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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 80 C 4302
	)	
LIUDAS KAIRYS,	)	(Hon. James B. Moran)
	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM IN OPPOSITION
TO THE GOVERNMENT'S MOTION TO STRIKE
HIS JURY DEMAND

DATED: April 19, 1982

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DEFENDANT'S MEMORANDUM IN OPPOSITION TO
THE GOVERNMENT'S MOTION TO
STRIKE HIS JURY DEMAND

Introduction

The United States Government claims it can strip foreign-born Americans of their citizenship and deport them without giving them a trial by jury. The United States Constitution, however, stands in its way. The Fifth Amendment (see Sections II and IV, infra), Article III, §2 and the Sixth Amendment (see Section III, infra), the Seventh Amendment (see Section V, infra), and the democratic principles they reflect guarantee naturalized citizens the protection of jury trial when the Government moves to take away their "right to have all other rights."

In support of its motion to strike Defendant's jury demand, the Government relies solely on a 1913 Supreme Court decision, Luria v. United States, 231 U.S. 9 (1913), and a footnote in United States v. Walus, 616 F.2d 283, 304 n.53 (7th Cir. 1980) following Luria. But Luria

and Walus do not address, let alone resolve, the Constitutional issues raised by the motion to strike. Both decisions consider right to a jury trial only under the Seventh Amendment. Defendant's right to a jury stems from Article III, §2, and the Fifth and Sixth Amendments, as well as from the Seventh Amendment.

Nor does the Luria decision even dispose of the Seventh Amendment issue today. Luria involved an attack on what the Court called "merely colorable" letters of citizenship (231 U.S. at 24) obtained by ex parte application, as one obtains a patent. In 1906, Congress substantially changed naturalization procedures by statute. Kairys acquired his citizenship by this different process, one which the Supreme Court has called "solemn adjudication." Schneiderman v. United States, 320 U.S. 118, 125 (1943). Moreover, the Court has disowned the patent analogy as applied to modern citizenship. (Id., 320 U.S. at 124 n.3). It now recognizes citizenship, instead, as a "precious right." (Id., 320 U.S. at 125). Luria's analogy of citizenship to a patent is thus not valid today. Luria no longer governs.

The Supreme Court has barred the Government from taking the citizenship of the native born without a jury. Naturalized Americans, the Court has also stated, stand on equal footing with the native born under the Constitution. The Constitution thus insures the naturalized citizen a jury of his peers, as well.

I. LURIA AND WALUS DO NOT CONTROL.

A. Luria and Walus Considered Only the Seventh Amendment Basis for Trial by Jury.

The Government claims that, in Luria, "[t]he Supreme Court . . . held that a defendant in a denaturalization action has no right to a jury trial." (Govt's Mem. 1). The Government overstates. In Luria, the Court limited its holding to a claim to a jury made solely under the Seventh Amendment. The Supreme Court's entire discussion of the jury-trial issue was:

"Lastly it is urged that the District Court erred in not according to the defendant a trial by jury. The claim is predicated upon the Seventh Amendment to the Constitution, which declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' This, however, was not a suit at common law. The right asserted and the remedy sought were essentially equitable, not legal, and this, according to the prescribed tests, made it a suit in equity. Parsons v. Bedford, 3 Pet. 433, 447; Irvine v. Marshall, 20 How. 558, 565; Root v. Railway Company, 105 U.S. 189, 207. In this respect it does not differ from a suit to cancel a patent for public land 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."

(231 U.S. at 27-28) (emphasis added).^{1/} The Luria opinion never addressed the other Constitutional principles on

^{1/} The report of Luria's argument in the Supreme Court reveals he claimed a right to jury trial only under the Seventh Amendment. (231 U.S. at 14). Further, Luria's jury-trial discussion may qualify as dictum. Luria, himself, remained in South Africa during his trial. (231 U.S. at 19). All the evidence at Luria's trial was stipulated. (231 U.S. at 17). Juries, of course, resolve only contested issues of fact and witness credibility. A jury at Luria's trial could have served no function.

which Kairys relies.^{2/} This Court thus remains free to do so.

B. Luria Does Not Decide the Seventh Amendment Issue Today. The 1913 Patent Analogy Logic Does Not Apply to Citizenship Obtained Under Modern Procedures.

Luria's reasoning does not even resolve the Seventh Amendment issue because of important changes in immigration procedures. In Luria, the Government sued to cancel a citizenship certificate obtained in 1894 under naturalization procedures in effect until 1906. In those days, a naturalized citizen obtained his certificate by ex parte application, as one would obtain a patent. The Luria Court understandably termed these certificates "merely colorable letters of citizenship." (231 U.S. at 24). Like patents, the Court reasoned, they could be canceled without resort to a jury trial.

Kairys's citizenship, by contrast, was achieved by means of a judicial proceeding against the Government. 8 U.S.C. §1447.^{3/} Modern citizenship rights "are pre-

2/ In its footnote treatment of the jury-trial issue, the Walus Court found itself "bound by" Luria and simply followed it without further analysis. Walus made no independent examination of the limited logic of Luria, nor did it go beyond the Seventh Amendment. The Court's citation to the Seventh Amendment cases Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), and Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962), confirm that it grounded its holding solely on Seventh Amendment grounds. United States v. Walus, 616 F.2d at 304 n.53.

3/ The Immigration and Nationality Act of 1952, under which Kairys was naturalized and this case brought, continued the basic naturalization and denaturalization provisions first enacted in the Act of 1906. Compare 34 Stat. 596-607 (1906) with 8 U.S.C. §§1421-51.

cious and . . . are conferred by solemn adjudication." Schneiderman v. United States, 320 U.S. at 125. The patent analogy therefore does not fit present-day citizenship.

Numerous and substantial differences distinguish Luria-type citizenship and the citizenship at stake here. Before the 1906 Act, the would-be citizen appeared before any state or federal court of record (or simply a clerk of the court) and declared under oath his bona fide intention to become a citizen and to renounce allegiance to foreign sovereigns. After waiting two years, the would-be citizen could then apply for admission to citizenship. As a condition to admission, the Court needed only to be satisfied, through the testimony of the applicant's citizen witnesses, that the applicant had lived in the United States for at least five years, that during that time he had behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the country's good order and happiness. Finally, the applicant took an oath to support the Constitution and renounced allegiance to any foreign sovereign. Luria v. United States, 231 U.S. at 22-23. The United States neither received notice of these proceedings nor had the right to appear and challenge the

application. See Comment, Pre-Statutory Denaturalization, 35 Cornell L.Q. 120 (1949) (App. Tab-1).^{4/}

In Johannessen v. United States, 225 U.S. 227, 236-37, 241 (1912) the Supreme Court described how the pre-1906 procedures were distinguished by their ex parte, non-adversarial character:

4/ These lax pre-1906 naturalization procedures were changed because they fostered naturalization fraud as a political tool in elections. Tammany Hall's tactics in New York City during the election of 1868 are instructive:

"Hitherto naturalization in this country has been conducted almost altogether amid the excitement of great political struggles. If you look at the record of naturalization in the city of New York . . . it will be seen that almost the entire naturalization of that city was confined in 1868 to the space of 20 days in the month of October next preceding the . . . [election]. . . . And during that short period more than 30,000 aliens were naturalized." Cong. Globe, 41st Cong., 2d Sess. 4267 (1869) (emphasis added), quoted in, Comment, Pre-Statutory Denaturalization, 35 Cornell L.Q. 120, 125 (1949) (App. Tab-1).

"Judge Barnard, in the supreme court of the city of New York, from October 8 to October 23, 1868, inclusive, naturalized 10,070 [citizens], or an average of 711 daily. On the 19th of October he naturalized 955 persons, or 40 an hour for the whole 24 hours, or a minute and a half for each person, provided he spend the whole 24 hours of the day at the work without sleeping or eating. . . . How did they get the witnesses for all these persons? . . . In the supreme court for 14 days, 21 persons witnessed 2,379 naturalization papers. They must have had a very general and extensive acquaintance." Cong. Globe, 41st Cong., 2d Sess. at 4269, quoted in, Comment, Pre-Statutory Denaturalization, 35 Cornell L.Q. 120, 125 (1949) (App. Tab-1).

See also Simons v. United States, 333 F.Supp. 855, 861 n.5 (S.D.N.Y.), aff'd, 452 F.2d 1110 (2d Cir. 1971).

For the convenience of the Court, Defendant has filed an Appendix (cited "App.") containing various materials to which this Memorandum refers.

"[A pre-1906] proceeding for the naturalization of an alien is in a certain sense a judicial proceeding, being conducted in a court of record and made a matter of record therein, yet it is not in any sense an adversary proceeding. It is the alien who applies to be admitted, who makes the necessary declaration and adduces the requisite proofs [He] is not required to make the Government a party nor to give any notice to its representatives.

* * *

The [1906] act [denaturalization provision] does not purport to deprive a litigant of the fruits of a successful controversy in the courts; for, as already shown, the proceedings for naturalization are not in any proper sense adversary proceedings, but are ex parte and conducted by the applicant for his own benefit."

It was by reason of this ministerial, ex parte character that pre-1906 certificates were considered analogous to patents:

"Sound reason, as we think, constrains us to deny to a certificate of naturalization, procured ex parte in the ordinary way, any conclusive effect as against the public. Such a certificate, including the 'judgment' upon which it is based, is in its essence an instrument granting political privileges, and open like other public grants to be revoked if and when it shall be found to have been unlawfully or fraudulently procured. It is in this respect closely analogous to a public grant of land . . . or of the exclusive right to make, use and vend a new and useful invention. . . ."

(225 U.S. at 238).

The validity of Luria's patent analogy thus hinged on the fact that pre-1906 citizenship certificates, like patents, were obtained by way of ex parte proceedings. This aspect of the patent analogy was underscored by Luria's citation to United States v. Stone, 69 U.S. (2 Wall.) 525 (1864). "The patent is but evidence of a grant

and the officer who issues it acts ministerially and not judicially." (69 U.S. (2 Wall.) at 535).

Unlike Luria, Kairys obtained his citizenship by way of a judgment in an adversary proceeding against the Government. The Court in Johannessen highlighted the difference between the pre- and post-1906 naturalization proceedings:

"The [1906] act . . . declares that the United States shall have the right to appear in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of naturalization. No such provision was contained in the act as it formerly stood."

(225 U.S. at 237).^{5/} The Supreme Court has recognized that citizenship certificates granted since 1906 are different because they result from a court-rendered judgment. In Schneiderman v. United States, 320 U.S. at 123, the Court wrote:

"We are dealing here with a court decree entered after an opportunity to be heard. At the time petitioner

^{5/} The 1906 Act provided:

"That the United States shall have the right to appear before any court or courts exercising jurisdiction in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition concerning any matter touching or in any way affecting his right to admission to citizenship, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings."

34 Stat. 596 §11 (1906). This provision was carried forward into the Immigration and Nationality Act of 1952, 8 U.S.C. § 1447, under which Kairys obtained his citizenship.

secured his certificate of citizenship from the federal district court . . . notice of the filing of the naturalization petition was required to be given ninety days before the petition was acted on . . . , the hearing on the petition was to take place in open court . . . , and the United States had the right to appear, to cross-examine petitioner and his witnesses, to introduce evidence, and to oppose the petition. . . . In acting upon the petition the district court exercised the judicial power conferred by Article III of the Constitution, and the Government had the right to appeal from the decision granting naturalization. Tutun v. United States, 270 U.S. 568 (1926). . . . [T]he hard fact remains that we are here re-examining a judgment, and the rights solemnly conferred under it."

The Schneiderman Court then went out of its way expressly to disown the Court's earlier analogy of citizenship to patents:

"Since 1790 Congress has conferred the function of admitting aliens to citizenship exclusively upon the courts. In exercising their authority under this mandate the federal courts are exercising the judicial power of the United States, conferred upon them by Article III of the Constitution. . . . For this reason it has been suggested that a decree of naturalization, even though the United States does not appear, cannot be compared (as was done in Johannessen v. United States, 225 U.S. 227, 238) to an administrative grant of land or of letters patent for invention, and that the permissible area of re-examination is different in the two situations."

(320 U.S. at 124 n.3) (emphasis added).

Supreme Court learning since Luria has repeatedly emphasized that a modern citizenship certificate amounts to much more than "an instrument granting political privileges" like a patent. Today's citizenship is a "precious right," Schneiderman, v. United States, 320 U.S. at 125, and a "priceless treasure." Fedorenko v.

United States, 449 U.S. 490, 507 (1981). It is, the senior Government prosecutor has testified, "the right to have all other rights." (Ryan Dep. 140) (App. Tab-2).

The right of a citizen to trial by a jury of his citizen-peers cannot turn on the anachronistic characterization of naturalized citizenship as a government grant of "political privileges." The Supreme Court "has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or a 'privilege.'" Morrissey v. Brewer, 408 U.S. 471, 481 (1972), quoting, Graham v. Richardson, 403 U.S. 365, 374 (1971). Luria's holding and logic have no application to these issues of modern citizenship.

C. This Court Can, and Should, Give Full Consideration to Kairys's Claims To A Jury Trial.

Neither Luria nor Walus blocks this Court from addressing Kairys's full Constitutional claim. Controlling standards of interpretation limit those cases to their facts and holdings:

"It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason for this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400 (1821). These standards should be applied strictly here, for in denaturalization cases "the facts and the law should be construed as far as is reasonably possible in favor of the citizen." Schneiderman v. United States, 320 U.S. at 122.

A citizen's call for a jury requires the closest consideration.

"Because "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence . . . any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.""

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 346 (1979), quoting, Dimick v. Schiedt, 293 U.S. 474, 486 (1935), quoted in, Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501 (1959). See also Jacob v. New York, 315 U.S. 752, 753 (1942).

Careful consideration of Kairys's claim accords with the Supreme Court's injunction to maintain "a jealous regard for the rights" of the citizen. Schneiderman v. United States, 320 U.S. at 120. Thus, this Court not only may, but should, freely and fully consider Kairys's demand for trial by jury.

This Court would particularly promote the interests of justice by ordering a jury. The only way to preclude two costly and painful trials is to empanel a jury now. If an appellate court later finds jury trial unauthorized, retrial would not necessarily be required. This Court could simply render judgment on the record of

the earlier trial, without the cost or anguish to the defendant and his family of a second trial. This approach is peculiarly appropriate in connection with a trial which likely will produce strong, public feelings,^{6/} and for which pro bono counsel bear the costs.

II. DUE PROCESS OF LAW INSURES KAIRYS A JURY TRIAL.

Kairys's right to trial by jury follows from both ancient principles and modern understanding of the role of the jury in insuring due process of law. The Supreme Court long ago recognized that proceedings like the Government's against Kairys must comport with due process:

^{6/} The trial court's experience in the Fedorenko case provides a foretaste of what can be expected:

"From the beginning [the trial] was like a Hollywood spectacular and polarized the residents of South Florida. As an example of some of the emotional intensity surrounding the trial, the Jewish Defense League ran ads in newspapers offering chartered buses from Miami Beach to Ft. Lauderdale on opening day. A demonstration outside the courtroom ensued with a chant: 'Who do we want? Fedorenko. How do we want him? Dead.' After the court was interrupted twice and the first three warnings were ignored by the demonstrators, a leader who was using an amplified bullhorn was arrested. A counter-demonstrator appeared two days later with an ensuing confrontation."

United States v. Fedorenko, 455 F.Supp. 893, 899 (S.D.Fla. 1978), rev'd, 597 F.2d 946 (5th Cir. 1979), aff'd, 449 U.S. 490 (1981). Justice requires that the Defendant, his family, the Court, and counsel suffer this kind of atmosphere only once, if at all.

"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, 208 U.S. 8, 13. It may result also in loss of both 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."

Ng Fung Ho v. White, 259 U.S. 276, 284-85 (1922). For this reason, the Supreme Court has progressively required the stricter, criminal-law procedural safeguards in denaturalization actions. Schneiderman v. United States, 320 U.S. at 160; Klapprott v. United States, 335 U.S. 601, 612 (1949). See also Comment, Denaturalization of Nazi War Criminals: Is There Sufficient Justice for those who would not Dispense Justice? 40 Md. L. Rev. 39 (1981) (the author concludes not) (App. Tab-3).

The Government has judicially conceded the appropriateness of criminal procedural safeguards in denaturalization proceedings. Thus, in discussing the appropriate restriction on use of photospreads in a denaturalization case, the Government argued to the Fifth Circuit:

"[W]e agree with the district court that, although this is not a criminal action, the [criminal law] standards announced in Simmons v. United States . . . and its progeny for use of photo spreads should apply here. . . . Any lesser standard has no place where a defendant's citizenship is at stake."

Brief for the United States at 51, United States v. Fedorenko, 597 F.2d 946 (5th Cir. 1979) (citations omitted; emphasis added), quoted in, Nesselson & Lubet, Eyewitness Identification in War Crimes Trials, 2 Cardozo L. Rev. 71, 76 n.28 (1980) (App. Tab-4).

The Supreme Court has held that, where the stakes for the defendant are as high as they are here, due process of law insures a jury:

"The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause "

Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

Long-settled principles of due process establish the naturalized citizen's right to a jury. In Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276-77 (1855), the Supreme Court first stated what "due process" is:

"To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

These principles were reaffirmed in Hurtado v. California, 110 U.S. 516, 528 (1884), Ownbey v. Morgan, 256 U.S. 94, 109 (1921), and Tumey v. Ohio, 273 U.S. 510, 523 (1927). Under them, due process prohibits procedures in conflict with express Constitutional provisions or not among the "settled usages and modes of proceeding" under the common law.

Both facets of Murray's Lessee's due process restrictions prohibit the Government from proceeding against Kairys without a jury. Denaturalization and deportation without a jury trial conflicts with the explicit guarantees of Article III, §2 and the Sixth Amendment (see Section III, infra) as well as the Seventh Amendment (see Section V, infra).

Moreover, the "settled usages and modes of proceeding existing in the common and statute law of England" never allowed the Government to banish a citizen without a jury. The words of Magna Carta expressly required a jury.^{7/} As the Supreme Court noted in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 186 (1963) (footnote omitted):

"Dating back to Magna Carta . . . it has been an abiding principle governing the lives of civilized men that 'no freeman shall be taken or imprisoned or disseised or outlawed or exiled . . . without the judgment of his peers or by the law of the land.'"

Blackstone confirms that, under English law at the time of the Revolution, banishment, exile, and transportation were punishments for crimes only proved at a trial by jury. 4 Blackstone's Comm. 368-70.

^{7/} "No freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land." W. McKechnie, Magna Carta 436 (1905) (emphasis added) (App. Tab-5). McKechnie holds that "and" rather than "or" is the proper translation from Latin. (Id., 442-43) (App. Tab-5).

Modern due process concepts also confirm Kairys's right to a jury. In Mathews v. Eldridge, 424 U.S. 319 (1976), the Supreme Court set out the standard for determining whether due process requires a particular procedure:

"[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

(424 U.S. at 334-35). See also Santosky v. Kramer, -- U.S. --, 50 U.S.L.W. 4333 (March 24, 1982).

Under the first test of Mathews, the Government's action against Kairys threatens him with permanent loss of vital private interests: life, Ng Fung Ho v. White, 259 U.S. at 284-85, and liberty. "The issue in these cases is . . . important to the liberty of the citizen" Chaunt v. United States, 364 U.S. 350, 353 (1960).

Secondly, the accused here faces the same, if not greater, risk of a wrongful deprivation of his rights by Government arbitrariness as he would in a criminal prosecution. The jury trial right is "intended to protect the accused from oppression by the Government. . . ." Singer v. United States, 380 U.S. 24, 31 (1965).

"The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it."

Duncan v. Louisiana, 391 U.S. at 155.^{8/}

A jury trial by nature entails procedures that reduce the risk of an erroneous conviction of the accused. In jury trials judges must rule expressly on the admissibility of each piece of contested evidence; the trier of fact never sees inadmissible evidence and thus never has to ignore what it already knows. Rule 103, Federal Rules of Evidence. This case involves an unusually large number of questions concerning the admissibility and credibility of documents and witnesses. (Mem. & Order, October 29, 1981) (App. Tab-6). Leaving preliminary admissibility to the Court and weight and credibility to the jury makes the Rules of Evidence a more meaningful safeguard for the accused. Jury trial procedures focus the trial judge on rules of proof and principles of law and the jury on issues of fact. This division of functions reduces risk of error. Moreover, these jury-trial procedures also

^{8/} In Schneiderman v. United States, 320 U.S. at 159, the Supreme Court warned against reasoning under which "the security of the status of our naturalized citizens might depend, in considerable degree, upon the political temper of majority thought and the stresses of the times." The strong feelings behind the Government's current campaign against alleged "Nazi war criminals" creates a risk that a citizen's security may be jeopardized by "the stresses of the times."

create a specific record which provides the accused with an opportunity squarely to frame, record, and raise issues on appeal.

No "government interest" outweighs the defendant's need for a jury trial. Guaranteeing naturalized citizens right to trial by jury would impose no significant burden on the Government. Any additional cost would be insubstantial in light of the issues involved and would fall as much on the defendant. The Government's interest in a marginal reduction of cost does not outweigh the defendant's interest in the additional security which a jury trial affords.

In this regard, Blackstone condemned encroachments on the jury trial right grounded on arguments of government "convenience":

"So that the liberties of England cannot but subsist, so long as this palladium [i.e., the jury trial right] remains sacred and inviolate, not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience. And however convenient these may appear at first, (as doubtless all arbitrary powers, well executed, are the most convenient) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern."

4 Blackstone's Comm. 343-44 (emphasis in original). These comments apply here.^{9/}

The Supreme Court has stated that "[i]n striking the appropriate due process balance the final factor to be assessed is the public interest," not exclusively the Government's interest as prosecutor. Mathews v. Eldridge, 424 U.S. at 347 (emphasis added). The public interest calls for a broad, not narrow, reach for the jury trial right to protect all Americans' civil liberties:

"The founders of our government thought that trial of fact by juries rather than by judges was an essential bulwark of civil liberty. For this reason, among others, they adopted Article III, §2 of the Constitution, and the Sixth and Seventh Amendments."

Galloway v. United States, 319 U.S. 372, 397 (1943) (Black, J., dissenting) (footnote omitted).

Denaturalization cases peculiarly call for jury trial. They "deal with 'judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship.'" Chaunt v. United States, 364 U.S. at 353, quoting, Baumgartner v. United States, 322 U.S. 665, 671 (1944). Basic principles of our democracy demand citizen involvement in judgments like these:

^{9/} The first court to consider the issue denied a jury, stating "jury cases always occupy more court time than the same number of equity trials; and this court certainly has no time to spare." United States v. Mansour, 170 F. 671, 675 (S.D.N.Y. 1908), aff'd per curiam without opinion, 226 U.S. 604 (1912).

"Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence."

Duncan v. Louisiana, 391 U.S. at 156. Citizen participation insures that the proceedings do not betray the tenets of the Republic. Thomas Jefferson wrote: "I consider trial by jury as the only anchor ever yet imagined by man by which a government can be held to the principles of its constitution." 3 Writings of Thomas Jefferson (Washington ed.) 71, quoted in, Parklane Hosiery Co. v. Shore, 439 U.S. at 343 n.10. (Rehnquist, J., dissenting) and Galloway v. United States, 319 U.S. at 397 n.1 (Black, J., dissenting). Appropriately, citizen jurors should decide, in the first instance, whether a fellow-citizen loses his rights.

The jury trial not only reflects our democratic principles of fairness, but enhances overall respect for law. As Justice Harlan observed in dissent in Duncan v. Louisiana, 391 U.S. at 187:

"[The jury trial] affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law."

Citizens' participation in denaturalization proceedings benefits the public interest through the people's involvement in government.

The public interest also necessitates that naturalized citizens enjoy the same rights as the native born. "[T]o perform its high function in the best way, 'justice must satisfy the appearance of justice.'" Re Murchison, 349 U.S. 133, 136 (1955) (emphasis added). Authorizing the Government to strip a naturalized citizen of "the right to have all other rights" without a jury, not only is, but appears unjust.^{10/} That appearance of injustice strikes hardest at the millions of naturalized citizens, many of whom have made large sacrifices to become Americans. The absence of a jury in these cases has the appearance of a legal technicality and thus offends the ordinary American's sense of fairness.

Denaturalization and deportation threaten the accused with "loss . . . of all that makes life worth living." Ng Fung Ho v. White, 259 U.S. at 284. The jury trial provides an important safeguard to the accused, impinges no substantial interest of the prosecution, and promotes the public interest. The process due Kairys thus includes a trial by jury.

III. ARTICLE III, §2 AND THE SIXTH AMENDMENT GUARANTEE KAIRYS A TRIAL BY JURY.

The Supreme Court holds that forfeiture of citizenship is penal and has "throughout history been used

^{10/} The appearance of injustice is peculiarly acute in that the Government could not strip native-born Americans of their citizenship without according them a jury trial. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). See Section IV, infra.

as a punishment." Kennedy v. Mendoza-Martinez, 372 U.S. at 168 n.23. Moreover, denaturalization has consequences which "may be more grave than consequences that flow from conviction for crimes." Klapprott v. United States, 335 U.S. at 611 (opinion of Black, J.). Article III, §2^{11/} and the Sixth Amendment^{12/} to the Constitution therefore guarantee Kairys a jury.

When the Government proceeds against an individual on a cause "essentially penal in nature," the Constitution guarantees the accused criminal procedural safeguards, including the right to trial by jury. Bell v. Wolfish, 441 U.S. 520, 535-40 (1979); Kennedy v. Mendoza-Martinez, 372 U.S. at 164. In Mendoza-Martinez, the Supreme Court itemized the relevant considerations to determine whether a cause is "essentially penal":

"[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment -- retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable

^{11/} Article III, §2, cl. 3 provides:

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury"

^{12/} The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed"

for it; and [7] whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face."

(372 U.S. at 168-69) (footnotes omitted).

Under each aspect of the Mendoza-Martinez analysis the Government's pursuit of Kairys qualifies as "essentially penal." Mendoza-Martinez identified the sanction the Government seeks here -- loss of citizenship -- as a penalty. (372 U.S. at 166-67). See also Bell v. Wolfish, 441 U.S. at 538. That sanction involves "affirmative disabilities or restraints." Denaturalization costs the individual "the right to have all other rights" within the Republic. These include freedom from fear of deportation, 8 U.S.C. §1252, or exclusion from the country, United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898), and the freedom to travel within it. Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 44, 48-49 (1867).^{13/}

The Government will seek to deport Kairys to the Soviet Union once it has denaturalized him.^{14/} Official

^{13/} Loss of citizenship necessarily results in the loss of all the privileges and immunities of an American citizen. These various legal rights include the right to demand the protection of the United States Government while abroad, Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873), and the right to own real property, 42 U.S.C. §1982; Oyama v. California, 332 U.S. 633, 647 (1948), among others.

^{14/} There is no doubt of the Government's intent to deport Kairys. The mandate of the Office of Special Investigations is to "deport, denaturalize, or prosecute" alleged Nazi war criminals.

(Footnote continued on following page)

press organs of the Soviet government have already denounced Kairys as a Nazi "war criminal." (DX 19, 50, 51) (App. Tabs-10, 11, 12). Thus Kairys's deportation to the Soviet Union means a "trial" and certain conviction there for "treason against the Motherland" in violation of Article 64 of the Soviet Criminal Code.^{15/} (App. Tab-13). In the hands of the Soviets, the likely penalty for Kairys is death.^{16/} The Government's prosecution of Kairys would likely result in his loss not only of "all that makes life worth living," but his life, as well.

(Footnote continued from preceding page)

See Attorney General's Order No. 851-79. (App. Tab-7). Within two months after the Supreme Court's affirmance of the denaturalization of Feodor Fedorenko, the Office of Special Investigations instituted deportation proceedings against him. See Justice Dep't Press Release (App. Tab-8). The Office also initiated deportation proceedings against Bishop Valerian Trifa shortly after entry of a District Court's denaturalization order, and before Bishop Trifa had even filed a notice of appeal. (Order of Immigration Judge, In the Matter of Valerian Trifa, January 4, 1982) (App. Tab-9).

^{15/} Imants Lesinskis, a KGB operative who defected to the United States in 1978, confirmed at a recent deposition in this case that if a Baltic emigre like Kairys were sent to the Soviet Union, his trial and conviction for treason would follow, and the death penalty probably imposed. The Lesinskis deposition occurred on April 8, 1982, and has not yet been transcribed by the Government-supplied court reporter.

^{16/} The Soviets recently confirmed their plans for "Nazi collaborators." The New York Times reported on April 17, 1982, at page 6, column 1:

"SOVIET SENTENCES 2 TO DEATH
FOR COLLABORATING WITH NAZIS

(Footnote continued on following page)

The sanctions the Government seeks against Kairys have historically been regarded as punishment. In Mendoza-Martinez, the Court noted:

"[F]orfeiture of citizenship and the related devices of banishment and exile have throughout history been used as punishment. In ancient Rome, 'There were many ways in which a man might lose his freedom, and with his freedom he necessarily lost his citizenship also. Thus he might be sold into slavery as an insolvent debtor, or condemned to the mines for his crimes as servus poenae.' Salmond, Citizenship and Allegiance, 17 L.Q. Rev. 270, 276 (1901). Banishment was a weapon in the English legal arsenal for centuries, 4 Bl. Comm. *377, but it was always 'adjudged a harsh punishment even by men who were accustomed to brutality in the administration of criminal justice.' Maxey, Loss of Nationality: Individual Choice or Government Fiat? 26 Albany L.Rev. 151, 164 (1962)."

(372 U.S. at 168 n.23). See also Klapprott v. United States, 335 U.S. at 616-20 (Rutledge and Murphy, JJ., concurring).

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"A Soviet military court sentenced two men to death for collaborating with the Gestapo in the Nazi occupation 40 years ago, the army daily Krasnaya Zvezda reported today.

"It said the two, identified as S. Ikayev and P. Darchiyev, were convicted of taking part in the roundup and execution of Soviet soldiers and partisans after German troops moved into southern Russia and the northern Caucasus. In one case, the newspaper said, they helped the Gestapo kill 1,150 civilians.

The two men changed their names and passports after the war and evaded arrest for 40 years, the article said. No details of how they were tracked down were given."

(App. Tab-14).

Continuing the close parallel to the Mendoza tests for penalty, scienter is here a requisite to denaturalization. In Knauer v. United States, 328 U.S. 654, 658-59 (1946), the Supreme Court explained that "we are dealing in cases of this kind with questions of intent." See also Chaunt v. United States, 364 U.S. at 354.

Tracking the fourth facet of Mendoza, the behavior leading to the denaturalization sanction under 8 U.S.C. §1451(a) is already a crime. Title 18, United States Code, §1425 makes unlawful acquisition of citizenship a felony.^{17/} Conviction under that provision automatically results in loss of citizenship. 8 U.S.C. §1451(g).^{18/}

^{17/} 18 U.S.C. §1425 provides:

- "(a) Whoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship; or
- (b) Whoever, whether for himself or another person not entitled thereto, knowingly issues, procures or obtains or applies for or otherwise attempts to procure or obtain naturalization, or citizenship, or a declaration of intention to become a citizen, or a certificate of arrival or any certificate or evidence of naturalization or citizenship, documentary or otherwise, or duplicates or copies of any of the foregoing -- Shall be fined not more than \$5,000 or imprisoned not more than five years, or both."

^{18/} 8 U.S.C. §1451(g) provides:

- "(g) When a person shall be convicted under Section 1425 of Title 18 of knowingly procuring naturalization in violation of law, the court in which such conviction is had shall thereupon

(Footnote continued on following page)

The first statute outlawing denaturalization abuses was a criminal statute. 2 Stat. 11 (1813). Moreover, until the Act of 1906, the only remedies for naturalization frauds were criminal penalties. See Comment, Pre-Statutory Denaturalization, 35 Cornell L.Q. at 121. (App. Tab-1).^{19/}

The denaturalization proceeding also seeks to further the traditional aims of punishment -- retribution and deterrence. The Government seeks to take Kairys's citizenship not only to exact retribution for an alleged past naturalization fraud but also for the alleged underlying acts. The Supreme Court has specifically identified deterrence as a goal of denaturalization. Stripping a defendant of citizenship is "designed to afford cumulative protection against fraudulent or illegal naturalization." United States v. Ness, 245 U.S. 319, 327 (1917). See also Knauer v. United States, 328 U.S. at 672-73; Chaunt v. United States, 364 U.S. at 354.

(Footnote continued from preceding page)

revoke, set aside, and declare void the final order admitting such person to citizenship, and shall declare the certificate of naturalization of such person to be canceled. Jurisdiction is conferred on the courts having jurisdiction of the trial of such offense to make such adjudication."

^{19/} In this regard, it is noteworthy that the Government places the Office of Special Investigations, specially funded for these proceedings, in the Criminal Division of the Justice Department.

The Supreme Court has identified no "alternative purpose" for denaturalization apart from punishment. Rather, the Court has recognized that "[d]enaturalization consequences may be more grave than consequences that flow from conviction for crimes." Klapprott v. United States, 335 U.S. at 611. As a result, it has progressively extended criminal procedural safeguards to defendants in denaturalization actions. Schneiderman v. United States, 320 U.S. at 160; Klapprott v. United States, 335 U.S. at 612.

The legislative history of the statutes under which the Government is proceeding against Kairys reveals the punitive character of the Government's effort. In introducing the Naturalization Act of 1906, Congressman Bonyngue argued:

"The evils and abuses, the crimes and the frauds that have been committed against the naturalization laws of the country constitute, I think, the strongest argument that could possibly be advanced for an entire revision of those laws."

(40 Cong. Rec. 3640) (March 9, 1906) (App. Tab-15). He later emphasized that the 1906 Act specifically intended to deter and punish "crimes" against the naturalization laws:

"We are dealing with the crimes against the naturalization laws. We are seeking to prevent them. We are seeking, in case they are committed, to provide for their detection and punishment."

(40 Cong. Rec. 3647) (March 9, 1906) (App. Tab-16).

Recent amendments to the Immigration and Nationality Act reveal Congress' unmistakable intent to

punish alleged Nazi war criminals. In introducing Public Law 95-549, "[t]o amend the Immigration and Nationality Act to exclude from admission into, and to deport from, the United States all aliens who persecuted any person . . . under the direction of the Nazi government of Germany. . . ." (92 Stat. 2065)(1978), Congresswoman Elizabeth Holtzman stated:

"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 Nazis regime.

* * *

"Mr. Speaker, the presence of Nazi war criminals in the United States constitutes the unfinished business of World War II."

(124 Cong. Rec. H10731) (Sept. 26, 1978) (App. Tab-17).^{20/}
Congress foreclosed mercy and confirmed its punitive intent when it denied the Attorney General authority to withhold deportation of a "Nazi war criminal" even though he would be persecuted in the country to which he was sent. 8 U.S.C. §§1251(a), 1253(h).

Under the Supreme Court's standards, the sanction the Government seeks against Kairys here is penal. Article III, §2 and the Sixth Amendment therefore guarantee him right to trial by jury.

^{20/} In a letter to the Attorney General concerning prosecution of these cases, Congressman Joshua Eilberg, chairman of the Subcommittee which proposed the recent amendments, wrote of his Subcommittee's "long and persistent efforts . . . in ridding this country of these undesirable elements." (Alleged Nazi War Criminals: Hearings before the Subcommittee on Immigration, Citizenship and International Law of the House Committee on the Judiciary, 95th Cong., 2nd Sess., pt. 2, 203 (1978)) (App. Tab-18).

IV. EQUAL PROTECTION OF THE LAWS GUARANTEES KAIRYS A JURY TRIAL.

Fifth Amendment "due process of law" also requires the Federal Government to insure equal protection of the laws.^{21/} As a component of due process, the guarantee of equal protection insures naturalized citizens, like the native-born, a trial by jury when the Government moves to take away their citizenship.

In Kennedy v. Mendoza-Martinez, 372 U.S. 144, the Supreme Court held that the Fifth and Sixth Amendments guarantee native citizens the right to jury trial when the Government moves to take away their citizenship. In denying a jury-trial in denaturalization proceedings, the Government would create two classes of citizens: native born and naturalized.

The Constitution prohibits discrimination, however, in the protection of the rights of naturalized and native-born citizens. Section 1 of the Fourteenth Amendment "provides its own constitutional rule in language calculated completely to control the status of citizenship: 'All persons born or naturalized in the

^{21/} While the Fifth Amendment contains no equal protection clause, the Supreme Court's "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975). See also Jimenez v. Weinberger, 417 U.S. 628, 637 (1974) (denial of benefits to illegitimate children "denies the former [illegitimate children] the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment.")

United States . . . are citizens of the United States. . . ." Afroyim v. Rusk, 387 U.S. 253, 262 (1967). In Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824), Chief Justice Marshall declared that naturalized citizens enjoy equal rights with the native born:

"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."

(22 U.S. (9 Wheat.) at 827). The Supreme Court has repeatedly emphasized the equality of naturalized and native-born:

"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.'"

Knauer v. United States, 328 U.S. at 658. See also Baumgartner v. United States, 322 U.S. 665, 673 (1944).

In Kennedy v. Mendoza-Martinez, 372 U.S. 144, the Supreme Court ruled that native-born citizens have the right to trial by jury when the Government moves to strip them of their citizenship. Equal protection of the laws guarantees that naturalized citizens, who "stand on equal footing with native citizens," receive the same procedural

protection.^{22/} The millions of naturalized citizens in our country should not be discriminated against, particularly when the stakes are so high and so personal. To take a citizen from his family without the basic right to a trial by a jury of his peers strikes the human conscience as wrong.

V. THE SEVENTH AMENDMENT INSURES
KAIKYS A TRIAL BY JURY.

The Seventh Amendment also bars the Government from denaturalizing and deporting Kairys without giving him a jury. The Seventh Amendment "preserve[s] the right to jury trial as it existed in 1791." Parklane Hosiery Co. v. Shore, 439 U.S. at 333. In 1791, the Government could not strip a citizen of his rights and expel him from the country without resort to a jury trial. At that time, most Americans thought their new Constitution prevented the Government from taking away their rights without resort to a jury. The Revolution had, in part, been fought because the King and Parliament had violated these ancient principles.

^{22/} Governmental discrimination on the basis of alienage is analogous. While both classes of persons in the denaturalization context are citizens, the discriminating factor is place of birth. It has long been held that any governmental classification based on alienage is "inherently suspect and subject to close judicial scrutiny." Graham v. Richardson, 403 U.S. 365, 372 (1971). See also Nyquist v. Mauclet, 432 U.S. 1, 7 (1977). A similar "discrete and insular minority" is involved in the denaturalization context; namely, foreign born naturalized citizens. United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved" The Supreme Court stated the scope of the Seventh Amendment jury-trial right in Curtis v. Loether, 415 U.S. 189, 193 (1974):

"Although the thrust of the [Seventh] Amendment was to preserve the right of jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time. Mr. Justice Story established the basic principle in 1830:

'The phrase "common law," found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. . . . By common law (the Framers of the Amendment) meant . . . not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. . . . In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights.' Parsons v. Bedford, 3 Pet. 433, 446-47 (1830) (emphasis in original)."

The scope of the Seventh Amendment under these principles squarely covers the Government's proceeding against Kairys.

"In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791."

Dimick v. Schiedt, 293 U.S. 474, 476 (1935). As understood on both sides of the Atlantic in 1791, the common-law guarantee of jury trial under Magna Carta covered any Government effort to take a citizen's rights and deport him. Blackstone wrote in 1769 that the jury-trial right under Magna Carta protected the English subject^{23/} from just such an effort:

"Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people, and the prerogative of the crown. It was necessary, for preserving the admirable ballance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justices of oyer and terminer occasionally named by the crown; who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration, that such is their will and pleasure. But the founders of the English laws have with excellent forecast contrived, that no man should be called to answer to the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow subjects, the grand jury: and that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen, and superior to all suspicion."

4 Blackstone's Comm. 343 (emphasis added).

Blackstone reflected Americans' understanding of their common-law heritage. "There is no doubt that for

^{23/} "'The term "citizen," as understood in our law, is precisely analogous to the term "subject" in the common law, and the change of phrase has entirely resulted from the change of government. The sovereignty has been transferred from one man to the collective body of the people and he who before was a "subject of the king" is now "a citizen of the state."'" United States v. Wong Kim Ark, 169 U.S. at 664, quoting, State v. Manuel, 20 N.C. (3 & 4 Dev. & Bat.) 20, 24-26 (1838).

many early American lawyers, Blackstone was the common law, because, for one thing, they often had no other book." Radin, Handbook of Anglo-American Legal History 287 (1936), quoted in, Hogan, Joseph Story on Juries, 37 Ore. L. Rev. 234 (1958) (App. Tab-19).

In Pernell v. Southall Realty, 416 U.S. 363, 376-81 (1974), the Supreme Court stated that the Seventh Amendment requires a trial by jury in a modern, "civil" proceeding when its closest 1791 common-law analog was a criminal prosecution which required a jury. In 1791, Americans would have considered a government proceeding to strip an individual of his rights and deport him a "criminal" proceeding to which the jury-trial right would apply. The 1791 understanding of a "civil" proceeding was one "between man and man," not government against man:

"At the first session of the first Congress under the Constitution, Mr. Madison, in the House of Representatives, on June 8, 1789, submitted propositions to amend the Constitution by adding, to the clause concerning the appellate jurisdiction of [the Supreme] Court, the words, 'nor shall any fact, triable by a jury, according to the course of the common law, be otherwise reexaminable than according to the principles of the common law,' and, to the clause concerning trial by jury, these words: 'In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate.' 1 Annals of Congress, 424, 435. And those propositions, somewhat altered in form, were embodied in a single article, which . . . became the Seventh Amendment. . . ."

Capital Traction Co. v. Hof, 174 U.S. 1, 7 (1899). By 1791, the Constitution contained two guarantees of jury trial in criminal cases, Article III, §2, and the Sixth Amendment.

Moreover, no analog to a 1791 common-law proceeding better fits the Government's pursuit of Kairys than a prosecution for the common-law crime of perjury. First, in both proceedings the Government is the complaining party. Blackstone identified perjury as an "offense against public justice." 4 Blackstone's Comm. 136.

Second, the elements of the offense are virtually identical. Blackstone stated that the common-law crime of perjury was "committed when a lawful oath is administered in some formal judicial proceeding, to a person who swears willfully, absolutely and falsely, in a matter material to the issue or point in question." 4 Blackstone's Comm. 136-37 (emphasis in original). The Government's charge against Kairys parallels these elements. The Government claims that Kairys swore falsely in the judicial process of acquiring citizenship. The remedy the Government seeks against Kairys also parallels the common law's punishment for perjury: banishment. 4 Blackstone's Comm. 136-37.^{24/} Prosecution for the common-law crime of perjury, not a mere suit to invalidate a patent, provides the closest analogy to the Government's effort here. Because a perjury prosecution in 1791 required a jury, the Seventh Amendment requires one here.

^{24/} Conviction for perjury under the statute 5 Eliz. [I] c.9 resulted in "the penalty of perpetual infamy" (4 Blackstone's Comm. 137), also the result if the Government succeeds against Kairys.

"[T]he thrust of the [Seventh] Amendment was to preserve the right of jury trial as it existed in 1791. . . ." Parklane Hosiery Co. v. Shore, 439 U.S. at 333, quoting, Curtis v. Loether, 415 U.S. at 193. The right of jury trial as it existed in 1791 restricted all Government efforts to take away a citizen's rights and liberties, regardless of the guises in which those efforts were cloaked. At that time, Americans had only recently balked at approving the Constitution because it did not explicitly enough preserve the jury trial right which they had fought the royal government to maintain. They expected the Bill of Rights which they exacted to guarantee the right. That the Federal Government could strip a fellow countryman of his rights and deport him without a jury trial would have been unthinkable to 1791 Americans. That the Federal Government would claim such authority would have seemed dangerous.

To conceive the scope of the right to trial by jury as "preserved" in the Bill of Rights requires consideration of what had happened to, and because of, that right before then.

The King and Parliament's encroachment on the right to trial by jury was a prime cause of the American Revolution.

In the Declarations and Resolves of the First Continental Congress, October 14, 1774, the colonists peaceably petitioned the English government to recognize:

"That the inhabitants of the English colonies in North-America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts, have the following RIGHTS:

* * *

"That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law."

Documents Illustrative of the Foundation of the Union of American States 2-3 (1927) (App. Tab-20).

On July 6, 1775, the Continental Congress pointed to the royal government's statutory subversion of the jury trial in its Declaration of Causes and Necessity of Taking Up Arms:

"[S]tatutes have been passed [by Parliament] for extending the jurisdiction of courts of admiralty and vice-admiralty beyond their ancient limits; for depriving us of the accustomed and inestimable privilege of trial by jury, in cases affecting both life and property. . . ."

(Id. at 12) (App. Tab-20).

Finally, in its prime complaints against the King, the Declaration of Independence reiterated Americans' opposition to attacks on the jury trial right:

"He [George III] has combined with others [i.e., Parliament] to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation: -- * * * For depriving us in many cases of the benefits of Trial by Jury. . . ."

(Id. at 23-24) (App. Tab-20).

After our country won independence, Americans continued to insist on absolute protection of the right to

jury trial. Opposition to ratification of the Constitution stemmed, to a great degree, from its failure adequately to protect the jury trial. "One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases." Parsons v. Bedford, 28 U.S. (3 Pet.) at 446. See also Parklane Hosiery Co. v. Shore, 439 U.S. at 341 (Rehnquist, J., dissenting). The first Congress under the Constitution moved quickly to satisfy this objection:

"[I]n response to widespread demands from the various State Constitutional Conventions, the first Congress adopted the Bill of Rights containing the Sixth and Seventh Amendments, intended to save [jury] trial in both criminal and common law cases from legislative or judicial abridgement."

Galloway v. United States, 319 U.S. at 398 (Black, Douglas, and Murphy, JJ., dissenting).^{25/}

The right to jury trial in 1791 stood against this historical backdrop. Americans had first complained to King and Parliament, then fought and defeated them, to preserve trial by jury as a defense against government attack on their lives and property. They resisted the new Constitution because it did not go far enough to preserve the jury trial. When the first Congress first met, it immediately assuaged their fears by proposing a Bill of

^{25/} "Of the seven States which, in ratifying the Constitution, proposed amendments, six included proposals for the preservation of jury trial in civil cases." Galloway v. United States, *supra*, 319 U.S. at 398 n.3 (Black, Douglas, and Murphy, JJ., dissenting).

Rights to protect the jury trial. The Government's claim today that it can strip a citizen of his rights and deport him without a jury trial would astonish, and disturb, Americans of 1791. They thought the Bill of Rights had settled the issue.

CONCLUSION

Liudas Kairys has been a citizen of this country for nearly 25 years. He served in the United States Army. He has been an exemplary citizen, paid his taxes, voluntarily served his community, school, and Church, and obeyed the laws of the land these many years. He has raised a close, law-abiding family. He is not a young man. The record shows that the likely result of his conviction would be permanent separation from family and imprisonment or death in the Soviet Union.

This Memorandum demonstrates that there are numerous strong Constitutional grounds for resolution of these most personal and serious matters by a jury. But even if the matter were less clear, the rock-ribbed principles of our Nation demand that Mr. Kairys have the right to face a jury before he loses "the right to have all other rights." The Declaration of Independence itself condemned an earlier government's conduct in "depriving us, in many cases, of the right to Trial by Jury."

This Government's sole response is to say that Mr. Kairys's right to family, security, peace, and life

itself is of no more consequence than some industrial patent. This insensitive view ill befits prosecutors armed with the full resources of the Federal Government in a contest against a single citizen of modest means.

It is most telling, that when asked, in this Court's presence, why the Government was so opposed to a jury of citizens, the prosecutors refused answer or explanation. If the prosecution's case is as strong as the law requires, it would survive scrutiny by a jury. If not, this matter should end, now.

A jury is the only way to avoid two trials. A jury is the only way to satisfy the Constitution. A jury is the only way to insure justice to Mr. Kairys and the appearance of justice to millions of naturalized Americans.

With the greatest respect and deference, Liudas Kairys requests his day in Court before a jury of his peers, American citizens.

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Respectfully submitted,


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