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UNITED STATES of America, Plaintiff,

v.

John DEMJANJUK, Defendant.

No. C77-923.

United States District Court,
N. D. Ohio, E. D.

June 23, 1981.

United States brought action under Immigration and Nationality Act to revoke certificate of naturalization of defendant and to vacate order admitting him to United States citizenship. The District Court, Battisti, Chief Judge, held that where defendant failed to disclose his service for German SS and willfully misrepresented that service on his visa application, defendant's failure to disclose his service was material misrepresentation and since defendant was ineligible for a visa under the Displaced Persons Act, his citizenship was also illegally procured and would be revoked.

Order entered.

1. Aliens ⇐71(18)

Government has burden of proving by clear, unequivocal and convincing evidence that defendant obtained his citizenship illegally or fraudulently.

2. Aliens ⇐70

Citizenship obtained through naturalization is not second-class citizenship and carries with it all of rights and prerogatives of citizenship obtained by birth in country save that of eligibility to the presidency.

3. Constitutional Law ⇐274.3

In denaturalization proceedings, conduct of postcomplaint photographic identifications outside presence of defense counsel was not so impermissibly suggestive as to give rise to likelihood of misidentification and deny defendant due process of law. U.S.C.A.Const. Amend. 14.

4. Aliens ⇐60.2

No alien has right to naturalization unless all statutory requirements have been complied with.

5. Aliens ⇐71(3)

Naturalization is "illegally procured" if some statutory requirement which is a condition precedent to naturalization is absent at time petition for naturalization is granted. Immigration and Nationality Act, § 340(a), 8 U.S.C.A. § 1451(a).

6. Aliens ⇐71(4)

Where defendant failed to disclose his service for German SS as a guard at both Trawniki and Treblinka and willfully misrepresented that service on his visa application, defendant was ineligible for a visa under the Displaced Persons Act and his citizenship was illegally procured and would be revoked. Displaced Persons Act of 1948, §§ 2(b), 10 as amended 50 U.S.C.A. App. §§ 1951(b), 1959.

7. Aliens ⇐71(3)

Denaturalization may be invoked for concealment of material facts or willful misrepresentation of material facts. Immigration and Nationality Act, § 340(a), 8 U.S.C.A. § 1451(a).

8. Federal Civil Procedure ⇐2331

Although Government erred in failing to seasonably supplement discovery requests in denaturalization proceedings, defendant was not prejudiced and, thus, was not entitled to new trial. Immigration and Nationality Act, § 340(a), 8 U.S.C.A. § 1451(a); Displaced Persons Act of 1948, § 2 as amended 50 U.S.C.A. App. § 1951.

John J. Horrigan, Asst. U. S. Atty., Cleveland, Ohio, Norman A. Moscowitz, U. S. Dept. of Justice, Washington, D. C., for plaintiff.

John W. Martin, Spiros Gonakis, Cleveland, Ohio, for defendant.

MEMORANDUM DECISION AND ORDER

BATTISTI, Chief Judge.

This is an action under the Immigration and Nationality Act of 1952, 8 U.S.C. § 1451(a), to revoke the Certificate of Naturalization of the defendant, John Demjanjuk, also known as Iwan Demjanjuk, and to vacate the order admitting him to United States citizenship. The defendant was admitted to the United States for lawful permanent residence on February 9, 1952, pursuant to the Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009, *as amended by* the Act of 1950, 64 Stat. 219 [henceforth referred to as the DPA]. On November 14, 1958, the defendant became a United States citizen by order of the United States District Court, Cleveland, Ohio.

The Government's amended complaint alleges that the defendant served with German SS (Schutzstaffel) personnel during World War II at three locations during 1942–1943:

(1) at the SS training camp at Trawniki, Poland;

(2) at the extermination camp at Treblinka, Poland; and

(3) at the extermination camp at Sobibor, Poland.

The Government's complaint further alleges that defendant served in a German military unit composed of Ukrainians at times during 1944–1945.

Section 1451(a) of the Immigration and Nationality Act, provides that citizenship can be revoked if it was either illegally procured, or procured by concealment of a material fact or by willful misrepresentation. The Government's six-count complaint alleges that defendant should be denaturalized under both criteria. In Counts I–II, the Government alleges that defendant illegally procured his citizenship because (1) his activities during the war precluded him from obtaining a valid visa as an "eligible displaced person" under the DPA, and (2) the visa actually obtained by the defendant was invalid since he willfully misrepresented his whereabouts during the war. Counts III–IV allege that defendant procured his naturalization by concealing and misrepresenting his service with German SS and military personnel during the years in question. The Government also alleges that defendant illegally procured his naturalization since he was not a person of good moral character. Count V alleges that defendant lacked the good moral character required for naturalization because of the commission of atrocities against Jewish prisoners at the extermination camp of Treblinka. Count VI alleges that defendant's failure to disclose his service in the German SS and the German military in his Application to File Petition for Naturalization (INS Form N–400) also indicates a lack of the good moral character that is a prerequisite to naturalization.

[1, 2] The right of citizenship once conferred should not be taken away without the clearest proof. As the Supreme Court recently reiterated, the Government has the burden of proving by "clear, unequivocal and convincing" evidence that defendant obtained his citizenship illegally or fraudulently. *Fedorenko v. U. S.*, —— U.S. ——, 101 S.Ct. 737, 747, 66 L.Ed.2d 686 (1981) (citing *Schneiderman v. United States*, 320 U.S. 118, 125, 63 S.Ct. 1333, 1336, 87 L.Ed. 1796 (1943)). This requirement is mandated by the magnitude of the right that is at stake in a denaturalization proceeding:

> "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. 654, 658, 66 S.Ct. 1304, 1307, 90 L.Ed. 1500 (1946) (quoting *Luria v. United States*, 231 U.S. 9, 22, 34 S.Ct. 10, 13, 58 L.Ed. 101 (1913)).

FINDINGS OF FACT

The defendant, John Demjanjuk, was born on April 3, 1920, in the village of Dub Macharenzi, Ukraine, a republic of the U.S.S.R. His father's name in Ukrainian is Mikola, the Russian form of which is Niko-

lai. (Tr. 28A) Defendant had little formal education, completing four grades of school while in the Ukraine. In 1939, defendant lived in Dub Macharenzi and worked as a collective farmer, sometimes as a tractor driver. Defendant was conscripted into the Russian army in 1940. On June 22, 1941, Germany invaded the U.S.S.R.

Three months after the war began, defendant, then a member of an artillery unit, was wounded in his back by shrapnel. The wound required hospitalization and upon release from the hospital, defendant returned to the front in the Crimea. Defendant admits that he was captured at the Battle of Kerch in the Crimea in 1942. (Tr. 1091) The Government called Dr. Earl F. Ziemke, a military historian specializing in the Eastern Front during World War II, who testified that from May 8–19, 1942, a major battle between the Germans and Russians did occur in the Kerch which resulted in 125,000 Russian soldiers being captured. (Tr. 51A–54A) It is likely, therefore, that defendant was captured by the German army no later than May 19, 1942.

Dr. Ziemke further testified that the Russian prisoners of war were then moved west from the Crimea to German POW camps, including Rovno, in the Western Ukraine, and Chelm, Poland. (Tr. 55–A) Defendant testified that after being captured he was in fact transferred first to Rovno for a few weeks and then to Chelm. (Tr. 1069) Defendant did not recall the exact dates of this translocation, but testified he was in Rovno during 1942–1943 and in Chelm until 1943 or 1944. The Government produced additional evidence on the estimated chronology of when defendant was transferred from the Crimea to Rovno and then to Chelm. Government's exhibits 2 and 3 are certified copies of excerpts from German war diaries containing a daily chronicle of prisoners captured in the battle of Kerch in the Crimea in May 1942, and the subsequent relocation of such prisoners in German POW Camps. Government Exhibit 2 records that on May 16 and May 17, 1942, approximately 5,000 prisoners from the battle of Kerch were transported to Rovno. (Tr. 62A) Government Exhibit 3 indicates that 1,400 prisoners, mostly from the battle of Kerch, arrived in Chelm on June 2, 1942, and that other prisoners arrived in Chelm later on June 4–5, 1942. (Tr. 63A).

The Court concludes that it is likely that the defendant was transferred from the Crimea to the POW camps of Rovno and Chelm sometime in May-June 1942. Defendant offered no evidence on a more exact chronology and the accepted chronology was deemed plausible by expert testimony. (Dr. Ziemke, Tr. 58A–68A) Defendant's statement that he might have been in Chelm sometime in 1944 was contradicted by Dr. Ziemke's testimony that the Germans probably would not have maintained a POW camp at Chelm, Poland, any later than January 1944, since the Russian front was quickly moving westward at this time. (Dr. Ziemke, Tr. 1129–32)

Up to this point, the Government's evidence essentially corroborates and amplifies the defendant's own admissions concerning his service in the Russian army and subsequent capture by the Germans. The major factual issues in this trial concern the defendant's whereabouts following his incarceration at the POW camp at Chelm. The Government believes that defendant was next transferred to Trawniki, Poland, a training camp run by the German SS, and was sent from there to Treblinka, Poland, where he assisted in the persecution and extermination of the Jews. Defendant denies ever being at either location. An examination of the historical relationship between Trawniki and Treblinka is prerequisite to an understanding of the evidence in this case.

In 1942 the Nazis initiated "Action Reinhard" in Poland, a codeword for the systematic extermination of the Jews from all the countries of Europe occupied by German forces.[1] Three extermination camps were

1. Historical background on Action Reinhard and the relationship between the SS camp, Trawniki, the German POW camps, and the extermination camps was provided by the expert testimony of Dr. Wolfgang Scheffler. Dr. Scheffler is a professor of political science at

constructed to implement the mass annihilation conceived by Action Reinhard. Two camps, Belzec and Sobibor, were located in the Lublin district of Poland, southeast of Warsaw. The third camp, Treblinka, was located in the district of Warsaw. (Tr. 98A) The German SS directly authorized Action Reinhard, although personnel from the "euthanasia program" [2] were also often used in actually implementing the plan. (Tr. 103A–104A)

The German SS lacked sufficient manpower in the Lublin district to carry out all the "tasks" of Action Reinhard. (Tr. 109A) Consequently, Russian POWs were employed in rounding up and transporting the Jews from the ghettoes to which they had been confined and also as staff in the concentration camps themselves. (Tr. 106A) These Russian POWs were obtained from prisoner of war camps in Eastern Poland, among them, Rovno and Chelm. (Tr. 107A) Prisoners from Rovno and Chelm were taken to Trawniki, a camp operated by the German SS, located southeast of Lublin.[3] (Tr. 7–8)

Once at Trawniki, the Russian POWs were given uniforms (at first black and later earth brown), organized into companies, platoons, and groups and given training in weapons. (Tr. 116A–118A) Upon entering these new units, the former POWs took an oath of service to the German SS and in fact were subject to the rules and regulations governing the German SS.[4] There was testimony that Ukrainian soldiers at Trawniki were paid a salary in Polish currency. (Tr. 194) Units of these Trawniki guards were transferred to the concentration camps of Belzec, Sobibor, and Treblinka where they performed most of the duties that were necessary in the extermination camps, including guarding the camp and supervising the Jewish victims as they were being herded to the gas chambers. (Tr. 118A–119A) According to expert testimony, these Trawniki guards were indispensable to the operation of Action Reinhard.[5] Action Reinhard came to a conclusion in the late fall of 1943 when Jewish prisoners revolted at Sobibor and Treblinka, and all three of the concentration camps were subsequently destroyed and camouflaged. (Tr. 123A; 133A)

A. Government's Evidence That Defendant Was At Trawniki

The Government's proof that the defendant was at Trawniki are Government's Exhibits 5 and 6, two sides, front and back, of a single German war document, the original of which is in the Vinnitskiy Oblast State

the Free University of Berlin and is an authority on the Nazi persecution of the Jews. Dr. Scheffler has also offered his expert opinions in several German trials concerning participants at the extermination camps of Sobibor and Treblinka. (Tr. 78A–94A)

2. Between 1939–1941 approximately 100,000 so called "mentally ill" persons were exterminated under the euthanasia program in special hospitals which later served as models for the extermination methods used to exterminate the Jewish population. (Tr. 104A)

3. *See United States v. Fedorenko*, 455 F.Supp. 893, 900 (S.D.Fla.1978), *rev'd* 597 F.2d 946 (5th Cir. 1979), *aff'd on other grounds* 449 U.S. 490, 101 S.Ct. 737, 66 L.Ed.2d 806 (1981). [henceforth, *Fedorenko*]. In this case the defendant testified that he was a Russian soldier, captured by the Germans, transported first to a POW camp at Rovno, then to a camp at Chelm, and finally to Trawniki. Fedorenko was eventually transported to Treblinka in September 1942.

4. *See also* testimony of Heinrich Schaefer. (Tr. 188–192) Schaefer indicated that the Ukrainian guard units were technically not members of the German SS. (Tr. 208)

5. Dr. Scheffler testified that at each of the three concentration camps, Belzec, Sobibor, and Treblinka the number of Trawniki guards significantly exceeded the German staff assigned to the camps. (Tr. 119A) It is estimated that over the entire period of Trawniki's existence, between 3,500 and 4,000 men were trained by the Germans. (Tr. 121A) The estimated number of Trawniki guards periodically serving at these concentration camps during Action Reinhard is Belzec (60); Sobibor (200); Treblinka (120). (Tr. 119A) It is conjectured that transfers occurred between Trawniki and the three other camps on the basis of need and exigency. (Tr. 121A)

Archive, U.S.S.R.[6] The Court initially received certified photographic copies of the document (Govt. Exs. 5–6) under Fed.R. Evid. 902(3)–(4). During the course of the trial, the original was made available by Soviet authorities for inspection and study by the Court and by the defendant. Photographic enlargements of the original document, Government's Exhibits 5(b) and 6(b) were then substituted for the original, which was returned to the custody of the Soviet archive.

Throughout the trial, defendant contended that Government's Exhibits 5 and 6 were not authentic and suggested the possibility of forgery. However, at no time during the entire course of the trial was *any* evidence introduced to substantiate these speculations. Since the Court concludes that the defendant was present at Trawniki based on an examination of Government's Exhibits 5 and 6, it is necessary to review the evidence supporting the authenticity of this document (to be referred to as the "Trawniki card").

Government's Exhibit 5 is an identification card clearly stating that "Iwan Demjanjuk is employed as a guard in the Guard Units (Wachmannschaften) of the Reich Leader of the SS for the Establishment of SS and Police Headquarters in the New Eastern Territory." The card carries the additional heading in boldface printing: "HEADQUARTERS LUBLIN, TRAINING CAMP TRAWNIKI, I.D. No. 1393."

Dr. Wolfgang Scheffler, an historian thoroughly familiar with German war documents (Tr. 85A–90A; 10–19), identified Government's Exhibit 5 as a service identification card, issued by the German SS, bearing the stamp of the SS Polizeifuhrer in the district of Lublin, and signed by Karl Streibel, the commandant of the Trawniki camp. (Tr. 19–25) It should be noted that although Dr. Scheffler testified that he had never seen a card identical to Exhibit 5 (Tr. 99–100), his testimony verified all the indicia on the card as being historically accurate.[7] Scheffler testified that such a card would have to have been issued during the period July 1941–July 1942, since the appellation "Representative of the Reichsfuhrer-SS for the Establishment of SS and Police Headquarters in the New Eastern Territory" was only in use during this period. (Tr. 23)

The testimony of Dr. Scheffler was corroborated by the testimony of Heinrich Schaefer. (Tr. 178 *et seq.*) Schaefer was a Russian soldier, captured by the Germans in Poland, and taken to Trawniki at the end of August 1941. (Tr. 185–188) At Trawniki, Schaefer worked as a paymaster in the camp's administrative office, paying the camp's Ukrainian guards. (Tr. 194) The official title of the Trawniki camp administration where Schaefer worked was "SS Standortverwaltung Lublin, Zweigstelle Trawniki" which translated means SS Garrison Lublin, Branch Office of Trawniki.[8] (Tr. 194) Schaefer was shown Government's Exhibit 5 and testified that it was an official I.D. card issued to all the persons training at Trawniki, that he himself had been issued such an I.D. card. (Tr. 215) Schaefer also identified the signature of Streibel, the camp commandant, since Streibel had often signed his leave passes. (Tr. 215)

The reverse side of the Trawniki card is Government's Exhibit 6. The left side of this exhibit contains a photograph, allegedly of the defendant, his name, family history, personal characteristics, and army assignments. The right side of Exhibit 6 contains a checklist of issued equipment, the signature of the issuing officer, Teufel,

6. The advancing Russian armies that pushed the Germans westward across Poland in 1944–1945 captured many war documents, including the administrative files of the German SS in the district of Lublin. Trawniki is located within the Lublin district. (Scheffler, Tr. 10)

7. Neither party produced another document exactly like Government's Exhibits 5 and 6 and the Government is not aware of the existence of another document similar to the Trawniki card. (Tr. 1150–1151)

8. A "Standortverwaltung" in the Germany army lexicon signified the administrative army unit responsible for providing housing and equipment in the particular area involved.

and the alleged signature of the defendant, indicating receipt of the enumerated equipment.

Dr. Scheffler was shown Exhibit 6 and indicated, again, that he had never seen a card exactly like Exhibit 6. However, Dr. Scheffler's testimony nevertheless verified the historical accuracy of the indicia found on the card. Particularly, Scheffler noted that the two stamps overlapping the photograph bear the legend: "SS Standortverwaltung Lublin, Zweigstelle Trawniki." (Tr. 25–28) Dr. Scheffler testified that it is known from former members of the Standortverwaltung of the branch Trawniki that one of the responsibilities of the administration was to provide supplies and equipment for the guard units stationed at Trawniki. (Tr. 26) This testimony is not only internally consistent with the equipment marked as "issued" on the right side of Government Exhibit 6, but corroborates the testimony offered by Heinrich Schaefer.

Schaefer recognized the "Standortverwaltung stamp" on Exhibit 6 as the "official seal of our unit in Trawniki." (Tr. 211–212) In addition, he testified that a man by the name of Ernst Teufel was in charge of the disposition of clothing within the administration (Tr. 195), and that Teufel held the rank of SS Rottenfuhrer or private first class. (Tr. 196) Upon examining the signature of "Teufel, SS Rottenfuhrer" on Exhibit 6, Schaefer indicated that this was the familiar signature of Ernst Teufel, with the idiosyncratic feature of the "T" written as the numeral "7". (Tr. 210) Schaefer admitted that he had never seen a card similar to Government's Exhibit 6, although he also testified that everyone at Trawniki had his photograph taken in the summer of 1942 and that the white rectangle on the chest of the subject photographed in Government's Exhibit 6 bore the identification number (not visible to the naked eye on either Govt's Exs. 6 or 6(b)[9]) of the particular soldier. (Tr. 229–230; 197–198)

Finally, the Government offered the testimony of Gideon Epstein, an expert forensic documents examiner and specialist in the examination of questioned documents. (Tr. 122–126) Epstein initially conducted his tests on the photographic copies of the Trawniki card (Govt. Exs. 5 and 6) and later conducted the same tests on the original document when it became available. Two different tests were conducted by Epstein. First, the signature of Karl Streibel on Government's Exhibit 5 and the signature of Ernst Teufel on Government's Exhibit 6 were examined and compared with known signatures of the same men. (Govt. Exs. 7, 8; Govt. Ex. 12) Epstein concluded that the signatures of Streibel and Teufel on Government's Exhibits 5 and 6 were authentic. (Tr. 132–133) Second, Epstein conducted an examination of Exhibits 5 and 6 to determine whether the documents had been altered or obliterated in any material way. Again, Epstein concluded that the documents had not been altered. (Tr. 151; 153)

Epstein conducted the same tests on the original Trawniki identification card when it became available and confirmed his previous conclusions. (Tr. 903) The only difference noted between the original Trawniki identification card and Exhibits 5 and 6 was that the left side of the original contained handwriting which had been blocked off the photographic copy (compare Govt. Exs. 5 and 5(b)[10]).

In the course of examining the original document, Epstein also studied the signature, "Demjanjuk" which appears on the lower right side of Government's Exhibit 6.

9. Microscopic analysis of the original Trawniki card revealed three of the four numbers that appear on the white rectangle on Government's Ex. 6, and these are 1?93. (Epstein, Tr. 903) The identification number on the other side of the card, Government's Ex. 5, is 1393.

10. A cursory examination of Exhibits 5 and 6 reveals handwriting interlineated between the German type. This handwriting is in Russian and is a Russian translation of the printed matter. (Tr. 912) Epstein opined that the Russian handwriting was probably done by the same person (Tr. 901) and a translation of the Russian writing on the left side of Government's Exhibit 5(b) reveals that a Russian translator entered the interlineations in 1948. (*See* Govt. Ex. 5(a)(i))

(*See* Govt. Ex. 6(c)) This signature was compared with known signature exemplars of the defendant. Epstein was unable to reach any definitive conclusions as to the common authorship of these signatures, because the signature on Government's Exhibit 6 is written in the Cyrillic alphabet (Tr. 1111), and Epstein lacked a comparable known signature of the defendant in the Cyrillic alphabet with which to compare the signature on Government's Exhibit 6. (Tr. 904–905) Defendant denies that the signature on Exhibit 6 is his. (Tr. 111; 1117)

Personal information of the defendant found on Government's Exhibit 6 perhaps most compellingly indicates defendant's presence at the SS training camp of Trawniki. Government's Exhibit 6 contains defendant's name, birthdate (April 3, 1920), father's name (Nikolai), birthplace (Dub Macharenzi) [11], and nationality (Ukrainian). In addition, under the line "special features" is written "scar on back." Defendant has admitted that he was wounded in the back by shrapnel early in the war as a Russian soldier. Other personal attributes, though disputed by the defendant, are corroborated by defendant's sworn statements in his application for an immigration visa, (Govt. Ex. 21). Government's Exhibit 6 lists defendant's hair as dark blonde and his eyes as grey. The defendant testified that his eyes are blue and that in 1942, the year in which the Government alleges defendant was at Trawniki, his hair color was light blonde. (Tr. 1074–1075). Defendant's application for immigration visa, December 27, 1951, however, lists defendant's eyes as grey and his hair as brown. (Govt. Ex. 21)

Finally, the photograph found on Government's Exhibit 6, in the opinion of the Court, clearly reflects the facial features of the defendant.[12] The defendant did not definitely deny that Government's Exhibit 6 contained a photograph of him. Rather, his response was equivocal in nature:

"Q. And as to Government's Exhibit 6, the photograph on there, is that a photograph of you?

"A. I cannot say. Possibly it is me.

"Q. Well, why can't you be sure?

"A. Because I never had such hair as the man in the photograph except in the Russian army.

"Q. Then if the photo is yours, it would have to have been during an era that you were in the Russian Army?

"A. Yes."

(Tr. 1076). The Court specifically finds that the photograph on Government's Exhibit 6 is that of the defendant.

On the basis of all the evidence reviewed above, the Court concludes that Government's Exhibits 5 and 6 are authentic and clearly show that defendant was at the German SS training camp of Trawniki.[13]

Neither Exhibit 5 nor Exhibit 6 contains a date as to when the card was issued, and therefore it is not certain when defendant was at the Trawniki camp. The Government did adduce evidence, however, from which an approximate date for the card may be ascertained. First, it was noted by Dr. Scheffler that the Trawniki card would have to have been issued during the period July 1941–July 1942, since the appellation "Representative of the Reichsfuhrer-SS for the Establishment of SS and Police Headquarters in the New Eastern Territory" was only utilized in this limited period. (Tr. 23)

A more exact date for the issuance of the Trawniki card was suggested by other evidence introduced by the Government. Government's Exhibit 6 was signed by

11. Government's Exhibit 6 lists defendant's place of birth as Dub Macharenzi, Saporosche. The inclusion of the district, Saporosche is apparently erroneous. (Tr. 1116–1117)

12. Assuming, as the government contends, that defendant was at Trawniki in 1942, defendant would have been 22 years old when the photograph on Government's Exhibit 6 was taken.

13. As indicated above, the defendant failed to introduce any evidence which challenges the authenticity of the Trawniki card. Although the original card was made available to the defendant for the purpose of expert documents analysis, no such analysis was conducted. The defendant has denied ever being at Trawniki or ever being issued a document like the Trawniki card. (Tr. 1076)

Ernst Teufel, rank, SS Rottenfuhrer. Government's Exhibit 9 corroborates this fact; it is a German war document suggesting the decoration of certain enlisted men, dated March 10, 1942, and issued by the German SS for the District of Lublin. The list of names contains that of Ernst Teufel, stationed at Trawniki, holding the rank of SS Rottenfuhrer. (Tr. 30–32) Government's Exhibit 10 is an allowance or salary chart card from the German SS personnel files in Berlin for Ernst Teufel. Item six of Teufel's card shows that he was promoted to the rank of SS Unterscharfuhrer on July 19, 1942. The rank of SS Unterscharfuhrer was the next advancement from the rank of SS Rottenfuhrer in the German army. (Tr. 32–34) It is therefore likely, based on Government's Exhibit 10, that Teufel signed the Trawniki card, Government's Exhibit 6, prior to July 19, 1942.

The Court previously concluded, based on expert testimony and other adduced evidence, that defendant was captured by the Germans in May 1942, and probably transferred from the Crimea to the POW camps of Rovno and Chelm sometime in May-June 1942. Following his incarceration at the POW camps, it now appears that defendant was transferred to the SS training camp at Trawniki sometime during the summer of 1942, prior to July 19, 1942.

The Government next contends that defendant was transferred from Trawniki to the extermination camp of Treblinka, Poland, in the fall of 1942. The defendant asserts that he never served the Germans as a guard in any concentration camp. (Tr. 1116) The Government produced six eyewitnesses from Treblinka, five Jewish survivors and a German guard who identified the defendant from photographs as the man known to them simply as Ivan,[14] the operator of the camp gas chambers, and a man who killed, beat, and abused Jewish prisoners at Treblinka.

B. *Treblinka*

The extermination camp of Treblinka was located in the district of Warsaw, Poland, and operated from July 1942 until August-September of 1943. (Tr. 98A; 123A) As indicated previously, Treblinka was part of the overall plan of Action Reinhard and it is an historical fact that former Russian POWs, often Ukrainians, were trained at Trawniki and later sent to serve at the concentration camp of Treblinka.[15] (Scheffler, Tr. 118A–125A)

The ghoulish, diabolical operation of Treblinka, resulting in the almost incomprehensible annihilation of 900,000 Jews (Tr. 126A) is indelibly stamped on the human conscience, and unfortunately is now a part of the human experience.[16] Certain aspects of the topography of Treblinka are relevant in the instant action. The death camp at Treblinka was divided into two parts, referred to as camp 1 and camp 2. (Govt. Ex. 15; Tr. 587–588) Camp 1, or the lower camp, was the "receiving" area for the transports of Jewish prisoners who were brought by sealed railroad cars to Treblinka. The upper camp, or camp 2, contained two gas chambers, a large facility with ten chambers and a smaller facility with three chambers. The burial pits for the exterminated bodies were located in camp 2 in close proximity to the gas chambers.

The Government called five surviving Jewish prisoners from Treblinka who testified at trial: Chil Rajchman, Elijahu Rosenberg, George Rajgrodzki, Sonia Lewkowicz, and Pinhas Epstein. In addition, the Government produced the videotape testimony of Otto Horn, a German guard at Treblinka, who was tried and completely exonerated for his activities at Treblinka in

14. The Russian proper name, Ivan, and its Ukrainian analogue, Iwan, are very common names, being the English equivalent of John. They will be used interchangeably in this decision.

15. In *Fedorenko*, the defendant admitted that he had received training at Trawniki and then was transported to Treblinka in September 1942 where he served as a guard. *U.S. v. Fedorenko*, 455 F.Supp. 893, 901 (S.D.Fla.1978)

16. A description of the grotesque *modus operandi* at Treblinka may be found in *U.S. v. Fedorenko*, 455 F.Supp. 893, 901 at n. 12 (S.D.Fla. 1978).

Germany in 1965. (Tr. 330) It is extremely important to note that all these witnesses were located for extensive periods of time in camp 2, the upper camp. Rajchman, Rosenberg, Rajgrodzki, and Epstein all shared the grim task of transporting dead bodies to the burial pits. (Tr. 421–422; 511–512; 580–581; 643) This work brought them in close proximity to the gas chambers. Sonia Lewkowicz worked in the kitchen and laundry of camp 2 directly behind the gas chambers. (Tr. 633) Otto Horn, classified as a male "nurse" in the German military, was assigned to duty in camp 2 supervising the Jewish prisoners as they burned corpses and worked near the pits. (Tr. 385)

Each of the witnesses recalled a Ukrainian named "Ivan" [17] who not only herded the Jewish prisoners into the gas chambers, but also activated the motors which gassed the Jews. (Tr. 306–307; 426; 514–515; 581; 633; 651–652) The savage cruelty of this notorious man earned him the special nickname among the camp's Jewish inmates, "Ivan Grozny" or "Ivan the Terrible." The duties which each witness performed at Treblinka should be examined in some detail because such examination is relevant to the credibility of the photographic identifications made by these witnesses.

Otto Horn was assigned to Treblinka in late October 1942 and was stationed in camp 2, until early September 1943, supervising the Jewish prisoners as they burned corpses and shoveled earth into the burial pits. (Tr. 385) Horn testified that Ivan was always present at the gas chambers (Tr. 306), that "he was Schmidt's right hand" [18] and enjoyed especially good terms with the German officers at the camp. (Tr. 308–309) Horn unequivocally testified that he had seen Ivan inside the gas chambers, directing the prisoners into the chambers and later operating the engines that sent the fatal gas into the chambers.[19] (Tr. 325–330) Horn was the only witness who testified that he had never seen Ivan commit any other atrocities while at Treblinka. (Tr. 398)

Chil Rajchman, the first of the Jewish survivors to testify, entered Treblinka in October 1942 and after three days was assigned to camp 2, first as a carrier of the dead corpses and later as a "dentist." [20] (Tr. 421–403) Rajchman remained in camp 2 until August 1943.[21] Rajchman identified Ivan as the man who operated the gas chambers. (Tr. 426) He witnessed a particular incident in which Ivan used a wood drill to torture one of his friends. (Tr. 426) Other atrocities perpetrated by Ivan were personally witnessed by Rajchman. (Tr. 427) It was noted that the barracks where the Jewish prisoners were confined in camp 2 afforded a clear view of the small gas chambers and Ivan's presence nearby. (Tr. 489)

Elijahu Rosenberg also entered Treblinka in the fall of 1942 and was soon assigned to camp 2 where he served as a corpse carrier for a few weeks. (Tr. 510; 512) After this, he was chosen to work inside the gas chambers removing the bodies after a gassing. Rosenberg testified that he saw Ivan at the gas chambers whenever more Jewish prisoners arrived. (Tr. 515) Ivan beat and tortured the incoming prisoners, herded them into the gas chambers, and then activated the destructive motors. (Tr. 515) He related other atrocities committed by Ivan which he had witnessed. (Tr. 516)

17. The fact that the survivors of Treblinka remember this man only as "Ivan" or "Iwan" is not especially surprising. Testimony revealed that the Jewish inmates knew their captors only by nickname or proper name; a closer social familiarity might easily have led to death.

18. Schmidt was a German officer in charge of the gas chambers. (Tr. 306)

19. Horn specifically marked a map of Treblinka indicating where he saw Ivan working inside and outside the gas chambers. *See* Government's Exhibit 1 attached to deposition of Otto Horn, February 26, 1980 and Tr. 325–327.

20. Rajchman was responsible for extracting valuable dental work from the mouths of the dead.

21. The latest any of these witnesses was at Treblinka was August 2, 1943. On this day the Jewish prisoners revolted and some escaped.

George Rajgrodzki entered Treblinka in September 1942 and worked as a corpse carrier in camp 2 from September through the end of November 1942. (Tr. 580) After this, Rajgrodzki worked in the kitchen of camp 2 for the rest of the time of his incarceration at Treblinka. Rajgrodzki, like all the body carriers, was often in the area of the gas chambers. (Tr. 582) The witness related that Ivan once gave him twenty lashes for being late for roll call. (Tr. 582) Rajgrodzki also recalled that Ivan once came over to the prisoners' barracks to hear him play the violin. (Tr. 584) In summary, Rajgrodzki testified that he had ample opportunity to view both Ivan, and another Ukrainian, Nikolai, who operated the gas chambers:

"I had plenty of opportunity to see them; for instance, by the gas chamber, sometimes one and sometimes, the other. I saw them in the area where we were carrying the corpses. I even was aware of them herding people in from the other side. . . ."

(Tr. 592)

Sonia Lewkowicz was incarcerated in Treblinka from December 1942 until August 1943. On March 5, 1943, Lewkowicz was assigned to work in the kitchen and later the laundry of camp 2 where she remained for the rest of her time at Treblinka. (Tr. 611) Mrs. Lewkowicz's work was in proximity to the gas chambers:

"Q. Mrs. Lewkowicz, how often were you actually in the area of the gas chambers?

"A. I was there many times. I was at the place where I hung the laundry. This was behind the gas chambers. I went there to hang up the laundry and to take off the laundry.

"Q. Were you ever there during the time there were gassings going on?

"A. One time when I was hanging the laundry there were people inside the gas chambers and I heard terrible screams from the gas chambers.

"Q. But only on this one occasion; is that correct?

"A. One and only one."

(Tr. 633) Lewkowicz testified that a Ukrainian named Ivan activated the gas chambers. (Tr. 611)

Finally, Pinhas Epstein testified that he was in Treblinka from September 1942 until August 1943. Epstein also served most of his time in camp 2 as a corpse carrier (Tr. 643) affording him a clear view of the gas chambers:

"Q. Have you ever had occasion to be present when the motors to the gas chambers were turned on?

"A. Yes, sir.

"Q. Were you able to see this area clearly, the area where the motors were?

"A. Yes, sir.

"Q. And do you know who operated the motors?

"A. The motors were activated by two Ukrainians; one was Iwan and the second was Nikolai."

(Tr. 651) Epstein also testified about other atrocities he saw Ivan commit. (Tr. 653)

C. Photographic Identifications

The evidence linking the defendant with this notorious Ivan at Treblinka are the photographic identifications made by the six witnesses both before trial and at trial. No in-court identification was attempted by either the Government or the defendant. All the pretrial photographic identifications except for Rajchman's were conducted overseas.[22] Several different photospreads were shown individually to each of the witnesses by different investigators on various dates.[23] Two photographs of the defendant

22. Rajchman viewed the photospreads in New York; Horn in West Berlin; Rosenberg, Rajgrodzki, Lewkowicz, and Epstein in Israel.

23. Horn was shown photospreads by American officials initially on November 14, 1979, and later at his videotaped deposition on February 26, 1980. American officials also showed Rajchman photospreads on March 12, 1980. Israeli authorities were responsible for conducting the pretrial photo-identifications with the remaining witnesses on the following dates: Rosenberg (May 11, 1976; December 25, 1979); Rajgrodzki (May 1978); Lewkowicz (March 15,

were utilized in these identification sessions. Each witness was shown a photospread containing a picture of the defendant taken from his 1951 application for an immigration visa. The defendant at this time was thirty one years old. Each witness picked out defendant's visa photograph and identified defendant as the man known as Ivan at Treblinka. In addition to the visa picture, five of the six witnesses were also shown another photospread containing the picture of the defendant found on the Trawniki card, Government's Exhibit 6.[24] Four of those witnesses picked out the photograph from the Trawniki card and again identified defendant's picture as that of Ivan. The fifth witness, Rajchman, failed to identify defendant's Trawniki picture on Government's Exhibit 6 in a pretrial confrontation, but did so at trial. A review of the photographic identification testimony of each witness follows.

Otto Horn viewed two photospreads which were only shown to Horn and to none of the other witnesses. (*See* Government's Exhibits 2 and 3 attached to the deposition of Horn, February 26, 1980). Each of the photospreads contained eight separate photographs. Prior to his videotaped deposition, Horn in succession picked out both defendant's visa picture and the Trawniki photograph and identified defendant as the Ivan he knew who worked at the Treblinka gas chambers. (Tr. 310–317) Later, at his videotaped deposition, Horn once again picked out the same photographs and made the same identification. (Tr. 318–324) The Court finds no aberrations in the conduct of these identifications which may be said to detract from the identifications Horn made.

Rajchman viewed Government's Exhibit 16 containing eight separate photographs, including defendant's visa picture. At the pretrial identification, Rajchman was asked whether he recognized anyone from Treblinka. Rajchman looked through the pictures, picked out defendant's visa photograph and stated: "I believe this is a picture of the Ukrainian Ivan." (Tr. 428–430) Rajchman selected the same visa photograph of the defendant at trial. At the pretrial identification, Rajchman was also shown Government's Exhibit 19, a photospread consisting of eight separate photographs, including defendant's Trawniki picture. Rajchman failed to identify defendant on the basis of the Trawniki photograph. (Tr. 487) However, when defense counsel allowed the witness to examine the photographs of Government's Exhibit 19 at trial, Rajchman picked out the Trawniki photograph and identified defendant as the Ivan he knew from Treblinka. (Tr. 482–483)

In 1976 Rosenberg was shown a photo album, Government's Exhibit 17, and was asked to identify people who were at Treblinka. (Tr. 517) Government's Exhibit 17 consists of forty-three photographs, of various size and quality, numbered and affixed to cardboard pages. The defendant's visa photograph, # 16, is found on the third page. Rosenberg testified that he looked through all the photographs, although a statement made at the time of the investigation indicates that he was shown seventeen photographs, presumably the first seventeen photographs in the album. (Government's Exhibit 29(a)) Rosenberg identified photograph # 16, defendant's visa photograph, as that of Ivan:

> "Q. Now, at the time could you be certain of your identification?
>
> "A. I was certain, but I left myself a little leeway on the possibility so that I did not say 100 percent; but, in my heart, I saw his appearance, the build of his head, and inside of me I was certain that that was him."

(Tr. 519) Rosenberg stated that his only hesitation was that the picture made defendant look more mature than he remembered Ivan to be at Treblinka. This, of course, is an accurate observation, since the

1978; December 27, 1979); Epstein (March 29, 1978; December 25, 1979)

24. Rajgrodzki was not shown the photograph of defendant found on the Trawniki card, Government's Exhibit 6.

visa photograph represents the defendant at age thirty-one, whereas in 1942 defendant would have been twenty-two years of age.[25] When the investigator told Rosenberg that according to her knowledge, the man he had chosen was not at Treblinka, Rosenberg reiterated: "I'm identifying him, he was in Treblinka; he resembles very much a Ukrainian whose name is Ivan." (Tr. 519)

Three years later, Rosenberg was shown Government's Exhibit 19, a photospread consisting of eight photographs, including defendant's Trawniki photograph. (Tr. 523) Rosenberg was told to point out the picture of the man known to him as Ivan, and he selected defendant's Trawniki photograph.[26] Rosenberg later identified both defendant's visa picture in Government's Exhibit 17 and the Trawniki photograph from Government's Exhibit 19 at trial.

Rajgrodzki was only shown a photospread containing defendant's visa photograph, Government's Exhibit 17. Rajgrodzki testified that at the pretrial identification, he looked through the entire photo album of forty-three pictures and identified defendant's visa photo as the "Iwan who was in camp 2" at Treblinka. (Tr. 586) Subsequently at trial, the witness again identified defendant's visa photograph.

The pretrial identifications conducted before Mrs. Lewkowicz were initiated in 1978. Mrs. Lewkowicz was shown the photo album, Government's Exhibit 17, containing defendant's visa photograph. The witness testified that she leafed through the album from beginning to end, although a statement prepared at the time suggests the possibility that the witness viewed only the page containing defendant's visa photograph and seven other photographs. (Defendant's Exhibit BBB) Mrs. Lewkowicz selected defendant's visa photograph and identified him as the Ivan she knew from the Treblinka gas chambers. (Tr. 613) A year later Mrs. Lewkowicz was shown the eight photographs in Government's Exhibit 19 and she selected and identified the defendant's Trawniki photograph. (Tr. 615) Mrs. Lewkowicz identified the same photographs in both photospreads at trial.

Finally, Pinhas Epstein was shown the photo album, Government's Exhibit 17, in 1978. Epstein testified that he looked through the album, although, again, a statement made at that time reflects the possibility that only eight photographs were then viewed. (Defendant's Exhibit CCC) The witness unequivocally selected the defendant's visa photograph as the Ivan he knew from Treblinka:

> "The witness points to Photo 16 and says: The person shown here reminds me a lot of Ivan. The picture is not completely in focus. The age differential also must be taken into account. The general shape of the face, especially the curvature of the forehead strengthen may [sic] opinion that it is Ivan. The short neck is characteristic on the broad shoulders-exactly what Ivan looked like."

(Defendant's Exhibit CCC) A year later, Epstein was shown the eight photographs that comprise Government's Exhibit 19 and once again he selected and identified defendant's Trawniki photograph. (Tr. 657) Both photographic identifications were later verified at trial.

[3] Defendant seeks to exclude evidence of the eyewitness photographic identifications on two grounds. The first ground is more easily disposed of. Defendant contends that the conduct of post-complaint photographic identifications outside the presence of defense counsel violated his fourteenth amendment guarantee to due process of law. Denaturalization proceedings are civil in nature although due to the valuable right of citizenship sought to be withdrawn, the Government must establish its allegations by evidence that is clear, convincing and unequivocal. *Schneiderman v. United States*, 320 U.S. 118, 63 S.Ct. 1333,

25. *See also* corroborating statement taken by the investigator at this time, Government's Exhibit H.

26. *See also* corroborating statement taken by the investigator at this time, Government's Exhibit 30(a).

87 L.Ed. 1796 (1943). The Supreme Court has held that in criminal proceedings an accused does not have a Sixth Amendment right to have counsel present when the Government conducts a post-indictment photographic identification proceeding. *United States v. Ash*, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973) Certainly the mere absence of counsel during the identification proceedings cannot be said to have denied defendant due process of law. Our legal system has always placed primary reliance for the ascertainment of truth on the "test of cross-examination" and effective cross-examination can be utilized to reveal any deficiencies in photographic identification procedures. Defendant conducted rigorous cross-examination of all six witnesses concerning the pretrial identification proceedings in this case. This adversary mechanism adequately compensated for the absence of defense counsel at the pretrial identification proceedings.

The defendant also argues for the exclusion of the pretrial and in-court identification testimony of four witnesses: Rosenberg, Lewkowicz, Epstein, and Rajgrodzki. It is defendant's contention that the pretrial photographic identifications of these witnesses were so conducive to mistaken identification as to deny defendant due process of law.

The Supreme Court has observed in criminal cases that the reliability of an eyewitness identification at trial following a pretrial identification must be evaluated in light of the totality of circumstances in each individual case. *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968). Unnecessary suggestiveness alone does not require exclusion of identification testimony. *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 55 L.Ed.2d 140 (1977) The focus is on the reliability of the witnesses' identification rather than on the flaws in the pretrial identification procedures. The Court has posited a list of factors to be considered in evaluating the reliability of questioned pretrial identifications:

> "As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."

Neil v. Biggers, 409 U.S. 188, 199–200, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972).

Two courts confronted with denaturalization proceedings similar to the instant case have relied upon these general parameters which the Supreme Court developed in the context of criminal prosecutions. *United States v. Fedorenko*, 455 F.Supp. 893, 905 (S.D.Fla.1978); *United States v. Walus*, 453 F.Supp. 699, 712 (N.D.Ill.1978), *rev'd* 616 F.2d 283 (7th Cir. 1980). The Court believes reliance on such general guidelines is proper, although the conventional criminal matrix from which these guidelines originated does not approximate the exceptional circumstances presented in the instant litigation. For example, in *Neil v. Biggers, supra*, the defendant was convicted of rape on evidence that consisted in part of testimony concerning the victim's identification at a police lineup that occurred seven months after the rape. The Court opined: "There was to be sure, a lapse of seven months between the rape and the confrontation. This would be a seriously negative factor in most cases." *Id.* at 201. In the present case, the length of time between the events in question and the witness identifications is an extraordinary 34–35 years. Such a lengthy duration of course imposes on the Court a duty to scrupulously examine the eyewitness identifications offered in this case. However, the Court feels that a Procrustean application of the specific guidelines for testing photographic identifications in more conventional criminal prosecutions is unwarranted in the present case. Careful consideration of the Supreme Court precedents in this area reveals that the central consideration is the reliability of the identification in light of all the circum-

stances. *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 55 L.Ed.2d 140 (1977). The Court concludes from the totality of facts in this case that the six eyewitness identifications of defendant as the "Ivan" known from Treblinka are reliable.

Defendant first argues that the photo album, Government's Exhibit 17, shown to Rosenberg, Lewkowicz, Epstein and Rajgrodzki is inherently suggestive and created a substantial risk of misidentification of the defendant.[27] It will be recalled, that Rosenberg viewed a minimum of seventeen photographs from this album, Rajgrodzki all forty-three photographs, Lewkowicz a minimum of eight photographs, and Epstein also a minimum of eight photographs, before the pretrial identifications were made.

Government's Exhibit 17 consists of forty-three black and white photographs of varying size and quality, affixed to ten cardboard pages. The defendant's visa picture, # 16, is located at the bottom left of the third page along with seven other photographs on the page. Photograph # 17 directly to the right of defendant's photograph is that of Fedor Fedorenko, the defendant in *U.S. v. Fedorenko*. Defendant argues that this page is suggestive for several reasons. First, defendant's photograph was placed next to that of Fedorenko who was the only other person other than the defendant of the forty-three individuals depicted in the photospread suspected of being at Treblinka. Next, defendant observes that photographs # 16 and # 17 are larger than the other photographs on the page and that the visual images on these pictures are clearer than those of the other pictures on the page. It should be noted that over half the other photographs in the album are as large or larger than photographs # 16 and # 17 and share comparable visual quality.

The Court concludes that whatever suggestiveness may be present on the page containing defendant's photograph in no way tainted the identifications of Rosenberg and Rajgrodzki. Both witnesses looked at a sufficient number of photographs of size and quality comparable to those found on the page containing defendant's photograph and both witnesses selected defendant's visa photograph with unequivocal certainty. The identifications of Lewkowicz and Epstein were similarly positive and unequivocal. However, the possibility that the alleged suggestive characteristics contributed to these identifications is heightened by the fact that, at a minimum, both witnesses may have viewed only the page containing defendant's photograph. Nonetheless, the Court does not find it necessary to determine the effects of the suggestiveness as unnecessary suggestibility alone does not require exclusion of the identification testimony. *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) An examination of the "totality of circumstances" in this case reveals the reliability of not only the identifications of Lewkowicz and Epstein, but also of the remaining witnesses.

It is uncontroverted that each of the witnesses had ample opportunity to view the individual known to them as "Ivan" at Treblinka. Each witness was stationed for extensive periods of time in camp 2 in close proximity to the gas chambers where Ivan worked. In addition, Rajchman, Rosenberg, and Epstein testified that they personally observed this individual commit atrocities at the camp. Rajgrodzki testified that Ivan once whipped him.

Thorough cross-examination of each witness failed to depreciate in any way the certainty of the identifications made by each witness. Each witness identified defendant as the Ivan known from Treblinka on the basis of defendant's visa photograph. In addition, four of five witnesses shown defendant's picture on the Trawniki card identified him. The fifth, Rajchman, who failed to select the photograph at a pretrial session did so in open court. There is no indication that the investigators conducting

27. The Court is aware that this same photo album was subjected to scrutiny in *U.S. v. Fedorenko*, 455 F.Supp. 893, 906 (S.D.Fla.1978) and was deemed impermissively suggestive. The photospread was compiled by Israeli police and contains photographs of individuals against whom war crime accusations have been made. (Tr. 1153)

the identification procedures in any way suggested the identification of defendant's photographs. Nor is there any indication that world wide media coverage of this case containing alleged photographs of defendant prejudiced the identifications made by any witness.

Finally, in identifying defendant as "Ivan" each of the witnesses offered a physical description of the Ivan they observed which is consistent with that of the defendant. Admittedly, these descriptions were given by the witnesses after they had viewed the photospreads. Comparison of the testimony reveals a few particular discrepancies but it may be fairly said that the following general description was offered by all the witnesses: young man, 22–25 years of age, tall, strong physique, dark or dark blonde hair.[28] The witnesses testified that the uniform worn by this individual was either black or dark brown. The use of both color types at Treblinka is likely.[29] It is important to note that several witnesses recalled features of Ivan which correspond to those of defendant and which are not recognizable from the photographs. For instance, Rosenberg correctly testified that Ivan's eyes were "grey" and Lewkowicz described Ivan's eyes as "light". (Tr. 535; 625) Rajgrodzki and Lewkowicz testified that Ivan's hair was dark blonde, which is the color indicated by the Trawniki card, Government's Exhibit 6. (Tr. 595, 633)

Defendant offered the testimony of one witness, Fedor Fedorenko, who was present at Treblinka during the years 1942–1943 as a Ukrainian guard. (Deposition of Fedor Fedorenko, March 7, 1981) Fedorenko was shown both defendant's Trawniki photograph and visa photograph and denied ever seeing the defendant at Treblinka. The Court finds that the testimony of Fedorenko is not credible. Fedorenko testified at his own trial that an "Ivan" operated the motors of the gas chambers. (Fedorenko Trial Transcript at pages 1458–59) However, at his deposition, Fedorenko claimed that he did not know such an Ivan or remember his appearance. (Deposition at pages 17–18; 22–23; 62–63; 66) Fedorenko also testified that he was never in camp 2 at Treblinka or near the gas chambers. (Deposition at page 38) If this statement is accurate, Fedorenko would not have had the opportunity to observe the individual known as Ivan and so his failure to identify defendant's photographs is not surprising.[30]

In conclusion, based on an examination of all the factual circumstances the Court finds that none of the pretrial photographic identifications was so impermissibly suggestive as to give rise to a likelihood of misidentification and deny defendant due process of law. Since the Court finds both the pretrial and trial photographic identifications to be reliable, it must conclude that defendant was present at Treblinka in 1942–1943.[31]

D. Defendant's Testimony

Defendant has denied ever serving the Germans as a guard at Trawniki, Treblinka, or any other location in 1942–1943. Defendant testified that after being captured by the Germans in the Crimea, he was

28. Horn, Tr. 307–308; Rajchman, Tr. 473–475, 495; Rosenberg, Tr. 515–535; Rajgrodzki, Tr. 595–599; Lewkowicz, Tr. 612–625; Epstein, Tr. 653.

29. Dr. Scheffler testified that the guards at Trawniki received black uniforms originally and these were replaced later on by khaki or earth brown uniforms. (Tr. 116A) *See also* testimony of Schaefer (Tr. 192)

30. The cross-examination of this witness revealed numerous inconsistencies which further detracted from his credibility.

31. Because the Court has found that defendant was present at both Trawniki and Treblinka, it is not necessary to determine whether defendant was ever present at the concentration camp of Sobibor, Poland. Government's Exhibit 6 shows that the defendant was detailed to Sobibor on March 27, 1943, but the circumstances and duration of this transfer are unknown. There was no eyewitness testimony presented that defendant served at Sobibor, although defendant stated on his application for immigration visa (Government's Exhibit 21) that he was in Sobibor from 1934–1943, working as a farmer. Defendant now admits that he lied on his visa application and claims that he was never at Sobibor during this period.

taken first to a POW camp at Rovno, in the Western Ukraine sometime in 1942 or 1943. (Tr. 1068) From Rovno, defendant indicates he was taken to a POW camp at Chelm, Poland, and remained here "until about 1943 or 1944." (Tr. 1069) The defendant testified that in 1944 he was transported to Graz, Austria, where he remained for three or four weeks. (Tr. 1069–1071) At Graz, defendant admitted that he was placed in a unit of the Ukrainian National Army, commanded by a General Shandruk, and organized by the Germans for later service against the Russians. (Tr. 1095–1096) According to defendant, although he was drilled in a unit, he never received a gun and never engaged in any military action while at Graz. (Tr. 1071; Deposition of February 20, 1980, at 66) While at Graz, defendant admitted that he received a blood group tattoo on the inside of his upper left arm. (Tr. 1070)

Defendant testified that he was transferred from Graz to a location known to him as Oelberg, Austria. (Tr. 1071) Defendant was uncertain as to the correct spelling of this location and neither the defendant nor the Government could locate an "Oelberg" in Austria. Nevertheless, defendant testified that he remained at Oelberg from approximately November 1944 until May 1945.[32] Defendant stated that he was placed by the Germans in a Russian National Army unit assigned to guard a captured Russian general. (Tr. 1099–1103) Aside from this duty, defendant claimed he engaged in no other military action. Finally, the defendant testified that he cut off the blood group tattoo he received at Graz while at Oelberg since "tattoos weren't given in the Russian National Army." (Tr. 1105–1106)

The credibility of defendant's testimony is severely undercut by the existence of Government's Exhibits 5 and 6 and the testimony of the other six Treblinka survivors which cumulatively show that defendant was present at Trawniki and Treblinka in 1942–1943. The Government attacked the credibility of defendant's testimony in several other ways. Expert testimony revealed that it was unlikely defendant was at a POW camp in Chelm, Poland, in the fall of 1944 as his testimony would indicate since the Russians had driven the Germans from Chelm by July 1944.[33] (Ziemke, Tr. 1129–1132) Expert testimony also revealed that General Shandruk, the general defendant claimed commanded the Ukrainian National Army at Graz in 1944, was not designated as the general of the Ukrainian National Army until March 1945. (Tr. 1134–1136)

Finally, defendant's admission that he had a blood group tattoo on the inside of his left arm raises serious questions. Only persons affiliated with the German SS were given such tattoos and it is unlikely that ordinary Russian POWs would be so marked. (Scheffler, Tr. 36–38) The International Refugee Organization (IRO), an agency established by the United Nations after the war to process thousands of displaced persons, recognized the significance of such tattoos, presumably because they would disqualify an individual from receiving any IRO assistance:

> "1. Tattooings. Tattoomgs which will be of value to the Field Eligibility personnel will fall normally in three categories which will be described below. The Nazi Government as a result of its desire to categorize as far as possible all of its manpower, instituted the system of tattooing whereby the elite could be differentiated from the normal personnel as well as from the undesirable.
>
> "2. The various tattooing marks and their purposes were as follows:
>
> . . . . .

32. This chronology is derived from defendant's testimony that he was at Oelberg from 1944 until the week before the end of the war. (Tr. 1097) Germany surrendered to the Western Allies and Russia on May 8, 1945.

33. According to the testimony of Dr. Ziemke, the latest possible period during which the Germans would have kept a POW camp at Chelm, Poland was January 1944.

(b) Members of the S.S. and the Waffen S.S. were tattooed with a blood mark underneath the left armpit. This blood group mark matched the blood group mark to be found on the S.S. persons [sic] filed at the S.S. Headquarters in Berlin. Again, whether or not an individual Waffen S.S. member had a blood group mark depended on the exigencies of the war and whether the facilities were available for tattooing. Frequently it occurred that persons who were conscripted in the latter days of the war were not tattooed because of the chaotic situation at the time." [34]

The Government argues that such a tattoo is additional evidence that defendant served the German SS at Trawniki and Treblinka. The Court, being unable to determine the accuracy of the Government's argument with certainty, must nevertheless observe that evidence of the blood group tattoo raises a final, serious doubt about the defendant's testimony concerning his whereabouts during the war.

It is undisputed that following the war, defendant was taken by American forces to several camps and eventually he arrived in Regensburg, Germany, where he drove a truck in an American Army motor pool from 1947–1949. (Tr. 1073)

E. Defendant's Immigration

It is necessary to review briefly postwar immigration procedures which are pertinent to this action. Following the conclusion of the war, the Allied armies became the guardians of about 8,000,000 persons including those liberated from extermination camps, former prisoners of war, and thousands of other persons dislocated by the hostilities. By 1948, 7,000,000 of these uprooted persons had been repatriated leaving approximately 1,000,000 persons in the United States, British, and French zones of Germany, Austria and Italy. S.Rep.No.950, 80th Cong., 2d Sess., U.S.Code Cong. Service 2028, 2035 (1948). Many of these people lived in camps operated by the International Refugee Organization (IRO), an organization founded in 1946 to offer care and assistance to the dislocated masses and to provide for their eventual repatriation. Part two of Annex I of the IRO Constitution, 62 Stat. 3037, 3051 (1946) provided that certain persons would *not* be the concern of the IRO:

"1. War criminals, quislings and traitors.

"2. Any other persons who can be shown:

(a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or

(b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations."

. . . .

In 1948, Congress enacted the Displaced Persons Act (DPA) to enable European refugees driven from their homelands to emigrate to the United States. Section 2(b) of the DPA, 62 Stat. 1009, defined a displaced person eligible for emigration by incorporating the definition of "refugees or displaced persons" contained in Annex I to the IRO Constitution, *supra*. A person seeking a visa to the United States under the DPA normally followed a tripartite procedure.

First, a refugee filed an application for IRO assistance. The applicant was interviewed by an IRO eligibility officer who elicited information about the applicant's personal and family history, with especial emphasis on the war years, in order to determine whether the applicant was qualified under the IRO constitution, *supra*. (Tr. 700–702) The primary source of background information inevitably came from the applicant himself. If qualified, the refugee was granted IRO assistance.

34. *Manual for Eligibility Officers*, International Refugee Organization (IRO), at 115 (Govt. Ex. 1 attached to deposition of Daniel Segat, January 16, 1981) [henceforth IRO Manual]. Such a tattoo would be important as Annex I to the IRO Constitution, Part II, provided that persons who voluntarily assisted the enemy forces during the war would not be the concern of the IRO. 62 Stat. 3037, 3052 (1946)

Next, the refugee sought to qualify as an eligible displaced person under the DPA. The Displaced Persons Commission was the agency in charge of implementing the DPA. Under sections 2(b) and 10 of the DPA, 62 Stat. 1009, 1013, positive eligibility under the IRO was a preliminary requisite. The IRO file containing the history of the particular refugee and the certification of IRO status was forwarded to the Displaced Persons Commission. A case analyst then made certain security checks on the background of the applicant to determine eligibility under the DPA and issued a report certifying that the applicant was a person eligible for admission into the United States under the DPA. (Tr. 787–791)

Finally, the case analyst forwarded an applicant's file, containing both the preliminary IRO certification and the Displaced Persons Commission report to the appropriate American Consulate. The applicant appeared at the consular office and was matched with an interpreter-typist, who assisted the applicant in filling out the application for an immigration visa. A vice-consul at the American Consulate reviewed the visa application and other documents in the applicant's file. The vice-consul then interviewed the applicant and, at a minimum, reviewed with the applicant all the entries which appeared on the visa application. If the vice-consul determined that the applicant met the criteria of the DPA and other immigration laws, he issued the applicant a visa.[35] (Tr. 844–847)

In 1948 defendant initiated procedures to immigrate to the United States. He first applied for assistance to the IRO. In his IRO application (Exhibit 3 attached to defendant's deposition, February 20, 1980), defendant neither disclosed his service with the German SS at Trawniki and Treblinka, nor did he reveal, as he testified at trial, that he had served in a German military unit in 1944–1945. Questions 10 and 11 of the IRO application asked for defendant's place of residence and employment for the last twelve years. Defendant answered that from 1937–1943 he worked in Sobibor, Poland, and from 1943–1944 in Pilau, Germany. Defendant now admits that these statements were false. (Deposition of defendant, February 20, 1980, at 39)

In October 1950, defendant applied to the Displaced Persons Commission for consideration to immigrate to the United States. Defendant made the same misrepresentations, concealing his service with the German SS and the German military. Page three of the report issued by the Displaced Persons Commission, Government's Exhibit 20, concluded based upon the information furnished by the defendant that he had been a farmer at Sobibor, Poland from 1936 to 1943; worked at the harbor of Danzig, Germany from 1943 until May 1944; and worked in Munich, Germany from May 1944 to May 1945.[36]

Defendant filed his application for an immigration visa on December 27, 1951. (Government's Exhibit 21) Defendant admits he misrepresented under oath his whereabouts and activities during the war. (Tr. 1084–1086) Defendant listed his residences during the period in question as follows: 1934–1943 Sobibor, Poland; 1943-September 1944 Pilau/Danzig, Germany; September 1944-May 1945 Munich, Germany. In addition, defendant misstated his

35. Section 10 of the DPA was amended by § 9 of the Act of 1950, 64 Stat. 219, 225–226 (1950) to clearly allow the vice-consul to make the final determination of eligibility of applicants, both under the DPA and under the general immigration laws. Conference Report No. 2187, 81st Congress, 2d Sess., U.S.Code Cong. Service 2513–2523 (1950). Section 9 provided: "no person shall be issued an immigration visa or be admitted into the United States under this Act if the consular officer or the immigrant inspector knows or has reason to believe that the alien is subject to exclusion from the United States under any provision of the immigration laws or (1) is not a displaced person and an eligible displaced person, or (2) is not eligible under the terms of this Act ...."

36. The case analyst, Leo Curry, responsible for submitting this report for the Displaced Persons Commission testified on behalf of the Government at trial. (Tr. 779 *et seq.*)

birthplace as Kiev, U.S.S.R. and his nationality as Polish/Ukrainian.[37]

Defendant testified that he made these misrepresentations during his immigration to avoid being repatriated to the U.S.S.R. because of his prior service in the Russian army. (Tr. 1081–1082)

Defendant was granted a visa and entered the United States for legal residence on February 9, 1952.

F. Defendant's Naturalization

Defendant applied to the Immigration and Naturalization Service (I.N.S.) for naturalization as an American citizen in 1958.[38] Defendant submitted his application to file petition for naturalization. (Government's Exhibit 25A) In processing defendant's application, the I.N.S. checked his immigration and visa file to verify that defendant's entry into the United States was lawful, as lawful entry is a prerequisite for naturalization. (Tr. 870–871; 885–886) An interview was conducted with defendant by a naturalization examiner on August 12, 1958, to review the contents of defendant's naturalization application. This interview was conducted under oath. At the time defendant again stated that the contents of his naturalization application were true, including his answer to question 23, in which he denied having given "false testimony for the purpose of obtaining any benefits under the immigration and naturalization laws."

On November 14, 1958, the United States District Court for the Northern District of Ohio, without knowledge of defendant's true activities and whereabouts during the war, naturalized the defendant. At his naturalization, defendant changed his first name from "Ivan" to "John."

37. The vice-consul who processed defendant's visa application, Harold Henrikson, testified on behalf of the Government at trial. (Tr. 839 *et seq.*)

38. Donald Pritchard, a former naturalization examiner in the Cleveland office of I.N.S. during the period in which defendant was naturalized, testified concerning the naturalization process. (Tr. 866 *et seq.*)

CONCLUSIONS OF LAW

Section 340(a) of the Immigration and Nationality Act, 8 U.S.C. § 1451(a), provides that a naturalized citizen may be denaturalized if the naturalization was "illegally procured" or "procured by concealment of a material fact or by willful misrepresentation." The Government argues that defendant can be denaturalized under both standards.

A. Citizenship Illegally Procured

[4, 5] Congress has been entrusted by the Constitution with the authority to establish the terms and conditions upon which aliens can be naturalized.[39] Consequently, no alien has the right to naturalization unless all the statutory requirements have been complied with. *Maney v. U. S.*, 278 U.S. 17, 22, 49 S.Ct. 15, 73 L.Ed. 156 (1928); *U. S. v. Ginsberg*, 243 U.S. 472, 475, 37 S.Ct. 422, 425, 61 L.Ed. 853 (1917). Naturalization is "illegally procured" if some statutory requirement which is a condition precedent to naturalization is absent at the time the petition for naturalization is granted. H.R. Rep.No.1086, 87th Cong., 1st Sess. 39, *reprinted in* U.S.Code & Ad.News 2950, 2983 (1961).

When defendant filed his petition for naturalization in 1958, § 318 of the Immigration and Nationality Act, 8 U.S.C. § 1429, provided that no person could be naturalized unless he had been lawfully admitted to the United States for permanent residence.[40] A valid immigration visa was necessary to obtain lawful residence in this country.[41]

39. Congress is empowered to "establish an uniform Rule of Naturalization" under Article I, Section 8, Clause 4.

40. *See also* § 316(a), 8 U.S.C. § 1427(a): "No person, except as otherwise provided in this title, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, *after being lawfully admitted for permanent residence*, ..." (emphasis added)

41. At the time of defendant's immigration,

The Court views the recent Supreme Court decision, *Fedorenko v. U. S.*, 449 U.S. 490, 101 S.Ct. 737, 66 L.Ed.2d 686 (1981), as dispositive of the issue of whether defendant illegally procured his citizenship. In that case, Fedorenko, an admitted guard for the German SS at both Trawniki and Treblinka, concealed this information from immigration officials and obtained a visa. The Supreme Court concluded that Fedorenko's failure to disclose the true facts about his service as an armed guard at Treblinka would have made him ineligible as a matter of law for a visa under the Displaced Persons Act. The Court's interpretation of several provisions of the DPA is relevant to the instant action.

Section 10 of the DPA, 62 Stat. 1013, provided: "[a]ny person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." The Supreme Court interpreted this provision to apply to willful misrepresentations of "material" facts and indicated that "at the very least, a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa." *Id.* 101 S.Ct. at 749. Fedorenko's failure to reveal his past service as an armed guard at Treblinka was found by the Court to be material since, under § 2(b) of the DPA and the IRO Constitution, service as a concentration camp guard, whether voluntary or involuntary, would have prevented anyone from obtaining a visa. The DPA made all those who "assisted the enemy in persecuting civil populations" ineligible for visas. *Id.* at 748–751. Since Fedorenko had failed to satisfy a statutory prerequisite to the acquisition of citizenship—lawful admission for permanent residence in this country—his citizenship was revoked as "illegally procured." *Id.* at 752.

[6] This Court previously concluded, *supra*, that the Government has shown by clear and convincing evidence that defendant served the German SS as a guard at both Trawniki and Treblinka in 1942–1943 and willfully misrepresented this service on his visa application. Harold Henrikson, the vice-consul responsible for processing defendant's visa application, testified that if an applicant had told him either (1) that he had served in a training camp such as Trawniki run by the German SS for the purpose of training guards for duties at extermination camps or (2) that he had served as a guard at an extermination camp, Henrikson would have denied such individual a visa under the DPA.[42]

In light of this testimony and the Supreme Court's opinion in *Fedorenko*, this Court must conclude that defendant's failure to disclose his service under the German SS at Trawniki and his later service as an

§ 13(a) of the Immigration Act of 1924, ch. 190, 43 Stat. 153, 161 (repealed in 1952) provided that "[n]o immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa...." Courts interpreting § 13(a) held that a visa obtained through a material misrepresentation was not valid. *Ablett v. Brownell*, 240 F.2d 625, 629 (D.C.Cir. 1957); *U. S. v. Shaughnessy*, 186 F.2d 580, 582 (2d Cir. 1951).

42. "Q. If an applicant stated during an interview that he was formerly a Soviet soldier, captured by the Germans, taken to a prisoner of war camp and thereafter recruited and trained at a training camp run by the Nazi SS for the purpose of training guards for duties at extermination camps and for use in other operations against the Jewish population, what effect, if any would this have on his eligibility to obtain a visa?
"A. I would deny the visa.
"Q. Upon what do you base this opinion?
"A. Well, my general recollection of the Displaced Persons Program and of the Displaced Persons Act is that it was not intended to benefit those who had aided, abetted and helped the Germans in their subjugation of Europe and their persecution of civilian population, and I would think that anybody who was connected with the SS in any way would be, in my opinion, ineligible for a visa.
"Q. Given the same facts except this time the individual stated to you he worked under the SS in an extermination camp.
"A. That would be a stronger case.
"Q. What would have happened?
"A. He would have been denied a visa." (Tr. 854–855)

armed guard at Treblinka were material misrepresentations under §§ 2(b) and 10 of the DPA. Since defendant was ineligible for a visa under the DPA, his citizenship must be revoked as "illegally procured" because he failed to satisfy a statutory prerequisite of naturalization.[43]

The Court rejects defendant's argument that he gave false statements on his visa application because he was afraid of repatriation to the Soviet Union.[44] The Fifth Circuit in *Fedorenko*, 597 F.2d 946, 953 (1979), rejected a similar defense and the Supreme Court, although not directly addressing the issue, opined that the fact that Fedorenko gave false statements because he was motivated by fear of repatriation "indicates that he understood that disclosing the truth would have affected his chances of being admitted to the United States and confirms that his misrepresentation was willful." 101 S.Ct. 748 at n.26. The Supreme Court reaffirmed prior cases which rejected lower court efforts to moderate the statutory mandate of Congress in denaturalization proceedings. "[O]nce a district court determines that the Government has met its burden of proving that a naturalized citizen obtained his citizenship illegally or by willful misrepresentation, it has no discretion to excuse the conduct." 101 S.Ct. 753.[45]

B. Naturalization Obtained by Concealment Of A Material Fact Or By Willful Misrepresentation

[7] The Court alternatively finds that defendant's certificate of naturalization

43. The Court's conclusion that defendant illegally procured his naturalization may be reached in a less elliptical manner. Section 13 of the DPA was amended in 1950, 64 Stat. 227, to provide: "No visa shall be issued under the provisions of this Act as amended ... *to any person who advocated or assisted in the persecution of any person because of race, religion, or national origin*, or to any person who has voluntarily borne arms against the United States during World War II." (emphasis added) Leo Curry, the case analyst who granted defendant status under the DPA, testified that if defendant had disclosed either his service at Trawniki or Treblinka, he would have been found ineligible by the DPA and refused admission to the United States under § 13. (Tr. 796–797)

44. After the war, there was a sharp divergence of viewpoint between the U.S. Government and the U.S.S.R. as to the repatriation policy to be followed concerning displaced persons born in areas subject to the governmental authority of the U.S.S.R. The U.S.S.R. demanded that the other Allied powers forcibly repatriate these persons while the U.S. opposed any such efforts. H.R.Rep.No.1854, 80th Cong., 2d Sess. 7 (1948). Testimony at trial indicated that forcible repatriation did occur early after the war, from May 22-September 30, 1945 when over two million persons were repatriated to the U.S.S.R. (Tr. 1045–1047) A former eligibility officer for the IRO testified that incidents of forcible repatriation also occurred until 1948. (Tr. 976) It is undeniable, therefore, that certain fears concerning possible forcible repatriation did permeate the refugee camps. However, Dr. Edward O'Connor, formerly a commissioner on the Displaced Persons Commission, indicated that it was the policy of the U.S. Government to oppose forcible repatriation and that such repatriation was stopped by a Presidential proclamation in the fall of 1945. (Tr. 1047, 1057). The IRO Constitution also allowed for individual freedom of choice with respect to repatriation, and a refugee could avoid being repatriated by stating a valid objection to returning to his country of origin. Annex I, Part I, Section C of IRO Constitution, 62 Stat. 3050 (1946). Finally, defendant himself admitted that after 1947 his fear of being forcibly repatriated to the Soviet Union had subsided. (Tr. 1081) Defendant did not fill out his IRO application until 1948 and his visa application until 1951.

45. The Court also finds that defendant illegally procured his citizenship because he lacked the good moral character required under Section 316(a) of the Immigration and Nationality Act, 8 U.S.C. § 1427(a). In determining good moral character, "the court shall not be limited to the petitioner's conduct during the five years preceding the filing of the petition, but may take into consideration as a basis for such determination the petitioner's conduct and acts at any time prior to the period." 8 U.S.C. § 1427(e). Specifically, the Court concludes that defendant's misrepresentations on his visa application concerning his service with the German SS at Trawniki and Treblinka precluded him from establishing good moral character under Section 101(F), 8 U.S.C. § 1101(f): "No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is or was—... (6) one who has given false testimony for the purpose of obtaining any benefits under this Act; ...."

must be canceled under section 340(a), 8 U.S.C. § 1451(a) as it was procured by "concealment of a material fact or by willful misrepresentation." Denaturalization may be invoked for concealment of material facts or willful misrepresentation of material facts. *Costello v. U. S.*, 365 U.S. 265, 272 at n.8, 81 S.Ct. 534, 538, 5 L.Ed.2d 551 (1961). The definition of "materiality" under § 1451(a) was posited by the Supreme Court in *Chaunt v. U. S.*, 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed.2d 120 (1960). In *Chaunt*, the Court stated that to prove misrepresentation or concealment of a material fact the Government must prove by clear and convincing evidence *either* (1) that facts were suppressed which, if known, would have warranted denial of citizenship *or* (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship. *Id.* at 355, 81 S.Ct. at 150.[46]

None of the questions in defendant's 1958 application for citizenship (Govt. Ex. 25A) explicitly required defendant to divulge his service at Trawniki and Treblinka in 1942–1943. However, question 23 inquired whether defendant had "given false testimony for the purpose of obtaining any benefits under the immigration and nationality laws." In reply, defendant falsely answered "no." Had defendant answered in the affirmative, further elaboration was required.[46A]

By denying he had ever given false testimony in obtaining his visa, defendant suppressed facts concerning his whereabouts during the war, which, if known, would have warranted denial of his petition for naturalization. A former naturalization examiner testified that when an application for naturalization is filed, the first step is to determine whether the applicant was lawfully admitted for permanent residence. (Pritchard, Tr. 870) As previously indicated, defendant's service for the German SS at Trawniki and Treblinka disqualified him for lawful permanent residence under the Displaced Persons Act. Defendant's false answer to question 23 therefore suppressed the existence of these disqualifying facts which, if disclosed, would have resulted in a denial of his petition for naturalization.[47] Consequently, defendant's naturalization must also be revoked because it was procured by a willful misrepresentation of material facts.[48]

46. The Supreme Court recently declined to address a problem which has arisen concerning the interpretation and viability of the second *Chaunt* standard of materiality. *Fedorenko v. U. S.*, 449 U.S. 490, 101 S.Ct. 737, 753 at n.40, 66 L.Ed.2d 686 (1981). At issue is whether the Government must always demonstrate the existence of disqualifying facts—facts that themselves would warrant denial of citizenship—in denaturalization actions under § 1451, or whether the Government need only prove that disclosure of the true facts would have led to an investigation that might have uncovered other facts warranting denial of citizenship. *Compare U. S. v. Rossi*, 299 F.2d 650, 652–53 (9th Cir. 1962) *with U. S. v. Fedorenko*, 597 F.2d 946, 950 (5th Cir. 1979); *Kassab v. I.N.S.*, 364 F.2d 806, 807 (6th Cir. 1966); *U. S. v. Oddo*, 314 F.2d 115, 118 (2d Cir.), *cert. den.*, 375 U.S. 833, 84 S.Ct. 50, 11 L.Ed.2d 63 (1963); *Langhammer v. Hamilton*, 295 F.2d 642, 648 (1st Cir. 1961).

46A. When the applicant lies in response to a direct question, his deception is covered by the "willful misrepresentation" language of the statute. 3 Gordon and Rosenfield, Immigration Law and Procedure § 20.4b, at 20–14 (1980).

47. Defendant's false answer to question 23 would also have made him ineligible for citizenship since his service with the German SS at Trawniki and Treblinka and the concealment of this service on his visa application, if disclosed at the time defendant filed his application for naturalization, would have revealed that defendant lacked the good moral character required by 8 U.S.C. §§ 1101(f) and 1427(a).

48. The Court finds it unnecessary to decide whether defendant's admitted service in German organized Russian and Ukrainian military units would, considered alone, also justify denaturalization. The defendant testified that he was involuntarily conscripted into these units and never engaged in combat while a member of the units. Section 2(b) of the DPA, defining "displaced person" in reference to the IRO Constitution, specifically excluded individuals who had "voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations." Annex I, Part II, IRO Constitution, 62 Stat. 3051–3052. In 1950, § 13 of the DPA was amended to include a provision disqualifying from immigration "any person who has voluntarily borne arms against the United States

MOTION FOR NEW TRIAL

[8] Following the trial of this matter but before the Court rendered its decision, defendant requested that a new trial be granted. Defendant's motion for a new trial, styled as a motion for a mistrial, essentially argues that the Government failed to comply with certain pretrial discovery requests and consequently defendant was deprived of information necessary for his defense. On May 4, 1981, the Court held a hearing on defendant's motion. Defendant's allegations have been carefully reviewed. The Court concludes that defendant's motion for a new trial should be denied.

Defendant's request for a new trial is based on a letter received from Government counsel at the conclusion of the trial.[49] The letter indicated that shortly before trial, the Government received statements of five witnesses from the U.S.S.R. The witnesses were interviewed by Soviet authorities at the request of the Government although Government counsel did not speak directly to the witnesses or have any personal contact with them. All five witnesses were present at the Trawniki training camp at various times in 1942.[50] One of the witnesses, Nikolai Dorofeev, stated that he remembered the defendant from Trawniki and identified two photographs of the defendant. The remaining witnesses had no recollection of the defendant. The letter explained that the statements had been received just prior to trial and that it had been impossible to obtain either the live or deposition testimony of the Soviet witnesses. Government counsel noted he was not requesting that the statements be made part of the trial record, but rather he was informing defendant's counsel of the existence of the statements "so that the record of discovery in this case is complete."

Defendant complains that the information offered by the Government in this letter was previously requested in various interrogatories and that the Government had a duty to provide the names of these Soviet witnesses seasonably, before trial, by supplementing its prior answers to interrogatories under Fed.R.Civ.P. 26(e)(1)(A).[51] Specifically, question one of defendant's first set of interrogatories, January 24, 1978, required the Government to state the name and address of every person known to the Government who had any knowledge of the alleged actions of the defendant.

Ordinarily, the duty to supplement responses under Rule 26(e) concerning the identity and location of persons having knowledge of discoverable matters arises "because of the obvious importance to each side of knowing all witnesses and because information about witnesses routinely comes to each lawyer's attention." Adviso-

during World War II." 64 Stat. 227. Legislative history shows that this amendment was meant to apply only to aliens who voluntarily bore arms against the United States on the western front. Conf.Rep.No.2187, 81st Cong., 2d Sess. 16, *reprinted in* U.S.Code Cong. Service 2513, 2524 (1950). *See also*, 96 Cong.Rec. 8221 (1950). Under either provision, the major touchstone was the "voluntary" nature of the service performed. The simple assertion by an applicant, either seeking IRO eligibility or displaced person status, that he served involuntarily in a German unit raised serious questions because the applicant bore the burden of proof concerning the "voluntariness" of his service. *See* IRO Manual, *supra*, at 6; § 10 of the Displaced Persons Act, as amended, 62 Stat. 1013. Expert testimony of immigration officials uniformly indicated that an applicant's unsubstantiated contention of involuntary service was disbelieved. (Tr. 709–710; 797–801; 859–860)

49. A copy of the letter was also forwarded to the Court.

50. Two of the witnesses later served at the Treblinka labor camp. This camp was a separate installation located several kilometers away from the extermination camp where defendant allegedly was present. *See* statements of S. E. Kharkovsky and A. N. Kolgushkin.

51. Fed.R.Civ.P. 26(e)(1)(A) provides in pertinent part:

"A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, ..."

ry Committee's Note, 48 F.R.D. 508 (1969). The Court is not insensitive to the additional consideration in the instant case that the defendant was necessarily dependent on United States governmental agencies for assistance in obtaining relevant information from Soviet authorities.

The Court finds that the Government had a duty under Fed.R.Civ.P. 26(e)(1)(A) to disclose the identity of one witness, Nikolai Dorofeev, by supplementing its response to the defendant's 1978 interrogatory request. Dorofeev's statement reflects, at the least, a tentative recollection of the defendant from the Trawniki training camp. This case involves events which allegedly occurred in 1942–1943 with potential eyewitnesses scattered throughout the world. In cases of such an exceptional nature it is especially important that the Government strictly comply with specific discovery requests concerning the identity and location of witnesses with knowledge of facts related to the Government's allegations.[52] Careful scrutiny of the statements of the other Soviet witnesses reveals that only Dorofeev has any potential knowledge of the alleged actions of the defendant. The four remaining witnesses expressly denied knowing the defendant while at Trawniki and failed to identify photographs of the defendant. The Government did not, therefore, breach any duty under Rule 26(e)(1)(A) with respect to these four witnesses.

Defendant argues that he has been prejudiced by the Government's failure to seasonably supplement his discovery requests and is entitled to a new trial. Undoubtedly, the Court has discretion to ameliorate any prejudice caused by the Government's failure to supplement the defendant's discovery requests. 8 Wright & Miller, Federal Practice and Procedure § 2050 (1970). In this regard, it is appropriate to evaluate the quality of the potential evidence Dorofeev or the other Soviet witnesses might contribute in order to determine whether defendant's trial has been prejudiced to the extent alleged.[53] Certainly, evidence which is cumulative in nature or which merely affects, in some insignificant respect, the credibility of evidence already considered should not justify a new trial at this stage of the proceedings.[54]

The Court does not believe that the potential testimony of Dorofeev or of any of the other Soviet witnesses is of such a nature as to alter the outcome in the case. Defendant contends that the testimony of these Soviet witnesses might in some way discredit the authenticity of the Trawniki card, Government's Exhibits 5 and 6. The Court must reiterate that at no time during the trial was any evidence introduced which brought into question the authenticity of the Trawniki card. In fact, an examination of the statements taken from the Soviet witnesses tends to corroborate the existence of such identification cards and therefore the authenticity of Government's Exhibits 5 and 6. Three of the Soviet witnesses stated that upon entering the Trawniki camp a form was filled out which contained a photograph and biographical data of each soldier.[55] It is important to emphasize that

52. In finding that the Government breached its duty under Fed.R.Civ.P. 26 to supplement its prior discovery responses, the Court does not ascribe any sinister motivation to Government counsels' conduct. The Government asserted its belief that any duty it had to supplement its answers to the 1978 interrogatory was modified by defendant's subsequent interrogatories specifically seeking the identities of any Soviet witnesses whom the Government intended to depose or call as witnesses at trial. *See* question 4, defendant's fourth set of interrogatories, April 14, 1980.

53. Even though the Court has found that the Government need only have provided defendant with the identify of Dorofeev, in light of the exceptional circumstances in this case, the Court has also examined the statements of the remaining Soviet witnesses for any evidence which might mandate a new trial.

54. *Cf.* motion for a new trial under Fed.R.Civ.P. 59 on the basis of newly discovered evidence. *Thomas v. Nuss*, 353 F.2d 257, 259 (6th Cir. 1965); 6A Moore's Federal Practice ¶ 59.08[3], at 59–118 (2d ed. 1979).

55. *See* statements of S.E. Kharkovsky, A.N. Kolgushkin and V.V. Orlovsky. Defendant's suggestion that the identification forms also contained the soldier's fingerprints is not supported by the Soviet witnesses' statements.

the Government did not base its allegation that defendant served at Trawniki on eyewitness testimony. The Government's proof of defendant's service at Trawniki is documentary, Government's Exhibits 5 and 6, and the authenticity of these documents, although merely questioned by the defendant, has not been impugned by even a scintilla of evidence. On the other hand, the Government established by sufficient evidence that these documents are authentic.

Review of the remaining information contained in the five witness statements reveals evidence which simply corroborates the testimony offered by the Government at trial concerning the capture of Soviet soldiers on the eastern front, their placement in German POW camps such as Chelm and Rovno, the transfer of Soviet soldiers from these POW camps to the SS training camp of Trawniki, the nature of the Trawniki camp, and the use of Trawniki personnel by the Germans in various operations persecuting the Jewish population.

The Court concludes, therefore, that the defendant is not entitled to a new trial because of the Government's tardy revelation of Dorofeev and the other Soviet witnesses. An examination of the witnesses' statements reveals evidence which is cumulative and not of such character that would probably produce a different result on a new trial.[56]

Alternatively, the defendant requests a new trial for the following reason. After trial was completed, defense counsel obtained a copy of an affidavit of Chaim Sztajer, a survivor of the extermination camp at Treblinka. Sztajer, a resident of Australia, saw a photograph in a local newspaper of another individual who is presently confronted with denaturalization proceedings in the United States similar to the instant case.[57] On September 2, 1980, Sztajer submitted an affidavit for use in this other proceeding in which he stated that the photograph of the person he saw in the Australian papers was that of the man known to him at Treblinka as "Ivan."

Defendant charges the Government with failing to provide him with information of this apparent misidentification despite discovery requests for such information. Defendant's allegation, ominous at first glance, must be considered specious on closer examination. Defendant's fourth set of interrogatories, April 14, 1980, question 11, sought the names and addresses of each person who had viewed photospreads including a photograph of the defendant and who had failed to identify the defendant. In May 1980, the Government answered this interrogatory and provided defendant with the names and addresses of twelve survivors of Treblinka, including that of Chaim Sztajer. Defendant apparently never contacted Sztajer or sought additional discovery concerning information Sztajer might possess.

Consequently, the Court does not believe that the effects of defendant's lack of diligence in pursuing information offered at an earlier date should be visited upon the Government at this time. Defendant's motion for a new trial on this alternative ground is therefore denied.

CONCLUSION

For the reasons set forth above, the Court finds that the November 14, 1958 order of the United States Court for the Northern District of Ohio, admitting the defendant, John Demjanjuk, to citizenship of the United States of America, is hereby revoked and vacated and his Certificate of Naturalization, Number 7997497, is canceled on the grounds that such order and Certificate were illegally procured and were procured by willful misrepresentation of material facts under 8 U.S.C. § 1451(a). Accordingly, judgment will be entered in

56. In light of all the surrounding circumstances and for the reasons set forth above, the Court does not find it necessary to reopen the case to take the testimony of any of the five Soviet witnesses. 6A Moore's Federal Practice ¶ 59.-04[13], at 59–30 (2d ed. 1979).

57. Government counsel in the present litigation is also trial counsel in the other denaturalization proceedings referred to above.

favor of plaintiff United States of America and against defendant John Demjanjuk.

IT IS SO ORDERED.

Rachel WETHERILL, Plaintiff,

v.

UNIVERSITY OF CHICAGO, et al., Defendants.

No. 77 C 1434.

United States District Court, N. D. Illinois, E. D.

July 23, 1981.

Plaintiff brought a diversity action for injuries allegedly resulting from her mother's ingestion during pregnancy of the drug diethylstilbestrol. The District Court, Shadur, J., held that: (1) task force report on the drug was not admissible under the public record exception to hearsay rule, and (2) task force report was not admissible under exception to hearsay rule for investigative reports based on factual findings.

Ordered accordingly.

1. Evidence ⇐333(1)

Introduction of a public record is permissible only if it is made for matters within personal knowledge of public official making report or his agent or someone with duty to report matter to public official. Fed.Rules Evid. Rule 803(8), (8)(B), 28 U.S.C.A.

2. Evidence ⇐333(1)

In an action for injuries allegedly resulting from mother's ingestion during pregnancy of the drug diethylstilbestrol, a task force report on the drug DES was inadmissible under the public record exception to the hearsay rule since it was based on evidence from numerous nonofficial sources, many of whom obviously had no duty imposed by law to report such information and inasmuch as recommendations of report were based on assessment of all information gathered, without differentiating between matters that were and were not subject of legal duty. Fed.Rules Evid. Rule 803(8), (8)(B), 28 U.S.C.A.

3. Evidence ⇐333(1)

In an action for injuries allegedly resulting from mother's ingestion during pregnancy of the drug diethylestilbestrol, a task force report on the drug was inadmissible under the exception to hearsay rule for investigative reports based on factual findings in that the task force never undertook nor intended to undertake a factual investigation on the effects of the drug. Fed. Rules Evid. Rule 803(8), (8)(C), 28 U.S.C.A.

Paul F. Stack, Jacqueline Lustig, Stack & Filpi, Chicago, Ill., for plaintiff.

Richard C. Bartelt, Max E. Wildman, Kay L. Schichtel, Wildman, Harrold, Allen & Dixon, Chicago, Ill., Lane D. Bauer, Steven C. Parrish, Anne E. Goos, Shook, Hardy & Bacon, Kansas City, Mo., for Eli Lilly & Co.

John Cadwalader Menk, John Cadwalader Menk & Associates, James W. Gladden, Jr., Mayer, Brown & Platt, Chicago, Ill., for University of Chicago.

MEMORANDUM OPINION AND ORDER

SHADUR, District Judge.

Rachel Wetherill ("Wetherill") brings this diversity action for injuries allegedly resulting from her mother's ingestion during pregnancy of the drug diethylstilbestrol ("DES"). In 1978 the United States Department of Health, Education and Welfare ("HEW," now the Department of Health and Human Services) published a report (the "Report") prepared by an ad hoc task force established to study the effects of DES. Wetherill has moved in limine for an order holding the Report admissible under Fed.R.Evid. ("Rule") 803(8). For the reasons stated in this memorandum opinion and order that motion is denied.

The Buchanan Aggravation

By PHILIP SHENON
Special to The New York Times

WASHINGTON, Feb. 18 — Patrick J. Buchanan, the White House director of communications, has been criticized before, but perhaps never with such passion.

"Great numbers of people are asking themselves: Why is Pat Buchanan so in love with Nazi war criminals?" said Allan A. Ryan Jr., a former Justice Department prosecutor.

Elizabeth Holtzman, the Brooklyn District Attorney, said: "The implications of Buchanan's comments are that we will support the anti-Communists no matter what they've done. We should remember that Hitler was anti-Communist, too."

Along with many Jewish spokesmen, they are upset over Mr. Buchanan's efforts to block the deportation of some East European émigrés accused of atrocities in World War II.

Mr. Buchanan has joined with émigré spokesmen who argue that several recent deportation cases are based on questionable evidence, much of it supplied by the Soviet Union, and that the accused should be tried in the West, with adequate due process.

The New York Times

Patrick J. Buchanan

He has taken a very public stand despite warnings that it could harm President Reagan and even raise ugly questions about his own sensitivity to Jewish concerns.

"It's does bring me aggravation," Mr. Buchanan said today. "I just felt that you have to provide a voice for those who don't have a voice, and these people didn't have one."

He said he had frequently been accused of anti-Semitism.

Mr. Buchanan, who has said that he will leave the Government shortly, last month urged Attorney General Edwin Meese 3d to meet with groups trying to block the deportation of Karl Linnas, a Long Island man who has been accused of running a Nazi concentration camp in Estonia in which thousands were murdered.

Mr. Linnas, whose final appeal was turned down by the Supreme Court last December, is facing deportation to the Soviet Union, which annexed Estonia in 1940.

To an extent, Mr. Buchanan's involvement in the case reflects his antipathy toward the Soviet Union, which supplied much of the evidence used against Mr. Linnas and others recently charged with war crimes.

Questions About Evidence

"I do have questions about the quality of the Soviet evidence," he said. "The Soviets have forged documents before, and have falsely accused American citizens."

His argument has drawn wide support in the émigré community.

"Buchanan is a man of principle," said Mari-Ann Rikken, vice president of the Coalition for Constitutional Justice, a group made up largely of East European émigrés and their families.

"Almost all of these cases use Soviet evidence," she said. "I totally agree with what he has to say about the inappropriateness of the Soviet Union as a partner in the cases.

"On one hand we pillory the Soviets for not permitting Jews to emigrate and beating them up when they protest, and on the other we think it's perfectly appropriate to take the results of a Soviet show trial and deport a man to his death."

But Rabbi Marvin Hier, dean of the Simon Wiesenthal Center in Los Angeles, questioned whether Mr. Buchanan had taken his anti-Communist stand too far.

"The fact of the matter is that Pat Buchanan does not want the United States to search for Nazi war criminals if the war criminals committed their crimes in the territory of the Eastern bloc," he said.

In an article last September in The Washington Post, Mr. Buchanan defended John Demjanjuk, a retired American auto worker who is now on trial in Israel. He is accused of torturing Jews while working as a guard, nicknamed Ivan the Terrible, at the Treblinka death camp in Poland.

According to Mr. Buchanan, Mr. Demjanjuk is a victim of mistaken identity.

Several Treblinka survivors, he said, had been unable to identify Mr. Demjanjuk, while others said Ivan the Terrible had been slain in an uprising in the camp. Perhaps more important, Mr. Buchanan said, a Nazi identification card that placed Mr. Demjanjuk at a camp used to train Treblinka guards might be a forgery by the K.G.B.

"I have come to believe that John Demjanjuk is not the bestial victimizer of men, women and children of the Treblinka killing ground but a victim himself of a miscarriage of justice," Mr. Buchanan wrote. "John Demjanjuk may be the victim of an American Dreyfus case."

> 'Pat Buchanan is going to bat for any Nazi war criminal in the United States.'
>
> *Allan A. Ryan Jr.*

Mr. Buchanan was careful to note that his views were not necessarily those of the Reagan Administration.

At the Justice Department and among Jewish spokesmen, there is concern that Mr. Buchanan is trying to undercut the work of department's Office of Special Investigations, a team of prosecutors who specialize in war crimes.

At the same time, they say, Mr. Buchanan might be doing political damage to the Administration.

"Buchanan is no help," said one Federal law-enforcement official who spoke on condition of anonymity. "It appears he's trying to shut down O.S.I."

The Office of Special Investigations brought the cases against Mr. Linnas and Mr. Demjanjuk.

Neal Sher, director of the office, declined to comment on Mr. Buchanan and his efforts, except to note that Mr. Buchanan began criticizing the office several years ago, before he joined the Administration, in his syndicated newspaper column.

Mr. Ryan, a former director of the office who helped prosecute Mr. Demjanjuk, was not so cautious in discussing Mr. Buchanan.

"Pat Buchanan is going to bat for any Nazi war criminal in the United States," he said. "I would be very surprised if anybody in the White House is thrilled with what he's doing."

'Not Surprising'

Ms. Holtzman, who introduced legislation while in Congress that resulted in the deportation of war criminals, said Mr. Buchanan "is trying to sabotage this effort."

"In a way it's not surprising," she said of his recent efforts in the Linnas case. "But it's still outrageous."

Mr. Buchanan denied he was trying to eliminate the Office of Special Investigations. Instead, he said he wanted the Justice Department to continue with the prosecutions, but to handle them in American courtrooms, not seek deportations.

"My view is that, if you're going to have the Justice Department with all that firepower prosecuting some of these people, let's have these trials in the United States," he said.

"Soviet justice," he added, "is an oxymoron."

Following the teaching of *Holloway* this court cannot speculate from the record whether Wilson was or was not prejudiced by the joint representation at the preliminary hearing. In the absence of inquiry, prejudice must be presumed. When a defendant is represented by an attorney with conflicting interests at trial or during another "critical stage" of the criminal proceedings, "reversal is automatic." 435 U.S. at 489, 98 S.Ct. at 1181.[4]

The petitioner has established a violation of his Sixth Amendment right to the assistance of counsel, and a writ of habeas corpus will issue.

What proceedings should follow the issuance of the writ and the vacation of the convictions is not made clear by *Holloway* and *Coleman*. In *Holloway* where the deprivation of the right to counsel occurred during the trial the Court remanded the case for further proceedings. In *Coleman*, where the deprivation occurred during the preliminary hearing, the Court vacated the convictions and ordered a hearing to determine if prejudice had been worked or if the convictions should be reinstated. Suffice it to say that this court's only function is to grant or deny the writ.

IT IS THEREFORE ORDERED that the petition for a writ of habeas corpus be, and hereby is, granted. The respondents and each of them are commanded forthwith to discharge the petitioner, Johnny Lee Wilson, from further detention or commitment or imprisonment by reason of the herein described convictions of rape and armed robbery.

KEY NUMBER SYSTEM

UNITED STATES of America, Plaintiff,

v.

Karl LINNAS, Defendant.

No. 79 C 2966.

United States District Court, E. D. New York.

July 30, 1981.

United States instituted action to revoke defendant's certificate of naturalization and to vacate order admitting him to United States citizenship. The District Court, Mishler, J., held that: (1) although pertinent facts were deemed established because of defendant's defying court order to answer interrogatories, defendant was entitled to opportunity at trial to rebut the facts deemed established; (2) videotaped depositions taken in Soviet Union were not per se inadmissible; and (3) citizenship was to be revoked because of defendant's participation in World War II atrocities against civilians and because of his concealment of such facts in seeking admission to the country and in obtaining citizenship.

Judgment for the United States.

counsel's representation of two co-defendants with conflicting defenses, the preliminary hearing judge knew or should have known from the representations of the petitioner's attorney and the statements of the prosecutor that the risk of a conflict of interest existed. That knowledge triggered his duty under *Holloway* to determine whether the risk warranted the appointment of separate counsel or the taking of other steps to protect the petitioner's Sixth Amendment right to assistance from an attorney who is unencumbered with conflicting loyalties. In other words, in the face of the petitioner's objection to the motion to consolidate because of a potential conflict of interest problem and the prosecutor's acknowledgement that the prospect of a conflict of interest existed, an "affirmative trial court response" was required under *Holloway*. *See United States v. Mavrick*, 601 F.2d 921, 929 (7th Cir. 1979). *See also United States v. Medina-Herrera*, 606 F.2d 770, 776 (7th Cir. 1979) (" '[The court must] be alert for indicia of conflict at all stages of the proceeding, including during trial.' " (quoting *United States v. Gaines*, 529 F.2d 1038, 1043 (7th Cir. 1976)).

4. Although the Supreme Court has recognized that "the lack of counsel at a preliminary hearing involves less danger to 'the integrity of the truth determining process at trial' then the omission of counsel at the trial itself or on appeal." *Adams v. Illinois*, 405 U.S. 278, 282–83, 92 S.Ct. 916, 919–20, 31 L.Ed.2d 202 (1972).

1. Aliens ⇐71(18)

In a proceeding to revoke citizenship the government has the burden of proving its case by clear, unequivocal and convincing evidence which does not leave the issue in doubt. Immigration and Nationality Act, § 340(a) as amended 8 U.S.C.A. § 1451(a).

2. Aliens ⇐71(18)

Federal Civil Procedure ⇐2015

Where defendant failed to fully answer government's interrogatories despite compulsion order the subject facts were deemed admissible and established a prima facie case in action to revoke defendant's certificate of naturalization, but because of the peculiar nature of denaturalization proceedings and in view of severe and unsettling consequences which might ensue from loss of citizenship, defendant was given the opportunity at trial to rebut the facts otherwise deemed established. Fed.Rules Civ. Proc. Rule 37(b)(2)(A), 28 U.S.C.A.; Immigration and Nationality Act, § 340(a) as amended 8 U.S.C.A. § 1451(a).

3. Aliens ⇐71(16)

It is within discretion of the trial judge to draw an adverse inference against a defendant in a denaturalization proceeding because of his unexplained failure to testify on matters peculiarly within his knowledge. Immigration and Nationality Act, § 340(a) as amended 8 U.S.C.A. § 1451(a).

4. Federal Civil Procedure ⇐1312

There was no per se rule requiring that videotaped depositions taken in the Soviet Union be excluded in proceeding to revoke citizenship. Immigration and Nationality Act, § 340(a) as amended 8 U.S.C.A. § 1451(a).

5. Federal Civil Procedure ⇐1312

Having foresaken his right of cross-examination at videotaped deposition taken in Soviet Union defendant could not subsequently claim foul play in regard to admission of such depositions in proceedings to revoke his citizenship, especially as defendant was unable to come forward with any proof that any of the Government's evidence offered at trial, either testimonial or documentary, was incredible or unauthentic in any respect. Immigration and Nationality Act, § 340(a) as amended 8 U.S.C.A. § 1451(a).

6. Federal Civil Procedure ⇐1312

Where in Soviet videotaped depositions the Soviet prosecutor referred to instant matter as an action against a "former war criminal," the district court, in evaluating weight of testimony given by the deponents, considered such evidence only as supportive and corroborative of the Government's primary evidence of defendant's involvement at concentration camp in determining whether to revoke his citizenship. Immigration and Nationality Act, § 340(a) as amended 8 U.S.C.A. § 1451(a).

7. Aliens ⇐60.2

Strict compliance with all conditions for naturalization is required. Immigration and Nationality Act, §§ 101(f)(6), 316(a)(1) as amended 8 U.S.C.A. §§ 1101(f)(6), 1427(a)(1); Displaced Persons Act of 1948, § 2 et seq. as amended 50 U.S.C.A.App. § 1951 et seq.; Fed.Rules Civ.Proc. Rule 37(a), 28 U.S.C.A.

8. Aliens ⇐71(7)

Defendant, who was found to have served as concentration camp guard in German occupied territory during World War II and to have served in German army, was ordered denaturalized not only as being ineligible for entry into United States under Displaced Persons Act because he assisted in persecuting civil populations but on ground that he illegally procured his citizenship or procured it by concealment of material fact or by willful misrepresentation concerning his activities during the war. Immigration and Nationality Act, §§ 101(f)(6), 316, 316(a)(1, 3), 340(a) as amended 8 U.S.C.A. §§ 1101(f)(6), 1427, 1427(a)(1, 3), 1451(a); Act Dec. 16, 1946, Annex I, Pt. II, 62 Stat. 3037; Displaced Persons Act of 1948, §§ 10, 13 as amended 50 U.S.C.A.App. §§ 1959, 1962.

9. Aliens ⇐71(3)

Citizenship is "illegally procured" within meaning of statute providing for loss of

citizenship, if some statutory requirement which is a condition precedent to naturalization is absent at the time the petition for naturalization is granted. Immigration and Nationality Act, § 340(a) as amended 8 U.S.C.A. § 1451(a).

See publication Words and Phrases for other judicial constructions and definitions.

10. Aliens ⇐71(5, 7)

Defendant, whose citizenship was sought to be revoked, lacked requisite good moral character for entry into United States because of his voluntary involvement in World War II in the unjustifiable atrocities committed against men, women and children and also because of false statements made on petition for naturalization. Immigration and Nationality Act, §§ 101(f)(6), 316(a)(3), 340(a) as amended 8 U.S.C.A. §§ 1101(f)(6), 1427(a)(3), 1451(a).

Edward R. Korman, U.S. Atty., Eastern District of New York, Brooklyn, N.Y., Rodney G. Smith, Martha Talley, Trial Attys., Office of Special Investigations, Criminal Division, Dept. of Justice, Washington, D.C., for plaintiff; Leonard A. Sclafani, Asst. U.S. Atty., Brooklyn, N.Y., of counsel.

Ivars Berzins, Babylon, N.Y., for defendant.

Memorandum of Decision and Order

MISHLER, District Judge.

[1] The United States of America commenced the instant action on November 21, 1979 pursuant to the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1451(a), to revoke the Certificate of Naturalization (No. 7641679) of defendant, Karl Linnas, and to vacate the order of the New York Supreme Court (Suffolk County) admitting defendant to United States citizenship. The Government seeks to upset defendant's naturalization obtained in February of 1960 on the theories that his citizenship was (1) "illegally procured" and (2) "procured by concealment of a material fact or by willful misrepresentation." Either of these theories, if proven by "'clear, unequivocal, and convincing'" evidence which does not leave "'the issue in doubt,'" *Schneiderman v. United States*, 320 U.S. 118, 125, 63 S.Ct. 1333, 1336, 87 L.Ed. 1796 (1943) (quoting *Maxwell Land Grant Case*, 121 U.S. 325, 381, 7 S.Ct. 1015, 1028, 30 L.Ed. 949 (1887)),[1] would provide the court with no alternative but to enter a judgment of denaturalization against defendant. *Fedorenko v. United States*, 449 U.S. 490, 101 S.Ct. 737, 752–53, 66 L.Ed.2d 686 (1981).

The Government's case turns on the legality of defendant's entry into this country in 1951 under the Displaced Persons Act of 1948, Pub.L.No. 80–774, ch. 647, 62 Stat. 1009, as amended (the "DPA"). The Government's five-count complaint alleges, *inter alia*, various heinous acts on the part of defendant during his residence in Tartu, Estonia between August 1941 and May 1943. In Count 1, the Government alleges that defendant was never lawfully admitted into the United States, a condition precedent for naturalization under Section 316(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1427, because (1) his activities during World War II precluded him from obtaining lawful entrance into the United States as an eligible person under the DPA, and (2) his willful misrepresentations made for "the purpose of gaining admission into the United States" under the DPA made him ineligible for admission under that Act. Counts II and III seek defendant's denaturalization based on the contention that his citizenship was procured by the concealment or misrepresentation of facts material to his eligibility for citizenship during the process leading to his naturalization in 1960. Contrary to defendant's sworn statements made for the purpose of acquiring citizenship, it is claimed that (1) he had committed crimes of moral turpitude, and (2) he was not a person of good moral character. Count IV alleges that defendant's citizenship was illegally procured

1. The Supreme Court has recently reaffirmed the applicability of the heavy burden of proof which is placed on the Government when it attempts to revoke an individual's citizenship. *Fedorenko v. United States*, 449 U.S. 490, 101 S.Ct. 737, 747, 66 L.Ed.2d 686 (1981).

since he in fact was not a person of good moral character. Finally, Count V states that, as a statutory matter, defendant was not a person of good moral character since he had given "false testimony for the purpose of obtaining ... benefits" under the Immigration and Nationality Act. Section 101(f)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1101(f)(6).

I. *Pre-Trial Proceedings*

[2] On September 24, 1980, the court granted the Government's motion pursuant to Rule 37(a), Fed.R.Civ.P., to compel defendant to answer certain enumerated interrogatories. Defendant expressly defied the court's order by failing to fully answer the Government's interrogatories. The Government's subsequent motion for sanctions, wherein it requested that all relevant facts pertaining to the Government's unanswered interrogatories be deemed established, was granted. However, because of the peculiar nature of denaturalization proceedings, and in view of the "severe and unsettling consequences" which might ensue from the loss of citizenship, *Fedorenko v. United States*, 101 S.Ct. at 747, the court left defendant with the opportunity to rebut the facts which we would otherwise "deem[ ] established beyond a reasonable doubt...." (Memorandum of Decision and Order dated October 14, 1980—findings of fact found at Appendix A). Following our imposition of sanctions pursuant to Rule 37(b)(2)(A) for the failure to answer interrogatories, defendant failed to answer certain questions at his deposition continuing his earlier claim rejected by the court of a Fifth Amendment privilege against self-incrimination. The court again ordered defendant to provide the Government with discovery, this time through his deposition testimony, and defendant once again refused. Consequently, the Government's proposed findings of fact sought to be proved through defendant's deposition testimony which he failed to provide was deemed to be established beyond a reasonable doubt, subject to rebuttal by defendant at trial. (See Memorandum of Decision and Order dated January 12, 1981—findings of fact found at Appendix B).

Though the Government had established the facts necessary to prove its *prima facie* case prior to trial, thereby relieving the Government of the need to offer evidence concerning many crucial facts pending the defense's offer of contradictory evidence at trial, the Government's pre-trial memorandum provided defendant with notice that it would present evidence on its direct case that would support its claims independent of the court's pre-trial fact findings made pursuant to Rule 37(b)(2)(A), Fed.R.Civ.P. (Government's Pre-Trial Memorandum mailed to defendant June 12, 1981).[2] Because the Government's offer of proof at trial overwhelmingly supported the allegations stated in its complaint, our decision today is based upon findings of fact established solely through the evidence adduced at trial.[3]

The case was tried before the court without a jury.

II. *The Trial*

The defendant, Karl Linnas, was born on August 6, 1919 in Tartu, Estonia. He married his wife Linda on July 7, 1944 in Haap-

2. As we stated at the December 15, 1980 pretrial conference, a trial on the merits would ensue in spite of the findings of fact made pursuant to Rule 37, Fed.R.Civ.P. The *only* advantage to the Government arising from the sanctions imposed on defendant for his failure to comply with discovery was that the Government had sustained its *prima facie* case. (Transcript filed with the court on January 26, 1981 at 10.)

3. Defendant's counsel made numerous objections during the course of the trial that he was not given an adequate opportunity to prepare a defense. The objections were frivolous. The Government had expeditiously supplied the defense with extensive discovery. Moreover, on at least one occasion during the trial, the court offered the defense an opportunity to offer proof concerning an issue raised at trial at any time before the rendering of this decision. (Record 319–320). We note that the defense has failed to submit any further evidence since the completion of the in-court proceedings on June 19, 1981 which might suggest a different view of the facts than that which we have deduced from the evidence presented at the trial.

salu, Estonia and entered the United States on August 17, 1951 for the purpose of establishing permanent residence. (Government Exhibit 31, K. Linnas Petition for Naturalization).[4]

[3] During the years 1940 through 1943, defendant resided in Tartu, Estonia. (GX–31, K. Linnas' Application for Immigration Visa and Alien Registration). In part, the trial focused on the activities of the German military forces, and the assistance provided them by an organization of Estonian nationals known as the "Home Guard" or "Self-Help" forces (referred to as the "Selbstschutz" by the Germans and as the "Omakaitse" by the Estonians) during the German occupation of Tartu which began in the summer of 1941. Specifically, the Government's case established clearly, unequivocally, and convincingly defendant's involvement as an active and voluntary member of the Selbstschutz starting in July of 1941. However, the information defendant had provided to immigration officials represented that he was a university student in Tartu during the period 1940–1943. Defendant failed to testify at trial on his own behalf,[5] and moreover, failed to appear at the trial.

A. *Historical Background*

The Government called Dr. Raul Hilberg to comment on the German military movement into the Soviet Union following the German invasion on June 22, 1941 and to describe various German policies and the implementation of those policies during their initial assault.[6] Professor Hilberg testified that the German invasion into Estonia occurred in mid-July 1941. The invading German forces that swept through Tartu included the mobile killing units known as the "Einsatzkommandos." These units formed battalions, referred to as "Einsatzgruppen," which were charged with carrying out Nazi policy aimed at the annihilation of Jews and other groups found inimical to the Reich. (Record at 50–51, GX–2 through 10). Professor Hilberg described the operation of the Einsatzgruppen in one of his publications as follows:

> "When the German Wehrmacht—the armed forces—attacked the USSR on June 22, 1941, the invading armies were accompanied by small mechanized killing units of the SS and Police which were tactically subordinated to the field commanders but otherwise free to go about their special business. The mobile killing units were operating in the front-line areas under a special arrangement and in a unique partnership with the German Army.
>
> * * * * * *
>
> The geographic distribution of Soviet Jewry determined to a large extent the basic strategy of the mobile killing units. To reach as many cities as fast as possible, the Einsatzgruppen moved closely

4. Hereinafter, Government exhibits admitted into evidence shall be designed by the letters "GX".

5. It is well within the discretion of a trial judge to draw an adverse inference against a defendant in a denaturalization proceeding because of his unexplained failure to testify on matters peculiarly within his knowledge. *Cabral-Avila v. Immigration and Naturalization Service*, 589 F.2d 957, 959 (9th Cir. 1968), *cert. denied*, 440 U.S. 920, 99 S.Ct. 1245, 59 L.Ed.2d 472 (1978); *United States v. Costello*, 275 F.2d 355, 359 (2d Cir. 1960), *aff'd*, 365 U.S. 265, 81 S.Ct. 534, 5 L.Ed.2d 551 (1961). The Government, however, has sustained its burden without our drawing this permissible inference.

6. The court found Dr. Hilberg eminently qualified to testify on these matters. Dr. Hilberg has researched the holocaust since 1948 and has had the opportunity to examine numerous collections of captured German documents for the purpose of reconstructing the situation in Eastern Europe during World War II. (Record at 27–28). He testified that there was only one collection in the United States which he has not visited. (*id.* at 30). The witness has written extensively on the holocaust which he defined as the "physical destruction of European Jewry under the Nazi regime between 1933 and 1945." (*id.* at 23). His first publication, *The Destruction of the European Jews*, was published in 1961 and documented the Germans' diabolical destruction plans during the period 1933 to 1945. The work is some 800 pages in length and is substantially based on information contained in captured Nazi German documents. (*id.* at 36–41).

upon the heels of the advancing armies, trapping the large Jewish population centers before the victims had a chance to discover their fate.... In accordance with the agreement, units of Einsatzgruppe A entered the cities of Kaunas, Liepaya, Yelgava, Riga, Tartu, Tallin, and the larger suburbs of Leningrad with advance units of the army."

(GX–1 at pp. 177 and 191).

The Einsatzkommandos executed their duties in Tartu, Estonia, with the assistance of the Estonian "Home Guard," the Selbstschutz.[7] (Record at 52–57; GX–2 through 10). Dr. Hilberg's testimony was uncontroverted and is supported by captured German war records contained in the library of the United States National Archives. (GX–2 through 10).

Einsatzgruppe A, aided by the Selbstschutz, was successful in achieving one of its major objectives. By mid-January 1942, the Chief of the Security Police and the Security Service was able to report that Estonia was "judenfrei" (free of Jews) and that the execution of the Jews had been handled in such a manner so as to minimize public attention to the fact of the German extermination process. (Record at 58, GX–6). While Jews were shot solely based upon the determination of their religious ancestry, Communists were shot only if they were active in the party, with the balance either being set free or detained in concentration camps.[8] (Record at 56).

The Government offered the preceding historical evidence to establish, among other things, that if defendant was in fact a member of the Selbstschutz, then the Government's case would have shown that defendant assisted the enemy in persecuting civil populations. The evidence adduced at trial proved beyond a reasonable doubt that defendant was a ranking member of that organization; it also supported the conclusion that he committed deeds which, independent of his membership in the Selbstschutz, would require his denaturalization.[9]

B. *Linnas' Involvement in the Selbstschutz*

1. *Eyewitness Testimony*

The Government conducted video-taped oral depositions in the Soviet Union of four individuals. Three of the four deponents were shown an eight-picture photospread from which each positively identified defendant as an individual who held a position of responsibility in the detention of Jews and others being held either at the exhibition grounds located near Tartu or, after the concentration camp relocated, at the Kuperjanov Barracks on Kastani Street.

7. In his testimony, Dr. Hilberg stated that "[t]he German personnel in the Einsatzgruppen did not [personally] engage in arrests or shootings to any great extent. They acted more as supervisors of indigenous personnel that were engaged in these activities." (Record at 55). The activities were carried out by the Germans' willing attendants—the Selbstschutz. (Record at 56).

8. As of September 19, 1941, the Chief of the Security Police and Security Service reported on the approximately 1200 arrests that had occurred in Tartu since the inception of German occupation earlier that summer:

> "The greater part of them involve persons who were arrested for Communist activity. 504 persons were set at liberty after inquiries were completed and they were registered in lists. 150 persons were released since there were obviously no grounds for arrest. 291 prisoners were transferred to the detention camp established and supervised by the Tartu Military Administration Headquarters. A total of 405 persons were executed in Tartu, including 50 Jews. There are no longer any Jews in custody." (GX–3).

9. During some time in June 1940, the country of Estonia was annexed by the Soviet Union. Defendant's post-trial memorandum suggests that the forcible occupation and annexation of Estonia by the Soviet Union, given the atrocities which the Soviets committed during that conquest, provide ample justification for Estonians who chose to bear arms against the invaders of their homeland. We do not question justifiability of the Estonian desire to purge its land of the Soviet element. Nevertheless, defendant's motivations have no legal significance given the facts established by the Government at trial, e. g., defendant's supervision and participation in *atrocities* committed against human life. We also note that even if motivation could provide a basis for "legal justification," defendant offered no evidence on what *his* motivations were for joining the Selbstschutz and aiding the German cause.

The four individuals who testified by video-taped deposition were: Hans Laats, Olav Karikosk, Oskar Art, and Elmer Puusepp.

Hans Laats supervised the guards who guarded the prisoners at the Kuperjanov Barracks in Tartu. (GX–19–A at 17). He testified that Linnas served as a guard at the exhibition grounds and several months thereafter became the chief of the relocated concentration camp at the Kuperjanov Barracks. (*id.* at 22–23). Defendant, Laats, and the other guards at the camp were members of the Selbstschutz. (*id.* at 12, 15, 23).

Laats witnessed the execution of prisoners who had been held at the Kuperjanov Barracks. Those who were to be executed were kept in a special barracks at the camp on Kastani Street. (*id.* at 18). On a number of occasions he observed defendant supervising the prisoners who were being escorted out of the special barracks to an execution site. (*id.* at 23). Laats confessed to his own presence at one execution conducted at an anti-tank ditch (known as the "Jalaka Line") outside Tartu. This excavation had been converted by the Einsatzkommandos into a mass grave site for the victims of their extermination process. In recounting a portion of Jalaka Line execution, he stated that Linnas was the individual who had announced the death sentence and had commanded the guards to fire on the prisoners who were kneeling at the ditch's edge.[10] (*id.* at 24).

Laats identified Linnas both at his video-taped deposition and at an earlier meeting with a representative of the Department of Justice as chief of the concentration camp at the Kuperjanov Barracks. (*id.* at 33–36). We find that the eight-picture photospread from which Linnas was identified, considering the totality of the circumstances, indicates that the Laats identification of Linnas was reliable.[11] *Cf. Neil v. Biggers*, 409 U.S. 188, 199–200, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972) (reliability of pre-trial identifications in the context of criminal prosecutions).

Olav Karikosk, a former concentration camp guard personally recruited by Linnas in October 1941, was ordered by Linnas to accompany him to an execution. (GX–20–A at 11–12, 24). The execution ritual was similar to the one described by Laats.[12] Karikosk positively identified Linnas at his video-taped deposition and on an earlier occasion as the chief of the concentration camp at the Kuperjanov Barracks.[13]

Oskar Art testified that he drove a bus which transported prisoners—on one occasion Jews, on two occasions non-Jews—to the Jalaka Line where they were shot. (GX–18–A at 18–24). Again, the execution ritual was similar to that described by Laats. Art stated that the prisoners were guarded by the Selbstschutz at all times. (*id.*). During one of the three executions in which he was involved, Linnas was present when the prisoners were herded onto the

10. Laats further testified that Linnas thereafter approached the ditch and, administering the coup de grâce fired into it. (GX–19–A at 24–25).

11. We also find that the pre-trial identifications made by Olav Karikosk and Oskar Art were reliable.

In making these determinations concerning reliability, we have been guided by the Court's recommendation in *Neil v. Biggers*:

"[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." 409 U.S. at 199.

12. He testified that "Jewish women and children ... were tied by their hands to ... rope and boarded on [a] bus ... [after] they had been undressed so that they were there in their underwear;" they were then taken outside the city to a so-called Jalaka Line some ten kilometers away from the city." (GX–20–A at 22–23). Upon arrival, the prisoners were commanded to kneel in front of the anti-tank ditch, their death sentences were given, and they were shot. (*id.* at 25–26).

13. Karikosk selected Linnas from an eight-picture photospread identical to the one presented to Laats except for the juxtaposition of the photographs.

bus destined for the execution site and when they were shot. (*id.* at 29). Art had known Linnas before the German occupation, (*id.* at 26–27). Art saw Linnas frequently after becoming a prisoner at the camp. (*id.* 30–31). Laats believed that Linnas was chief of the guards at the camp and the highest ranking Estonian there. (*id.* at 32–34). After viewing a photospread virtually identical to those used in the previously mentioned video-taped depositions, Art identified Linnas as chief of guards at the concentration camp at the Kuperjanov Barracks.[14] (*id.* at 37–40).

Elmer Puusepp was arrested by members of the Selbstschutz during the summer of 1941 because he had been a political officer under the Soviet Government. (GX–21–A at 7–8). Puusepp was eventually brought to the Kuperjanov Barracks with a group of approximately forty prisoners. (*id.* at 18–20). The group was divided in half. (*id.* at 20). The group to which he was not assigned was sent to the "death barracks," and Puusepp never saw anyone in that group again. (*id.* at 20, 25).

Puusepp testified that the man who he came to know as Linnas on one occasion had received prisoners at the Tartu concentration camp. (*id.* at 20–21). He recounted a second instance in which he had seen Linnas participate in the operations at the Kuperjanov Barracks. This incident occurred in the City of Tartu when Linnas helped direct Jews being ordered from a Jewish school onto a red bus which had been used on other occasions to remove prisoners from the death barracks at the concentration camp. (*id.* at 29). Linnas was seen helping a little girl "5 or 6 years old" with a doll as large as she was onto the bus. (*id.*). Puusepp noticed a guard carrying the little girl's doll to storage that very same evening together with clothing and other personal effects taken from those persons who had just been executed. (*id.* at 31).

His account of the general conditions at the camp was as follows: prisoners were fed soups made out of "[h]alf-rotten horse corpses or horse carcasses," (*id.* at 22); lice prevented the prisoners from sleeping, (*id.* at 38); and the barracks were so "tightly packed" that, at times, it was impossible to turn over. (*id.*).

Dr. Keiland, a citizen of Finland at the time of trial and a resident of Tartu during the subject period, testified at trial and stated that he witnessed the detention of Jews and non-Jews—men, women, and children—at the exhibition grounds ("Naituse Valjak") in Tartu during July 1941. (Record at 177–179). During his several visits to the exhibition grounds he viewed "Jews lying, sitting and sleeping in [cages of barbed wire.]" (*id.* at 178–181). Dr. Keiland did not see defendant at the camp on any of his trips. (*id.* at 183). However, he did identify those guarding the detainees as members of the Selbstschutz. (*id.* at 179–180).

[4] Each of the video-taped depositions was admitted into evidence. The defense refused to attend the depositions held in the Soviet Union because it contended that any such proceeding conducted there would be a sham. Evidence offered at trial through defense witnesses attempted to show that the Soviets, on many occasions, have manipulated and, at times, have manufactured evidence to convict innocent Soviet citizens for the purpose of attaining political objectives of the Soviet Communist party. In essence, defendant contends that we must adopt a *per se* rule excluding all evidence deriving from Soviet sources. In rejecting this contention, we simply note one of the fatal flaws in defendant's broadbush attack on Soviet-source evidence. In the context of this case, the defense witnesses were unable to cite *any* instance in a western court in which falsified, forged, or otherwise fraudulent evidence had been supplied

14. The photograph of Linnas which appeared in each of the photospreads presented to the witnesses at each of the video-taped depositions conducted in the Soviet Union was the photograph of defendant submitted with his visa application in 1951.

by the Soviet Union to a court or other governmental authority. (Record at 470, 597–598, 646).[15]

[5, 6] The defense was unable to come forward with *any* proof that any of the Government's evidence offered at trial, either testimonial or documentary, was incredible or unauthentic in any respect. We find that defendant's defense by innuendo is without any merit. Having foresaken its right of cross-examination at the depositions taken in the Soviet Union, the defense cannot now claim foul play.[16] Moreover, various documents signed by Linnas (discussed hereunder) and the admission made by him to Richard Siebach (see note 17) corroborate the testimony of the Soviet witnesses as to Linnas' position and authority at the Tartu Concentration Camp.

2. *Documents Signed by Linnas as Chief of the Concentration Camp*

The Government offered copies of four documents bearing the signature "Karl Linnas" over the title "Chief of Concentration Camps" or "Chief of Tartu Concentration Camp." (GX–26, 27, 28, 30). These documents, dated November and December 1941, were certified by the Consular Division of the U.S.S.R. Embassy in accordance with Rules 902(3) and 902(4) of the Federal Rules of Evidence and Rule 44, Fed.R.Civ.P.

Each of the documents was admitted into evidence. The documents concerned the routine operation of the camp consisting of orders and correspondence pertaining to prisoners (GX–27, 28, 30) and a pass authorizing a guard to bear arms and travel at night (GX–26). These documents, if in fact signed by defendant, would establish Linnas' supervisory role at the Tartu Concentration Camp in the fall of 1941. We would further conclude that, as an Estonian, he was a member of the Selbstschutz aiding the Germans in the administration of their master plan.

Special Agent Michael Noblett of the Federal Bureau of Investigation, an expert document examiner, examined the four concentration camp documents and determined that (1) there were "strong indications" that the signatures were authored by defendant, (Record at 274), and (2) the physical condition and composition of the documents supported the conclusion that they are authentic, original and unaltered documents. (*id.* at 661–663). The defense failed to produce a document expert to challenge either their authenticity or the conclusion that defendant was the signatory. We find that the documents were signed by Linnas and are authentic and unaltered. The testimony of Laats, Karikosk, Art and Puusepp corroborates the finding that Linnas was a member of the Selbstschutz and served in a supervisory role in the management of the Tartu Concentration Camp.[17] We find that the Government has met its burden in establishing these facts.

15. After reading the deposition transcripts and viewing portions of each of the video-tapes taken in the Soviet Union, we find that the Government witnesses were credible.

16. The court however is disturbed by language used by the Soviet prosecutor when introducing members of the Department of Justice to deponents Oskar Art, Olav Karikosk, and Hans Laats. In each instance the Soviet official referred to the instant matter as an action by the United States against the former war criminal, Karl Linnas. The case was variously described as concerning: the "Fascist prisoner murder[er], Karl Linnas," (GX–18–A at 3) and "Karl Linnas, a former war criminal," (GX–19–A at 3, GX–20–A at 3). In evaluating the weight of the testimony given by these deponents, we have been mindful of the prejudicial language employed by the Soviet prosecutor. Accordingly, we have considered this evidence only as supportive and corroborative of the Government's primary evidence of Linnas' involvement at the Tartu Concentration Camp, the documents signed by defendant as chief of the concentration camp.

17. The Government presented further corroborative evidence of defendant's involvement at the concentration camp in Tartu, Estonia. Richard Siebach testified that defendant denied he had headed the Tartu camp in response to a question by Siebach about a newspaper article on that subject. Rather, defendant claimed only to have been a guard at the Tartu camp. (Record at 306–307).

C. *Linnas' Service in the German Army Following his Departure from the Tartu Camps*

The Government sought to establish that defendant voluntarily entered and served in the Estonian Schutzmannschaft as a junior lieutenant in May 1942, served in its successor organization, and then served in an Estonian Police Battalion between 1942 and 1944. Each of these military forces was an integral part of the German Army in World War II. (Record at 98–102; GX–13 and 14).

We find that defendant voluntarily joined one of the component units of "Security Cadre 41–E" in Tartu, Estonia.[18] (Record at 98; GX–11). This unit, composed largely of members who had served in the Selbstschutz, (Record at 90), was redesignated Schutzmannschaft Battalion 41–E within two months after defendant joined it. (Record at 97; GX–12).

Evidence presented by the Government *compels* the conclusion that some time prior to July 1944 defendant was transferred to the 38th Police Battalion. (Record at 103; GX–15, 16, 17). In July 1944 the 38th Estonian Police Battalion served under the command of an "SS Oberfuhrer" (Senior Colonel) and went into battle in an effort to halt the massive Soviet counter-offensive which was then underway. (Record at 105–106). The documents presented by the Government show beyond any reasonable doubt that Linnas was a volunteer in the 38th Police Battalion. (see Appendix C). The captured German documents, GX–15, 16, 17, contain a great deal of personal information concerning a wounded lieutenant SS volunteer named Karl Linnas. The information contained therein coincides with the information found in defendant's immigration records:

	Information From Captured German Documents	Information From Defendant's Immigration Record
Name:	1. Karl Linnas (GX–15, 16, 17)	1. Karl Linnas (GX–31, 39)
Birth Date:	2. August 6, 1919 (GX–16, 17)	2. August 6, 1919 (GX–31, 39)
Place of Birth:	3. Tartu, Estonia (GX–17)	3. Tartu, Estonia (GX–31, 39)
Wounded in Battle:	4. August 30, 1944 (GX–15)	4. August, 1944 (GX–39)
Date of Marriage:	5. July 7, 1944 (GX–15)	5. July 7, 1944 (GX–31)
Wound or Marks of Identification:	6. Large schrapnel penetration to right shoulder joint and upper right arm. (GX–17)	6. Scar on right shoulder and back of neck. (GX–31)

The Government's evidence is uncontroverted and overwhelmingly establishes defendant's service in the 38th Police Battalion, an arm of the German Wehrmacht. Accordingly, we find that defendant served in the German armed forces during World War II.

III. *Discussion*

A. *Postwar Immigration Procedures*

[7] In order to understand how defendant failed to comply with the conditions for naturalization, it is necessary to describe briefly the route which an alien was required to travel.[19] The Government witnesses who offered testimony concerning the standard operating procedures of officers and employees of the International

18. Dr. Hilberg testified that individuals taken into such units in May of 1942 would have been volunteers. (Record at 94). He had no knowledge of conscription into those units at that time. (*id.*).

19. In reviewing the immigration process, we must of course bear in mind that strict compliance with *all* conditions for naturalization is required:

> "This judicial insistence on strict compliance with the statutory conditions precedent to naturalization is simply an acknowledgement of the fact that Congress alone has the constitutional authority to prescribe rules for naturalization, and the courts' task is to assure compliance with the particular prerequisites to the acquisition of United States citizenship by naturalization legislated to safeguard the integrity of this "priceless treasure." *Johnson v. Eisentrager*, 339 U.S. 763, 791, 70 S.Ct. 936, 950, 94 L.Ed. 1255 (1950) (Black, J., dissenting)."

Fedorenko v. United States, 101 S.Ct. at 747 (footnote omitted).

Refugee Organization (the "IRO"),[20] the Displaced Persons Commission, and the American Consulate described the process just as it was outlined by Chief Judge Battisti in *United States v. Demjanjuk*, 518 F.Supp. 1362, 1378–79 (N.D.Ohio 1981):

> "In 1948, Congress enacted the Displaced Persons Act (DPA) to enable European refugees driven from their homelands to emigrate to the United States.[21] Section 2(b) of the DPA, 62 Stat. 1009, defined a displaced person eligible for emigration by incorporating the definition of 'refugees or displaced persons' contained in Annex I to the IRO Constitution.... [22]
>
> A person seeking a visa to the United States under the DPA normally followed a tripartite procedure.
>
> First, a refugee filed an application for IRO assistance. The applicant was interviewed by an IRO eligibility officer who elicited information about the applicant's personal and family history, with especial emphasis on the war years, in order to determine whether the applicant was qualified under the IRO constitution .... The primary source of background information inevitably came from the applicant himself. If qualified, the refugee was granted IRO assistance.
>
> Next, the refugee sought to qualify as an eligible displaced person under the DPA. The Displaced Persons Commission was the agency in charge of implementing the DPA. Under sections 2(b) and 10 of the DPA, 62 Stat. 1009, 1013, positive eligibility under the IRO was a preliminary requisite. The IRO file containing the history of the particular refugee and the certification of IRO status was forwarded to the Displaced Persons Commission. A case analyst then made certain security checks on the background of the applicant to determine eligibility under the DPA and issued a report certifying that the applicant was a person eligible for admission into the United States under the DPA....
>
> Finally, the case analyst forwarded an applicant's file, containing both the preliminary IRO certification and the Displaced Persons Commission report to the appropriate American Consulate. The applicant appeared at the consular office and was matched with an interpreter-typist, who assisted the applicant in filling out the application for an immigration visa. A vice-consul at the American Consulate reviewed the visa application and other documents in the applicant's file. The vice-consul then interviewed the applicant and, at a minimum, reviewed with the applicant all the entries which appeared on the visa aplication [sic]. If the

20. The IRO was an organization sponsored by the United Nations. Its Constitution was signed by the United States on December 16, 1946 (T.I.A.S. No. 1846) and became effective on August 20, 1948. See 62 Stat. 3037. Part two of Annex I of the IRO Constitution, 62 Stat. 3037, 3051 (1946), provided that certain persons would *not* be considered the "concern" of the IRO:

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

21. The mass dislocation of persons caused by the devastation of World War II is well documented. The *Demjanjuk* court capsulized the magnitude of the problem as follows:

> "Following the conclusion of the war, the Allied armies became the guardians of about 8,000,000 persons including those liberated from extermination camps, former prisoners of war, and thousands of other persons dislocated by the hostilities. By 1948, 7,000,000 of these uprooted persons had been repatriated leaving approximately 1,000,000 persons in the United States, British, and French zones of Germany, Austria and Italy. S.Rep.No. 950, 80th Cong., 2d Sess., U.S. Code Cong. & Ad.News 2028, 2035 (1948). Many of these people lived in camps operated by the International Refugee Organization (IRO), an organization founded in 1946 to offer care and assistance to the dislocated masses and to provide for their eventual repatriation." At 1378.

22. Accordingly, the same persons who were not eligible for IRO assistance were also ineligible for lawful admission into the United States by virtue of Section 2(b) of the DPA. See note 20, *supra*.

vice-consul determined that the applicant met the criteria of the DPA and other immigration laws, he issued the applicant a visa." [23]

The immigration process leading to defendant's entry into the United States began in February 1948 when defendant's father, August Linnas, filed with the Preliminary Commission for the International Refugee Organization ("PCIRO") a signed and sworn application for assistance, on behalf of himself and his family, including defendant. (GX-38-B). The application stated that defendant was a student and technical artist in Tartu, Estonia from 1940 through 1943.

In mid-December 1949, defendant's wife, Linda Linnas, filed an IRO Resettlement Registration Form on behalf of herself, defendant and defendant's daughters. (GX-31). In reliance upon the information contained in the Application for Assistance to PCIRO and the Resettlement Registration Form, the IRO certified defendant as a displaced person and refugee, as defined in Annex I of the IRO Constitution, on December 29, 1949. Karl Linnas in fact was not entitled to such certification.[24]

On April 27, 1951, James McDonald, a case analyst for the United States Displaced Persons Commission (the "Commission"), issued a report stating that Karl Linnas was eligible for consideration for admission into the United States.[25] However, defendant's certification as an eligible displaced person was made possible only as a result of the false statements he had made to members of the Counter Intelligence Corps of the United States Army (the "CIC") that, among other things, he had been a university student in Tartu, Estonia during the period 1940-1943,[26] he had never served in the German Army and he had not been a member of any political group or organization.[27]

On May 17, 1951, defendant filed a signed and sworn Application for Immigration Visa and Alien Registration with the United States Consulate at Munich, Germany, in which he claimed status as a displaced per-

23. "Section 10 of the DPA was amended by § 9 of the Act of 1950, 64 Stat. 219, 225-226 (1950) to clearly allow the vice-consul to make the final determination of eligibility of applicants, both under the DPA and under the general immigration laws. Conference Report, 81st Congress, 2d Sess., U.S.Code Cong. & Ad.News 2513-2523 (1950). Section 9 provided: 'no person shall be issued an immigration visa or be admitted into the United States under this Act if the consular officer or the immigrant inspector knows or has reason to believe that the alien is subject to exclusion from the United States under any provision of the immigration laws or (1) is not a displaced person and an eligible displaced person, or (2) is not eligible under the terms of this Act. . .'" *United States v. Demjanjuk*, At 1379 n. 35 (N.D.Ohio 1981).

24. The deposition testimony of Daniel Segat, an expert on the eligibility criteria for IRO assistance, was admitted into evidence. (GX-38). Mr. Segat, the Chief Eligibility Officer for the entire IRO operation between September 1950 and September 1951, (GX-38 at 8-9), testified that defendant would have been found ineligible for IRO assistance based on either his service as a concentration camp chief or guard in a German-occupied territory during World War II, (*id.* at 23-24), or based on his voluntary service in an Estonian Police Battalion or an Estonian unit of the Schutzmannschaft, (*id.* at 24).

25. McDonald's responsibility as a case analyst was to determine an applicant's eligibility status under the DPA. (Record at 478). In making his evaluation, he relied on reports generated by the United States Army Counter Intelligence Corps (the "CIC"). (*id.* at 481). He testified that he would not have certified defendant as an eligible displaced person had he been aware of his service as a concentration camp guard. (*id.* at 483-484).

26. Dr. Keiland testified that the University at Tartu ("Tartu Ulikool") was closed during the summer and the autumn of 1941. (Record at 184). The consolidated report of German Major General Walther Stahlecker to the German Foreign Office concerning the activities of Einsatzgruppe A (June 23, 1941 through October 15, 1941) reported that educational activities had been halted at both the University of Tartu and the Technical Institute in Tallin. (GX-9-A at 95).

27. The Government established that defendant had made these false statements through the testimony of former CIC members Victor Johansen, (Record at 321, *et seq.*), Richard Priem, (*id.* at 374, *et seq.*) and Ray Whiteturky, (*id.* at 402, *et seq.*). See also (GX-39).

son. Defendant was issued an immigration visa on that same date. Ralph Fratzke, a former Vice Consul, United States of America, testified to the procedures by which visas were issued. He testified that a visa would not have been issued if the vice consul had known of defendant's wartime activities.[28] (Record at 507–508).

On May 21, 1951, defendant was examined by an officer of the Immigration and Naturalization Service (the "INS"), Walter Ziemak, for the purpose of determining whether Linnas was eligible to enter the United States. At that time, defendant signed two copies of INS Form I–144, one in Estonian and one in English. (GX–31). In accordance with the routine practice of the INS, Ziemak explained to defendant the contents of the form after defendant had read it, but before defendant affixed his signature to it. (Record at 525). By signing Form I–144 and then swearing to its contents upon entering the United States on August 17, 1951, defendant twice falsely stated that he had "never advocated or assisted in the persecution of any person because of race, religion or national origin...."

B. *Defendant's Naturalization*

Defendant executed an application to file a petition for naturalization as an American citizen on July 4, 1959. (GX–31). The INS checked petitioner's application against his immigration and visa file to determine that defendant's entry into the United States had been lawful.[29] (Record at 541–542, 544). It was routine practice for INS naturalization examiners to orally question petitioners concerning each of the questions on the application for naturalization. (*id.* at 545). Each applicant's interview was conducted under oath. (*id.* at 543). On December 14, 1959, defendant was examined by the INS and falsely swore to the contents of his petition. Specifically, in answer to question 23, defendant denied that he had ever "committed a crime involving moral turpitude" or that he had ever "given false testimony for the purpose of obtaining any benefits under the immigration and naturalization laws."

On February 5, 1960, the Supreme Court of Suffolk County, New York, without knowledge of defendant's true activities and whereabouts during World War II, admitted defendant to United States citizenship.

C. *Conclusion of Law*

[8] The United States Constitution vested Congress with plenary power in establishing rules for naturalization.[30] Pursuant to that power, Congress enacted Sections 340(a) of the Immigration and Nationality Act, 8 U.S.C. § 1451(a), which provides that a naturalized citizen shall suffer the loss of his citizenship if the privileged status was "illegally procured" or "procured by concealment of a material fact or by willful misrepresentation." We find that defendant's denaturalization is required under either standard.

1. *Citizenship Illegally Procured*

[9] Citizenship is illegally procured if "some statutory requirement which is a condition precedent to naturalization is absent at the time the petition [for naturalization] was granted." H.R.Rep.No. 1086, 87th Cong., 1st Sess. 39, *reprinted in*, U.S.Code & Ad.News 2950, 2983 (1961). *See Rogers v. Bellei*, 401 U.S. 815, 830, 91 S.Ct. 1060, 1068, 28 L.Ed.2d 499 (1971); *United States v. Ginsberg*, 243 U.S. 472, 475, 37 S.Ct. 422, 425, 61 L.Ed. 853 (1917). Here, defendant lacked two statutory prerequisites for citizenship.

28. Mr. Fratzke testified because the individual responsible for issuing Karl Linnas' visa had died. (GX–41; Record at 501–502).

29. David Ilschert, a former naturalization examiner in the New York office during the period in which defendant was naturalized, testified concerning the naturalization process. (Record at 537, *et seq.*).

30. Congress is empowered to "establish a uniform Rule of Naturalization" under Article I, Section 8, Clause 4.

a. *Defendant Was Never Lawfully Admitted to the United States*[31]

Since defendant entered the country under the Displaced Persons Act, the legality of his entry depends upon his eligibility under that Act. Section 13 of the DPA makes ineligible those persons who "*have assisted the enemy in persecuting civil populations of countries, Members of the United Nations* . . . ."[32] (emphasis added).

The facts speak for themselves. It is beyond dispute that defendant, Karl Linnas, "assisted the enemy in persecuting civil populations of countries, Members of the United Nations." *See Fedorenko v. United States*, 101 S.Ct. at 750 ("an individual's service as a concentration camp armed guard—whether voluntary or involuntary—made him ineligible for a visa"). The inescapable conclusion is that defendant unlawfully entered the country because of the willful misrepresentations he made to the CIC and the INS for the purpose of gaining entrance into the United States:

". . . Any person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." Section 10 of the DPA, 62 Stat. 1013.

Under the explicit terms of the law governing defendant's entry, his willful,[33] material[34] misrepresentations made him ineligible for a visa.

b. *Defendant Lacked the Requisite Moral Character*

[10] The second unsatisfied statutory condition precedent which made defendant's entry into this country unlawful derived from his lack of good moral character at the time he entered the United States. We find that defendant did not possess the required good moral character because of his voluntary involvement in the unjustifiable atrocities committed against men, women and children a relatively short period of time prior to his entry into this country. *See Tieri v. INS*, 457 F.2d 391 (2d Cir. 1972).

Section 316(a)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1427(a)(3), provides in pertinent part that:

"(a) No person, except as otherwise provided in this subchapter, shall be naturalized unless such petitioner, * * * (3) dur-

31. The requirements for legally procuring naturalized citizenship are set out in Section 316 of the Immigration and Nationality Act, 8 U.S.C. § 1427. Section 316(a)(1) provides, *inter alia*, that:

Residence

(a) No person, except as otherwise provided in this title, shall be naturalized unless such petitioner (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being *lawfully* admitted for permanent residence, within the United States for at least five years * * *. (Emphasis added).

32. See note 22, *supra*. Further, Section 13 of the DPA, as amended in 1950, 64 Stat. 227, provided that no visa would be issued under the Act to "any person who advocated or assisted in the persecution of any person because of race, religion, or national origin. . . ." Accordingly, we also find that defendant failed to satisfy Section 13 of the DPA.

33. The evidence which we have discussed compels the conclusion that defendant's misrepresentations concerning his wartime activities, specifically, his participation in Nazi atrocities, were not inadvertent. Rather, his misrepresentations were knowing and willful. This conclusion is further supported by defendant's perjury in 1946 during which time he filed a signed and sworn questionnaire for displaced persons. (GX-32). In it he stated that, during the years 1941 and 1942, he was employed as a temporary draftsman and student. In response to a question requiring disclosure of all military and political activity from 1936 to 1946, he failed to disclose any military service during 1941 and 1942.

34. Defendant's misrepresentations concerning his service of the German Reich were material. Each of the Government witnesses questioned concerning the consequences of having served as a guard in a concentration camp indicated that such an individual would be ineligible for either IRO assistance or for immigration under the DPA. (GX-38 at 24; Record at 342, 389, 484, 508-509, 528-529). "At the very least, a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa." *Fedorenko v. United States*, 101 S.Ct. at 749. The misrepresentation was equally material for purposes of defendant's naturalization. (Record at 557-558, 562).

ing all the period referred to in this subsection has been and still is a person of good moral character. . . ."

Because we find that defendant failed to satisfy this condition for naturalization his award of citizenship was unlawful and must be revoked pursuant to Section 340(a) of the Immigration and Nationality Act, 8 U.S.C. § 1451(a).[35]

Based on the foregoing, it is patently clear that defendant's citizenship was illegally procured and must be revoked.

2. *Citizenship Procured by Concealment of a Material Fact or By Willful Misrepresentation*

An alternative ground requiring the cancellation of defendant's certificate of naturalization ensues from the willful, material misrepresentations he made to the Government during the procedures leading to his naturalization in 1960. Section 340(a) of the Immigration and Nationality Act, 8 U.S.C. § 1451(a). In stating (1) that he had never "committed a crime involving moral turpitude," (GX–31, Form N–400, question 23) and (2) that he was and had been "during all periods required by law, a person of good moral character," (GX–31, Form N–405, statement 15), defendant knowingly concealed, among other things, the facts of his service at the concentration camp in Tartu, Estonia during World War II. These facts were material under any view of the test of materiality as announced in *Chaunt v. United States*, 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed.2d 120 (1960). *See Fedorenko v. United States, supra.* Consequently, defendant's naturalization must be revoked because it was procured by a willful misrepresentation of material facts.

IV. CONCLUSION

For the reasons set forth above, it is hereby

ORDERED that the order of the Supreme Court of the State of New York, Suffolk County, dated February 5, 1960, admitting defendant, Karl Linnas, to United States citizenship be, and the same is, hereby revoked and vacated, and his Certificate of Naturalization, Number 7641679, is cancelled on the grounds that such order and Certificate were illegally procured and were procured by willful misrepresentation of material facts under Section 340(a) of the Immigration and Nationality Act, 3 U.S.C. § 1451(a); and it is further

ORDERED that Linnas' Certificate of Naturalization, Number 7641679, shall be surrendered and delivered by Linnas to the Attorney General of the United States or his representative, the United States Attorney for the Eastern District of New York, on or before August 15, 1981;[36] and it is further

ORDERED that Karl Linnas is forever restrained and enjoined from claiming any rights, privileges or advantages of United States citizenship, including under or through any document evidencing United States citizenship; and it is further

ORDERED that the Clerk of the Court is directed: (1) to send forthwith a certified copy of this memorandum of decision and order to the Attorney General of the United

35. Defendant's lack of good moral character is also established by virtue of the false statements made on his petition for naturalization. Section 101(f)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1101(f)(6), provides in pertinent part:

"No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established is, or was

. . .

* * * * * *

(6) one who has given false testimony for the purpose of obtaining any benefits under this Act."

The misrepresentations made to the Displaced Persons Commission and Vice-Consul were false statements within the meaning of Section 101(f)(6) of the Immigration and Nationality Act.

36. *See* 8 U.S.C. § 1451(h). Surrender of defendant's Certificate of Naturalization is stayed pending appeal upon the condition that defendant file a notice of appeal within ten (10) days from the date of entry of judgment and diligently prosecute said appeal.

States;[37] (2) to send a certified copy of this memorandum of decision and order, and a certified copy of the judgment to be entered forthwith, to the Supreme Court of the State of New York, County of Suffolk,[38] and (3) to expeditiously enter judgment in favor of plaintiff United States of America and against Karl Linnas granting the relief requested in the complaint.

APPENDIX A

The facts found in our October 24, 1980 decision were as follows:

1. Defendant resided in the City of Tartu, Estonia, during all or part of the period July 1, 1941 to May 31, 1943, at or near a site known as "the Kuperjanov Barracks."

2. In 1949, defendant resided in or near Neuberg, Germany where, during 1949, he initiated or caused to be initiated application procedures for a United States Immigration Visa as a displaced person, pursuant to the Immigration and Nationality Act of 1924, as amended, and the Displaced Persons Act of 1948, Pub.L.No. 774 (62 Stat. 1009).

3. Defendant did not attend the University of Tartu at any time after July 1, 1941. He did attend and graduate from an Estonian Army Officers Training Academy prior to that date, and on that date held the rank of Second Lieutenant or its equivalent in the Estonian Army Reserve.

4. On or before July 1, 1941, defendant was a member of the paramilitary organization known as the "Omakaitse." Defendant held the rank of Second Lieutenant in this organization, which assisted the military forces of Nazi Germany in conducting arrests, imprisonments, physical abuse, and execution of unarmed civilians in German-occupied Estonia during all or part of the period July 1, 1941 to May 31, 1943.

5. During the period August, 1941 to May, 1943, military and paramilitary forces of Estonia and Nazi Germany established and administered, under the supervision of the occupying military and police forces of Nazi Germany, concentration camps at various sites in Tartu, Estonia, including, but not limited to, those sites known as "Naituse Valjak" and the "Kuperjanov Barracks," in which unarmed Estonia civilians, including men, women and children were imprisoned on the basis of race, religion or political opinion.

6. Defendant commanded the Tartu concentration camps at Tartu, Estonia, or was a member of the security forces of said concentration camps, during all or part of the period August, 1941 to May, 1942, inclusive.

7. During the period August, 1941 to May, 1942, the security forces at the Tartu concentration camps included what was known as the "special section," which selected prisoners, including unarmed civilian men, women and children to be put to death.

8. On one or more occasions between August, 1941 and May, 1942, defendant, on the basis of a list prepared and supplied to him by the aforesaid "special section" supervised the removal of prisoners from barracks at the Tartu concentration camp and their transfer to a site known as the "Jalaka Line" located near Tartu, and there supervised their execution.

9. In his capacity as an officer at the Tartu concentration camps, defendant wore the uniform of a Second Lieutenant or equivalent rank of the pre-1940 Estonian Army. He was armed with a pistol, which he carried to the aforesaid execution site, and from time to time fired that pistol at unarmed civilians in the course of their execution.

10. On or about May 26, 1942, defendant became a member of a military unit known as the Security Cadre Unit 41"E", as acting platoon leader of the heavy machine gun company. This unit assisted the military and police forces of Nazi Germany in Operations in German-occupied Estonia.

11. On August 30, 1944, defendant was a member of a military organization known as the 38th Estonian Police Battalion, in which he served as a Second Lieutenant or equivalent rank. This unit assisted the mil-

37. *See* 8 U.S.C. § 1451(h).

38. *See* 8 U.S.C. § 1451(h).

APPENDIX A—Continued

itary and police forces of Nazi Germany in operations in German-occupied Estonia.

12. For some or all of his services at the Tartu concentration camps, in the heavy machine gun company of Security Cadre Unit 41"E", and in the 38th Estonian Police Battalion, defendant was paid by the government of Nazi Germany.

13. On August 30, 1944, while a Second Lieutenant or its equivalent rank in the 38th Estonian Police Battalion, defendant was wounded and evacuated to Nazi Germany, at which time defendant continued to be supported by the government of Nazi Germany.

APPENDIX B

The findings of fact were as follows:

FACT: On August 22, 1945, United States military authorities issued to defendant an "A.E.F. Registration Record," also known as a "DP–2 card" . . . .

FACT: On or about August 27, 1946, defendant filed with the Third United States Army at Geretsried Displaced Persons Camp in Germany, a questionnaire for displaced persons, in the Estonian language, signed and sworn by defendant. [GX–32 admitted into evidence].

In response to this questionnaire, defendant stated, in item 6(b), that during the years 1941 and 1942, his occupation was as temporary draftsman and student. He further stated, in response to a question requiring disclosure of all military and political activity 1936–1946 (item 7), that his only service was in the Army of the Democratic Estonian Republic, 1938 to 1940, as a sergeant, and in an Estonian security battalion in Tartu, Estonia, 1943 to 1944, as a sergeant. In fact, during all or part of the period August 1941 to May 1942, inclusive, defendant was a member of the *Omakaitse* (Estonian Self-Defense) with the rank of second lieutenant, and commanded or was a member of the security forces of the Tartu concentration camps at Tartu, Estonia, and at no time during the period August 1941 to May 1942 was he a student.

Following defendant's misrepresentation, the Third United States Army established defendant's status as a displaced person.

FACT: On July 5, 1947, United States military authorities issued to defendant an "A.E.F. Registration Record," also known as a "DP–3 card" . . . .

FACT: On or about February 6, 1948, defendant's father, August Linnas, with defendant's knowledge and approval, filed with the Preliminary Commission for the International Refugee Organization a signed and sworn Application for Assistance (CM/1 form), in the German language, numbered 845742, on behalf of August Linnas, Ida Linnas (defendant's mother), Karl Linnas (defendant), Linda Linnas (defendant's wife), and Anu and Tiina Linnas (defendant's daughters) [GX–38–B admitted into evidence]. This application stated that from 1940 to 1943 Karl Linnas was a student and technical artist in Tartu, Estonia, and further that he was a university student from 1938 to 1943, when in fact, during all or part of the period August 1941 to May 1942 inclusive, defendant commanded or was a member of the security forces of the Tartu concentration camps at Tartu, Estonia, and at no time during the period August 1941 to May 1942 was he a student.

FACT: On or about December 16, 1949, defendant's wife, Linda Linnas, with defendant's knowledge and approval, filed an International Refugee Organization Resettlement Registration Form, bearing CM–1 number 845742, signed and sworn by Linda Linnas, on behalf of Linda Linnas, Karl Linnas (defendant) and Anu and Tiina Linnas (defendant's daughters) [GX–38–C admitted into evidence].

In reliance upon information provided in this form and in other documents referenced in this form, on December 29, 1949 the International Refugee Organization certified defendant as a displaced person and refugee, as defined in Annex I of the IRO Constitution, and as of concern to the IRO, when in fact, by virtue of his activities at the Tartu concentration camps, he was not entitled to such certification.

FACT: On one or more occasions prior to April 27, 1951, defendant was interviewed by representatives of the Counter Intelli-

APPENDIX B—Continued

gence Corps, United States Army (hereinafter CIC) on behalf of the United States Displaced Persons Commission, for the purpose of establishing eligibility as a displaced person under the Displaced Persons Act of 1948, as amended. Defendant stated to the CIC that he was drafted into the Estonian Army on July 1, 1938 and served until June 1940, that he was again drafted into the Estonian Army on May 22, 1943 and served with the "Estonian Home Guard, Kreis Tartu" in the vicinity of Tartu, Estonia until he was wounded in August 1944, that he never served in the German Army or wore a German Army uniform, and that he had not been a member of any political group or organization, when in truth and in fact, as the defendant well knew, he had been a second lieutenant in the Omakaitse (Estonian Self-Defense) and in that capacity had been a commander or member of the security forces of the Tartu concentration camps during all or part of the period August 1941 to May 1942.

FACT: On or about April 27, 1951, James P. McDonald, a case analyst for the United States Displaced Persons Commission (hereinafter the Commission), based on the Commission's investigation and on statements, certifications and other documents contained in the Commission's files, issued on behalf of the Commission a report stating that the Commission had established that defendant had not advocated or assisted in the persecution of any person because of race, religion or national origin, and certified him as eligible for consideration for admission to the United States as a displaced person under Section 2(c) of the Displaced Persons Act of 1948, as amended.

FACT: On or about May 17, 1951, defendant filed an Application for Immigrant Visa and Alien Registration (Form 256a), signed and sworn by defendant, with the United States Consulate at Munich, Germany in which he claimed status as a displaced person [GX–31 admitted into evidence]. Attached as part of this application was the photograph of defendant, signed on the front and back by him. Also filed as part of this application and submitted herewith as part of [GX–31] was identity card number 004235 for Karl Linnas, dated August 22, 1941, a marriage certificate for Karl Linnas and Linda Saks, dated July 7, 1944, and four good conduct certificates pertaining to defendant's conduct in post-war Germany.

FACT: On August 17, 1951, defendant entered the United States for the purpose of immigration at New York, New York. Upon entry into the United States, he signed and swore to two copies of an "Affidavit as to Subversive Organizations or Movements" (INS Form I–144) [GX–31 admitted into evidence], one in the Estonian language and one in the English language, stating that he had never advocated or assisted in the persecution of any person because of race, religion or national origin. This affidavit had been read by and explained to defendant by an American official at Augsburg, Germany on or about May 21, 1951.

APPENDIX C

One of the documents establishing defendant's service in the 38th Estonian Police Battalion is Government Exhibit 15–A, a German Nazi document captured by the allies, which reads as follows:

(stamp) (120)

Higher SS and Police Commander (HSSPf), Baltic Sea (stamp: Feb. 13, 1945)

Welfare Headquarters—Subsidiary Office I

Schwerin, Feb. 2, Arsenal 1945

File symb.: F.U.Ausland Ja/HO

Subj.: Volunteer pay

To: (stamp: Office for Member Support Abroad rec.: Feb. 10, 1945)

SS Race & Colonization Main Office

—Office for Member Support Abroad—

Prague II

Karl Laznowsky Quay 60

The Estonian volunteer, Lieutenant of Protective Police *Karl Linnas*, born on Aug. 6, 1919, belongs to Police Front Battalion 38, APO no. 46,903, he was wounded on Aug. 30, 1944. He is now under outpatient treatment here in Schwerin and is residing with his wife at Severinstr. 34. He has been married since July 7, 1944.

About mid-December 1944 he applied to you through his hospital for continued disbursement of combat pay, which he has not received since July 1, 1944.

APPENDIX C—Continued

I request to be informed immediately as to what became of his application, since the combat pay is urgently required for his living expenses. Remittance can be made to account no. 6082 of the Sparkasse (Savings Bank) in Schwerin/Mecklenburg.

(stamp: NOT IN FILE) (signature)

SS 1st Lieut. (Reserve)

AMERICAN RE-INSURANCE COMPANY, Plaintiff,

v.

The INSURANCE COMMISSION OF the STATE OF CALIFORNIA, as liquidator of Signal Insurance Company and of Imperial Insurance Company, the Chief of the Receivership Division of the Department of Insurance of the State of Alabama, as ancillary liquidator of Imperial Insurance Company, the Department of Insurance of the State of Florida, as ancillary receiver of Signal Insurance Company and of Imperial Insurance Company, the California Insurance Guarantee Association, the Arizona Property and Casualty Insurance Guaranty Fund Board, the Iowa Insurance Guarantee Association, the Nevada Insurance Guarantee Association, the Florida Insurance Guarantee Association, the Washington Insurance Guarantee Association, the Alaska Insurance Guarantee Association, the Kansas Insurance Guarantee Association, the Oregon Insurance Guarantee Association, the Utah Insurance Guarantee Association and Dr. Robert Watanabe, Defendants.

State of Nevada and Rauel Sawyer, Intervenors.

No. CV 78-4069-WMB.

United States District Court, C. D. California.

Aug. 7, 1981.

In action to determine distribution of direct payment of reinsurance proceeds due under reinsurance contracts following insolvency of insurance companies, parties moved for partial summary judgment. The District Court, Wm. Matthew Byrne, Jr., J., held that California Insurance Commissioner was statutory successor of companies and reinsurance agreements.

Ordered accordingly.

1. Federal Civil Procedure ⇐2470.1, 2470.4

Summary judgment may properly be granted only when no genuine issue of any material fact exists or, when viewing evidence and inferences that may be drawn therefrom in light most favorable to adverse parties, movants are clearly entitled to prevail as matter of law.

2. Commerce ⇐62.3

Under Constitution, federal government has power to regulate insurance as part of interstate commerce. U.S.C.A. Const.Art. 1, § 8, cl. 3.

3. Commerce ⇐62.3

Federal government has expressly declined to exercise its power to regulate insurance as part of the interstate commerce and has left such regulation to states. McCarran-Ferguson Act, §§ 1-5, 15 U.S.C.A. §§ 1011-1015.

4. Insurance ⇐3.1

Although Constitution would support federal regulation of insurer insolvency proceedings, Congress has declined to exercise its power to do so. Bankr.Act, § 4(b), 11 U.S.C.A. § 22(b); U.S.C.A.Const.Art. 1, § 8, cl. 4.

5. Federal Courts ⇐419

Appropriate state laws regulate insurer insolvency and in particular govern direct payment of reinsurance proceeds in event of insurer insolvency.

6. Federal Courts ⇐410, 419

Federal District Court would apply law of forum state, including its choice of law