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DISLOYALTY AND DENATURALIZATION

Forrest R. Black*

In these troublous times, the question becomes important: "What steps can be taken by legislation and administration to revoke certificates of naturalization on the ground of subsequent disloyalty of the grantee?" The British Law is simple and direct. It provides (a) on the substantive side, for an affirmative ground of revocation of a certificate of naturalization where "the person to whom the certificate is granted has shown himself by act or speech to be disaffected or disloyal to his Majesty".1 And (b) from the standpoint of procedure, the British Act provides for a speedy administrative determination which grants to the Secretary of State final power to revoke a certificate of naturalization. The Secretary may create a committee for this purpose and the committee shall have the power of a court in respect to (a) the enforcing of attendance of witnesses and examining them on oath, affirmation or otherwise and the issuance of a commission or request to examine witnesses abroad and (b) the compelling the production of documents and (c) the power to punish persons guilty of contempt. By way of contrast, our law2 provides for only two grounds of revocation, "fraud" and "illegal procurement" and sets up a judicial rather than an administrative procedure. This article will discuss specifically the question; to what extent can the British law be engrafted on our system? And we will then propose a plan to deal with the problem which it is believed will meet the test of constitutionality.

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2 U. S. C., Title 8, sec. 405.
PART I. INTRODUCTION.

By way of background, it is important at the outset to note the veering interpretations of the Supreme Court of the United States in three leading cases dealing with the nature of the naturalization process. Those cases are Johannessen v. United States, United States v. Ness and Tutun v. United States.

(1) Johannessen v. United States was a proceeding under section 15 of the Act of June 29, 1906 to cancel a certificate of citizenship granted by a state court ex parte more than seventeen years before. It was admitted that the certificate was based upon the perjured testimony of two witnesses to the effect that Johannessen had resided in the United States for five years at least then past. The government is seeking to cancel the certificate on the ground that it was fraudulently and illegally procured. Mr. Justice Pitney, speaking for a unanimous court held (a) that section 15 of the Act of 1906 authorizing direct proceedings to attack certificates of citizenship was constitutional. (b) That prior decisions of this court holding that a judgment of a competent court admitting a person to citizenship, is like every other judgment competent evidence of its own validity, and go no further than protecting the judgment from collateral attack; (c) That the doctrine of res judicata or estoppel by judgment does not apply to an ex parte proceeding and (d) that the Act of 1906 is not unconstitutional because it is retrospective in its operation. The court specifically refused to comment on two queries that had been raised; (1) as to the conclusive effect of a certificate of naturalization issued after appearance and cross examination by the Government and (2)-whether in the absence of a statute such as the Act of 1906, a court of equity could set aside, or restrain the use of a certificate of naturalization.

It is interesting to note that the Government in its brief in the Johannessen case said, "It may be said, ex cathedra, that the Department of Justice has acquiesced in the view that judgments in naturalization proceedings are not appealable". This
view of the Department of Justice, which was overruled in the later case of *Tutun v. United States*\(^9\) was predicated on the ruling of the Circuit Court of Appeals for the Fifth Circuit in *United States v. Dolla*\(^{10}\) where that court held that a naturalization proceeding under the Act of 1906 was not a "case" within the meaning of the Judiciary Act of March 3, 1891,\(^{11}\) regulating the appellate jurisdiction of that court and that therefore the judgment of of a District court was final.

There is a second doctrine in *United States v. Dolla*\(^{12}\) which the Supreme Court of the United States in the case of *Tutun v. United States* supra, repudiated in some of its implications. In the *Dolla* case the court said, "Naturalization of aliens is an act of grace, not right". The idea that naturalization is an act of grace, not right, will be discussed in connection with the analysis of the *Tutun* case.

(2) In *United States v. Ness*\(^{13}\) a suit was brought under Section 15 of the Naturalization Act of 1906 to cancel a certificate of naturalization on the ground of "illegal procurement" because the petitioner failed to file with the clerk the certificate stating the "date, place and manner" of arrival as provided in sec. 4 of the Act. Ness admitted the failure but claimed that his right to a certificate had become *res judicata* for the reason that the United States had entered its appearance under section II of the Act in the prior proceedings in opposition to the grant and that its motion to dismiss had been denied. Mr. Justice Brandeis speaking for a unanimous court held (a) that the filing of a certificate of arrival as provided in the section was an essential prerequisite to a valid order of naturalization; (b) that the court of naturalization having assumed to dispense with this requirement, its decision could be set aside on the ground of illegal procurement and (c) that sections 11 and 15 of the Naturalization Act afford cumulative protection against fraudulent and illegal naturalization and that in a suit under the latter to set aside a certificate granted in disregard of an essential requirement of the statute, the United States is *not estopped* by the order of naturalization, although pursuant to the former

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\(^{9}\) *270 U. S. 568* (1926).

\(^{10}\) *177 Fed. 101* (1910).

\(^{11}\) *26 Stat. 828*.

\(^{12}\) *177 Fed. 101, 105* (1910).

\(^{13}\) *245 U. S. 319* (1917).
section, it entered its appearance in the naturalization proceeding and there unsuccessfully raised the same objection. Thus the Ness case answers one of the questions left unanswered by the Johannessen case to wit: "Do sections 11 and 15 afford the United States alternative or cumulative means of protection against illegal or fraudulent naturalization? The Ness case holds that cumulative redress is afforded and that there is no estoppel against the government even though the prior proceeding was not ex parte.

The court in the Ness case followed the doctrine of the case of United States v. Ginsberg, where the court said, "An alien who seeks political rights as a member of this nation can rightfully obtain them only upon terms and conditions specified by Congress . . . No alien has the slightest right to naturalization unless all statutory requirements are complied with."

(3) In Tutun v. United States, the question was raised whether the circuit courts of appeal have jurisdiction to review a decree or order of a federal district court denying the petition of an alien to be admitted to citizenship in the United States. Mr. Justice Brandeis speaking for a unanimous court held (a) that an order of the District Court granting or denying a petition for naturalization is a final decision within the meaning of the Judicial Code sec. 128; (b) a petition for naturalization is a "case" within the meaning of Judicial Code sec. 128 and an order of the District Court denying the petition is reviewable by the Circuit Court of Appeals.

The Tutun case is important in that it (1) repudiates the position of the government in the Johannessen case "that the Department of Justice has acquiesced in the view that judgments in naturalization cases are not appealable". (2) It repudiates the doctrine of the Dolla case supra that naturalization is an act of grace, and not of right. Mr. Justice Brandeis said on this point:

The opportunity to become a citizen of the United States is said to be merely a privilege and not a right. It is true that the Constitution does not confer upon aliens the right to naturalization. But it authorizes Congress to establish a uniform rule therefor. Art. 1, § 8, cl. 4. The opportunity having been conferred by the Naturalization Act, there is a statutory right in the alien to submit his petition and evidence to a court, to have that tribunal pass upon them, and, if the requisite facts are established, to receive the certificate. See United

24 U. S. 472, 475 (1917).
270 U. S. 569 (1926).
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There is, of course, no "right to naturalization unless all statutory requirements are complied with." United States v. Ginsberg, 243 U. S. 472, 475; Luria v. United States, 251 U. S. 9, 22. The applicant for citizenship, like other suitors who institute proceedings in a court of justice to secure the determination of an asserted right, must allege in his petition the fulfilment of all conditions upon the existence of which the alleged right is made dependent; and he must establish these allegations by competent evidence to the satisfaction of the court. In re Bodek, 63 Fed. 813, 814, 815; In re an Alien, 7 Hill (N. Y.) 137. In passing upon the application the court exercises judicial judgment. It does not confer or withhold a favor.

The petitioner in his brief presented this argument in a more convincing manner than the Supreme Court although the court approved of the petitioner's contention. In summary fashion it might be stated as follows: (a) Naturalization is a statutory right and not a favor, providing that the preliminary statutory requirements have been met. (b) The court, unlike the Congress, does not act as a matter of sovereign grace; it never so acts, for that would be beyond and outside the judicial function. (c) Whenever it acts, it acts judicially and by a recognized procedure and (d) Its discretion is a legal and not a personal arbitrary one.

Tutun case is also important as background material for analyzing our problem in that Mr. Justice Brandeis has clearly stated two ideas; (a) that Congress, from the beginning of the government has seen fit to provide that admission to citizenship shall be a judicial function and (b) he has pointed out alternative procedures that might be established by Congress. On these points he says:

The function of admitting to citizenship has been conferred exclusively upon courts continuously since the foundation of our Government. See Act of March 26, 1790, c. 3, 1 Stat. 103. The federal district courts, among others, have performed that function since the Act of January 29, 1795, c. 20, 1 Stat. 414. The constitutionality of this exercise of jurisdiction were not a case or controversy within the meaning of Art. III, § 2, this delegation of power upon the courts would have been invalid. Hayburn's Case 2 Dall. 409; United States v. Ferreira, 13 How. 40; Muskrat v. United States, 219 U. S. 346. Whether a proceeding which results in a grant is a judicial one, does not depend upon the nature of the thing granted, but upon the nature of the proceeding which Congress has provided for securing the grant. The United States may create rights in individuals against itself and provide only an administrative remedy. United States v. Babcock, 250 U. S. 328, 331. It may provide a legal remedy, but make resort to the courts available only after all administrative remedies have been exhausted. Compare New Orleans v. Paine, 147 U. S. 261; United States v. Sing Tuck, 194 U. S. 164; American Steel Foundaries v. Robertson, 262

34 U. S. Records and Briefs, pp. 31-32.
It may give to the individual the option of either an administrative or a legal remedy. Compare Clyde v. United States, 13 Wall. 38; Cherpenning v. United States, 94 U. S. 397, 399. Or it may provide only a legal remedy. Compare Turner v. United States, 248 U. S. 354. Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution, whether the subject of the litigation be property of status. A petition for naturalization is clearly a proceeding of that character.

PART II. COULD CONGRESS CONSTITUTIONALLY CONFERENCE ON ADMINISTRATIVE OFFICERS THE FINAL POWER TO REVOKE CERTIFICATE OF NATURALIZATION?

In a legal article entitled "Making Naturalization Administrative", Mr. Harold Fields makes the statement that "the transfer of the power over naturalization from the judiciary to the executive department can be authorized by Congressional action." It is submitted that this proposition is subject to some limitation. Although it is conceded that Congress could constitutionally confer on administrative officials the final determination of questions affecting admission to citizenship it is not believed that Congress could transfer from the courts to administrative officials the final power to revoke certificates of naturalization already issued.

In the article above described, the only citation of authority for the proposition that the whole naturalization process could be made administrative is a single sentence from Mr. Justice Brandeis's opinion in Tutun v. United States, where he said, "The United States may create rights in individuals against itself and provide only an administrative remedy." Three comments should be made in connection with the use of this statement from the Tutun case. (1) The Tutun case did not involve the question of a cancellation of a certificate of naturalization but raised the point as to whether the Court of Appeals could review a District Court holding which had denied an applicant a certificate of naturalization. (2) The quoted statement was dictum in the Tutun case and it is obviously dictum in so far as our problem is concerned. (3) A perusal of the Tutun case will indicate that the only authority therein cited for the doctrine announced in the quoted sentence was the case of Babcock v.

38 270 U. S. 563, 576 (1926).
United States. The Babcock case was based on a Congressional statute of March 3, 1885, authorizing the payment of claims for property belonging to officers and enlisted men which had been lost or destroyed under certain circumstances. The statute conferred on the accounting officers of the Treasury the power of “final determination”. The court held that claims under this act were not within the jurisdiction of the Court of Claims. The statement, which Mr. Justice Brandeis paraphrased, read as follows in the Babcock case: “That the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts”. The Babcock case cites five cases as authority for the doctrine supra and all of them concern money claims against the government21 and it is submitted that none of them is authority for the proposition that an administrative officer can be vested with the final power to cancel a certificate of naturalization.

Affirmatively, we present in outline form, the constitutional argument to show that Congress cannot confer final power on an administrative officer to cancel a certificate of naturalization.

(1) What Is the Status of a Naturalized Citizen?

In Luria v. United States,22 the court upheld section 15 of the Naturalization Act of 1906 dealing with the evidential effect of taking up a permanent residence in a foreign country within five years after securing a certificate of naturalization. Mr. Justice Van Devanter in the opinion23 pointed out that “under
our Constitution, a naturalized citizen stands on an equal footing with a native citizen in all respects, save that of eligibility to the Presidency (Minor v. Happersett, 21 Wall. 162, 165; Elk v. Wilkins, 112 U. S. 94, 101; Osborn v. Bank, 9 Wheat. 738, 827)."

(2) The Exclusion and Expulsion Cases Contrasted.

Some light will be thrown on our problem by examining the distinction that the Supreme Court has made in exclusion and expulsion cases. The statutes give to immigration officials authority only in cases of aliens and confer no power over citizens. Therefore in these cases, when the issue of citizenship or alienage is raised, a jurisdictional fact must be determined. In order that the pertinency of the exclusion and expulsion cases to our problem may be appreciated, it should be noted that when a certificate of naturalization is canceled, the status of the party affected is changed from that of a person "standing on an equal footing with a native citizen in all respects, save that of eligibility to the Presidency" to that of an alien.

Exclusion cases. In exclusion cases, the courts have apparently adopted the rule that a claim to American citizenship made by a person applying for admission does not entitle him to a judicial trial of the validity of the claim. This is so even when the facts alleged establish a prima facie case. Apparently, the immigration officers may in such cases decide the facts on which their own jurisdiction depends. This holding was forecast in the opinion of Mr. Justice Holmes in U. S. v. Sing Tuck, but a definite decision was made in U. S. v. Ju Toy, first, that the statutory provision that the decision of the Secretary should be final applied to the question of citizenship, and second, that the statute so providing was constitutional, as due process of law did not in such cases require a judicial trial. This case has been followed in later cases in the Supreme Court. In exclusion cases there has been no indication of a tendency away from it.

The author is indebted to Dean William C. Van Vleck for the statement of the distinction between the exclusion and the expulsion cases; see "Administrative Control of Aliens" pp. 189, 190 (1932).

194 U. S. 161 (1904).
198 U. S. 253 (1904).
Expulsion cases. In expulsion cases, however, the Supreme Court has departed from the rule it adopted in U. S. v. Ju Toy. In these cases the rule as the finality of the decision of the administrative officers on the issue of citizenship is otherwise. When a person within a country against whom a warrant of arrest in expulsion proceedings has been issued, has presented substantial evidence tending to establish a claim to citizenship, he is entitled to a judicial trial of the issue presented by his claim.\(^2\) The first judicial statement that there was a difference between the exclusion and the expulsion proceedings such that the doctrine of U. S. v. Ju Toy would not apply to the latter, was in a case decided by the circuit court of appeals of the seventh circuit.\(^3\) This distinction was made effective by the Supreme Court in Ng Fong Ho v. White.\(^4\) In that case, two persons of Chinese race had been arrested under warrant of the Secretary and had been ordered deported after expulsion proceedings had been completed. They claimed to be citizens on the ground that they were foreign-born sons of native-born American citizens. It was conceded that they had been duly admitted by the immigration authorities when they first arrived in this country, but the department claimed that an error had been made at that time because of deception practiced by the applicants. The latter petitioned for a writ of habeas corpus. The Supreme Court held unanimously that the petitioners were entitled to a judicial hearing on the issue of citizenship. 

In Ng Fung Ho v. White,\(^5\) Mr. Justice Brandeis said:

If the jurisdiction of the Department of Labor may not be tested in the courts by means of the writ of habeas corpus, when the prisoner claims citizenship and makes a showing that his claim is not frivolous, then obviously deportation of a resident may follow upon a purely executive order whatever his race or place of birth. For where there is jurisdiction a finding of fact by the executive department is conclusive, United States v. Ju Toy, 198 U. S. 253; and courts have no power to interfere unless there was either denial of a fair hearing, Chin Yow v. United States, 208 U. S. 8, the finding was not supported by evidence, American School of Magnetic Healing v. McAnulty, 157 U. S. 94, or there was an application of an erroneous rule of law, Grogow v. Uhl, 239 U. S. 3. To deport one who so claims to be a citizen, obviously deprives him of liberty, as was pointed out in Chin Yow v. United States, 206 U. S. 8. It may result also in loss of both

\(^{2}\)Ng Fung Ho v. White, 259 U. S. 276 (1921).
\(^{3}\)Moy Suey v. United States, 147 Fed. 697 (1906).
\(^{4}\)269 U. S. 276 (1921).
\(^{5}\)259 U. S. 276, 284 (1921).
property and life; or of all that makes life worth living. Against the
danger of such deprivation without the sanction afforded by judicial
proceedings, the Fifth Amendment affords protection in its guarantee
of due process of law. The difference in security of judicial over
administrative action has been adverted to by this court. Compare
United States v. Woo Jan, 245 U. S. 552, 556; White v. Chin Fong, 253
U. S. 90, 93.

Thus far the attempted analogy between expulsion cases
(wherein administrative action is not final and wherein to deny
the person claiming to be a citizen the right to judicial review
would violate the Fifth Amendment) and the cancellation of
certificates of naturalization has stressed the jurisdictional
fact\(^{22}\) theory insofar as the former is concerned.

The point may be raised that all of this discussion concern-
ing the jurisdictional fact theory is not applicable to the can-
cellation process. In answer we point out that Congress has
only empowered the courts to cancel certificates on two grounds: fraud and illegal procurement. Further, the basic act asserts
that “an alien may be admitted to become a citizen of the United
States in the manner indicated under sections 372 to 394 of this
Title and not otherwise”. (U.S.C.A. Title 8, sec. 372.) The
statute contains many prerequisites, the existence or non-
existence of which are jurisdictional facts, such as insufficient
residence,\(^{33}\) racial eligibility,\(^{34}\) ability to speak English,\(^{35}\) that
he once withdrew his declaration in order to evade the draft,\(^{36}\)
that he is an anarchist or polygamist,\(^{37}\) etc.

Further, neither fraud nor illegal procurement is a word
of art containing a specific legal content. Both involve a fusion
of questions of law and of fact. If the attempt were made by
Congress to confer this power of cancellation on administrative
officials and make their determination final, it is believed that
such a setup would violate due process of law. The outlines of
jurisdictional power are too vague and amorphous to permit
finality in the administrative agency. The holder of a certificate
of naturalization is on a par, in the eyes of the law, with a native
born citizen. When in a cancellation proceeding he asserts the

\(^{22}\)See my article “The Jurisdictional Fact Theory and Administra-
tive Finality” in the (1937) 22 Cornell Law Quarterly 349 and 615.
\(^{33}\)8 U. S. C. A. 382.
\(^{34}\)8 U. S. C. A. 359.
\(^{36}\)Ibid. 366.
\(^{37}\)Ibid. 364.
existence of the jurisdictional facts which Congress has declared to be prerequisites for citizenship, he is entitled to a judicial trial of that issue.

But there is another reason which would seem to strengthen the analogy and that is developed admirably in Dean William C. Van Vleck's book, *The Administrative Control of Aliens*. He points out\(^3\) that "the list of the causes for expulsion reads like a criminal code". Although technically the courts have not characterized the power as "criminal", the Report of the Minority of the Committee on Immigration and Naturalization in connection with H. R. 10078,\(^3\) has characterized it as "quasi-criminal". Dean Van Vleek points out that:\(^4\)

In its essential elements, however, it partakes largely of the nature of criminal justice, *in the nature of many of the charges made, the kind of facts which must be proved and the kind of issues decided, and more especially in its effects on the interests of the persons against whom it is brought.*

The same thing can be said for many of the proceedings in the cancellation of a certificate of naturalization, especially where the charge is that the person is opposed to the principles of the Constitution,\(^4\) that he has been guilty of an illegal entry into the country,\(^4\) or that he is a polygamist or that he is opposed to organized government. All of these cancellation proceedings smack of a criminal trial and a system of administrative finality would not assure the safeguards traditionally incorporated into the administration of our criminal law such as a public trial, information to the accused as to the nature and cause of the accusation, the right to confront witnesses against him, compulsory attendance of witnesses in his favor, trial by an impartial jury and counsel to assist him in his defense.

(3) *The Military Law Cases—in Reverse.*

Mr. Justice Brandeis in *Ng Fung Ho v. White*, supra, compares the exclusion cases to those cases wherein a person not in fact in the military establishment is attempted to be tried by

\(\text{\textsuperscript{3}}\) P. 219.
\(\text{\textsuperscript{4}}\) 70th Cong. 1st Sess., H. R. 484, p. 8.
\(\text{\textsuperscript{4}}\) P. 224.
\(\text{\textsuperscript{4}}\) Rowan v. United States, 18 Fed. (2d) 246 (1927).
court martial or to be made amenable to the military law. He says:

The situation (exclusion of one claiming to be a citizen) bears some resemblance to that which arises where one against whom proceedings are being taken under the military law denies that he is in the military service. It is well settled that in such a case a writ of habeas corpus will issue to determine the status. (Ex Parte Milligan, 4 Wall. 2.)

The Milligan doctrine prohibits the military officials themselves from having the final determination whether they have jurisdiction of the person; that question will be disposed of by the courts when raised by a writ of habeas corpus. It is interesting to note that the court in the Milligan case not only held that the Military Commission set up in Indiana did not have jurisdiction over Milligan but went further by dictum and said that Congress did not have the constitutional authority to clothe the Military Commission with this power.

(4) Revocation of Patents as an Analogy.

It has been often said that "naturalization under our Constitution is in all substantial respects like a patent for land or for an invention—a grant on the part of the Government, conditioned on compliance with certain express statutory requirements." It is well settled by the cases that after a patent is once issued, the patent office has no power to revoke, cancel or annul the patent. The only authority to annul or revoke is in the courts of the United States, and the same rule applies to a patent for land granted by the officers of the Land Department. But it may be said that these rules are merely based on constructions of the existing Congressional statutes dealing with patents for inventions and for land and throw no light on the query whether Congress could confer final power on the administrative officers.

Two cases on this point are suggestive. In McCormick Machine Co. v. Aultman, the Patent office attempted to revoke a patent in part upon a re-application of the patentee for a reissue of it, by repudiating its former rulings. The court

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4 Ex Parte Milligan, 4 Wall. 2 (1866).
48 Stedman on Patents, sec. 131.
45 United States v. Stone, 2 Wall. 525, 535 (1864).
47 169 U. S. 606 (1897).
said, "To attempt to cancel a patent upon an application for reissue when the first patent is considered invalid by the examiner would be to deprive that applicant of his property without due process of law, and would in fact be an invasion of the judicial branch of the government".48 Considered in connection with this doctrine is the case of United States v. Bell Telephone Co.,49 which clearly states that the revoking power in so far as a patent is concerned exists in the judicial branch irrespective of any statute so conferring that power on the courts.

The court said:

In England grants and charters for special privileges were supposed to issue from the King, as prerogatives of the Crown and the power to revoke them was long exercised by the King by his own order or decree. This mode of vacating charters and patents gradually fell into disuse; and the same object was obtained by scire facias, returnable into the Court of King's Bench or of Chancery. * * * In this country, where there is no kingly prerogative, but where patents for lands and inventions are issued by the authority of the government and by officers appointed for that purpose, who may have been imposed upon by fraud or deceit, or may have erred as to their power, or made mistakes in the instrument itself the remedy for such evils is by proceedings before the judicial branch of the government.

But the point was raised by demurrer that since there was no statute which conferred this jurisdiction on the courts "that no authority or power exists in law to entertain such a suit". The court held that both on the basis of English law and on the Constitution of the United States such a "jurisdiction to repeal a patent by a decree of a Court of Chancery as an exercise of its ordinary powers was well established",50 both as to patents for land and for inventions. "It would be a strange anomaly in a government organized upon a system which rigidly separates the powers to be exercised by its executive, its legislative and its judicial branches, and which in emphatic language defines the jurisdiction of the judicial department, to hold that in that department there should be no remedy for such a wrong."51

(5). The View of the Solicitor's Office of the State Department.

Mr. Richard W. Flournoy, Jr., Assistant Solicitor, Department of State, in a scholarly article entitled "Naturalization and
Expatriation”, had the following to say about administrative finality insofar as cancellation of certificates of naturalization was concerned:

It is believed, however, that such an important thing as the cancellation of citizenship should not result from a mere administrative decision. In this relation may be recalled the observations of the court in *Burkett v. McCarty*, 10 Bush (Ky. 758, 760. In declaring that loss of citizenship could properly be pronounced only by a court of law in regular judicial proceedings, the court said, “To decitizenize a free man is a tremendous blow. It deprives him of his chosen country and home and sunders his most endearing relation, social and civil.”

PART III. **Could Congress Constitutionally Provide for Revocation of a Certificate of Naturalization on the Ground of Subsequent Disloyalty?**

(In the discussion of this point, it is assumed that the final power of revocation is in the judicial department of the Government.)

(A) **The Nature of the Power to Grant Certificates of Naturalization.**

As a basis for the discussion of the power of revocation it will be helpful first to outline the nature of the power to grant citizenship by naturalization.

(1) **The Power to Provide for Naturalization Is Exclusively in the Federal Congress.**

The Constitution of the United States confers on Congress the power “to establish an uniform rule of naturalization throughout the United States”. Chief Justice Marshall in 1817 declared “that the power of naturalization is exclusively

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52 (1922) 31 Yale L. J. 702, 848 at 866.

53 It should be pointed out that there is some trend to enlarge the function of Administrative officers in the naturalization process. (See the *Trend Toward Administrative Naturalization* by Henry B. Hazard, Bureau of Naturalization in 21 American Political Science Review, 342. Mr. Hazard refers to the act of June 8, 1926 (44 Stat. at L. 709, 710), which in order to relieve the congestion of federal district courts authorized federal judges to designate examiners from the Bureau of Naturalization to conduct preliminary hearings and to make findings and recommendations thereon. Two things should be noted about this statute, (a) it applies to petitions for naturalization and not to cancellation of certificates and (b) even in its limited field, the decision of the administrative official is not final.

54 Art. I., sec. 8.
in Congress does not seem to be, and certainly ought not to be controverted.”

(2) Dual Citizenship and the Effect of the Fourteenth Amendment.

The original Constitution contained no definition of citizenship although it made use of the word “citizens”. Further it recognized not only citizens of each state but also citizens of the United States. In *Dred Scott v. Sanford*, Chief Justice Taney said, “It is very clear that no state can by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own.” The general view prior to the Fourteenth Amendment seems to have been that United States citizenship, except in cases of naturalization, was subordinate to and derived from state citizenship. Mr. Chief Justice White in the opinion in the *Selective Draft Cases*, declared that the Fourteenth Amendment had “completely broadened the national scope of the Government under the Constitution by causing citizenship of the United States to be paramount and dominant instead of being subordinate and derivative”.

(3) Naturalization Is a Statutory Privilege and an Alien Has No Inherent Right to Become a Citizen.

To become a citizen of the United States by naturalization is not a right but a statutory privilege, which can be granted by the courts only under provision of laws enacted by Congress. Aliens in the United States have no inherent right to be admitted to citizenship. Congress alone has the undoubted authority under the Constitution to prescribe the terms and conditions upon which such a privilege shall be granted. Mr. Justice Gray in

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56 *Chirac v. Chirac*, 2 Wheat. 259, 269 (1817).
58 *19 Howard 393* (1857).
60 *245 U. S. 366, 389* (1918).
the case of *United States v. Wong Kim Ark,*62 said, "Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship."

(4) **An Administrative Officer or a Court Cannot Add to the Statutory Requirements for Naturalization.**

In *In re Mella,*63 a regulation of the naturalization bureau provided that a declaration of intention shall not be filed or accepted unless accompanied by a certificate of arrival. The statute of Congress did not provide for this prerequisite. The court held that the regulation was invalid because not authorized by the Naturalization Act. Tuttle, District Judge, said:

It is settled law that while an executive tribunal or official may constitutionally be empowered by Congress to make such regulations as are reasonably necessary to the proper execution of the statute, so long as such regulations are merely administrative in character and relate only to the enforcement of the statute, yet such executive tribunal or official cannot, constitutionally, either with or without the sanction of Congress, make any rule or regulation the effect of which would be to add to, take from or otherwise change such statute, for that would be to permit the executive department to encroach upon and usurp the functions of the legislative department, to which alone belongs the power to legislate.

The law is well settled that the prerequisites prescribed by statute cannot be dispensed with,64 and in *Tutun v. United States,*65 the court said that Congress having laid down the rules governing admission of aliens to citizenship, it is not within the power of a court, in the exercise of its discretion to add to them. In *State v. District Court of 16th Judicial District,*66 it was held that:

the court has no authority in naturalization proceedings to include in its judgment a provision forever debarring applicant from citizenship, since it is authorized to act only upon the application then pending, and even if the naturalization law does not permit a subsequent application, the court has no authority to prevent Congress from enacting a law which will permit such application.

62 *United States v. Ginsberg, 243 U. S. 472 (1916).*
63 5 Fed. (2d) 687 (1925).
64 169 U. S. 649, 669 (1897).
65 12 Fed. (2d) 783 (1926).
66 202 Pac. 387 (Mont., 1921).

Although the federal statutes have always conferred authority on certain state courts to admit aliens to citizenship for the purpose of naturalization all courts under the act are federal courts. In the naturalization process the state courts act as governmental agencies of the federal government. Further, the procedure in state courts for this purpose is controlled by Congress.

(B) The Existing Cancellation Statute Analyzed.

Although the constitutionality of the existing cancellation statute has been upheld in Johannessen v. United States, and in Luria v. United States, this fact throws little direct light on our problem which involves the constitutionality of a substantive provision which would permit cancellation on the ground of subsequent disloyalty. Our present cancellation statute provides for cancellation on only two grounds, fraud and illegal procurement. Although the act involved may be subsequent to the grant, both grounds relate back to the time of the grant of the certificate. As was said in the Luria case, supra, the cancellation statute does not forfeit the naturalized alien's right to citizenship. It is aimed only to cancel a previous certificate for fraud or illegal procurement in its inception. It has further been held in United States v. Albertini, that this cancellation statute does not detract from or add to the rights and remedies of the government as they existed prior to the statute. The design of the statute is to enable the government to exercise jurisdiction over naturalization proceedings and in its discretion to oppose, contest and convert the proceedings into those actually adversary. It has been further held in In re Maculoso's Naturalization, that the statute only furnishes a new remedy for which there

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67 Van Dyne on Citizenship, II.
70 In re Gee Hop, 71 Fed. 274, 275 (1895).
71 U. S. C. Title 8, sec. 405.
72 225 U. S. 227 (1911).
73 231 U. S. (1913).
74 206 Fed. 133 (1913).
75 237 Pa. 132, 85 Atl. 149 (1912).
was an existing remedy. Hence, the remedy is cumulative and not exclusive. Consequently, the fact that the statute was retrospective and applied to naturalization proceedings under former laws did not raise a constitutional question.76

Before the passage of the Naturalization Act of 1906 providing expressly for the cancellation of certificates of naturalization on grounds of fraud or illegal procurement, it had been held that the United States could sue for the cancellation of a decree of naturalization where it had been fraudulently or illegally obtained.77

(C) **Certificates of Naturalization under the Existing Statutes Have Been Canceled by Indirection where Disloyalty Was Involved.**

Under our statutes the only method of cancellation, where disloyalty is involved, is *indirect* in the sense that it relates back *directly* to the statutory grounds of *fraud* or *illegal procurement*. Some of these cases seem rather far-fetched in their reasoning because of the interval of time elapsing between the date of the certificate and the date of the disloyal utterance or act. Only a few of the more extreme cases will be presented here. Because of the strained construction indulged in, they should show that in the minds of some judges at least there is an imperative need for a *direct statutory provision* permitting cancellation on the ground of subsequent disloyalty.

In *United States v. Wursterbarth,* 78 a native of Germany was naturalized and became a citizen in 1882. He took the oath to support the Constitution of the United States and renounced allegiance to his former sovereign. Thirty-five years later during the World War he expressed his desire for a German victory and stated that he recognized an allegiance to Germany superior to that due the United States. The court held that that attitude expressed in 1917, a few days after our entrance into the war, unexplained, warrants cancellation of his certificate on the ground that it was procured thirty-five years earlier by fraud, in that his oath to renounce allegiance to any foreign country was false and excepted the land of his nativity.

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77 U. S. v. Norsch, 42 Fed. 417 (1920); U. S. v. Kornmehl, 33 Fed. 10 (1898); see also 3 Moore's International Law Digest 500.
78 249 Fed. 908 (1918).
In *United States v. Darmer*, a German was naturalized in 1888. During the War, when asked to buy Liberty Bonds, he emphatically refused on the ground that he was of German descent and made other statements indicating allegiance and loyalty to Germany rather than to the United States. The certificate was canceled on the same ground as in the preceding case.

*United States v. Herberger*, a German was naturalized in 1912. During the War he wrote a letter to his sister in Germany which tended to show the naturalized citizen’s sympathy with Germany. The court canceled the certificate of naturalization on the ground of fraud stating that “the existence of a condition being shown, it will be presumed, in the absence of a showing to the contrary, to have theretofore existed for a reasonable time.”

The cases discussed above should be distinguished from such cases where the applicant at the time of naturalization really believed in the overthrow of government by force or maintained in fact his former allegiance and failed to disclose it, such as *United States v. Olsson*, *United States v. Swelgin*, *United States v. Stuppielo*. But where considerable periods of time elapse between the date of naturalization and the date of the disloyal utterance or act, we are inclined to favor the view expressed by the Circuit Court of Appeals of the Ninth Circuit in *Rowan v. United States*, when it said:

“To say that one who was not a member of the I. W. W. in 1907, by merely joining in 1912 and remaining a member through 1917 must in 1907 have been opposed to organized government, or been lacking in allegiance, is far too conjectural. Nor do we think that the proven fact that 10 years after 1907 Rowan was guilty of violation of the Espionage Act is logically probative of his state of mind in 1907.”

The cases discussed above wherein thirty-five years elapse between the naturalization and the occurrence of the disloyal utterances or acts place too great a strain on the fiction of relation-back and make a mockery of the presumption of a “reasonable time” within which the same attitude of mind is supposed

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*248 Fed. 989 (1917).*  
*272 Fed. 278 (1921).*  
*196 Fed. 562 (1912).*  
*254 Fed. 884 (1918).*  
*260 Fed. 483 (1919).*  
*18 Fed. (2d) 246, 248 (1927).*
to prevail in the defendant. While we can understand the patriotic motives of the judges in these wartime cases, we cannot endorse the legal doctrine utilized to reach the desired result. In the absence of Congressional action, which would affirmatively make disloyalty a ground for revocation, it is not a legitimate function of the courts to resort to this kind of chicanery.

(D) *Are the Dicta in United States v. Wong Kim Ark, and in Osborn v. United States Bank Controlling?*

In *United States v. Wong Kim Ark*, the only question involved was whether under the 14th Amendment a child born in the United States of parents of Chinese descent (who could not be naturalized under the Congressional act) was a citizen of the United States and the court held that he was. But by way of dictum the court, through Mr. Justice Gray, said, "The power of naturalization, vested in Congress by the Constitution, *is a power to confer citizenship, not a power to take it away". Standing alone and wrenched from its context, it might appear at first blush that this doctrine would prevent Congress from providing for a revocation of a certificate of naturalization on the ground of subsequent disloyalty. But such is not the case. The court in making the statement had in mind the particular facts in the case to wit, that the 14th Amendment permitted by birth the creation of a natural born citizen, even though the parents of the child could not become naturalized citizens under the Congressional act. The court elaborating on the argument said, "Congress having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, *a fortiori*, no act or omission of Congress, as to providing for the naturalization of parents or children of a particular race, can affect citizenship acquired as a birthright, by virtue of the Constitution itself, without any aid of legislation. The 14th Amendment, while it leaves the power where it was before, in Congress, to regulate naturalization has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship."

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5169 U. S. 649 (1897).

*Id.* at p. 703.
In Osborn v. United States Bank, the question involved was whether the incorporation of the Bank of the United States by Congress gave the circuit courts of the United States jurisdiction of suits by and against the bank, and the court held that it did. But by way of dictum the court said,

* * * A naturalized citizen is, indeed, made a citizen under an act of congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize congress to enlarge or abridge those rights. The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might sue. He is distinguishable in nothing from a native citizen, except so far as the constitution makes the distinction; the law makes none. There is, then, no resemblance between the act incorporating the bank, and the general naturalization law.

It is submitted that neither the Wong Kim Ark nor the Osborn dictum is controlling insofar as our problem is concerned. This point will be made clearer in the discussion which follows dealing with the correlative right of expatriation on the part of the citizen and the deprivation of citizenship by the government upon the commission of certain subsequent acts by the citizen.

(E) Citizenship Is a Status Relationship and the Privileges and Duties Appurtenant Thereto Are of a Correlative Nature.

In Minor v. Happersett, Chief Justice Waite said,

The citizen owes the state allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is compensation for the other, allegiance for protection and protection for allegiance.

Professor W. W. Willoughby has said, Allegiance, as its etymology indicates, is the name for the tie which binds the citizens to his state—the obligation of obedience and support which he owes to it.

Professor Dudley O. McGovney has said, "It may be asked, what law determines the distribution and division of all persons in the world among the several states? What law determines which person belongs to that state and to that? Being an international matter, it would seem that international law itself should furnish the rule of division. But it does not do so. International law has here a complete hiatus. The only rule that it lays down, that

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9 Wheat. 737 (1824).
21 Wall. 162, 165 (1875).
each state may determine for itself what persons it will regard as nationals. In short it lays down a confusion, and confusion exists."

From the standpoint of municipal law the state is unlimited in the regulation of the admission and loss of citizenship.\(^*\)

(F) **The Status of Citizenship May Be Terminated by the Citizen by Expatriation with the Consent of the Government.**

The status of citizenship may be terminated by the Citizen through the process of expatriation. Since 1868 the right of expatriation has been recognized by statute.\(^9\) Prior to 1868, judicial decisions in the United States as to existence of a right of expatriation, in the absence of a statute creating it have not been uniform.\(^9\) It should be noted, however, that no one may abandon his or her American citizenship *without the consent of the government*. In the early case of *Shanks v. Dupont*,\(^9\) this doctrine was declared and has not since been questioned. In that case the court said,

The general doctrine is, that no persons can by any act of their own, without the consent of the government, put off their allegiance, and become aliens.

Professor Willoughby commenting on this case says,\(^9\)

In other words, the Government has the same control over the denial of a continuance of citizenship that it has over the creation or recognition of that status.

Expatriation has been defined as "the voluntary renunciation or abandonment of nationality and allegiance.\(^9\) Since this voluntary renunciation or abandonment however can only be permitted under terms and conditions subject to the control of the government, it would seem that of the two parties to this status arrangement, known as citizenship, the government has the upper hand. Professor Willoughby has said,\(^9\)

The law is clear, whatever this right (of expatriation) may be, it is subject to full control by the government, both affirmatively and negatively. That is, the government may provide that certain acts upon the part of the citizen may be punished by a denial to him or her thenceforth of the rights and privileges of citizenship, or may be deemed to operate as a renunciation of his or her American citizenship.

\(^*\) American Citizenship, 11 Col. L. Rev. 231, at 233.
\(^9\) 15 Stats. at L. 223, chap. 249.
\(^9\) 3 Peters 242 (1830).
\(^9\) Van Dyne, *Citizenship*, p. 269.
DISLOYALTY AND DENATURALIZATION

Forfeiture of Rights of Citizenship as Well as Rights to Become Citizens—the Desertion Statutes—the Only Law of the United States under which Conviction for the Commission of a Crime Entails a Forfeiture of the Rights of Citizenship.

Sec. 1996 (U.S. Comp. Stat. 1901) provides:

All persons who deserted the military or naval service of the United States, and did not return thereto or report themselves to a provost-marshal within sixty days after the issuance of the proclamation by the President, dated the 11th day of March, 1865, are deemed to have voluntarily relinquished and forfeited their rights of citizenship, as well as their right to become citizens; and such deserters shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof.

Sec. 1998 (U.S. Comp. Stat. 1901) provides:

Every person who hereafter deserts the military or naval service of the United States, or who, being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the military or naval service, lawfully ordered, shall be liable to all the penalties and forfeitures of section nineteen hundred and ninety-six.

The courts have held that the provisions of section 1998 subjecting every deserter to a forfeiture of all rights of citizenship can only take effect on conviction by court martial. One punished under this section might lose his rights as a citizen and be debarred from ever holding any federal office and will also be denied a subsequent admission to citizenship.

Professor Willoughby commenting on these sections dealing with desertion from the military or naval forces of the United States or evading the draft says,

It would appear that this forfeiture of the "rights of citizenship" is not equivalent to the forfeiture of citizenship itself, for, though the rights are lost, the obligations are not destroyed.

By an amendment of 1912 the Revised Statute, secs. 1996 and 1998 discussed above has been changed so that such forfeiture of citizenship does not take place thereafter, except during times of war, and persons deserting the military or naval forces in times of peace are thus placed beyond the purview of

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89 P. 1269.
90 P. 1269; U. S. C., Title 8, sec. II.
92 In re Carver, 142 Fed. 623 (1905).
93 In re Gnadt, 269 Fed. 189 (1920).
the penalty of the law of 1865. Luella Gettys in her book, "The Law of Citizenship in the United States" says, "the law providing for forfeiture of citizenship on conviction for desertion appears to be the only law of the United States under which conviction for the commission of a crime entails a forfeiture of citizenship."\(^{105}\)

(H) Annulment of American Citizenship where American (Woman) Citizen Marries a Foreigner.

In *Mackenzie v. Hare*,\(^{106}\) the question was raised as to the constitutionality of the annulment of American citizenship under the provision of the act of March 2, 1907,\(^{107}\) that any American woman who marries a foreigner shall take the nationality of her husband, the contention being that, under the Constitution the plaintiff's citizenship became a right or privilege by birth which could not be taken away from her except as a *punishment for crime* or by her voluntary expatriation. To this the court replied:

As a Government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers.... It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen. The law in controversy does not have that feature. It deals with a condition voluntarily entered into, with notice of the consequences. . . . may involve national complications of like kind as her physical expatriation may involve. Therefore, as long as the relation lasts, it is made tantamount to expatriation. That is no arbitrary exercise of government.

Marriage of an American woman with a foreigner is tantamount to voluntary expatriation; and Congress may, without exceeding its power, make it so as it has in fact done. It will be noted that the court conceded that citizenship could be forfeited by "voluntary expatriation or as a *punishment for crime*" and the latter is the gist of our thesis. The legal effects of marriage by an American (woman) citizen have been changed by the Married Woman's Naturalization Act of September 22, 1922,\(^{108}\) which was passed since the *Mackenzie* case.

\(^{105}\) P. 165.
\(^{106}\) 239 U. S. 299 (1915).
\(^{107}\) 34 Stat. at L. 1228.
\(^{108}\) 42 Stat. at L. 1021.
(I) Presumption of Expatriation—Resumption of Residence in Native State or Residence in Other Foreign State After Naturalization in the United States.

The methods of expatriation have been summarized as follows:109 (a) Expatriation by naturalization in foreign state.110 (b) Expatriation by oath of allegiance to a foreign state.111 (c) Expatriation by desertion.112 (d) Expatriation by marriage.113 (e) Expatriation by cancellation of certificate on grounds of fraud or illegal procurement,114 and (f) By treaty, expatriation by resumption by naturalized American citizen of residence in native country.

In addition to the above methods of expatriation, by which it is automatically effected, the Act of March 2, 1907, provides for a presumption of expatriation “when any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state.” It shall then be presumed that he has ceased to be an American citizen. But this presumption may be overcome by presenting satisfactory evidence on seven points outlined by the Department of State.115 It should also be noted that our statutes now provide that “no American citizen shall be allowed to expatriate himself when the country is at war.”116 However the Act of 1907 dealing with the presumption of expatriation is vague and many questions are still undecided, (a) what is the legal effect of the presumption; (b) no time limit is provided within which the rebuttal must be made to overcome the presumption; (c) does the effect of failure to overcome the presumption result in loss of citizenship or only in withdrawal of protection—(while protection may be denied by the Department of State it would appear that no power has been delegated to that department to revoke citizenship.)117

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110 34 Stat. at L. 1228, chap. 2534, sec. 2.
111 Ibid., Moore’s Digest 111, 718 ff.
113 34 Stat. at L. 1228, chap. 2534, sec. 3.
114 34 Stat. at L. 596, Part I, chap. 3592, sec. 15.
115 Dept. of State, March 6, 1928, “Presumption of Expatriation May be Overcome”, etc.
116 U. S. C., Title 8, sec. 16, Chap. I.
117 See Lambie, Presumption of Cessation of Citizenship, 24 Am. J. of Inter. Law 264, 278 (1930); see Gettys, Ibid. at p. 173.
PART IV. Conclusions.

(1) In *Luria v. United States*,\(^1\) 231 U.S. 9, the court made it plain that under our cancellation statute the grounds of *fraud* and *illegal procurement* are not *substantive* grounds of revocation but relate to *procedural irregularities* either on the part of the applicant or the court. Further, in the *Luria* case the court characterized the provision dealing with subsequent residence in the native or foreign country which is declared to be *prima facie* evidence of a lack of intention to become a permanent citizen of the United States at the time of the application for citizenship, as follows: “It will be observed that this provision prescribed a rule of *evidence*, not of *substantive right*.\(^2\) Further, the fact that Luria was naturalized prior to the enactment of this evidentiary presumption did not prohibit its application to him, for the court pointed out that ‘a right to have one’s controversies determined by existing rules of evidence is not a vested right’.\(^3\)

(2) We suggest that a *penalty* section be added to the federal criminal code providing that any naturalized citizen, who is convicted of any of the following offenses, shall, in addition to the penalties already provided for such offenses, have his certificate of naturalization canceled. This new penalty section shall be applicable to the following offenses:

- Treason (U.S.C. Title 18, sec. 1, where the death penalty is not imposed);
- Misprision of treason (U.S.C. Title 18, sec. 3);
- Inciting rebellion or insurrection (U.S.C. Title 18, sec. 4);
- Criminal correspondence with foreign governments (U.S.C. Title 18, sec. 5);
- Seditious conspiracy (U.S.C. Title 18, sec. 6);
- Recruiting for service against the United States (U.S.C. Title 18, sec. 7);
- Enlisting to serve against the United States (U.S.C. Title 18, sec. 8).

Other offenses may be brought within the scope of the penalty provision and the cancellation may be left to the discretion of the court instead of being made mandatory.

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\(^1\) 231 U. S. 9 (1913).
\(^2\) *Id.* at p. 25.
\(^3\) *Id.* at p. 26.
The British law\textsuperscript{121} affirmatively sets up a \textit{substantive} ground of revocation in the provision that a certificate of naturalization shall be canceled if "the person to whom the certificate is granted has shown himself by act or speech to be disaffected or disloyal to his Majesty". The penalty proposal suggested has three obvious advantages over an attempt to copy the British practice of setting up affirmatively a \textit{substantive} ground of revocation. (a) It obviates the difficulty of formulating a definition of "disloyalty" which would constitute effectively a new substantive federal offense. (b) Our existing substantive law covering the field of "disloyalty" is comprehensive and has been interpreted and upheld by the courts. (c) Even if the formulation of a new substantive offense of "disloyalty" for the purpose of cancellation of certificates of naturalization was satisfactory on grounds of policy, it might not successfully run the gauntlet of constitutionality, under the First and Fifth Amendments.

The second feature of the British law which vests the \textit{final} power of revocation in the Secretary of State could not be engrafted on our statute for the reason that Congress could not constitutionally confer on an administrative official the final power of revocation of a certificate of naturalization. This is shown \textit{supra} by the discussion of the patent and exclusion cases.

Whether we adopt the penalty proposal and attach it to existing criminal statutes, or attempt to spell out a new substantive ground for revocation based on subsequent disloyalty, which would be criminal in its nature, we cannot avoid the jury trial provisions of the Sixth Amendment. In either case, a criminal statute will be involved which is to be distinguished from our present cancellation procedure on the grounds of fraud or illegal procurement, both of which date back to the time of the granting of the certificate, and are equitable in their nature. In \textit{Luria v. United States}\textsuperscript{122}, the court in construing the present cancellation procedure held that a jury trial is unnecessary. The court said:

The right asserted and the remedy sought were essentially equitable, not legal, and this according to the prescribed tests made in a suit in equity. \textit{Parsons v. Bedford}, 3 Pet. 433, 447; \textit{Irvine v. Marshall}, 20 Howard 558, 565; \textit{Root v. Railway Co.}, 105 U. S. 180, 207. In this

\textsuperscript{121}1 Statutes of England 189, 190.
\textsuperscript{122}231 U. S. 9 (1913).
respect, it does not differ from a suit to cancel a patent for public lands or letters patent for an invention. See United States v. Stone, 2 Wall. 525; United States v. San Jacinto Tin Co., 125 U. S. 273; United States v. Bell Telephone Co., 128 U. S. 315.

(6) Our proposal would raise only one constitutional question and that would be as to the validity of the *penalty provision per se*, for the reason that the courts have already upheld the constitutional power of Congress to enact those sections of the federal criminal code known as "offenses against the existence of government" to which our proposal would attach an additional penalty provision.

The penalty provision *per se* is constitutional for the following reasons:

(A) The nature of the revocatory power depends upon the nature of the grant which is revoked. We have shown that

1. The power to provide for naturalization is exclusively in the federal Congress.
2. Congress is under no obligation to pass a naturalization law, but having done so, the alien's right is a statutory one. The Constitution does not confer upon aliens the right to naturalization.
3. No alien has the slightest right to naturalization unless all statutory requirements are complied with. An alien who seeks political rights as a member of this nation can rightfully obtain them only upon terms and conditions specified by Congress.
4. Under our system, the terms and conditions for naturalization are a matter of legislative discretion; the function of admission has been conferred exclusively on the courts.
5. An administrative officer or a court cannot add to the statutory requirements for naturalization.
6. The United States is not estopped by the order of naturalization, even though it entered its appearance in opposition to the grant in the original proceedings.

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123 U. S. C., Title 18, sec. 1. Treason—"The crime of treason is defined by the Constitution itself, thus taking it out of the power of legislative regulation". Charge to Grand Jury, 5 Blatch. 549, 30 Fed. Cases No. 18,271 (C. C., N. Y. 1861).
U. S. C., Title 18, sec. 3. Charge to Grand Jury, 1 Bond 609, 30 Fed. Cases No. 18,272 (C. C. Ohio 1861).

124 Chirac v. Chirac, 2 Wheat. 259 (1817).
128 In re Mellea, 5 Fed. (2d) 687 (1927).
(B) The status of citizenship involves privileges and duties appurtenant thereto of a correlative nature. "Allegiance and protection are reciprocal obligations."\textsuperscript{130} Further the renunciation of prior allegiance and the oath "to support and defend the Constitution of the United States against all enemies, foreign and domestic and bear true faith and allegiance to the same"\textsuperscript{131} is a continuing obligation which remains in force and effect as long as the status relationship exists. Congress can provide that a naturalized citizen convicted of violating one of these offenses against the existence of government of his adoption can have his certificate of naturalization canceled as part of the penalty for his offense.

(C) The desertion statute\textsuperscript{132} affords a precedent for our proposal. Although it applies only to members of the military or naval service, it has been upheld by the courts.\textsuperscript{133} This desertion statute which provided for forfeiture of citizenship on conviction for desertion has been characterized as "the only law of the United States under which conviction for the commission of a crime entails a forfeiture of citizenship."\textsuperscript{134}

(D) The need for a candid, legislative declaration, as our proposal envisages, is emphasized by the attitude of our courts in those cases\textsuperscript{135} wherein certificates of naturalization (under the existing statutes) have been canceled by indirection where subsequent disloyalty was involved. If the American people believe that it is a sound national policy to denaturalize on the ground of disloyalty, Congress should so declare and thus remove the temptation from the courts to resort to legal chicanery in many cases in order to achieve the desired result.

\textsuperscript{128} Minor v. Happersett, 21 Wall. 162, 165 (1874).
\textsuperscript{129} U. S. C., Title 8, Chap. 9, sec. 331.
\textsuperscript{131} Kurtz v. Moffitt, 115 U. S. 487 (1884); In re Carver, 142 Fed. 623 (1906); In re Gnadt, 269 Fed. 189 (1920).