Indiana Law Journal

Volume 37 | Issue 2 Article 4

Winter 1962

Administrative Versus Judicial Determinations of Citizenship: Some Problems in the Administration of Section 360 of the Immigration and Nationality Act

ADMINISTRATIVE VERSUS JUDICIAL DETERMINATIONS OF CITIZENSHIP: SOME PROBLEMS IN THE ADMINISTRATION OF SECTION 360 OF THE IMMIGRATION AND NATIONALITY ACT

The concept of citizenship is fundamental in defining the relationship between an individual and a sovereign state.[1] United States citizenship is especially fundamental in that it has conferred more freedom upon more individuals than any other in history. American citizens may worship God as they please, express their opinions freely and pursue any lawful business or profession of their choice. They have the right to be secure in their homes and in their possessions and they are protected against arbitrary action by the state.[2] In the words of Mr. Justice Black:

> Not only is United States citizenship a 'high privilege,' it is a priceless treasure. For that citizenship is enriched beyond price by our goal of equal justice not for citizens alone, but for all persons coming within the ambit of our power.[3]

A denial of citizenship, is therefore, a serious matter, and the Constitution requires that it not be arbitrary.[4]

Consequently, neither a state nor a federal agency may deprive a person of citizenship or the rights of citizenship without a trial hearing on that issue.[5] But the Constitution does not require a court trial in all instances.[6] In some cases an administrative hearing may be an acceptable alternative.[7] Residency or lack of residency is the constitutional

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1. VAN DYNE, CITIZENSHIP OF THE UNITED STATES iv (1904).
2. The incidents of American citizenship are beyond the scope of this note but see Holliman, *Some Privileges and Duties of a Citizen,* 30 OKLA. B.A.J. 1387 (1959) for an enthusiastic consideration of this topic.
3. Johnson v. Eisentrager, 339 U.S. 763, 791 (1950).
4. Kwock Jan Fat v. White, 253 U.S. 454 (1920); Chin Yow v. United States, 208 U.S. 8 (1908).
5. Ng Fung Ho v. White, 259 U.S. 276 (1922); Wah Suey v. Backus, 225 U.S. 460 (1912); Chin Yow v. United States, 208 U.S. 8 (1908); United States v. Ju Toy, 198 U.S. 253 (1905); United States v. Sing Tuck, 194 U.S. 161 (1904).
6. Kwock Jan Fat v. White, 253 U.S. 454 (1920); United States v. Ju Toy, 198 U.S. 253 (1905); United States v. Sing Tuck, 194 U.S. 161 (1904); Nishimura Ekiu v. United States, 142 U.S. 651 (1892).
7. *Ibid.*

basis for this distinction.[8] In *United States v. Ju Toy*[9] the Supreme Court held that a person "stopped at our borders" receives all that the Constitution requires if he is given an opportunity to test his claim in an administrative hearing.

Such a hearing satisfies the minimal constitutional requirement if an issue of citizenship is raised by a non resident. Congress, however, can establish higher standards of trial formality by legislation. Section 360 of the Immigration and Nationality Act is the present statutory determinant of the type of trial to be accorded claims of citizenship.[10] Its conservative provisions adhere closely to the constitutional minimum. Section 360 prescribes a judicial remedy for denials of citizenship which occur within the United States and an administrative remedy for those which occur outside of the United States and in exclusion proceedings. The American Bar Association has recommended that section 360 be amended to afford a judicial remedy to every claimant of United States citizenship, whether within or without the United States.[11] This recommendation has been reflected in some of the conflicting interpretations of that provision. The courts are not in agreement as to the effect of section 360 and interpretations are developing which will render it meaningless. The purpose of this note is to place that conflict in a historical context and to analyze the reasons for the disagreement among the courts.

The discussion begins historically with *United States v. Ju Toy*.[12] In that case, the Supreme Court decided that the Constitution required no more than an administrative hearing if the issue of citizenship arose in an exclusion proceeding. Ju Toy, a non resident, applied for admission at a port of entry and supported his petition by alleging American citizenship. The immigration officials decided that he was not a citizen and excluded him. Ju Toy petitioned for a writ of habeas corpus but failed to allege that the administrative hearing was unfair. The trial court considered his claim *de novo* and reversed the administrative determination. On appeal the Supreme Court reinstated the administrative

8. In *United States v. Ju Toy*, 198 U.S. 253 (1905), the Supreme Court minimized the rights of non residents by holding that a person excluded from the United States is only entitled to an administrative hearing. In *Ng Fung Ho v. White*, 259 U.S. 276 (1922) the Court emphasized the significance of residency by holding that a person within the United States could not be deported without a court trial on the issue of citizenship.

9. 198 U.S. 253 (1905).

10. Immigration and Nationality Act § 360, 66 Stat. 273 (1952), 8 U.S.C. § 1503 (1958).

11. 10 ADM. LAW BULL. 10-11 (Fall, 1957).

12. 198 U.S. 253 (1905).

decision, holding that the applicable immigration laws made administrative determinations of citizenship conclusive on the courts. Since Ju Toy had failed to allege an unfair hearing, there was no basis for a court review of the agency action. Even if he had alleged an unfair hearing, the reviewing court would have been limited to a consideration of that issue and could not have decided his citizenship in an original action.[13]

In *Ng Fung Ho v. White*[14] the Supreme Court distinguished between resident and non resident citizenship claimants. The Court held that the Constitution would not permit a citizenship claimant to be deported without a court trial on that issue. The decision emphasized the significance of residency by reaffirming the *Ju Toy* holding that a non resident citizenship claimant must be satisfied with an administrative hearing.

The "fair hearing" required in an exclusion proceeding does not necessarily mean compliance with the procedural formality of the Administrative Procedure Act. The provisions of the APA do not apply to "the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute."[15] The special boards of inquiry employed in immigration proceedings are embraced within this exception.[16] In 1950, Congress expressly exempted exclusion proceedings from the adjudicative requirements of the Administrative Procedure Act.[17] Although this exemption was repealed in 1952 by the Immigration and Nationality Act,[18] exclusion proceedings are still execpted from the requirements of the APA because of the specific statutory procedure for the conduct of

13. The scope of review in a habeas corpus proceeding is limited to a consideration of the fairness of the agency action and whether the evidence adequately supports the verdict. See cases cited in Gonzales v. Zurbrick, 45 F.2d 934, 936 (6th Cir. 1930).

14. 259 U.S. 276 (1922).

15. Administrative Procedure Act § 7, 60 Stat. 241 (1946), 5 U.S.C. § 1006(a) (1958).

16. Wah v. Shaughnessy, 190 F.2d 488 (2d Cir. 1951); Frisch v. Miller, 181 F.2d 360 (5th Cir. 1950); Saclarides v. Shaughnessy, 180 F.2d 687 (2d Cir. 1950). In *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), the Supreme Court held that administrative hearings in deportation cases must conform to the procedural requirements of the APA. Immediately after this decision, representatives of the Department of Justice informed the Committee on Appropriations of the House of Representatives that the Immigration Service would need close to four million dollars in additional appropriations to meet the expense of complying with the APA. Based upon this information, the House Appropriations Committee recommended the enactment of a rider exempting exclusion and deportation proceedings from the Administrative Procedure Act. 8 U.S.C.A. 48-50 (1952).

17. "Proceedings under law relating to exclusion or expulsion of aliens shall hereafter be without regard to the provisions of Sections 5, 7 and 8 of the Administrative Procedure Act." Act of Sept. 27, 1950, Ch. III § 101, 64 Stat. 1048.

18. Immigration and Nationality Act § 403(a), 66 Stat. 280 (1952), 8 U.S.C. § 155(a) (1958).

such proceedings.[19] The special statutory procedure is a substitute for the comparable provisions of the APA.

An exclusion hearing conducted by a special inquiry officer will satisfy the general requirements of fairness if it includes notice of the charges against the applicant, the right to representation by counsel, an opportunity for the claimant to confront and cross examine adverse witnesses and a decision based upon an accurate record and supported by substantial evidence.[20] Regardless of these considerations, a hearing before a special inquiry officer is not comparable to a hearing conducted by an officer qualified under section 11 of the APA. As of 1952, the Immigration and Naturalization Service had 119 full time hearing officers. These officers had Civil Service classifications ranging from GS-7 to GS-9. Only 26.8% had baccalaureate degrees and of this number only 4.3% had law degrees. None of these examiners were practicing attorneys before they became hearing officers.[21] In 1955 the Hoover Commission Task Force reported that: "These officers for the most part are unqualified to perform legal or judicial functions."[22]

Prior to the enactment of the federal Declaratory Judgment Act, a non resident citizenship claimant had no right to a court trial but was remitted to a hearing conducted by such special inquiry officers. In 1934, Congress enacted the Declaratory Judgment Act[23] which authorized federal courts to issue declaratory judgments determining rights, obligations and status whenever such issues became involved in a justiciable controversy. In *Perkins v. Elg*[24] the Supreme Court held that this Act was applicable to controversies regarding citizenship. Six years later, Congress enacted the Nationality Act which contained a special statutory remedy for declarations of citizenship. Section 503 authorized federal courts to entertain original actions to determine the facts of citizenship whenever denied by administrative authority, whether within the United States or abroad.[25]

The special remedy differed from the general declaratory judgment action in two ways. First, section 503 permitted the action to be brought either in the District of Columbia or in the district of the plaintiff's residence. The Declaratory Judgment Act required the action to

19. Marcello v. Bonds, 349 U.S. 302 (1955).
20. Kwock Jan Fat v. White, 253 U.S. 454 (1920); Chin Yow v. United States, 208 U.S. 8 (1908).
21. 2 DAVIS, ADMINISTRATIVE LAW TREATISE 5, § 10.02 (1958).
22. 1955 TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE 273.
23. Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1952), as amended; 28 U.S.C. § 2201 (Supp. II, 1958).
24. 307 U.S. 325 (1939).
25. Nationality Act of 1940 § 503, 54 Stat. 1137, 1171.

be brought only in the district of the defendant's residence, ordinarily the District of Columbia. Second, the remedy created by the Nationality Act was implemented by a provision permitting a person outside the United States to obtain a certificate of identity from a consular officer of the United States. This certificate was designed to aid an aggrieved person to travel to the United States in order to prosecute his claim of citizenship. Because of the more advantageous provisions of the Nationality Act, the special remedy of section 503 replaced the general remedy for adjudications of citizenship.[26]

The legislative history of the Nationality Act indicates that section 503 was intended to be merely a remedy against arbitrary expatriation.[27] It immediately followed the subchapter which created additional grounds for expatriation and the congressional debates indicate that it was intended primarily to protect those who might run afoul of the expatriation provisions.[28] Apparently Congress was content to let *Ju Toy* govern denials of citizenship in exclusion proceedings.

But the introductory language of section 503 permitted "any person" denied a right of citizenship to obtain a declaratory judgment. Literally, this language was broad enough to include persons who had raised the issue in an exclusion proceeding. The significance of this broad language, however, was not immediately recognized.[29] Only four exclusion cases were reported under section 503 within the first five years after its enactment.[30] In one of the first exclusion cases brought under that provision the court held that an administrative determination of citizenship was conclusive on the courts.[31] But it was eventually decided that section 503 would justify a declaratory judgment of citizenship in exclusion cases.[32]

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26. Tom Mung Ngow v. Dulles, 122 F. Supp. 709 (D.D.C. 1954).

27. See discussion in 86 CONG. REC. 13247-48 (1940).

28. "The Congressional proceedings, plus the place of Section 903 in the Nationality Code, persuasively indicate that, in enacting that Section, the Congress never contemplated that it should be availed of by persons who have never been in the United States and against whom no charge of expatriation has been made." Ly Shew v. Acheson, 110 F. Supp. 50, 55 (N.D. Cal. 1953).

29. Zimmerman, *Judicial Versus Administrative Determination of Controverted Claims to United States Citizenship*, 43 GEO. L.J. 19, 46 (1954); Willis, *The Right to Judicial Review of an Administrative Finding on the Fact of Citizenship in Exclusion Cases*, 1950 WIS. L. REV. 677, 682 (1950).

30. Haaland v. Attorney General, 42 F. Supp. 13 (D. Md. 1941); Schaufus v. Attorney General, 45 F. Supp. 61 (D.Mo. 1942); Brassert v. Biddle, 59 F. Supp. 457 (D.Conn. 1944); Ginn v. Biddle, 60 F. Supp. 530 (E.D. Pa. 1945).

31. United States *ex rel.* Medeiros v. Clark, 82 F. Supp. 412 (S.D.N.Y. 1948).

32. Gan Seouw Tung v. Clark, 83 F. Supp. 482 (S.D. Cal. 1949); Yoshiro Shibata v. Acheson, 86 F. Supp. 1 (S.D. Cal. 1949); Meiji Fujizawa v. Acheson, 85 F. Supp. 674 (S.D. Cal. 1949); Ishikawa v. Acheson, 85 F. Supp. 1 (D. Hawaii 1949); Mah Ying Og v. Clark, 81 F. Supp. 696 (D.D.C. 1948).

Once aliens discovered the significance of that provision it did not take them long to exploit its possibilities. In California, three cases were filed under section 503 in 1949. The number of cases increased to twenty-five in 1950 and to 161 in 1951.[33] In 1952, the trend became apparent and one California judge indicated the seriousness of the problem:

> Then came the deluge. By the close of business on December 24, 1952, there were on file in this District a total of 716 cases. By the same date, 189 cases had been filed in the Southern District of California, a grand total of 905 cases in both California districts. As near as may be presently ascertained, a total of 1,288 cases (including the California suits) have been commenced in the United States.[34]

The amount of litigation thrust upon the courts by the use of section 503 in exclusion cases was not the only disadvantage of that provision. The easy availability of certificates of indentity provided an opportunity for aliens to enter the country fradulently. The certificates not only made it easy for their holders to travel to a port of entry on American vessels, but they also served as tickets of admission. Once entry had been achieved, the aliens would disappear and never appear in court to litigate their claims of citizenship.

In 1952, Congress repealed section 503 and substituted for it section 360 of the Immigration and Nationality Act.[35] That amendment was

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33. Ly Shew v. Acheson, 110 F. Supp. 50, 54 (N.D. Cal. 1953).

34. *Ibid.*

35. "If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of Title 28 (Declaratory Judgment Act) against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this chapter or any other act or (2) is in issue in any such exclusion proceeding. . . . (b) If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right by any department . . . thereof, upon the ground that he is not a national of the United States, such a person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. . . . The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under sixteen years of age, who was born abroad of a United States citizen parent. (c) A person who has been issued a certificate of identity under the provisions of subsection (b) of this section, and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this

intended to solve the problems caused by a liberal interpretation of section 503. Section 360(a) limits the right to sue for a declaratory judgment of citizenship to persons who are within the United States. It also deprives the Federal Courts of jurisdiction to issue declaratory judgments if the issue of citizenship arises or is involved in an exclusion proceeding.

Subsections (b) and (c) are designed to provide an administrative remedy for persons outside the United States who have no right to relief in the federal courts. Subsection (b) directs such a person to obtain a certificate of identity, enabling him to travel to a port of entry and to apply for admission into the United States. Apparently, obtaining a certificate of identity is part of the procedure for securing an administrative adjudication of citizenship.[36]

Subsection (c) requires the certificate holder to prosecute his claim in an exclusion proceeding where, according to the *Ju Toy* decision, it may be administratively determined. Thus, the direction to raise the issue of citizenship in an exclusion proceeding is a provision for its administrative adjudication.

If a certificate of identity is a condition precedent to obtaining administrative relief, it is important to note that it is only available to prior residents of the United States or to children under sixteen who were born abroad of American parents.[37] Section 360, as it has been interpreted, has a limited class of beneficiaries because it is unavailable to persons who cannot secure certificates of identity.[38]

Because of its discriminatory nature, section 360 has not received a uniform interpretation. The courts are divided as to its effect on the rights of non residents to receive a trial hearing on the issue of citizenship. Some courts have ignored constitutional implications and have

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chapter relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. . . ." Immigration and Nationality Act § 360, 66 Stat. 273 (1952), 8 U.S.C. § 1503 (1958).

36. Tom Mung Ngow v. Dulles, 122 F. Supp. 709 (D.D.C. 1954); D'Argento v. Dulles, 113 F. Supp. 933 (D.D.C. 1953); Avina v. Brownell, 112 F. Supp. 15 (S.D. Tex. 1953).

37. "The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent." Immigration and Nationality Act, § 360(b), 66 Stat. 273 (1952), 8 U.S.C. § 1503(b) (1958).

38. Guerrieri v. Herter, 186 F. Supp. 588 (D.D.C. 1960); Tijerina v. Brownell, 141 F. Supp. 266 (S.D. Tex. 1956); Tom Mung Ngow v. Dulles, 122 F. Supp. 709 (D.D.C. 1954); Avina v. Brownell, 112 F. Supp. 15 (S.D. Tex. 1953).

interpreted section 360 as being exclusively determinative of the citizenship issue.[39]

In *D'Argento v. Dulles*[40] a non resident petitioned for a declaratory judgment to determine his citizenship subsequent to receiving a notice of expatriation. The Secretary of State obtained a dismissal on the ground that section 360(a) deprived the court of jurisdiction to entertain the case. Since D'Argento's citizenship was not denied within the United States, he lacked the requisite status to sue for a declaratory judgment. Finding that D'Argento was eligible for a certificate of identity, the court directed him to pursue his administrative remedy, holding that Congress intended for non residents to adjudicate their citizenship under the limited procedure of section 360(b) and (c).

In *Avina v. Brownell*[41] the immigration authorities excluded a non resident on the ground that he had forfeited his citizenship by leaving the country to evade the draft. Avina contested the exclusion order and filed for a declaratory judgment of his citizenship. The court granted the defendant's motion for dismissal because Avina had failed to exhaust his administrative remedies under section 360. The court suggested in dicta that a person who has been unable to secure a certificate of identity might not be able to bring any kind of action to establish his citizenship.

Ferretti v. Dulles[42] is on the same point. The court in that case held, as an additional ground for its decision, that the plaintiff could not obtain a court review of her citizenship until she had exhausted her administrative remedies under section 360(b) and (c). Since she was eligible for a certificate of identity she was not entitled to a judicial consideration of her claim until immigration officials had determined her citizenship in an exclusion proceeding. Even then, the reviewing court could not adjudicate her citizenship in an original trial. Administrative adjudications of citizenship under section 360 are reviewable by way of habeas corpus "and not otherwise."[43] Accordingly, the court would have been limited to a review of the fairness of the agency action.[44]

Sato v. Dulles[45] is in accord with these decisions. In that case, the

39. Sato v. Dulles, 183 F. Supp. 307 (D. Hawaii 1958); Rosasco v. Brownell, 163 F. Supp. 45 (E.D.N.Y. 1958); Moy Yee Mon v. Dulles, 161 F. Supp. 924 (E.D. Mich. 1958); Matsuo v. Dulles, 133 F. Supp. 711, 716 (S.D. Cal. 1955); Avina v. Brownell, 112 F. Supp. 15 (S.D. Tex. 1953); D'Argento v. Dulles, 113 F. Supp. 933 (D.D.C. 1953).

40. 113 F. Supp. 933 (D.D.C. 1953).

41. 112 F. Supp. 15 (S.D. Tex. 1953).

42. 246 F.2d 544 (2d Cir. 1957).

43. Immigration and Nationality Act § 360(c), 66 Stat. 273 (1952), 8 U.S.C. § 1503(c) (1958).

44. Bilokumsky v. Tod, 263 U.S. 149, 157 (1923); Chin Yow v. United States, 208 U.S. 8, 11 (1908); United States v. Ju Toy, 198 U.S. 253 (1905).

45. 183 F. Supp. 307 (D. Hawaii 1958).

plaintiffs were American citizens by birth, but they were expatriated and denied passports because they had voted in a Japanese election. Both plaintiffs appealed the agency action and sued for a declaratory judgment. The court dismissed their complaint, noting that their cause of action was not preserved by the savings clause of the new legislation. So, under section 360(a), the plaintiffs were precluded from obtaining a declaratory judgment because they were not within the United States. The court held that subsections (b) and (c) provided the sole remedy for non resident citizenship claimants.

In view of the legislative history of section 360, these interpretations are a reasonable expression of congressional intent.[46] Congress amended section 503 of the Nationality Act to eliminate the abuses which resulted from its administration. Congress intended not only to regulate the procedure for obtaining certificates of identity but also to substitute an administrative remedy for non residents.[47] This was intended to relieve the courts of excessive litigation resulting from the liberal interpretations of the 1940 Act.

Other courts, however, have evaded the injunction of section 360(a) by permitting actions for declaratory judgment in cases where the citizenship claimant is ineligible for a certificate of identity.[48] This line of authority was initiated by *Tom Mung Ngow v. Dulles*[49] in which a resident of China was denied a passport on the ground that he was not a citizen. Ngow petitioned for a declaratory judgment, but the Secretary of State defended on the theory that section 360(a) deprived him of any right to bring the action. The District Court denied the motion for dismissal and permitted Ngow to maintain the action. The court held that section 360 is inapplicable to citizenship claimants who do not qualify for certificates of identity under the terms of subsection (b). Accord-

46. "In spite of the definite restrictions on the use and application of § 503 to bona fide cases, the subcommittee finds that the section has been subject to broad interpretation, and that it has been used in a considerable number of cases to gain entry into the United States where no such right existed. . . . The subcommittee therefore recommends that the provisions of section 503 as set out in the proposed bill be modified to limit the privilege to persons who are in the United States. . . ." S. REP. No. 1515, 81st Cong. 2d Sess., p. 777 (1950).

47. "The bill modifies section 503 of the Nationality Act of 1940 by limiting the court action exclusively to persons who are within the United States. . . . The net effect of this provision [section 360(b)] is to require that the determination of the nationality of such person [one eligible for a certificate of identity] shall be made in accordance with the normal immigration procedures. These procedures include review by habeas corpus proceedings where the issue of the nationality status of the person can be properly adjudicated." S. REP. No. 1137, 82d Cong. 2d Sess., p. 50 (1952).

48. Guerrieri v. Herter, 186 F. Supp. 588 (D.D.C. 1960); Tijerina v. Brownell, 141 F. Supp. 266 (S.D. Tex. 1956); Tom Mung Ngow v. Dulles, 122 F. Supp. 709 (D.D.C. 1954).

49. 122 F. Supp. 709 (D.D.C. 1954).

ing to subsection (c), a certificate of identity is essential to administrative relief. But such certificates are not available to persons like Tom Mung Ngow, who have never resided in the United States and are over sixteen years of age. Such persons do not qualify for any statutory remedy. The court cited *D'Argento v. Dulles*[50] but distinguished it by noting that the petitioner in that case was eligible for a certificate of identity and could have received relief under section 360(b) and (c).

The District Court in *Tijerina v. Brownell*[51] reached the same conclusion. That court permitted a person excluded from the United States to sue for a declaratory judgment to establish his citizenship. Tijerina, like Tom Mung Ngow, did not qualify for a certificate of identity. The court held that section 360(a) does not preclude the possibility of relief by declaratory judgment in situations where that provision does not apply and where there is no available procedure to adjudicate the issue of citizenship.

Although these decisions cannot be justified by statutory language or legislative history, they express a justifiable exception to the provisions of section 360. The courts have postponed a decision on constitutional issues by affording a judicial remedy to persons who do not qualify for a certificate of identity. The discriminatory scheme of section 360(b) and (c) bars persons who cannot obtain a certificate of identity from the administrative route, so a court trial is the only opportunity for such persons to receive a trial hearing on the issue of their citizenship.

Congress cannot establish arbitrary classifications and distinguish between the rights of persons similarly situated.[52] Although the fifth amendment does not contain an "equal protection" clause, discrimination in a federal statute may be so arbitrary as to violate due process.[53] The standards of equality imposed against federal legislation, however, are less restrictive than are those applied against the states.[54] A complainant against a federal statute must show that the classification is so grossly discriminatory as to amount to a confiscation of his rights.[55] The regulation of certificates of identity has a valid purpose in that it was designed to cure specific abuses in that procedure. The classification scheme of section 360(b) may have a reasonable relationship to that purpose.

50. 113 F. Supp. 933 (D.D.C. 1953).
51. 141 F. Supp. 266 (S.D. Tex. 1956).
52. Bolling v. Sharpe, 347 U.S. 497 (1954).
53. Detroit Bank v. United States, 317 U.S. 329 (1943); Steward Machine Co. v. Davis, 301 U.S. 548 (1937); La Belle Iron Works v. United States, 256 U.S. 377 (1921).
54. Bertelsen v. Cooney, 213 F.2d 275 (5th Cir. 1954); Neild v. District of Columbia, 110 F.2d 246 (D.D.C. 1940).
55. *Id.*

Nevertheless, persons who cannot qualify for certificates of identity are deprived of their right to a trial hearing to the extent that the certificate procedure is made a part of the remedy for securing adjudications of citizenship.

The courts have reacted to this problem by permitting such persons to litigate their citizenship by declaratory judgment. But this is not an entirely adequate solution. The *Tom Mung Ngow* decision exempts from the statute a part of the class which Congress intended to regulate. It makes the discrimination cut the other way; persons ineligible for a certificate of identity have the advantage of a declaratory judgment while certificate holders are remitted to an administrative remedy. This is a serious discrimination because administrative hearings do not afford the procedural safeguards of a court trial. A citizenship claimant in an exclusion proceeding has the burden of proof on the issue of his admissibility.[56] The judicial rules of evidence are inapplicable to such hearings and hearsay evidence may be received against the claimant.[57] The presumption of legitimacy, one of the strongest in law, has no place in an immigration proceeding.[58] Finally, a special inquiry officer may rely on uncertified foreign documents in reaching his determination, even though the claimant has no opportunity for cross examination.[59] The Constitution requires a court trial in criminal cases, yet loss of citizenship can be more serious than a fine or imprisonment. Thus, any interpretation of section 360 which treats certificate holders less favorably than non holders is subject to constitutional objections.

The only solutions are to give certificate holders the option of declaratory judgment, since non holders can obtain such a remedy, or to remit both classes to an administrative hearing. In *Cort v. Herter*[60] the District Court for the District of Columbia selected the first solution and permitted a person who could have obtained a certificate of identity to sue for a declaratory judgment. In that case, a citizen by birth was denied a passport on the ground that he had been expatriated for leaving the country at the beginning of the war. He contested the administrative ruling and sued for a declaratory judgment. The Secretary of State moved for dismissal, contending that the petitioner had failed to pursue section 360 procedure for obtaining a review of his citizenship. The

56. Loy v. Cahill, 81 F.2d 809 (9th Cir. 1936); *ex parte* Miyazono, 53 F.2d 172 (9th Cir. 1931).

57. Loy v. Cahill, 81 F.2d 809 (9th Cir. 1936); Smith v. Curran, 12 F.2d 636 (2d Cir. 1926).

58. Matter of L.C.S., 6 I.&N. Dec. 212 (Bd. Immigration Appeals 1954).

59. Smith v. Curran, 12 F.2d 636 (2d Cir. 1926).

60. 187 F. Supp. 683 (D.D.C. 1960), *appeal docketed sub nom.* Rusk v. Cort (No. 567, 1960 Term; renumbered No. 20, 1961 Term), 30 U.S.L. WEEK 3001 (1961).

court denied the motion, holding that section 360 is not an exclusive remedy for citizenship claimants. It merely provides an alternative remedy and does not preclude a non resident from obtaining a declaratory judgment if he avoids the certificate procedure for administrative relief.[61]

This decision, like *Tom Mung Ngow v. Dulles*,[62] is not justified by legislative history. Section 360 was not designed to provide an alternative remedy for denials of citizenship. It was intended to prevent court adjudications of citizenship when the issue arises outside the United States or in an exclusion proceeding.[63] The option afforded by the *Cort* case destroys the effectiveness of section 360 because non residents will not choose the administrative procedure of that provision when a declaratory judgment can be so easily obtained. The *Cort* decision does settle constitutional doubts, however, by rendering the discriminatory scheme of section 360(b) and (c) completely harmless. If that decision is affirmed by the Supreme Court,[64] every claimant of United States citizenship will be entitled to a judicial determination of his claim. Section 360 will have been amended by the judicial process to conform to the recommendation made by the American Bar Association in 1957.[65]

TAXABILITY OF LIFE INSURANCE PROCEEDS PAID TO STOCKHOLDERS OF CLOSELY-HELD CORPORATIONS

The taxability of insurance proceeds paid upon policies covering the lives of key persons and stockholders of closely-held corporations presents an interesting and unique problem for the tax planner. The choice of similar programs may lead to vastly different tax consequences, and careless planning may subject surviving stockholders to taxation under the theory of constructive dividends. This problem is by no means new for in 1925 the Commissioner of Internal Revenue ruled that:

Where the proceeds of a life insurance policy are paid to a cor-

61. "While the plaintiff might have applied for a certificate of identity for the purpose of following the procedure set forth in Section 360, there is nothing in this case to indicate that he ever did or that such a certificate has been issued to him. Instead he has *chosen* to bring this action under the Declaratory Judgment Act for a judgment declaring him to be a United States citizen." Cort v. Herter, 187 F. Supp. 683, 685 (D.D.C. 1960). (Emphasis added.)

62. 122 F. Supp. 709 (D.D.C. 1954).

63. Legislative history cited notes 46, 47 *supra*.

64. This case was argued October 11, 1961 but the decision is still pending. 30 U.S.L. WEEK 3134 (1961).

65. *Cf.* text accompanying note 11 *supra*.