran v. INS, 656 F.2d 469, 472 (9th Cir. 1981) (presumption applies only in cases where illegal entry is at issue); Navia-Duran v. INS, 568 F.2d 805 (1st Cir. 1977) (presumption does not operate until the INS makes out a prima facie case).
\textsuperscript{154} Tejeda-Mata v. INS, 626 F.2d 721, 725 (9th Cir. 1980), \textit{cert. denied}, 102 S.Ct. 2280 (1982); \textit{see also} Cabral-Avila v. INS, 589 F.2d 957, 959 (9th Cir. 1978), \textit{cert. denied} 440 U.S. 920 (1979). This presumption of deportability does not deprive the alien of any fifth amendment privilege against self-incrimination, Smith v. INS, 585 F.2d 600, 602 (3d Cir. 1978), unless the testimony is used against the alien in a subsequent criminal proceeding. Chavez-Raya v. INS, 519 F.2d 397, 401 (7th Cir. 1975).
been granted, the actual deportation of the alien must be carried out.\textsuperscript{155} Although the question of destination arises during the initial hearing, the actual implementation of the deportation order is handled outside the adjudicative process.\textsuperscript{156}

The actual destination of a deported alien is a consideration which is secondary to the initial question of his deportability. The Attorney General is given six months from either the final order of deportation, or from the date of the final reviewing court's decision, to effect the alien's departure from the United States.\textsuperscript{157} Congress has provided a specific procedure for the deportation of an expelled alien, which provides three series of destination options.\textsuperscript{158} First, the alien is permitted to designate one country of choice, to which the alien will go if the designated country agrees to the plan.\textsuperscript{159} If, however, the Attorney General concludes that deportation to that country "would be prejudicial to the interests of the United States," if the alien declines to make a proper designation, or if the country refuses to accept the deportee, then the second option is attempted.\textsuperscript{160} The second option authorizes the Attorney General to pick the country of which the alien is a subject, national, or citizen, provided that this country is willing to take the alien into its territory.\textsuperscript{161} If this second option cannot be implemented, the Attorney General is then authorized to choose any of the following countries for designation: the country from which the alien last entered the United States, the country from which port the alien embarked for the United States, the country in which the alien was born, the country in which the alien's birth place is situated when the deportation order is rendered, any country in which the alien resided prior to entering the United States, any country having sovereignty over the alien's birth place, or any other country willing to take in the alien.\textsuperscript{162}

\textsuperscript{155} See 8 U.S.C. § 1252(c).
\textsuperscript{156} See Gordon & Rosenfield, supra note 32, § 5.18, at 201.
\textsuperscript{157} 8 U.S.C. § 1252(c).
\textsuperscript{158} See 8 U.S.C. § 1253(a); Matter of Linnas, supra note 109, at 3–4; see generally Wong Kam Cheung v. INS, 408 F.2d 35 (2d Cir. 1969).
\textsuperscript{159} 8 U.S.C. § 1253(a). In practice this occurs during the hearing. Id.
\textsuperscript{160} Id. If the country fails to advise the U.S. Attorney General within three months following an initial inquiry, the designation may thereafter be disregarded. Id. See also Matter of Linnas, supra note 109, at 3.
\textsuperscript{161} 8 U.S.C. § 1253(a); Matter of Linnas, supra note 109, at 3.
\textsuperscript{162} 8 U.S.C. § 1253(a)(1)–(7). There is no priority or preference to the order of these choices. Id. See Linnas, supra note 109, at 10–12. When no other country but the Soviet Union is willing to accept a deportable former Estonian Nazi persecutor into its territory, it may be properly designated as the country of deportation under 8 U.S.C. § 1253(a)(7)). The State Department had declared that such a deportation would not contravene the United States' refusal to recognize the legitimacy of the Soviet annexation of Estonia. Linnas, supra note 109, at 10–12. In affirming the BIA's deportation order against Linnas to the Soviet Union, the Second Circuit Court of Appeals rejected Linnas' assertion that such a deportation would violate his rights to due process and equal protection. Linnas, supra note 109, at 2.
The determination of the deportee's destination further delays the actual removal of denaturalized Nazi persecutors. The delay occurs because the Nazi persecutors have usually surrendered their former citizenship at the time of their naturalization in the United States. Thus, after U.S. citizenship is revoked, these former Nazi persecutors become stateless persons; as such, no country is obligated to take them back. Consequently, in the majority of cases the OSI has had to depend on the third option in the statute: finding any country which will consent to taking in the deported Nazi persecutor. This process is time-consuming, with few possible choices, but nevertheless the OSI has succeeded in deporting three Nazi persecutors, two of whom had been previously denaturalized.

IV. THE CONSOLIDATED DENATURALIZATION/DEPORTATION PROCEDURE: A PROPOSAL

A. Purpose and Policy

The U.S. government's policy towards former Nazi persecutors that live in the United States is to strip such persons of the privileges of U.S. citizenship and residence they obtained illegally. To accomplish this revocation under current law, two separate processes of denaturalization and deportation must be used, resulting in protracted and duplicative litigation that takes five to seven years, at best, to complete. OSI presently has over 300 cases under investigation, many of which will result in legal action. If these Nazi cases are to be litigated in an efficient manner, a change in the existing law of denaturalization and deportation is required. One way to accomplish this change is for Congress to amend the INA to provide for a consolidated denaturalization/deportation

163 See Ryan, supra note 3, at 360-61; 343-44.
164 Id.
165 Id. See also, e.g., Linnas, supra note 109, at 10-12.
166 Two denaturalized Nazi persecutors have been deported, including Feodor Fedorenko (to the U.S.S.R.). See supra note 16 and 32; see also Ex-Nazi in United States Since 1949, is Deported to Soviet Union, N.Y. Times, Dec. 23, 1984, at 12, col. 3. The other denaturalized deportee is Viorel Trifa (to Portugal). See Deported Bishop Flies to Portugal, N.Y. Times, Aug. 15, 1984, at 1, col. 1. A third Nazi persecutor who was never naturalized, Hans Lipschis, was deported in 1983 to West Germany, where he was a citizen. See OSI, Digest of Cases, supra note 9, at 47. Two other OSI defendants, Andrija Artukovic and John Demjanjuk, were finally removed from the United States through requests for their extradition by Yugoslavia and Israel, respectively. U.S. Extradites Croat to Yugoslavia, N.Y. Times, Feb. 13, 1986, at 3, col. 1.; Nazi Suspect in Israel to Face Trial, N.Y. Times, Mar. 1, 1986, at 1, col. 1. See supra note 18; Demjanjuk v. Petrovsy, 776 F.2d 571, 576 (6th Cir. 1985), cert. denied, 106 S.Ct. 1198 (1986). Both had been formerly subject to orders of deportation. See supra note 18; Demjanjuk, 776 F.2d at 573.
167 See supra note 7.
168 See supra notes 22-166 and accompanying text.
169 See supra notes 9-14.
procedure. Such an amendment would not be outside Congress' proper scope of authority.

Congress' power over the area of immigration is extensive and the Court has upheld its ability to change the statutorily mandated procedures within this area, including denaturalization and deportation.\(^{170}\) In the past, Congress has authorized judicial hearings for specific types of deportation cases.\(^{171}\) Therefore, the legislature has the power to create a statutory exception to the executive branch's general grant of authority over deportation without violating any separation of powers principle.\(^{172}\)

The purpose and ultimate goal of consolidating the denaturalization and deportation processes would be to eliminate unnecessary duplication and thereby shorten the duration of the entire process into a more reasonable time frame, without denying a defendant any constitutionally required procedural protections.

B. Application of the Consolidated Procedure to Nazi Persecutors

In making the consolidated procedure applicable to OSI's cases against naturalized U.S. citizens, alleged to be former Nazi persecutors, Congress would

\(^{170}\) See, e.g., Fiallo, 430 U.S. at 792; Galvan, 347 U.S. at 530–32; Zakonaite v. Wolf, 226 U.S. 272, 275 (1912); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892); Jean v. Nelson, 727 F.2d 957, 964–65 (11th Cir. 1984); Matter of Longstaff, 716 F.2d 1439, 1442–43 (5th Cir. 1983). See also supra notes 30 and 91 and accompanying text.

\(^{171}\) United States v. Woojan (Chinese Exclusion Case), 245 U.S. 552, 556 (1918) (maintained the validity of a statute which authorized a judicial proceeding instead of an administrative determination for the deportation of Chinese laborers, whose immigration had been suspended by the Chinese Exclusion Laws, Act of September 13, 1888, § 13, 25 Stat. 476, 479).

\(^{172}\) See generally id. Although the current deportation statute, 8 U.S.C. § 1252(b), states that "[t]he procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section," this is mandated by congressional policy, and not by any constitutional principle. In fact the legislative history behind the statutory provision for a specific procedure demonstrates it "was meant to exclude the application of the Administrative Procedure Act (APA)." Marcello, 349 U.S. at 309. See H.R. REP. No. 1365, 82d Cong., 2d Sess. 60, 63 (1952), reprinted in 1952 U.S. CODE CONG. & AD. NEWS 1653, 1710–13. Congress provided for an exclusive procedure in order to make clear that deportation was not governed by the requirements of the APA. Id. Congress, therefore, has the authority to enact a consolidated denaturalization/deportation procedure applicable to Nazi persecutors, without violating the spirit and intent of the specific procedural directive. See id.

Based on the exclusive statutory provision mentioned above, courts have ruled that the federal judiciary is without any decision-making power over individuals subject to deportation, and therefore may not, sua sponte, order deportation. Lawrence v. United States, 441 F. Supp. 684, 685 (W.D.Tenn. 1977); United States v. Castillo-Burgos, 501 F.2d 217, 219–20 (9th Cir. 1974). Such exclusive administrative jurisdiction possessed by the executive branch is a creation of Congress, and not a result of any separation of power principle. Thus, Congress has the power over immigration proceedings to make an exception to executive control of deportation proceedings. Woojan, 245 U.S. at 556. In fact, Congress has distinguished deportation cases which involve the question of citizenship from other deportation cases, authorizing the involvement of federal district courts in these instances. See 8 U.S.C. § 1105a(a)(5). See also generally Ng Fung Ho, 259 U.S. at 282–85; Exedaitelos v. Fluckey, 54 F.2d 858 (6th Cir. 1931).
have three feasible legislative classes to choose from. The most narrowly drawn of these would include only those alleged to be Nazi persecutors, as defined by the excludable and deportable categories added by the Holtzman Amendment. As will be discussed, this category is the most appropriate and workable. A second possibility would be to make the procedure applicable to naturalized citizens alleged to have been involved with the persecution of any person. Obviously, this would include Nazi persecutors. The last, and most expansive classification would be any naturalized citizen who is later discovered to have entered the United States illegally. This category would include all alleged Nazi persecutors, since by definition, they were originally excludable at entry.

1. Nazi Persecutors

   Prior congressional action appears to indicate that the consolidated proceeding should be made applicable only to Nazi persecutors. The enactment of the Holtzman Amendment in 1978 highlights the feasibility of this potential application. First, the measure incorporated into the INA's excludable and deportable classes, individuals who took part in Nazi persecution between 1933 and 1945. The definition of these individuals is found in 8 U.S.C. §§ 1182(a)(33) and 1251(a)(19). A district court can utilize this definition in the consolidated procedure.

   The Holtzman Amendment also precludes Nazi persecutors from being eligible for discretionary relief from deportation. Such legislative action enhances the feasibility of this classification for the proposed procedure, since there would be no need to provide for any discretionary relief.

   The legislative history of the Holtzman Amendment suggests how appropriate the consolidated procedure can be when solely applied to alleged Nazi persecutors who have obtained naturalized citizenship. One of the original versions of the legislation, and a revised version favorably reported by the Subcommittee on Immigration, Citizenship and International Law, would have made excludable and deportable all aliens who engaged in any persecution on the basis of race, religion, national origin or political opinion. A later amendment, how-

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173 See supra note 2.
174 See supra notes 3–4. 8 U.S.C. § 1182(a)(33), added in 1978, operates to make any Nazi persecutor who entered the United States at any time, excludable through its retroactive application. See supra note 97. See also Artukovic, 693 F.2d at 897.
175 See supra notes 105–07 and accompanying text.
176 Id.
177 See supra notes 130 and accompanying text. The subsequent 1981 Amendment further implemented the intent of the 1978 Holtzman Amendment. See id.
178 See supra notes 130 and accompanying text.
ever, made on the House floor, and urged by many members of the House Judiciary Committee, limited the language of the final version solely to those individuals who engaged in persecution under the direction of, or in association with, the Nazi government of Germany.\textsuperscript{181} Such congressional action provides a substantial precedential foundation on which to base the limited application of the proposed consolidated procedure to only Nazi persecutors.

The underlying policy of the Holtzman Amendment, that former Nazi persecutors deserve specific definition and treatment as a class within the realm of immigration and naturalization law, also favors limiting the consolidated proceeding to these individuals.\textsuperscript{182} Acknowledgement of the Nazi persecutor’s actions led Congress to make him excludable and deportable.\textsuperscript{183} Therefore, the Nazi persecutor should not be able to delay extensively and possibly prevent deportation by hiding behind the protection of an invalid grant of citizenship.

2. All Persecutors

Despite the fact that the original version of the Holtzman Amendment was never passed, Congress could still feasibly make the consolidated procedure applicable to any naturalized citizen later discovered to have been involved with the persecution of others on the basis of race, religion, national origin or political opinion.\textsuperscript{184} Congress’ enactment of the Refugee Relief Act of 1980,\textsuperscript{185} included provisions which prohibit any individual, who has engaged in persecution, from obtaining benefits under the Act.\textsuperscript{186} First, the Act defines a “refugee” for purposes of relief eligibility as excluding “any person who ordered, incited, assisted or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”\textsuperscript{187} Since a persecutor would not be eligible to enter the United States as a bona fide refugee under the Act, such an individual could be deported as having


\textsuperscript{182} See 124 CONG. REC. 31,647 (1978). Representative Holtzman’s statement in the House debate on the pending Bill, points to the uniqueness of the Nazi persecutor: “We cannot as a nation condone the presence in the United States of those who have engaged in these unspeakable acts of persecution, mass murder, and annihilation under the German Nazi regime.” Id.

\textsuperscript{183} Id.

\textsuperscript{184} See supra note 180.


\textsuperscript{186} Id.

been originally excludable upon entry into the United States.\textsuperscript{188} The Act also adds to the withholding of deportation provision, 8 U.S.C. § 1253(h), an exclusion to eligibility for this form of relief from deportation, if the individual participated in any persecution.\textsuperscript{189}

These amendments to the INA represent an emerging congressional sensitivity to human rights; application of the consolidated procedure could further serve to address these concerns.\textsuperscript{190} Nevertheless, these provisions of the Refugee Relief Act are only applicable to those aliens who are otherwise eligible for refugee status, and not to any other general category of immigrants.\textsuperscript{191} The prohibitions against persecutors added by the Act only extend to determinations regarding refugee status and asylum eligibility; they do not provide new specific excludable and deportable categories, as did the Holtzman Amendment.\textsuperscript{192} Therefore, in order to make the consolidated procedure applicable to all alleged former persecutors, Congress would also have to amend 8 U.S.C. §§ 1182(a) and 1251(a), adding to both sections the class of persecutors, as defined within the Refugee Relief Act of 1980.\textsuperscript{193}

3. Excludable Aliens

Any initially excludable alien, who obtains naturalized U.S. citizenship, is per se amenable to both denaturalization and deportation. Therefore, Congress could theoretically make the consolidated procedure applicable to this broad class of individuals.\textsuperscript{194} This categorization would make the procedure applicable to naturalized citizens discovered to have allegedly been directly involved with Nazi persecution.\textsuperscript{195} In fact, under current practice, the government rarely

\textsuperscript{188} 8 U.S.C. § 1251(a)(1). \textit{See supra} note 88. An alien's request for asylum will be denied if it is determined that the alien was involved with persecution. 8 C.F.R. § 208.8(f)(1) (1986). When such a denial is made, the INS is authorized to commence deportation proceedings, if the alien is already in the United States. 8 C.F.R. § 208.8(f)(4) (1986).

\textsuperscript{189} Refugee Relief Act of 1980, \textit{supra} note 185; 8 U.S.C. § 203(e); 8 U.S.C. § 1253(h)(2). Such relief is automatically considered in conjunction with a request for asylum during a deportation proceeding; if the alien is eligible under § 1253(h) criteria, this relief becomes mandatory. \textit{See supra} note 130.

\textsuperscript{190} \textit{See supra} note 187.


\textsuperscript{192} \textit{See 8 U.S.C.} §§ 1101(a)(42), 1253(h)(2).


\textsuperscript{194} By definition, an excludable alien automatically does not meet the naturalization prerequisite of lawful prior residence, \textit{see supra} note 22, and may not meet the precondition of good moral character. \textit{See supra} note 24. Therefore, this alien would have procured a certificate of naturalization illegally, and would be subject to denaturalization under 8 U.S.C. § 1451(a). \textit{See supra} notes 38–46 and accompanying text. An alien who is excludable at entry is deportable upon discovery within the United States. \textit{See 8 U.S.C.} § 1251(a)(1); \textit{see also supra} note 88.

\textsuperscript{195} \textit{See 8 U.S.C.} §§ 1182(a)(35), 1251(a)(1), 1251(a)(19), 1451(a).
brings denaturalization actions, and "[a]side from the cases brought by OSI, there are virtually no other denaturalization cases in the courts today."196

Despite this potentially practical application, such a categorization would be overbroad. Excludable aliens include a variety of individuals.197 While many classes of excludable aliens are unfit to meet the preconditions for naturalized citizenship, there are some who could meet these prerequisites, if they were in the United States lawfully.198 A federal district court has held that the standards for exclusion of aliens are not congruent with the standards for naturalization.199 The court ruled that a defendant's liability to exclusion and subsequent deportation as an alien excludable at entry under § 1251(a)(1), did not require a finding that he was ineligible for naturalization.200 Therefore, legislation that makes the consolidation procedure applicable to all originally excludable aliens is unnecessarily broad.201

C. Procedural Structure of the Consolidated Proceeding

The most expedient consolidated procedure would consist of a single initial trial and a subsequent consolidated appeal, avoiding any repetition in the process. The protections of the fifth and fourteenth amendments afforded to all U.S. citizens, naturalized and natural-born, require that the issue of validity of naturalization be fully litigated before the filing of any deportation charges.202 Therefore, the proposed consolidated denaturalization and deportation procedure consists of a bifurcated initial proceeding in federal district court, with a consolidated right of appeal to the circuit court of appeals and the Supreme Court.203

The trial would be bifurcated. The first segment of the trial would be a denaturalization trial. The second part, which could only be initiated upon an order of revocation issued in the prior segment, would involve deportation charges.204 Such a procedural structure is necessary to prevent a naturalized

196 Ryan, supra note 3, at 341.
199 Id. at 1210–11.
200 Id.
201 See also 8 U.S.C. § 1182(a)(22) (Congress already has explicitly made "aliens ineligible for citizenship" excludable). Additionally, discretionary relief would have to be available to defendants under this application of the consolidated proceeding. See supra notes 130–31.
202 See infra notes 242–77 and accompanying text (discussion of due process and presumption in favor of citizenship).
203 See supra note 15.
204 The Federal Rules of Civil Procedure already grant a district court broad discretion to decide how cases on its docket are to be tried. Fed. R. Civ. P. 42. This Rule may be invoked to dispatch the business of the court with expedition and efficiency, while maintaining the court's ability to arrive at a just disposition. Stoddard v. Ling-Temco-Vought, Inc., 513 F. Supp. 514, 927–28 (C.D. Cal. 1980).
citizen from being made to face charges of deportation, before the issue of the validity of his naturalization is fully litigated. The first segment of the procedure would be identical to a current denaturalization trial. The government would have to succeed on the merits in proving the invalidity of the defendant's naturalization before being able to begin the second part of the procedure.

The later portion, initiated by the filing of deportation charges against the denaturalized defendant, would vary greatly from the existing administrative deportation procedure. As with any trial in federal district court, the Federal Rules of Civil Procedure and the Federal Rules of Evidence would apply. Although either party would be permitted to introduce any additional evidence in the deportation segment, the application of offensive collateral estoppel, which is now utilized by OSI in deportation hearings, would eliminate the government's need to do so. The BIA has held that offensive collateral estoppel permits a plaintiff to use a prior determination of an issue by a court of competent jurisdiction, that was essential to the past judgment against a defendant, preventing its relitigation in the subsequent suit. The doctrine serves the interests of judicial finality and certainty, and will prevent drawn-out litigation.

See also 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE at 253 § 2381 (1973). Specifically, Rule 42(b) gives the district court discretion to decide on its own motion to order separate trials for any claims or issues to further convenience, avoid prejudice and promote expedition and economy. Fed. R. Civ. P. 42(b); Easton v. City of Boulder, Colo., 776 F.2d 1441, 1447 (10th Cir. 1985) (Rule 42(b) provides broad discretion to trial judges to decide whether to bifurcate trial as to liability and damages, and exercise of such discretion is set aside only if clearly abused); Bandai America, Inc. v. Bally Midway Mfg. Co., 775 F.2d 70, 74 (3d Cir. 1985) (it was proper for district court to bifurcate issues when separate proceedings will be conducive to expedition and economy). The scope of Rule 42 is extensive and allows federal trial courts to grant bifurcation or consolidation of claims and issues in any kind of case. One possible challenge to this type of procedure is that it would be prejudicial to a defendant to have the same judge decide both denaturalization and deportation actions. In Demjanjuk, 776 F.2d at 577, however, it was held that in absence of some evidence of actual bias or prejudice from some source other than his prior judicial contact, the judge, who decided the denaturalization action against the defendant, was not required to excuse himself from ruling on the defendant's extradition proceeding. Id. to supra note 11 and accompanying text. Offense collateral estoppel was upheld by the Sixth Circuit Court of Appeals in U.S. v. Demjanjuk, 767 F.2d 922 (6th Cir. 1985). This opinion, however, was not recommended for full-text publication, and is therefore only available on Lexis. See, U.S. v. Demjanjuk, No. 85-3198 (6th Cir. 1985). As
estoppel can be used to prevent the relitigation of issues which were determined in a prior denaturalization action, successfully brought against a Nazi persecutor.212 Indeed, all relevant facts which concern the deportability of a denaturalized Nazi persecutor can be determined from the record of the denaturalization trial.213 In addition, a Nazi persecutor is not eligible for any form of discretionary relief, other than a temporary stay pending appeal.214 Thus, the second segment of the consolidated proceeding could consist of just a motion for summary judgment before the trial judge, if there are no outstanding genuine issues of material fact.215 This potential use of offensive collateral estoppel points to the feasibility of the proposed procedure, especially when solely applicable to alleged former Nazi persecutors.216

As in any other civil proceeding in federal court, either party would be permitted to appeal from a final determination of the district court.217 One of two final outcomes could result from the bifurcated trial. There could be a verdict for the government on both denaturalization and deportation, or a verdict for the defendant on denaturalization, upholding the validity of the grant of naturalized citizenship.218 In the later case, if the district court's decision were reversed on appeal, the government would be entitled to have the case remanded for the deportation portion of the trial.219 The reviewing court would

utilized in existing deportation hearings, offensive collateral estoppel only shortens the entire process by a few days. Interview with Allan A. Ryan, Jr. by Boston College Holocaust/Human Rights Research Project Members, December 3, 1984.


213 Id.

214 See supra note 130-31 and accompanying text.

215 Matter of Fedorenko, supra note 16, at 11; see also Fed. R. Civ. P. 56. A prior judicial decision, effective against a defendant, has been used by the United States, as a plaintiff, in order to preclude litigation of issues in a later proceeding, through a motion for summary judgment. United States v. Kabinto, 456 F.2d 1087, 1090 (9th Cir. 1972); Smith v. United States, 369 F.2d 49, 53 (8th Cir. 1966), cert. denied, 381 U.S. 1010 (1967). In considering such a motion for summary judgment, a district court judge's decision in a prior proceeding is final enough for the application of collateral estoppel in the later suit; the possibility of an appeal of the prior decision does not prevent application of the doctrine. Sherman v. Jacobson, 247 F. Supp. 261, 268 (S.D.N.Y. 1965). See also Southern Pacific Communications Co. v. American Tel. & Tel. Co., 740 F.2d 1011, 1018 (D.C. Cir. 1984).

216 See supra notes 173-201 and accompanying text.

217 See supra note 11.

218 See supra text accompanying notes 202-205. A split verdict in favor of the defendant on denaturalization and in favor of the government on deportability, would not occur. This outcome would never result because a finding initially in favor of the defendant on the issue of citizenship would preclude the commencement of the subsequent deportation phase. Id. A split verdict in favor of the government on denaturalization, but in favor of the defendant on deportability, although theoretically possible, is not likely to occur in the case of a Nazi persecutor. This is because proof of such an individual's illegally procured naturalization also would serve as proof of the individual's deportability. Matter of Fedorenko, supra note 16, at 11.

have great latitude to consider the district court's findings of fact and conclusions of law, as is now required in an appeal from a denaturalization judgment.\textsuperscript{220} The actual implementation of the deportation order would not occur until after all rights of appeal were exhausted.\textsuperscript{221} Any applicable forms of discretionary relief could be considered by the trial judge after the consolidated appellate process is completed.\textsuperscript{222} Finally, the procedure now used to determine the destination of the deportable alien would not be altered.\textsuperscript{223}

D. \textit{Procedural Aspects and Protections}

The consolidated proceeding would have to incorporate all the exclusive procedural protections already afforded the naturalized defendant in a denaturalization action.\textsuperscript{224} In any case where the government seeks to take away an individual's naturalized citizenship, the government must shoulder the higher burden. It must prove its case in a judicial trial, with all reasonable doubts resolved in favor of the defendant.\textsuperscript{225}

The form and service of process would have to meet the present requirements of a regular denaturalization action.\textsuperscript{226} The complaint would have to include all the requisite averments concerning the wrongful procurement of citizenship. In addition, however, a paragraph should be added which states that if invalidity of the defendant's naturalization is proved, then the government will begin the second deportation phase of the proceeding against the defendant.\textsuperscript{227} In this way the defendant would have adequate notice of all the potential allegations required to be answered within the consolidated proceeding, without actually bringing deportation charges against a U.S. citizen prior to loss of the allegedly invalid naturalization.\textsuperscript{228}

\begin{footnotes}
\item See \textit{Costello}, 365 U.S. at 269.
\item See 8 C.F.R. § 3.6 (1986).
\item See supra notes 130–51 and accompanying text. Applying the consolidated procedure solely to Nazi persecutors would eliminate the need to have the trial judge decide issues concerning discretionary relief from deportation. \textit{Id.}
\item 8 U.S.C. § 1253(a); see also supra notes 158–66 and accompanying text. The defendant could still be permitted to make his first choice of destination during the deportation phase of the trial. See supra text accompanying notes 127–28.
\item See text accompanying notes 57–66.
\item See supra text accompanying notes 52–66. See also 8 U.S.C. § 1451(b).
\item See 8 C.F.R. § 242.1(b).
\item This method of notice would be sufficient in light of \textit{Matter of Fedorenko}, supra note 16, in which the BIA upheld the application of collateral estoppel to issues in a deportation proceeding against a denaturalized Nazi persecutor from findings made in the denaturalization judgment. See
\end{footnotes}
The affidavit showing good cause would also play a crucial role in the feasibility of the consolidated denaturalization and deportation procedure. In addition to the affidavit showing the evidentiary basis for bringing the revocation action, it would also be used to give the judge enough background to determine whether the case warrants the initiation of the special consolidated trial. This would serve two important functions. First, it would permit the judge to prevent unsubstantiated cases from being brought against naturalized citizens, as now occurs in denaturalization actions. Second, it would give the judge a preliminary means to ensure that only those cases which Congress deems appropriate for adjudication within the consolidated proceeding would be considered.

The subsequent deportation segment of the bifurcated trial, if commenced, would not be procedurally similar to a regular deportation hearing. The charges would be brought in federal district court, thus elevating the adjudication of deportation issues from the administrative level to a judicial determination. Because the deportation segment would be tried judicially, both the order to show cause and the statutory burden to show entry would be discarded in the consolidated proceeding. The government would be required to prove alienage and amenability to specific grounds of deportability by clear, unequivocal, and convincing evidence. Therefore, no statutory presumption of deportation would be available in the consolidated trial against the defendant on grounds of illegal entry.

V. CONSTITUTIONALITY OF PROPOSED CONSOLIDATED DENATURALIZATION AND DEPORTATION PROCEDURE

A. Applicable Standards

The proposed consolidated denaturalization and deportation proceeding would not violate any constitutional principles or deny the defendant any con-
stitutional protections. The issues to be adjudicated in the consolidated procedure are the validity of naturalized citizenship and deportability. These issues have never warranted the heightened constitutional scrutiny accorded criminal prosecutions. Additionally, cases which involve denaturalization and deportation fall under Congress' broad power to legislate in the area of immigration and naturalization. Therefore, the U.S. Supreme Court usually defers to such legislative policy and procedure-making when it considers the constitutionality of laws enacted in this area. The main constitutional issues raised by the proposed consolidated proceeding are if such a measure would be inconsistent with the citizenship clause of the fourteenth amendment, or if the procedure would violate the guarantees of equal protection and due process.

B. Citizenship Clause Protection of Naturalized Citizenship

The fourteenth amendment states, in relevant part, that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States . . . ." This citizenship clause has been interpreted by the U.S. Supreme Court as bestowing upon the naturalized citizen all the rights and privileges held by the natural-born citizen, including the right not to have one's citizenship status involuntarily taken away by the government. Yet, the Court has acknowledged that grants of naturalized citizenship proved to be procured illegally or fraudulently may be revoked involuntarily, without violating the citizenship clause.

The naturalized citizen is afforded the same protections as the natural-born citizen against deprivation of this liberty. Because there is such a strong presumption in favor of citizenship, Congress must provide various procedural protections within a denaturalization proceeding, including the higher burden of proof and the resolution of all doubts in favor of the naturalized citizen.

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237 See infra text accompanying notes 242–97.
239 See supra note 20.
240 See Jean, 727 F.2d at 964–65.
241 See infra text accompanying notes 242–97.
242 U.S. Const. amend. XIV, § 1.
243 Afroyim, 387 U.S. at 262, 267–68. See generally Knauer, 328 U.S. at 658. The Afroyim Court noted that the original purpose of this clause was to ensure that the newly emancipated slaves would not have this right abridged. Afroyim, 387 U.S. at 263–67. The one noted exception to the doctrine of equality between native born and naturalized citizens is eligibility for the presidency, for which only native born citizens qualify. Id.
244 Afroyim, 387 U.S. at 267 n.42. See supra note 30.
245 Minker, 350 U.S. at 187–88 ("where there is doubt it must be resolved in the citizen's favor"). See also id. at 197 (Douglas, J. concurring) ("[w]hen we deal with citizenship we tread on sensitive ground").
246 See supra text accompanying notes 76–81.
A problem raised by the consolidated procedure is whether the potential of deportation unconstitutionally infringes upon the naturalized citizen's equal rights under the citizenship clause. Any U.S. citizen, whether natural-born or naturalized, is not amenable to deportation.\textsuperscript{247} Congress would impermissibly limit a U.S. citizen's freedom of movement if it were to authorize the deportation or even the initiation of charges of deportation against a bona fide citizen.\textsuperscript{248} Therefore, the bona fide naturalized citizen is not required to answer to deportation charges under the consolidated bifurcated trial.\textsuperscript{249} Only after a final judicial determination that the grant of citizenship was wrongfully procured, are charges of deportation even filed against the defendant.\textsuperscript{250} Thus, only an individual who has been returned to his alien status becomes amenable to charges of deportation.\textsuperscript{251}

Although citizenship must be afforded a high degree of protection, a recent Supreme Court decision indicates that Congress would not violate the principles of the citizenship clause if it enacts the proposed procedure. In \textit{Vance v. Terrazas},\textsuperscript{252} the U.S. Supreme Court considered the constitutionality of an expatriation statute.\textsuperscript{253} \textit{Terrazas} involved a challenge to 8 U.S.C. § 1481(a)(2), which provides that one who takes an oath or allegiance to a foreign state loses his U.S. citizenship. The defendant argued that the statute's standard of proof, by preponderance of the evidence, and its rebuttable presumption in favor of a defendant's voluntariness was a violation of the citizenship clause.\textsuperscript{254} The Supreme Court looked to Congress' broad power to prescribe rules of evidence and standards of proof in federal court, when it denied the defendant's constitutional claims.\textsuperscript{255} The Court held that Congress has express power to enforce the fourteenth amendment's citizenship clause and thus has the "power whatsoever to address itself to the manner or means by which fourteenth amendment citizenship [natural-born or naturalized] may be relinquished."\textsuperscript{256} By analogy Congress also has the authority to enact the proposed consolidated procedure.\textsuperscript{257} In the denaturalization and deportation procedure, all presumptions in favor

\textsuperscript{247} Eichenlaub, 338 U.S. at 528. See generally United States v. Wong Kim Ark, 169 U.S. 649, 701 (1898); Gordon & Rosenfield, supra note 32, at 26 § 4.56.

\textsuperscript{248} See generally Zemel v. Rusk, 381 U.S. 1, 16 (1965); Kent v. Dulles, 357 U.S. 116, 126-27 (1958).

\textsuperscript{249} See supra text accompanying notes 202–207.

\textsuperscript{250} Id.

\textsuperscript{251} Id. See also Eichenlaub, 338 U.S. at 528; see Gordon & Rosenfield, supra note 32, at 37–40 § 20.6.

\textsuperscript{252} Vance v. Terrazas, 444 U.S. 252 (1980).

\textsuperscript{253} See supra note 28.

\textsuperscript{254} Terrazas, 444 U.S. at 255–58.

\textsuperscript{255} Id. at 266. See also U.S. Const. art. 1, § 8, cl. 9.

\textsuperscript{256} Terrazas, 444 U.S. at 266.

\textsuperscript{257} See supra note 30. Under the same power over the federal courts and over the method of revocation of naturalized citizenship, Congress could create such a new consolidated procedure without infringing upon the established rights of naturalized citizens.
of citizenship are maintained. 258 Deportation charges are not brought until it has been determined that the individual in question does not deserve the protections afforded by the fourteenth amendment. 259

C. Due Process Considerations

Procedural due process considerations guaranteed by the fifth amendment protect the individual against arbitrary government action which results in the impairment of life, liberty or property. 260 Due process standards applicable to U.S. citizens are greater than those afforded to aliens. 261 The consolidated proceeding would be likely to withstand challenges on this ground because it provides all the procedural protections in the existing denaturalization procedure, and enhances the procedural rights afforded to an alien in the regular deportation hearing. 262 Both naturalized citizens subject to a denaturalization proceeding and aliens subject to a deportation hearing are entitled to varying amounts of procedural due process. 263 Nevertheless, the paramount federal power over immigration and naturalization, which includes these two procedures, gives Congress almost unlimited procedural rulemaking power in order to further national interests. 264

In the proposed consolidated proceeding, the key procedural change which most threatens due process guarantees, is that an initial determination of deportability would be made prior to any appeal on the final determination of the revocability of the certificate of naturalization. 265 Prior Supreme Court opinions and subsequent congressional provisions, however, have created a significant analogous situation in which an individual's claim of citizenship may not even be considered until a final determination of deportability is made. In Ng Fung Ho v. White, 266 the Supreme Court established the right of judicial consideration, through a de novo hearing, for a defendant's claim of citizenship subsequent to a deportation order where any genuine issue of material fact exists regarding citizenship. 267 Justice Brandeis, writing for the majority, recognized that the fifth amendment guarantee of due process entitled two alleged aliens, who were

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258 See supra text accompanying notes 202–207.
259 Id. In other words, the individual's grant of citizenship is invalid as having been wrongfully procured.
261 Diaz, 426 U.S. at 78. This is exemplified in Congress' ability to deport aliens but not citizens.
262 See supra notes 202–23 and accompanying text.
263 See generally Costello, 355 U.S. at 269–70, 283–84; Japanese Immigrant Case, 189 U.S. at 97.
264 Hampton v. Mow Sun Wang, 426 U.S. 88, 100–01 (1976); Diaz, 426 U.S. at 77.
265 See supra text accompanying notes 208–20.
266 Ng Fung Ho v. White, 259 U.S. 276 (1922).
267 Id. at 283–85.
specifically deportable under the Chinese Exclusion Laws, to a determination of citizenship by a judicial body. However, he held that they did not have to be discharged from the deportation order.268 This basic procedural right, which only requires an eventual judicial determination of the citizenship issue and not a preliminary determination, has been reaffirmed by the Court and through statutory enactment by Congress.269

The bifurcated initial procedure, which would permit a judicial determination of deportability if the former Nazi persecutor's naturalized citizenship were first found to be invalid, would not violate the guarantee of due process.270 If an individual's citizenship status can be determined after a finding of deportability is made, as in Ng Fung Ho and its statutory embodiment, 8 U.S.C. § 1105a(a)(5), then a denaturalized individual's deportability can be passed upon prior to taking an appeal on the validity of the citizenship issue.271 Additionally, the broad scope of review afforded the decision on appeal enhances the procedural due process provided by the consolidated denaturalization and deportation procedure.272 Both the denaturalization and deportation orders would be subject to reconsideration of the findings of fact and conclusions of law made by the district court.273 If the reviewing court found infirmities in the lower court's determinations on the citizenship issue and reversed in favor of the defendant, then the finding of deportation would also be reversed since the jurisdictional fact of alienage would not have been proven.274 Therefore, consolidation would provide a defendant with a sufficient opportunity to attack the lower court's determinations prior to the actual implementation of a deportation order.275

A final possible concern would be whether, in the later deportation session, the use of the prior findings of facts from the initial revocation portion violates due process.276 Since this is now permitted through utilization of offensive collateral estoppel in deportation hearings, it appears that this use of the facts would not be violative.277 Overall, the procedural protections afforded the defendant in the consolidated proceeding would satisfy due process requirements.

268 Id. at 285.
269 See Agosto v. INS, 436 U.S. 748, 752–53 (1978); Kessler, 307 U.S. at 34–35; Bilokumsky, 263 U.S. at 152–53. See also 8 U.S.C. § 1105a(a)(5), which provides an exception to the general provision for judicial review of deportation orders, see supra note 139, providing for de novo hearing in a federal district court in cases where the person subject to deportation claims to be a U.S. citizen.
270 See cf. Agosto, 436 U.S. at 752–53.
271 Id. See supra text accompanying notes 217–20.
272 See supra text accompanying note 220.
273 Id.
274 See supra note 8.
275 See supra text accompanying notes 221–22.
276 See supra notes 208–16.
277 See Matter of Fedorenko, supra note 16, at 11. See also supra notes 208–16.
D. Equal Protection

Although the equal protection clause of the fourteenth amendment is not applicable to actions of the federal government, the concept of equal protection may be found within the due process clause of the fifth amendment.\(^{278}\) The fifth amendment prohibits unequal classifications where the discrimination is so unjustifiable that it violates due process.\(^{279}\)

Under traditional equal protection analysis, a classification of a group of individuals which serves to discriminate comes under varying degrees of judicial scrutiny, depending upon which governmental body created the classification and the rights at stake.\(^{280}\) The least strict standard of review, the rational basis test, is the standard which applies in scrutinizing the proposed consolidated denaturalization/deportation proceeding for two reasons. First, the creation of the procedure would be a congressional action, subject to usual equal protection treatment afforded federal action by Congress.\(^{281}\) Acts of Congress are presumed to be constitutional unless it can be shown that such law creates a classification which gives rise to unequal treatment, and that the classification bears no rational relation to a legitimate governmental purpose.\(^{282}\) Thus, the rational basis test is applicable wherever Congress creates such a classification. Secondly, the specific area of law involved in the consolidated procedure, immigration and naturalization law, has traditionally been recognized as being under the paramount power of the federal government through Congress.\(^{283}\) Measures taken within this area need only be scrutinized to determine whether a legitimate government interest is at issue.\(^{284}\)

The enactment of the consolidated procedure applicable to the alleged former Nazi persecutor would create a classification that gives rise to unequal treatment.\(^{285}\) It would distinguish naturalized citizens alleged to have wrongfully procured their grants of citizenship due to past involvement with Nazi persecution from all other naturalized citizens alleged to have illegally or fraudulently obtained their certificates of naturalization.\(^{286}\)


\(^{279}\) Bolling, 347 U.S. at 499.

\(^{280}\) Tribe, supra note 260, at 991–94 § 16-1.

\(^{281}\) See Hampton, 426 U.S. at 100–01.


\(^{283}\) Hampton, 426 U.S. at 100–03.

\(^{284}\) Alvarez v. District Director of INS, 539 F.2d 1220, 1224 (9th Cir. 1976). See also Tribe, supra note 260, at 281–82 § 5–16.

\(^{285}\) See supra notes 173–201 and accompanying text. The same is true if the procedure is made applicable to all former persecutors, or to all excludable aliens.

\(^{286}\) Id. See 8 U.S.C. § 1451(a).
If Congress enacts this immigration and naturalization procedure it will be upheld if the rational basis test is applied and the governmental interests for creating such an unequal classification are considered. There is a reasonable basis for Congress' actions involving this class of individuals. Nazi persecutors are intrinsically deportable upon the proof introduced in the denaturalization proceeding. Their initial excludability and thus their ineligibility for both U.S. citizenship and residence, stems from their past heinous acts. The unique nature of these individuals' past activity warrants the creation of a special procedure to adjudicate their cases. As a class, Congress has already singled out Nazi persecutors for special treatment under immigration law sanctions through the Holtzman Amendment.

The fact that the classification in the consolidated procedure singles out the alleged Nazi persecutor as naturalized citizen, rather than as alien, would not alter this equal protection analysis. In a comparable area that concerns a discriminating classification of U.S. citizens, the Supreme Court has consistently upheld statutory distinctions between natural-born citizen children of alien parents and of U.S. citizen parents for the purpose of subjecting the alien parents to immigration sanctions. The distinctions in question involved age requirements for citizen minors to petition for their parents' admission into the United States. The congressional purpose behind these requirements was to prevent total circumvention of immigration and nationality law by persons who illegally entered the United States, and then promptly had children to attempt to evade deportation. This classification of minors who are nevertheless citizens of the United States has been upheld even where the deportation of the

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287 See generally Fiallo, 430 U.S. at 794–96; Diaz, 426 U.S. at 81–82. An equal protection challenge by a former Nazi persecutor in a denaturalization case was rejected. Kairys, 782 F.2d at 1383. The defendant argued that the action discriminates against naturalized citizens by enabling revocation of citizenship without the requirement of intentional action constituting relinquishment, as is needed in an expatriation action. Id. See also supra note 28. The court held that because there are no pre-citizenship acts to prescribe for natives, naturalized citizens may be treated differently without violating the equal protection clause. Kairys, 782 F.2d at 1583. (Congress, in regulating the standards for denaturalization, may take into account the inherent differences of citizenship between native and naturalized citizens). See also, Linnas, supra note 109, at 18 (Nazi war criminals are not a class of persons entitled to strict scrutiny under equal protection analysis; a rational relationship, being the applicable standard, exists between the deportation of Nazi war criminals and a legitimate legislative purpose).


289 See supra note 182.

290 See supra notes 173–83 and accompanying text; see also infra note 332.

291 See supra notes 173–201 and accompanying text. See also, Linnas, supra note 109, at 18.


293 Id. See also Papakonstantinou v. Civelleti, 496 F. Supp. 105, 110–11 (E.D.N.Y. 1980); Perdido v. INS, 420 F.2d 1179, 1181–82 (5th Cir. 1969).

294 Hernandez-Rivera v. INS, 630 F.2d 1352 (9th Cir. 1980); Urbano de Malaluan v. INS, 577 F.2d 589, 594 (9th Cir. 1978).
alien parents results in the de facto deportation of the minor U.S. citizen.\textsuperscript{295} Classification of the alleged former Nazi persecutor which warrants unique procedural treatment is no more discriminatory.\textsuperscript{296} If a Nazi persecutor illegally entered the United States and subsequently obtained a voidable grant of naturalized citizenship, he is shielding himself from deportability. There is a rationally based national interest in preventing this result, especially in light of Congress' specific inclusion of the former Nazi persecutor within the excludable/deportable classes.\textsuperscript{297}

VI. PROCEDURAL FEASIBILITY OF CONSOLIDATED DENATURALIZATION AND DEPORTATION PROCESS

A. Legal Similarities

A consolidation of the judicial and administrative contexts by which denaturalization and deportation are conducted would be feasible. The two procedures are similar and are significantly compatible in their methods and standards of proof.\textsuperscript{298}

The current denaturalization and deportation procedures were both initially created within the INA.\textsuperscript{299} Although the INA could have put deportation within a judicially adjudicated context, Congress chose to entrust the deportation function to the executive branch through the INS.\textsuperscript{300} Therefore, this administrative/judicial distinction between deportation and denaturalization would not preclude a consolidated judicial proceeding exception. Both denaturalization and deportation proceedings now operate similarly, especially in the Nazi persecutor cases. They involve a civil action initiated by the government, which is represented in both procedures by the OSI, in the Nazi cases.\textsuperscript{301} Neither sanction

\textsuperscript{295} Urbano de Malaluan, 577 F.2d at 594.
\textsuperscript{296} The same argument can be made for classifications based on either all perpetrators or all excludable aliens. Both would present a variety of national interest assertions for satisfaction of the rational basis test. See supra text accompanying notes 260–65.
\textsuperscript{297} See supra note 2. Similarly, an existing rational basis could be asserted for either of the other two possible classifications. See supra notes 173–201 and accompanying text. The constitutionality of either of the three classifications rests upon the same dispositive factor: whether it is discriminatory to distinguish between different categories of naturalized citizens, for the purposes of the consolidated proceeding. See supra text accompanying notes 285–88. Congress could choose to only include Nazi persecutors, the smallest classification, since the Supreme Court has upheld Congress' power to classify in a method which only attacks one piece of an existing problem at a time. See Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).
\textsuperscript{298} See infra text accompanying notes 299–324.
\textsuperscript{299} See INA, supra note 4.
\textsuperscript{300} See generally Woojan, 245 U.S. at 556–57. See also Gordon & Rosenfield, supra note 32, at 6–7 § 5.1. See also supra note 111.
\textsuperscript{301} See supra note 53 and accompanying text.
is subject to a statute of limitations, and each may be applied retroactively.\footnote{302 See supra notes 35–37, 96–98 & 100 and accompanying text.} Both proceedings demand that the government prove its case by the heightened burden of clear, unequivocal, and convincing evidence.\footnote{303 See supra notes 76–81 and 150–54.} Both apply the same case law standards to the issue of materiality where fraud or concealment come into question.\footnote{304 See supra notes 41 and 110.} Finally, both are subject to review by appeals through the federal judiciary.\footnote{305 See supra notes 73 and 139.} These similarities make the consolidated denaturalization/deportation proceeding feasible.

Where the two proceedings are legally dissimilar, the necessary changes would be made to the deportation segment. The aspects of current deportation law which would need to be altered are the initiation of service and notice,\footnote{306 \textit{28 U.S.C.} § 1254; \textit{8 U.S.C.} § 1105a(a)(6)(c).} compliance with the Federal Rules of Civil Procedure and the Federal Rules of Evidence,\footnote{307 \textit{8 U.S.C.} § 1451(b); \textit{8 C.F.R.} § 242.1.} the shifting burden upon the defendant, and the scope of review on appeal.\footnote{308 See supra notes 141 & 152.}

In each of these areas, the existing practice within the denaturalization procedure would apply. Although the deportation segment of the consolidated process would require these alterations, the actual methods of proving each case are significantly compatible. Therefore, the consolidated proceeding would be practical and workable, even in its bifurcated structure.\footnote{309 See supra notes 202–23 and accompanying text.}

In OSI’s cases against alleged Nazi persecutors, major aspects of the adjudicative process, including the ultimate facts needed to be proved, and the standards needed to be met to prove the allegations, are identical and therefore easily combined into a single action.\footnote{310 Matter of Fedorenko, supra note 16, at 11. See also text accompanying notes 304–05.} In both denaturalization and deportation cases against alleged former Nazi persecutors, the following basic factual allegations must be proved: first, the defendant’s past involvement with Nazi persecution and subsequent application for and grant of an immigration visa; and second, the defendant’s inadmissibility, under either previous or existing applicable law, to enter the United States due to such past history.\footnote{311 Matter of Fedorenko, supra note 16, at 11.}

Offensive collateral estoppel now is applied in the later deportation hearing to preclude relitigation of factual findings and conclusions of law made in the initial denaturalization trial.\footnote{312 \textit{Id.} Parties who have had a full and fair opportunity to litigate the issues in the preliminary
After his denaturalization was upheld by the Supreme Court, the BIA ruled that the deportation issues "[arose] out of the identical facts and the same principles of law that were considered by the Supreme Court in the denaturalization case," and therefore the application of collateral estoppel was upheld. In Matter of Fedorenko, the BIA distinguished three general categories of ultimate facts in the case: facts pertaining to Fedorenko's citizenship and nationality; facts pertaining to his activities during World War II; and facts pertaining to his application for a visa and his immigration to the United States. Based on these determinations, a district court could apply both denaturalization and deportation law to rule on whether the defendant's citizenship should be revoked, and then, if so, whether the defendant is a deportable alien. The methods of proof in the Nazi persecution case are thus so compatible that the consolidated, albeit bifurcated, trial would not only be feasible, but could also depend upon the same evidence in both segments. The government would most likely be able to file for a motion of summary judgment on the issue of deportability, based on the prior findings of fact and conclusions of law.

This procedural convenience would not, however, preclude the Nazi persecutor/defendant from introducing other evidence, not previously considered, to assert additional defenses in the later deportation phase. Another unique facet of the Nazi persecutor cases is the defendant's lack of eligibility to apply for any existing statutory form of discretionary relief from deportation. In the bifurcated trial of the proposed consolidation, the court would not reach the issue of deportability until it conclusively found that the defendant's citizenship was invalid due to past involvement with Nazi persecution. Therefore, since such an individual is automatically precluded from being eligible to apply for any form of discretionary relief, no consideration would be required in the later deportation segment. Overall, the denaturalization judicial hearing can use collateral estoppel offensively in a second administrative civil hearing without offending the policies behind the doctrine and behind due process.
ized Nazi persecutor is either deportable with no discretionary relief available, or he is not deportable.\textsuperscript{322}

The lack of equitable discretion in the hands of judges, to excuse a defendant's failure to comply with all statutory conditions precedent to naturalization, further enhances the feasibility of the proposed consolidated denaturalization/deportation proceeding.\textsuperscript{323} As in a regular denaturalization action, the district judge would not have discretion to overlook proven failures to meet the required prerequisites to naturalization imposed by Congress.\textsuperscript{324} This would further limit the considerations the judge would have before him and make the Nazi persecution cases even more workable within a consolidated procedure.

B. \textit{Feasibility of Deportation Issue: Consideration by Federal District Court Judges}

All adjudication of deportation at the initial stage is now administrative and takes place in hearings before an immigration judge.\textsuperscript{325} The proposed consolidation would elevate the consideration of deportability to the federal district courts.\textsuperscript{326} This could be problematic since judicial expertise in deciding such a specialized statutory area as deportation is limited.\textsuperscript{327} At present, district courts do not have jurisdiction to hear deportation cases at their initial stage.\textsuperscript{328} Nonetheless, this situation would not create an insurmountable barrier to the feasibility of the proposed consolidated proceeding. First, Congress has frequently redetermined federal court jurisdiction, mandating federal judges to master areas of law previously unfamiliar to them.\textsuperscript{329} There is also a great amount of existing case law in this area of deportation, both through the administrative determinations made, and through appellate determinations made by the circuit courts.\textsuperscript{330} The amount of applicable deportation law utilized in the consolidated proceeding for Nazi persecutors would be limited. The proceeding itself would

\textsuperscript{322} Cf. supra note 218.
\textsuperscript{323} See supra text accompanying notes 50–51.
\textsuperscript{324} See supra note 50.
\textsuperscript{325} 8 U.S.C. § 1252(b). This condition would not have been altered by passage of the Simpson-Mazzoli bill, see supra note 118, which as proposed would only have elevated the immigration judge to the level of an administrative law judge. Authority over the adjudicative process would have been taken out of INS, but still would be maintained within the Department of Justice through the creation of an Immigration Board. \textit{Id.} As indicated, this last version of the bill was not acted upon before the 98th Congress adjourned. \textit{Id.}
\textsuperscript{326} See supra text accompanying notes 208–09 & 261–62.
\textsuperscript{327} See 8 U.S.C. §§ 1105(a), 1252(b), 1329. \textit{See also} note 138.
\textsuperscript{328} 8 U.S.C. § 1329.
\textsuperscript{329} In fact, the 1961 amendment creating a statutory right to judicial review of deportation orders in the courts of appeals, see supra note 139, did just this. \textit{See} House Report 1086, supra note 38.
\textsuperscript{330} See Gordon & Rosenfield, supra note 32, at 20 § 1.156. The administrative decisions are published and are often cited in the courts of appeals decisions. \textit{See}, e.g., Mukaevski, 773 F.2d at 438–39.
be limited to a specific category of cases, which do not encompass any consideration of discretionary relief.\textsuperscript{331} This serves to diminish the amount of additional expertise needed to consider the issues in the deportation segment of the consolidated proceeding.

VII. Conclusion

The proposed consolidated denaturalization/deportation action would provide for an initial trial in federal district court, with all the procedural rights already afforded to a defendant in a denaturalization action brought under current law. This primary adversarial proceeding would, however, be bifurcated in that the court as fact finder would first be required to pass upon the issue of citizenship before the government would be allowed to present its case on the issue of deportation. This would be necessary to preserve the presumption in favor of citizenship rooted in the citizenship clause of the fourteenth amendment. Once an initial determination is made at the trial level, either party would have the same rights of appeal as participants in a civil suit in federal court. In such a consolidation, the defendant's right to due process guaranteed by the fifth amendment would not be violated.

Congress has explicitly mandated that Nazi persecutors can be denaturalized and deported upon proof of their involvement with persecution of civilians on the basis of race, religion, national origin, or political opinion during the period of Nazi rule. Because the classification of these individuals is reasonably based, application of the procedure to them would not violate equal protection principles found within the fifth amendment guarantee of due process.

Congress has called for the removal of former Nazi persecutors from the United States. Current denaturalization and deportation cases, brought against alleged Nazi persecutors who have obtained naturalized citizenship, demand additional specific legislative treatment. The entire process needs to be expedited and simplified, from revocation of citizenship to the order of deportation. The proposed consolidation of these two processes into a single bifurcated original proceeding in federal district court, with federal rights of appellate review, would accomplish this needed improvement. It would also enhance the effectiveness with which the U.S. government can finally prevent the country from serving as a safe haven for former Nazi persecutors.\textsuperscript{332}

\textsuperscript{331} See supra note 130.

\textsuperscript{332} Although the main purpose of the denaturalization and deportation of a former Nazi persecutor is to bring the individual in question before the law for his alleged violations of immigration law, see Ryan, supra note 3, at 335, such cases do produce certain ancillary objectives. They put on the record a response by the U.S. government to the presence of former persecutors in the United States, after many years of delay and inaction. See also Ryan, supra note 3, at 337.
Allan Ryan Jr. has stated, "we are proceeding against [former Nazi persecutors] under the law not because of what they might do in the future but because to look the other way would be necessarily to forgive what they did in the past." Nevertheless, to proceed against them in an unnecessarily inefficient manner is to display a lack of will in attempting to bring these former Nazi persecutors to justice. A delay of justice is, in itself, injustice. Therefore, Congress should use its broad power over this area of the law, and pass legislation that implements a consolidated denaturalization/deportation procedure.

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333 Ryan, supra note 3, at 339. In his book, Quiet Neighbors: Prosecuting Nazi War Criminals in America, supra note 3, Ryan further explains the need to take effective action against individuals who directly participated in Nazi persecution:

Look to the next century, or look to our own. The lesson is the same. The Holocaust was mass murder as political policy, and civilized people must reject it in every form, at every opportunity. Of the hundreds of thousands who carried out this campaign in Germany and Europe forty years ago, those who remain in the United States today are only the aging remnants. Yet we know they are here and we know that they broke the law to get here and stay here and live here in peace. To say that they pose no danger to anyone because they are old people misses the point entirely. . . . What we are doing today should have been done thirty-five years ago. But to grant these people repose from the law in [the 1980's] would mean that their thirty-five years of silence and our thirty-five years of inaction somehow atone for their awful crimes, and that justice is the result. We should not accept that insidious logic, nor can we accept it merely because the criminals are fewer and older today.

Id. See also supra note 7.