IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Appellee

V.

SERGE KOWALCHUK, a/k/a
SERHIJ KOWALCZUK,

Appellant

COURT OF APPEALS NO. 83-1571

Appeal from the United States District Court
For the Eastern District of Pennsylvania

APPELLEE'S BRIEF

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2. Did the District Court clearly err in its factual determination that "the Lubomyl schutzmannschaft, of which the defendant was voluntarily a member, voluntarily assisted the enemy forces in their operations against the United Nations?"

3. Did the District Court clearly err in its factual determination that defendant "made a willful misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person?"

4. Did the District Court apply the correct legal standard in determining that defendant's misrepresentaitons to immigration officials were material?

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II. ABBREVIATIONS

Defendant submitted "Appellant's Appendix" along with his brief; the government will refer to pages in Appellant's Appendix by "A" followed by the page number. The government herewith submits the Government's Appendix; the government will refer to pages in the Government's Appendix by "GA" followed by the page number.

III. STATEMENT OF THE CASE

A. Nature and Background of the Case

This is an action brought by the United States of America ("the government"), pursuant to Section 340(a) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. §1451(a), to revoke the United States citizenship of the defendant, Serge Kowalchuk. The complaint was filed on January 13, 1977. An amended complaint was filed on June 5, 1981.

The amended complaint (A 338-361) alleged, inter alia, that the defendant served in the Ukrainian police[1] in the town of Lubomyl during the Nazi occupation of the Ukraine; that the Ukrainian police in Lubomyl assisted the occupying Nazi forces in the persecution of Jews and other civilians; and that the defendant personally assisted in these persecutions.

The government also alleged that defendant had misrepresented his employment and residence during the Nazi occupation when he sought to enter the United States under the Displaced Persons Act. Specifically, defendant asserted in his immigration papers that he had been a tailor's assistant in the town of Kremianec, Poland from 1939 to 1944. By virtue of these misrepresentations, defendant gained entry into the United States in February 1950.

The government claimed that defendant's citizenship had been procured illegally and by material misrepresentations and that his citizenship therefore had to be revoked.

The case was tried before the Honorable John P. Fullam, sitting without a jury, in October and December 1981. On July 1, 1983, the Court entered judgment denaturalizing defendant on the following grounds:

> 1. The defendant * * * was not entitled to the benefits of the Displaced Persons Act, because:
>
> a. He assisted the Nazis in persecuting civilian populations, through his role as a member of the Lubomyl schutzmannschaft.
>
> b. The Lubomyl schutzmannschaft, of which the defendant was voluntarily a member, voluntarily assisted the enemy forces in their operations against the United Nations.
>
> 2. Defendant Serhij Kowalczuk illegally obtained his visa because he made a willful misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person, within the meaning of §10 of the Displaced Persons Act.
>
> 3. Because his entry into the United States for permanent residence was illegal, the defendant Serhij Kowalczuk illegally obtained his naturalization certificate. [A 1697-1698.]

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1. The Ukrainian police was also known as the Ukrainian militia and the Ukrainian schutzmannschaft. (A 1674, 1690, 864, 1248-1252.) These terms will be used interchangeably throughout this brief, depending upon the term or terms that a particular witness used in his testimony.

This case has never previously been before this Court and counsel is not aware of any related case pending before this Court.

B. Historical Background

1. Lubomyl During the Nazi Occupation

Lubomyl is a town in the Wolhynia region of the Ukraine. Until 1939, it was part of Poland. In September 1939, Nazi Germany and the Soviet Union divided Poland, resulting in Lubomyl's occupation by the Soviet Union. (A 471.) When Nazi Germany invaded the Soviet Union on June 22, 1941, Lubomyl was quickly overrun by the Germans and was occupied by the third day of war. (A 472, 97, 41-42.) It remained under German military jurisdiction until September 1, 1941, when a civilian administration controlled by the Nazis was installed. (A 473, 527-528, 852.)

At the time of the German invasion, Lubomyl had a population of approximately 10,000, half of which was Jewish. (A 464, 673, 855.) A Jewish ghetto was established in Lubomyl in December 1941 and Jews from Lubomyl and the surrounding area were required to move into the ghetto. (A 1301, 496, 629, 976-977.) Approximately 5,000 Jews were placed into the ghetto. (A 102-103.)

Before they were murdered en masse, the Jews of Lubomyl were subjected to extreme hardships and indignities. They had to wear an armband with the Star of David and, later, a yellow badge. (A 1302, 975-976, 496-500, 627, 43-44, 263.) They were prohibited from conducting worship services and their children were excluded from schools. (A 496.) They were forced to perform labor for the Nazis (A 496, 104, 643-644) and received only 200 grams of bread per day (A 496, 653-654). After they were ordered into the ghetto, their living conditions became significantly worse: there was extreme overcrowding, with as many as 22 people living in each house, and severe shortages of food and water. (A 976-977, 653-654, 668-669, 104.) Valuables were confiscated. (A 493-495, 146, 626-627.) Jews were not allowed to leave the ghetto and were to be shot without warning if they attempted to do so. (A 103, 1303, 977, 496, 43-44, 270.) There were periodic "actions" in which Jews were apprehended and shot. (A 970-974, 986, 476-495, 638-653, 144.)

The Lubomyl ghetto existed until October 1, 1942 when all of its remaining residents were marched three kilometers to the village of Borki. There they were shot to death at mass graves. (A 121, 1108-1112, 656-658, 177-181.)

2. Procedures for Obtaining a Visa Under the Displaced Persons Act

When World War II ended, Europe was populated by millions of refugees and displaced persons. The United Nations responded by creating the United Nations Relief and Rehabilitation Administration (UNRRA) to provide the necessities of life and repatriation to those who were willing to return to their homelands. When UNRRA was phased out and replaced in July 1947 by the International Refugee Organization of the United Nations (IRO), practically all refugees who desired to return to their homelands had already done so. (A 393.) The hundreds of thousands of persons remaining in European refugee camps were unwilling to return to their countries of origin. In response to the problem, the IRO made efforts to resettle those persons in other countries. The United States was among those nations which agreed to accept them.

On June 25, 1948 Congress enacted the Displaced Persons Act (DP Act or DPA)[2] which was designed to permit entry into the United States of over 200,000 homeless individuals.[3]

Only "refugees" or "displaced persons" who were of "concern" to the IRO were eligible to enter the United States under the DP Act. Section 2 of the DP Act incorporated the definition of "refugees or displaced persons" contained in Annex I to the IRO Constitution. The IRO Constitution provided that the following persons were not of concern to the IRO and would not be eligible for refugee or displaced person status:

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2. Displaced Persons Act of 1948, Ch. 647, 62 Stat. 1009 (1948), GA 1-6.

3. The June 1950 amendments to the DP Act, 64 Stat. 219, GA 7-16, increased the number of visas which could be issued. Even this number, however, represented only a fraction of the persons who sought entry to this country.

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

In order to immigrate to the United States under the DP Act, an individual therefore first had to be certified by the IRO as "of concern" to the organization. (A 387, 394-395, 574, 1026-1029.) An applicant submitted a personal history form called a CM/1 to the IRO for the purpose of establishing eligibility for all IRO benefits, including, but not limited to, immigration to the United States. (A 388, 1045-1046.)

Once an applicant was found to be of concern to the IRO, if the applicant sought to immigrate to the United States, he was required to submit a form called a "Fragebogen" (questionnaire). (A 1031-1033, 395-396.) The Fragebogen was prepared solely for the purpose of determining eligibility for immigration to the Untied States under the Displaced Persons Act. (GA 17-27: Government Exhibit 15A; A 1046, 408.)

The Displaced Persons Commission was the United States government agency entrusted with administering the DP Act. The Fragebogen, as well as the CM/1 Form, were submitted to the DP Commission. The Counter Intelligence Corps of the U.S. Army (CIC) conducted a security and background investigation for the DP Commission of those applicants residing in areas occupied by the U.S. military. The CIC relied upon the Fragebogen and CM/1 in investigating the applicant. (A 578.) If the CIC found no derogatory information, a case analyst for the Displaced Persons Commission reviewed the file to determine whether the applicant was eligible for a visa under the terms of the Displaced Persons Act. To make that determination, the case analyst relied upon the findings of the CIC and the information provided by the applicant in the Fragebogen and CM/1. (A 581-585.) The case analyst summarized his findings in a report. (Government Exhibit 15D.) If there was any question that the applicant may not have been eligible, the case analyst resolved the matter

against the applicant because "there were too many people in the camps at that time to risk passing a case where there was a possibility of misbehavior and leave someone with an absolutely clean record rotting in a refugee camp." (A 590; GA 5: §10 DP Act, 1948.)

If the case analyst found that the applicant was eligible under the DP Act, the case analyst's report, along with the Fragebogen and CM/1 form, were sent to an American consulate so that the applicant could apply for a visa. (A 1031-1033, 585, 455.) At the consulate a vice consul of the United States Department of State reviewed the file which had been forwarded and thereafter interviewed the applicant. The applicant was sworn to the truthfulness of the information in the documents. (A 1031-1033.) If the applicant met all of the eligibility requirements of the DP Act, the visa was issued.

IV. OPINION AND JUDGMENT BELOW

A. Findings of Fact

1. Defendant's Activities During the Nazi Occupation

The District Court found that shortly after the Germans occupied Lubomyl in 1941, a schutzmannschaft (police force/militia) made up of local Ukrainians, was established in Luboyml. (A 1690, Decision p. 21.) The defendant was a member of the Lubomyl schutzmannschaft and occupied "a position of some responsibility." (A 1691, Decision p. 22.)

The Court also found clear, convincing and unequivocal evidence of the integral role of the Lubomyl schutzmannschaft in carrying out the Nazis' racial policies:

> What the evidence does establish with the requisite clarity and conviction is that the Lubomyl schutzmannschaft regularly and routinely enforced the martial law restrictions imposed by the Germans, including beating Jews found outside the ghetto after curfew, beating or severely reprimanding Jews who failed to wear the required insignia, assisting the Germans in confiscating valuables from the Jewish inhabitants, arresting and participating in the harsh punishment of persons involved in black-market activities or subversive activities hostile to the German occupation forces; * * *

> [M]embers of the schutzmannschaft accompanied the German gendarmes on the many occassions disclosed by the testimony when persons were rounded up for forced labor, or arrested for various supposed infractions; that many of the persons thus apprehended were killed soon afterward; and that members of the schutzmannschaft were present during such executions. Although the evidence does not disclose, with the requisite clarity and conviction, that the defendant personally participated in any of these individual atrocities, the evidence as a whole leaves little doubt that everyone associated with the schutzmannschaft, including the defendant, must have known of the harsh repressive measures which the schutzmannschaft were carrying out pursuant to German direction. [A 1693-1694, Decision pp. 24-25.]

Based on this evidence, the District Court found that the defendant had "assisted the Nazis in persecuting civilian populations, through his role as a member of the Lubomyl schutzmannschaft," and that the "Lubomyl schutzmannschaft, of which the defendant was voluntarily a member, voluntarily assisted the enemy forces in their operations against the United Nations." (A 1698, Decision p. 29.)

2. Defendant's Immigration to the United States

The District Court found that after the War, defendant spent four years at a displaced persons camp at Lexenfeld, Austria, where he applied to the IRO for eligibility as a refugee. As part of this process, defendant completed a CM/1 personal history form in November 1947, which resulted in an IRO finding of eligibility. (A 1672-1673, Decision pp. 3-4.) This rendered defendant eligible for resettlement. (Id.)

Defendant then submitted the IRO documentation, along with a completed Fragebogen, to the Displaced Persons Commission. (Id.) The DP Commission certified defendant's eligibility under the DP Act in 1949, whereupon he completed a formal application for a visa at a United States consulate. A visa was issued in late 1949. (Id.)

Significantly, however, the Court found that defendant lied in both his CM/1 form and Fragebogen when he claimed to have been a tailor in Kremaniec, Poland during the entire War. Defendant concealed from immigration officials his service in the schutzmannschaft.

The District Court found that:

> [i]n applying for a visa and submitting the fragebogen * * * the defendant plainly was making representations for the purpose of gaining entry to the United States. [A 1695, Decision p. 26.]

By misrepresenting his wartime occupation and residence in the Fragebogen, defendant concealed his assistance in perseuction as part of the Lubomyl police.[4] The Court found that:

> it seems quite probable that consular officials would not knowingly have issued a visa to a person who actively assisted the Nazis in persecuting civilians, regardless of the extent of his direct personal involvement in atrocities. [A 1695-1696, Decision pp. 26-27.]

The Court concluded that the defendant "made a willful misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person, within the meaning of §10 of the DPA." (A 1698, Decision p. 29.)

B. Conclusions of Law

The District Court concluded that because defendant was not a genuine refugee "of concern" to the IRO (i.e., he assisted the Nazis in persecuting civilian populations and voluntarily assisted the enemy forces in their operations against the United Nations), he was not entitled to the benefits of the Displaced Persons Act. (A 1698, Decision p. 29.) Accordingly, defendant lacked the lawful admission into this country which is a statutory prerequisite to naturalization.

The Court below also concluded that defendant had illegally obtained his visa by making a willful, material misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person. Pursuant to §10 of the Displaced Persons Act, such misrepresentation automatically barred defendant from eligibility to enter the United States. (A 1698, Decision p. 29.)

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4. The Court found that an admission of membership in the Ukrainian militia would have resulted in an inquiry which would have disclosed the activities of the militia on behalf of the Germans. (A 1695-1696, Decision pp. 26-27.) In other words, even minimal truthfulness by defendant would have inevitably resulted in revelation of his assistance in persecution.

Because his entry into the United States for permanent residence was illegal, defendant illegally procured his naturalization and his citizenship had to be revoked. (A 1698, Decision p. 29.) Fedorenko v. United States, 449 U.S. 490 (1981).

V. ARGUMENT

A. Standard of Review

The District Court's determination that the defendant assisted in persecuting civilian populations, voluntarily assisted the enemy forces, and made a willful misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person, are findings of "ultimate fact."[5] As this Court recognized in Interdynamics, Inc. v. Wolf, 698 F.2d 157 (3d Cir. 1982), review for questions of ultimate fact is governed by the "clearly erroneous" standard of Rule 52(a), Fed.R.Civ.P.:

> We recognize that a finding of equivalence [in patent law] probably falls within that ever-troublesome category known as "questions of ultimate fact" and thus constitutes "a mixture of fact and legal precept," Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F.2d 98, 102 (3d Cir. 1981). The Supreme Court recently has held, however, that the standard of review for questions of fact applies as well to questions of ultimate fact.

Id. at 176, n. 36. The Court in Interdynamics quoted from the Supreme Court's decision in Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982):

> [Fed.R.Civ.P.] 52 broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.

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5. Defendant does not contest that, if he assisted in persecution, voluntarily assisted the enemy, or made willful material misrepresentations to obtain a visa, he would have to be denaturalized because his citizenship would have been illegally procured. Fedorenko v. United States, supra.

See also Inwood Laboratories v. Ives Laboratories, 456 U.S. 844, 856-857 (1982); C & K Coal Co. v. United Mine Workers of America, 704 F.2d 690, 695 (3d Cir. 1983); Bittner v. Borne Chemical Co., 691 F.2d 134, 138-139 (3d Cir. 1982).[6]

"It is the responsibility of an appellate court to accept the ultimate factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of

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6. The two cases cited on page 11 of Appellant's Brief do not support the argument that the District Court's conclusions that defendant assisted in persecution, voluntarily assisted the enemy forces and made a willful misrepresentation, are legal conclusions subject to reversal if merely erroneous. In fact, they support the opposite conclusion.

Halderman v. Pennhurst State School Hospital, 707 F.2d 702 (3d Cir. 1983) held that:

1. The question of whether a proposed community placement of a profoundly retarded child would be "more beneficial" than his remaining in a state school and hospital is a factual question subject to the clearly erroneous standard of review. 707 F.2d at 705.

2. The question of whether the District Court gave sufficient weight to the parents' concerns and violated their constitutional rights is a legal issue, subject to plenary review. 707 F.2d at 706.

Determining whether a group of factors is "more beneficial" to an individual than another group of factors is analogous to determining whether defendant's actions during the War assisted the Nazis in persecuting civilians or assisted the enemy in its operations against the United Nations. Both are ultimate factual determinations subject to the clearly erroneous standard of review, as made clear in Halderman.

In Universal Minerals, Inc. v. C.A. Hughes and Co., 669 F.2d 98 (3d Cir. 1981) this Court held that:

1. A person's state of mind, such as intent to abandon, is a finding of fact rather than a holding of law. 669 F.2d at 104.

2. The principle that culm may be abandoned when it is left on the land of another with the intention of abandoning it, is a legal determination. 669 F.2d at 103.

Universal Minerals clearly demonstrates that questions regarding state of mind — such as voluntariness (as in voluntarily assisting the enemy) and willfullness (as in willfully misrepresenting) are factual issues.

credibility, or (2) bears no rational relationship to the supporting evidentiary data." Interdynamics, Inc. v. Wolf, 698 F.2d 157, 176 (3d Cir. 1982); Krasnov v. Dinan; 465 F.2d 1298, 1302 (3d Cir. 1972).

The remaining two issues, the legal standard for determining the materiality of the misrepresentation and the question of whether defendant's due process rights were violated, are legal issues subject to plenary review by this Court.

B. The Trial Court Correctly Found, Based on the Record, That Defendant's Conduct During the Nazi Occupation Constituted Assistance in Persecution

1. The Testimony of Defendant and His Brother

The defendant testified that the Ukrainian militia (or Ukrainian police) in Lubomyl was formed about two or three weeks after the German occupation began.[6] (A 1298.) Defendant admitted that he worked for the Lubomyl militia during the German occupation (A 1250, 1299, 1319), commencing this work in approximately August 1941 (A 1299).

Defendant admitted that he had his own office at the Lubomyl militia (A 1306, 1250) and that he was one of only three militia employees who had his own office (A 1306). There were from 35 to 40 militia men when defendant began working there. (A 1300.) Defendant admitted that he sometimes wore a uniform. (A 1251.)[7]

Defendant admitted that he was aware of at least some of the restrictive measures that were instituted against the Jews of Lubomyl: every Jew had to wear a yellow patch, Jews were forced into a ghetto in late fall 1941 and Jews could not leave the ghetto without permission. (A 1301-1303.)

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6. The Nazis launched their invasion of the Soviet Union on June 22, 1941. (A 852.)

7. Defendant later claimed that this was really an old Boy Scout uniform. (A 1310.) He claimed that he wore this uniform merely to avoid curfew restrictions when he was out on dates. (A 1251, 1309.) The District Court apparently did not credit this part of defendant's testimony. (A 1692, Decision p. 23.)

Defendant admitted that one of his duties at the Lubomyl militia was to make schedules for patrols and guard duties for the Ukrainian militia men. (A 1299-1300.) Defendant would take the names of the militia men and assign them to different locations. (A 1300, 1307.) Defendant admitted that he assigned Ukrainian militia to patrol the Jewish ghetto:

> Q But just to return, is it your testimony that you did assign patrols that went through the Jewish ghetto of the Ukrainian militia?
>
> A Not only the ghetto but all the parts of the city.
>
> Q Some were assigned specifically to go to the ghetto?
>
> A The ghetto. [A 1302.]

Defense witness Mykola Kowalchuk, the defendant's brother, also testified that Jews in Lubomyl were required to wear yellow patches, that in the fall of 1941 they were restricted to the ghetto, and that the Ukrainian police, as well as the German gendarmes, patrolled the ghetto to keep the Jews from leaving. (A 1167-1168.) Mykola Kowalchuk also testified that on the day of the liquidation of the Jewish ghetto, he saw all of the Jews in the town square being surrounded by the local Ukrainian police and the Germans. (A 1168, 1111-1112.)

Based solely on these admissions and Mykola Kowalchuk's testimony, there is sufficient evidence to support the District Court's finding that the defendant assisted the Nazis in persecuting civilian populations.

2. Government's Witnesses

The government presented the testimony of nine eyewitnesses to the events in Lubomyl. One witness who testified at trial, Abraham Getman, lives in the United States. Two of the witnesses, Moshe Lifschutz and Shimeon Koret, live in Israel; they testified by videotaped deposition. Six of the witnesses, Alexandr Trofimovich, Dem-yan Fedchuk, Gerasim Kotsura, Petr Kotovich, Aleksandr Voloshkevich, and Akim Yarmolyuk live in the U.S.S.R.; they also testified by videotaped deposition.

All of these witnesses (most of whom knew defendant before the War) testified that the defendant served in the Ukrainian police in Lubomyl. (Getman - A 968; Lifschutz - A 476-477; Koret - A 638; Trofimovich - A 38; Fedchuk - A 95; Kostura - A 171-173; Kotovich - A 209, 213; Voloshkevich - A 265.) The witnesses who also served as policemen in the Lubomyl police identified defendant as the deputy kommandant of the Ukrainian police in Lubomyul. (Fedchuk - A 95, 98; Kostura - A 171-173.) The Jewish survivor witnesses identified defendant as "the kommandant." (Getman - A 967-968; Lifschutz - A 476-477, 549; Koret - A 682.)

Most of these eyewitnesses testified to specific atrocities or acts of persecution performed by the defendant, in addition to the general conditions in Lubomyl. The District Court, however, credited their testimony only to the extent that it related to the general conditions in Lubomyl and the atrocities and persecution generally carried out by the Ukrainian police. The government will, likewise, confine its discussion of the testimony of these witnesses to a general description of the role of the Ukrainian police in persecuting the Jews, and not discuss the testimony of these witnesses implicating the defendant directly in atrocities. The government would be remiss, however, were it not to point out that numerous witnesses described defendant's personal and direct involvement in the murders and brutalities against the Jews of Lubomyl.

Mr. Getman, a Jewish survivor of Lubomyl, testified that the Ukrainian police was formed shortly after the Germans occupied Lubomyl. (A 967.) He testified to various atrocities and acts of persecution carried out by the Ukrainian police. In one action, Ukrainian police took away his father and other Jews in a truck; he heard shooting and the next day he found the bodies of these people at the Jewish cemetery. (A 970-972.) In another action, Jewish women were forcibly taken away by Ukrainian police and German gendarmes. (A 973-974, 986.) Mr. Getman also testified that the Ukrainian police and German gendarmes enforced the requirement that Jews wear yellow patches. (A 975-976.) In the fall of 1941, the Jewish ghetto was formed, with five to seven families forced to live in each house. (A 976-977.) Jews

who left the ghetto without authorization were to be shot. (A 977). The Ukrainian police and German gendarmes patrolled the ghetto and enforced these restrictions. (A 977.)

Mr. Lifschutz, another Jewish survivor of Lubomyl, testified to an action involving the public selection of five Jews by Germans and Ukrainian militia and the subsequent shooting of these Jews. (A 476-483.) He also observed actions in which Jews were rounded up and taken away by Ukrainian militia and Germans. (A 483-490.) On some occasions, Ukrainian militia went through the Jewish ghetto looking for valuables, sometimes beating the Jews in the process. (A 493-495.) Mr. Lifschutz testified that Jews were deprived of basic rights: they were not allowed on the streets after 7 o'clock, they were forced to work extremely long hours for only two hundred grams of bread per day, they were not allowed outside of the ghetto without permission, there were no schools, meetings, social activities, radios or newspapers allowed, and Jews were required to wear yellow badges and other markings. (A 496.) The Ukrainian town council and Ukrainian militia supervised and enforced these rules. (Id.) On one occasion, Mr. Lifschutz himself was taken to the Ukrainian militia headquarters and beaten by Ukrainian militiamen for not wearing the yellow badge. (A 497-500.)

Mr. Koret, another Jewish survivor of Lubomyl, testified that, after the Germans occupied Lubomyl, there was a Ukrainian police force and German gendarmes. (A 628-631.) Mr. Koret witnessed Ukrainian policemen beat his father (A 638-640) and later saw police beat other Jews after they were moved to the ghetto (A 656, 669-670). On another occasion, he witnessed Ukrainian policemen and German gendarmes beat his father and other Jews who did not have work certificates; they were then taken to the police station. (A 642-644.) On a third occasion, he witnessed the killing of his brother by the Ukrainian police and German gendarmes acting in concert. (A 645-653.) After the Jewish ghetto was formed in December 1941, Mr. Koret recalled that Ukrainian policemen patrolled the ghetto. (A 632-633.) Jews were required to wear yellow patches. (A 627.) Living conditions in the ghetto were extremely

crowded; Jews were only allowed a small amount of bread and some margarine, and if they were caught attempting to buy food on the black market, they were shot. (A 653-654.) The Ukrainian police helped to enforce these restrictions. (A 655, 668-669.)

Mr. Fedchuk served in the Ukrainian police during the Nazi occupation. (A 97.) He testified that the Ukrainian police guarded the Jewish ghetto, which held approximately 5,000 Jews. (A 102-103.) Consistent with defendant's own testimony, he testified that defendant gave instructions to policemen, including himself, to guard the ghetto. (Id.) Jews were to be shot without warning if they left the ghetto. (Id.) Fedchuk also recalled that there was a shortage of food and water in the ghetto, and that Jews were forced to do very difficult work. (A 104.)[8]

Mr. Trofimovich, a non-Jewish resident of Lubomyl during the Nazi occupation, testified concerning the restrictions placed on the Jews: they had to wear yellow badges, they were restricted to the ghetto, and Ukrainians could not enter the ghetto or bring food to the Jews. (A 43-44.) The local Ukrainian police guarded the ghetto and beat Jews who went outside the ghetto. (A 45-46, 56.)

Mr. Voloshkevich, a non-Jewish resident of Lubomyl during the Nazi occupation, also testified that Jews were required to wear yellow badges, were not allowed out of the ghetto, and were beaten by Ukrainian police and German gendarmes if found outside the ghetto. (A 263, 270.)

Professor Raul Hilberg, an expert historian, testified that throughout the Ukraine, the Ukrainian schutzmannschaft (also known as the militia or police) were employed in the process of collecting Jews into ghettos, guarding the ghettos, and eventually liquidating the ghettos by killing all the Jews. He testified that captured German documents used at the Nuremburg trials

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8. Fedchuk, as well as some of the other witnesses, also testified concerning the role of the Lubomyl Ukrainian police in the mass murder of the Lubomyl Jews in October 1942. However, defendant claimed that he was not in Lubomyl at that time, and the District Court held that the government did not prove defendant's presence by clear and convincing evidence.

showed that these Ukrainian schutzmannschaft were incorporated into the German SS and police structure and documented the use of the schutzmannschaft by the SS[9] and police in actions of persecution throughout the Ukraine. (A 863-905; e.g., GA 123-147: Government Exhibits 7, 9, 10,; Government Exhibits 11, 12, 4, 5, 14.)[10]

3. This Evidence Clearly Supports the District Court's Finding That Defendant Assisted In Persecution

The District Court's findings concerning the role of the Lubomyl schutzmannschaft in persecuting the Jews is fully supported by the record, even if the testimony of all the Soviet witnesses were totally disregarded. There is clearly sufficient evidence in the testimony of defendant, Mykola Kowalchuk, Getman, Lifschutz, Koret, and Dr. Hilberg to support the District Court's findings concerning the role of the Lubomyl schutzmannschaft in persecuting the Jews. Given this testimony, it was entirely proper for the Court to credit the Soviet witnesses to the extent that they provided corroboration of the schutzmannschaft's involvement in the persecution and ultimate extermination of the Jews in Lubomyl. In fact, defense counsel conceded that the role of the Lubomyl militia in the persecution of the Jews was never an issue in the case. (A 832-833.)

The District Court's finding that defendant, through his role as a member of the Lubomyl schutzmannschaft, assisted in persecuting civilians, is also not clearly erroneous. The record amply supports the finding that defendant

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9. SS were the initials for "Schutzstaffel," under the command of Heinrich Himmler, the Reichsfuehrer of the SS and police. One of the primary functions of the SS and police was the murder of all Jews in the areas occupied by Germany.

10. On page 22 of Appellant's Brief, it is asserted that Dr. Hilberg testified that captured Nazi documents reported that Ukrainians were not eager to persecute their Jewish neighbors. That assertion distorts Dr. Hilberg's testimony. Dr. Hilberg stated that these Nazi documents reported that Ukrainians did not spontaneously and independently conduct pogroms against the Jews; it was therefore necessary for the Nazis to organize Ukrainian police forces to carry out the persecution of the Jews. (A 917-921.)

occupied a position of responsibility with the schutzmannschaft.[11] Even if one were to accept that defendant's functions were largely administrative, they were integral to the operation of a unit which, in conjunction with the German SS and police, persecuted innocent civilians. Eyewitnesses to the activities of the Lubomyl police confirmed that it was an organization devoted in part to the execution of the Nazi's racial policies. Patrol of the Jewish ghetto and enforcement of ghetto restrictions by the police were themselves assistance in persecution. Defendant assigned police to those patrols. In addition, the ghetto was extremely overcrowded; food and water were in short supply. Jews were used as slave laborers and were required to wear identifying yellow patches. Jews were barred from leaving the ghetto or from obtaining additional food. Violators were beaten or killed. Valuables were confiscated. The police were responsible for enforcing all of these restrictions. It is not clear error to conclude that someone in a position of responsibility in such a police unit is culpable for its inhumane actions. The evidence clearly showed that an applicant for IRO eligibility and a DP Act visa would have been rejected even if he performed only administrative functions for a collaborationist police unit. (A 445.)

The lower Court's finding that defendant's activities on behalf of the Lubomyl schutzmannschaft constituted assistance in persecution is consistent with the findings of other courts which have considered similar cases.

United States v. Osidach, 513 F.Supp. 51 (E.D.Pa. 1981) (Bechtle, J.) was also a denaturalization proceeding against an individual who had served as a policeman in the Ukraine during World War II. The court held that Osidach's role as an armed, uniformed Ukrainian street policeman and as an interpreter for the Ukrainian and German police constituted persecution under the

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11. Defendant claims that he was never a member of the schutzmannschaft, but merely an employee of the local government who did work for the schutzmannschaft. This distinction is meaningless. Whether or not defendant considered himself a member, he had an office there and performed significant work for the schutzmannschaft. It was his activities on behalf of the schutzmannschaft, whether or not he considered himself a member, which constituted persecution. Second, the District Court found that defendant was in fact a member, and that finding is not clearly erroneous.

Displaced Persons Act, even though no specific arrests or other acts against Jews by the defendant were proven. 513 F.Supp. at 97-99.

In United States v. Dercacz, 530 F.Supp. 1348 (E.D.N.Y. 1982) defendant had also been a policeman in the Nazi occupied Ukraine during World War II. He entered the United States under the DP Act in 1949. The court held that Dercacz had illegally entered the U.S. under this Act because of his participation in the persecution of Jews:

> Defendant testified that one of his duties on the Ukrainian police force was to bring Jews not wearing the identifying armband to the police station and to report to the commandant and the Gestapo. Dercacz Dep. at 98. He further testified that his duty was to report civilians known to have sold food to the ghettoized Jews. Id. at 100. This testimony leaves no doubt that defendant, by virtue of his admitted duties, assisted the Nazis in persecuting civilian Jews. [530 F.Supp. at 1351.]

Dercacz was ordered denaturalized on the government's motion for summary judgment.

Dercacz was a rank-and-file policeman while Osidach was one level above a rank-and-file policeman. Kowalchuk was found by the Court to have occupied "a position of some responsibility" in the police. Eyewitnesses recalled that he was either the commandant or deputy commandant. The evidence clearly shows that the policemen Kowalchuk assigned to patrol the ghetto performed the very same acts and much worse acts of persecution than those found to have been performed by Osidach or Dercacz. Certainly, it is not error to find that a person "of responsibility" carrying out administrative functions is as culpable as the rank-and-file police who directly carried out the aforementioned acts of persecution. The District Court's finding that defendant assisted the Nazis in persecuting civilians is not "completely devoid of minimum evidentiary support displaying some hue of credibility." Interdynamics, Inc. v. Wolf, supra; Krasnov v. Dinan, supra. The finding of the court below must therefore be affirmed. Id.; Pullman-Standard v. Swint, supra; Inwood Laboratories v. Ives Laboratories, supra.

Defendant disingenuously likens himself to the innocent hair cutter/prisoner in the Supreme Court's example. That argument ignores both the essence of the Supreme Court's dichotomy and the facts in this case showing the direct involvement of the police in the persecution, ghettoization and ultimate liquidation of the Jewish residents of Lubomyl.

The Supreme Court's footnote quoted above was directed at a concern raised by the district court in that case that fellow concentration camp inmates who were forced to perform labor at Treblinka might subsequently face denaturalization under the government's interpretation of the DP Act. The Supreme Court rejected such concerns. The hair cutter in the Supreme Court's example was someone who did not participate whatsoever in the duties of a camp guard. His or her impact on the persecution of inmates would presumably have been nil. Kowalchuk, in contrast, voluntarily held a responsible position in a police force which carried out acts of persecution; he admitted a role in assigning policemen to guard and patrol the Jewish ghetto. His functions were, accordingly, much closer to a concentration camp guard than someone who cut inmates' hair. The District Court's decision to analogize Kowalchuk's activities to Fedorenko's is a reasonable one and was certainly not clearly erroneous.

C. The Trial Court Correctly Found, Based on the Record, That Defendant Voluntarily Assisted the Enemy Forces of Nazi Germany During the Second World War

The District Court's factual finding that "[t]he Lubomyl schutzmannschaft, of which the defendant was voluntarily a member, voluntarily assisted the enemy forces in their operations against the United Nations," has two components:

1. That defendant's membership in the Lubomyl schutzmannschaft was voluntary, and
2. That the Lubomyl schutzmannschaft assisted the enemy forces in their operations against the United Nations.

1. Defendant's Membership in the Lubomyl Schutzmannschaft was Voluntary

The evidence of defendant's membership in the Lubomyl schutzmannschaft has already been detailed. The defendant's own story concerning his involvement with the militia shows that it was entirely voluntary. (A 1298-1300.) Defendant never even claimed that he was drafted or forced to join or to perform his duties there.[12] Fedchuk, who also served in the Lubomyl militia, confirmed that membership was voluntary. (A 97-98, 110-111.)

Michael Thomas, who served as Chief Eligibility Officer for the IRO,[13] testified that service in the Ukrainian police was presumed to be voluntary by the IRO. (A 399-401.) The fact that someone joined the police in 1941, at the beginning of the Nazi occupation, was of great significance in demonstrating voluntariness. (Id., A 429-432.)[14]

The District Court's factual determination that defendant's service in the schutzmannschaft was voluntary is not clearly erroneous, considering the testimony of defendant, Fedchuk and Thomas.

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12. The implication on page 3 of Appellant's Brief that defendant's service in the schutzmannschaft was involuntary because he "needed to help support himself and his family" is incorrect. Defendant presented no evidence that he was unable to take another job. The statement on page 4 of Appellant's Brief that defendant was assigned to the schutzmannschaft "at German direction" sometime in 1942 is also incorrect. Defendant testified that he began working for the schutzmannschaft in August 1941 (A 1299); the Ukrainian mayor of Lubomyl gave him the job (A 1298-1299, 1250).

13. Mr. Thomas was an official of the United Nations Relief and Rehabilitation Administration (UNRRA) from 1945 to 1947. (A 375.) Thereafter, when the functions of UNRRA were taken over by the Preparatory Commission of the International Refugee Organization (PCIRO) and later the International Refugee Organization (IRO), Mr. Thomas was an official of these organizations. (A 377-378.) Mr. Thomas became the Chief Eligibility Officer for the entire IRO in August 1948. (A 378.)

14. The assertion at pages 25-28 of Appellant's Brief that Mr. Thomas did not recognize the requirement of voluntariness in assisting the enemy forces in their operations against the United Nations, as opposed to the lack of a requirement of voluntariness in assistance in persecution, is incorect. Mr. Thomas very clearly explained that distinction. (A 399, 429-430.) Mr. Thomas' testimony was that service in a police force in an area occupied by the Nazis was presumed to be voluntary. (A 399-401, 429-432.)

2. The Lubomyl Schutzmannschaft Assisted the Enemy Forces in Their Operations

The evidence of the role of the Ukrainian schutzmannschaft in the persecution of Jews has already been detailed. The record also contains ample evidence that the Ukrainian schutzmannschaft assisted the occupying Nazi forces by carrying out other tasks. Mr. Getman testified that he witnessed the shooting to death of a Polish cripple by a German gendarme accompanied by Ukrainian policemen. (A 980.) Trofimovich witnessed the hanging of a Ukrainian woman in the center of the town by Ukrainian policemen and Germans. (A 49-50, 59.) Several witnesses testified that the Ukrainian police arrested, interrogated and tortured persons suspected of underground activities. (Kotovich - A 215-219; Yarmoluck - A 289; Trofimovich - A 48, 53; see also Government Exhibit 14.)

Michael Thomas testified that service in a police force established in the Ukraine during the Nazi occupation, in and of itself, constituted assistance to the enemy forces. (A 398, 427.)[15] Indeed, the police forces themselves were considered by the IRO to be enemy forces. (A 456.)[16] The mere fact of belonging to a police force that was established during the Nazi

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15. As the Supreme Court stated in Udall v. Tallman, 380 U.S. 1, 16 (1965):

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. * * * Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' Power Reactor Company v. International Union of Electrical, etc. 367 U.S. 396, 408, 6 L.Ed. 2d 924, 932, 81 S.Ct. 1529.

See also American Paper Institute v. American Electric Power, 76 L.Ed. 2d 22, 39 (1983).

16. See also GA 51: IRO Manual for Eligibility Officers, p. 33, ¶22 [Ex. P-1 to Thomas dep.]; GA 40: Defendant's Exhibit Q-5, p. 3. These documents, used by the IRO in eligibility determinations, specifically named police as "enemy forces."

occupation of the Ukraine was considered by the IRO to be voluntary assistance to the enemy because it freed the enemy from using its own personnel for carrying out the daily tasks of occupation. (A 406.)[17]

In view of the eyewitnesses' testimony and the evidence of the IRO's policy vis-a-vis police forces, the District Court clearly did not err in finding that the Lubomyl schutzmannschaft assisted the enemy forces in their operations against the United Nations and civil populations.[18] The purpose and effect of these activities was to maintain Nazi control over a conquerred, occupied area and to implement essential Nazi policies, including racial persecution of various civilian groups.[19]

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17. Contrary to the argument made at pages 28-29 of Appellant's Brief, defendant did not serve in the army of a "satellite state." The Ukraine was not a satellite state, as were Hungary and Romania; the Ukraine was a conquered area that was under German administration. (A 473, 527-528, 852.) Defendant served in a police force which had the duty of maintaining Nazi control over an occupied area and carrying out Nazi policies. Defendant was not merely a soldier on the Eastern front fighting the Soviet Union.

18. Defendant's Exhibit Q-5, quoted at page 24 of Appellant's Brief, specifically states that assistance to the enemy includes "aiding the enemy * * * against the civil population of the territory in enemy occupation." (GA 40: PCIRO Provisional Order No. 42, p. 3.)

19. Defendant's service in the Lubomyl schutzmannschaft did not represent a mere continuance of a peacetime occupation, as claimed on pages 29-30 of Appellant's Brief. Defendant testified that the Ukrainian militia was formed after the German occupation began in June 1941 (A 1298) and that he commenced work for the militia in August 1941. (A 1299.) Defendant stated that he had previously worked as a tailor. (A 1246, 1252-1253.) It is therefore clear that neither defendant nor the Lubomyl militia merely continued normal peacetime functions. The role of the Lubomyl schutzmannschaft in persecuting the Jews also shows that this police force did not merely continue to carry out normal peacetime functions.

Defendant then suggests that, because he joined the police during the military occupation and prior to the institution of a Nazi civil administration (on September 1, 1941), his police functions were a continuation of a peacetime occupation. That assertion is ludicrous. Germany invaded the Soviet Union on June 22, 1941. That date is the appropriate demarcation between wartime and peacetime, not the date when the Nazis decided to convert from a military to civilian occupation.

D. The Trial Court Correctly Found, Based on the Record, that Defendant Made a Willful Misrepresentation for the Purpose of Gaining Admission into the United States as an Eligible Displaced Person

1. The Government's Evidence

From the beginning of the process which led to his immigration to the United States, defendant misrepresented his past. When he applied for IRO assistance on November 25, 1947,[20] he misrepresented his wartime occupation and residence. On the CM/1 form, defendant stated that he had resided in Kremianec, Poland from 1939 to 1944 and had been employed there as a tailor's apprentice. (GA 35, 29: Government Exhibit 15B, ¶s 10, 11.) His testimony at trial established that these statements were untrue. (A 1296-1310; see District Court's Decision p. 5, A 1674.)

On April 19, 1949, defendant executed a "Fragebogen" (questionnaire). (GA 17-27: Government Exhibit 15A; A 1323-1325.) The express purpose of the Fragebogen was to determine eligibility for immigration to the United States, as was made clear from the language contained on the face of the Fragebogen:

> I declare that the above information and answers are correct and complete according to my best knowledge and conscience. I sign this declaration in the certain knowledge that the veracity of the information given here will be checked, and if it is found to be untrue, incomplete, or misleading in any point, I may be denied entry into the United States. [GA 27, 20: Government Exhibit 15A.]

This warning and declaration appeared directly above the place where defendant signed the Fragebogen. The Fragebogen also contained the following language at the top of the first page:

> ATTENTION: Before the questions asked here are answered, the attestation at the end of the questionnaire must be read. [GA 22, 17.]

In spite of this warning, defendant claimed in the Fragebogen that he had been a tailor in Kremianec throughout the War. (GA 24, 26, 18, 20: Government Exhibit 15A, ¶s 28, 29, 42.) He also claimed that he had been forcibly

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20. This was prior to the institution of the Displaced Persons program. The DP Act was passed on June 25, 1948.

transported by the Germans (GA 26, 20: Government Exhibit 15A, ¶42) when in fact, as he admitted at trial, he voluntarily left Lubomyl (A 1255).

When he applied for his visa, defendant swore before a United States vice consul that all of the information contained in the Fragebogen was true. (A 1033.) At no time during the immigration process did defendant reveal the truth about his employment and residence during the War, or the manner in which he left the Ukraine.[21]

The District Court concluded that "[i]n applying for a visa and submitting the fragebogen * * * the defendant plainly was making representations for the purpose of gaining entry to the United States."[22] The District Court further found that defendant's statements in the Fragebogen concerning his employment and residence during the 1941-1944 period were misrepresentations. These findings are soundly based on the record and not clearly erroneous.[23]

2. The Defendant's Arguments

The Fragebogen, including the warning that a false statement could lead to denial of entry into the United States, is written in the German language. Defendant argues that he was not competent in German and therefore did not know that the Fragebogen was for the specific purpose of immigration to the

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21. In his brief, defendant stresses the fact that an extensive investigation was carried out by the Displaced Persons Commission, which found no derogatory information (Appellant's Brief pp. 18, 8 n.1); however, that investigation was premised on defendant's misrepresentation that he had been a tailor in Kremianec during the period 1941 to 1944. Given the small size and remoteness of Lubomyl and defendant's admission that he and his brother were the only refugees from Lubomyl in their DP camp (A 1287-1288), it is not surprising that defendant's misrepresentations went undetected by the DP Commission.

22. The Court found that the misrepresentations to the IRO did not, standing alone, constitute misrepresentations made for the express purpose of gaining entry into this country. However, when the same misrepresentations were repeated to DP Commission and consular officials, they were clearly made for the purpose of obtaining a visa. (Decision p. 26, A 1695.)

23. The materiality of the misrepresentations will be discussed at pp. 30-36, infra.

United States. (Appellant's Brief, p. 40.) However, in his CM/1 form, defendant claimed tht he spoke and wrote German fluently. (GA 35, 29: Government Exhibit 15B, ¶13.) At trial, he testified that he was sent to the town of Mattieu from August 1942 to January 1943 to take courses, including German language courses. (A 1313-1314.) He lived in Austria for four years prior to completing the Fragebogen. (A 1257-1258.) Given these facts, the Court properly did not credit defendant's feigned ignorance of German.

Even if it is true that defendant could not speak German at the time he signed the Fragebogen, the IRO always provided an applicant with an interpreter who could speak the applicant's language. (A 388, 455, 1282, 1329-1330, 1277.) In fact, defendant acknowledged that an interpreter was present when the Fragebogen was filled out. (A 1329-1330.) Furthermore, in his later face-to-face meeting with a U.S. consular officer for the express purpose of obtaining his visa, defendant was sworn to the truth of the facts in the Fragebogen. (A 1033.) Clearly there was sufficient evidence in the record for the District Court to conclude that defendant knew that the Fragebogen was specifically for the purpose of immigration to the United States.

Defendant also claims that he should not be held responsible for the false information in the Fragebogen, since some of that false information may have been copied from the CM/1 form. (Appellant's Brief, pp. 37, 40.) However, it is undisputed that defendant signed the Fragebogen under oath; he is therefore responsible for the information contained in it, whether or not it was copied from another form.[24] Defendant also swore to the truth of

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24. Further, it appears that the information contained in ¶29 of the Fragebogen, dealing with prior employments, was not merely copied directly from the CM/1 form. There is additional information in ¶29 of the Fragebogen which does not appear on the CM/1 form. For example, on the CM/1 form, it states that from 1939 to 1944, defendant worked as an "apprentice tailor" for the "Filipovicz Firm." In the Fragebogen, it states that from 1939-1944, defendant worked as a "tailor assistant" for "Filimonov Serhij" and that his reason for leaving was "practice and living needs." The official who filled out the Fragebogen could not have known that defendant worked for Filimonov instead of Filipovicz (defendant testified at trial that Filimonov was the correct name (A 1247)) nor could he have known that this person's first name was Serhij simply on the basis of the information in the CM/1 form.

[FOOTNOTE CONTINUED ON NEXT PAGE]

Furthermore, the Attorney General's memorandum cited by defendant (GA 54-60: Defendant's Exhibit N) was predicated on a situation in which a DP applicant truthfully stated the relevant facts to DP officials, but had previously misstated those facts to non-immigration officials:

> It appeared that when the Altmans were actually called before the case analyst, and were placed under oath, they promptly revealed the true fact and confessed the false statements because of their unwillingness to give false testimony under oath. We specifically adverted to the hypothesis that had the Altmans persisted in their misrepresentations before a person charged with the administration or enforcement of the Displaced Persons Act of 1948, the basis would have been provided for a finding of ineligibility under Section 10 of the Displaced Persons Act of 1948. [GA 57, emphasis added.]

That language clearly distinguishes the Altman case from the instant one. Kowalchuk never revealed the truth; to the contrary, when he appeared before the vice consul he swore to the truth of all statements contained in his Fragebogen, despite the obvious misrepresentations contained therein. The lower Court's finding that defendant had made misrepresentations to officials who administered the DP Act was not only factually sound but consistent with the Attorney General's interpretation of Section 10 of the DP Act.[26]

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26. Defendant's Exhibit N also stated the following:

> A misrepresentation as to residence, is a misrepresentation as to a material fact and when made to the Displaced Persons Commission, to a United States Consul, or to the Immigration and Naturalization Service, constitutes a misrepresentation within the contemplation of Section 10 of the Displaced Persons Act. * * *
>
> [W]here the misrepresentation (misstatement or fraudulent document) made to the Counter Intelligence Corps, is accepted, considered, and acted upon by the Displaced Persons Commission, or a United States Consul, or the Immigration and Naturalization Service, by rejecting the application on the ground of ineligibility under Section 10, the case cannot later be reactivated and the displaced person found eligible. This is necessarily so since the terms of Section 10 of the Displaced Persons Act provides that '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 to the United States.' [GA 54.]

Defendant next argues that the case of United States v. Iwanenko, 145 F.Supp. 838 (N.D. Ill. 1956) supports his position (pages 41-42 of Appellant's Brief). That case, however, is easily distinguished. The court found that Mrs. Iwanenko misrepresented her place of birth when she applied for a visa because of her fear of repatriation to Russia. 145 F.Supp. at 843. The court held that such misrepresentation was not material, since she would have obtained a visa even if she had told the truth about her birthplace. 145 F.Supp. at 842-843. There was no finding, and, in fact, no claim, that Mrs. Iwanenko had served in a police force in an area occupied by the Nazis, had assisted the Nazis in persecuting the civilian population, or had voluntarily assisted the enemy forces. There was no claim that Mrs. Iwanenko had misrepresented her occupation during World War II. The court specifically held that "there is no doubt that she was a displaced person within the provisions of the constitution of the International Refugee Organization." 145 F.Supp. at 842. No such finding could have been made with respect to Kowalchuk.

Appellant's Brief also points to the reliance by the court in Iwanenko on the following excerpt from the legislative history of the Immigration and Nationality Act of 1952:

> It is also the opinion of the Conferees that the sections of the bill which provide for the exclusion of aliens who obtained travel documents by fraud or willfully misrepresenting a material fact should not serve to exlude or to deport certain bona fide refugees who in fear of being forcefully repatriated to their former homelands misrepresented their place of birth on applying for a visa and such misrepresentation did not have as its basis the desire to evade the quota provisions of the law or an investigation in the place of their former residence. [145 F.Supp. at 843 (emphasis added).]

However, defendant did not misrepresent his place of birth, as did Mrs. Iwanenko; he misrepresented his occupation and place of residence during a period when he served in a collaborationist police force that persecuted civilians. The court in Iwanenko also noted that "[i]f, in the instant case, the petitioner had given the false information for the purpose of deceiving the United States, there would be an entirely different situation and she would not be entitled to take the oath of citizenship." Id. In the instant

case, the record clearly supports the District Court's finding that Kowalchuk had given false information for the specific purpose of gaining entry to the United States.

E. The District Court Correctly Held that Defendant's Misrepresentations Were Material and Therefore Resulted in the Illegal Procurement of His Citizenship

The District Court held that the decision in this case was controlled by Fedorenko v. United States, supra. The Court then held, consistent with Fedorenko, that the facts of this case supported the conclusion that defendant's wartime conduct violated Section 2 of the DP Act and, further, that defendant's concealment of his true wartime employment from the DP Commission and State Department were willful and material misrepresentations. The misrepresentations therefore were violative of Section 10 of the DP Act.[27] The Court's analysis of both the law and facts with respect to Sections 10 and 2 is fully justified and not erroneous.

1. The District Court Correctly Held that Fedorenko v. United States Controls Disposition of this Case

In Chaunt v. United States, 364 U.S. 350 (1960), the government alleged that defendant had concealed a record of three arrests at the time he applied for citizenship. Denaturalization was requested on the ground that Chaunt had willfully misrepresented material facts for the purpose of obtaining citizenship. The Court held that an individual should be denaturalized if his misrepresentations to naturalization officials were material, defining material to mean:

> [E]ither (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

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27. Section 10 of the DP Act provided that:

> 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.

> leading to the discovery of other facts warranting denial of citizenship. [364 U.S. at 355.]

Accord, United States v. Riela, 337 F.2d 986 (3d Cir. 1964).

In Fedorenko v. United States, supra, defendant was denaturalized because his citizenship had been illegally procured. This result was reached because Fedorenko made misrepresentations as to his wartime employment as a guard at Treblinka to visa-issuing officials, rather than to naturalization officials, as had occurred in Chaunt. The Supreme Court held that it did not need to reach the question whether the two-part standard of materiality in Chaunt applied to misrepresentations in applications for visas because the case could be decided under Section 10 of the DP Act. The latter provision barred an applicant from obtaining a visa if he had ever made a willful misrepresentation for the purpose of gaining admission to the United States as an eligible displaced person.

The Court then held that a misrepresentation under Section 10 also had to be "material" and 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. [449 U.S. at 509.]

Because the record established that a concentration camp guard at Treblinka was deemed to have assisted in persecution within the meaning of the DP Act, concealment of Fedorenko's employment at Treblinka was material (i.e., it was a fact which, if revealed, would have disqualified him for a DP visa).

The government believes that the Court below correctly held that Fedorenko, as it interprets Sections 10 and 2 of the DP Act, controls this case and that the second part of the Chaunt test remains an open issue which need not be reached in this case.[28]

2. The District Court's Holding That Defendant Obtained his Visa in Violation of Section 10 of the DP Act is Consistent with Fedorenko

The lower Court's conclusion that Fedorenko "controls disposition of the

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28. However, as discussed at pp. 34-36, infra, even if Chaunt were held to provide the proper standard, defendant would still have to be denaturalized.

present case" (Decision p. 28, A 1697) is easily justified by the similarity of facts in the two cases. In each case, defendant had engaged in employment which assisted the Nazis in persecution; such wartime conduct barred both defendants from obtaining benefits under the DP Act, pursuant to the proscriptions of Section 2, which incorprated the IRO constitution. Both defendants concealed their employment and the attendant persecution when they applied for visas under the DP Act.

The record in this case would have supported a finding that, as with concentration camp guards, Ukrainian police were excluded from eligibility under the DP Act. Government Exhibits 26E and 26L (GA 63, 66) are official decisions of the DP Commission rejecting members of the Ukrainian schutzmannschaft. The decisions establish that members of the Ukrainian schutzmannschaft were ineligible under Section 13 of the DP Act, because the Ukrainian schutzmannschaft was a movement hostile to the United States.[29] Exhibit 26E is a Displaced Persons Commission memorandum rejecting one Alex Eling for admission into the United States under the DP Act. It states the following:

> The Commission * * * finds that the Applicant is rejected under Section 13 because Subject was a member of, or participated in, a movement which was hostile to the United States or its form of government, since he was a member of the Schutzmannschaft in the Ukraine holding the rank of Zugführer [platoon leader].

Exhibit 26L is a DP Commission memorandum rejecting one August Schimann, which states the following:

> The Commission * * * finds that the applicant is rejected under Section 13 because Subject was a member of, or participated in, a movement which was hostile to the United States or its form of government, since he was a member of the

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29. Section 13 of the DP Act provided that:

> No visas shall be issued under the provisions of this Act to any person who is or has been a member of, or participated in, any movement which is or has been hostile to the United States or the form of government of the United States.

Ukrainische Schutzmannschaft from 1941 until 1943.[30]

In addition to the DP rejections, Michael Thomas, the Chief Eligibility Officer for the IRO, confirmed that defendant's mere membership in the Ukrainian police would have rendered him ineligible for IRO assistance, even if he had not personally committed any acts of persecution against civilians. (A 398.) That policy was in effect at the time of defendant's applications to the IRO and DP Commission. Thomas further testified that any assistance in persecution, even simply translating documents dealing with the persecution of Jews, would render an individual ineligible. (A 445.)

Although we believe that, based on this record, members of the Lubomyl schutzmannschaft were per se ineligible for a DP visa, the Court decined to reach this conclusion because it was clear that defendant could not have met the requirements of IRO and DP Act eligibility without fully explaining his employment activities during the War. That explanation, if truthful, would necessarily have required him to reveal that during the War, he had been employed by a Ukrainian schutzmannschaft unit under the direct control of the Nazis which had responsibility for guarding a Jewish ghetto and enforcing the Nazis' anti-Jewish policies. The Court also observed that "quite probably" no consular official would have knowingly issued a visa to someone who had in this manner actively assisted[31] in persecution, "regardless of the extent of his direct personal involvement in atrocities." (Decision p. 27, A 1696.)

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30. Both of these rejections were dated in May 1952. Defendant received his visa in December 1949. Section 13 was part of the original 1948 DP Act but was amended in June 1950. However, the provision of Section 13 under which Eling and Schimann were rejected (i.e., membership in a movement hostile to the United States) was not changed by the amendment. Eling and Schimann were each rejected because he "was a member of, or participated in, a movement which was hostile to the United States or its form of government." That is the same language as is found in Section 13 prior to the amendment. (See GA 6.)

See also Government Exhibits 26 A-R, which establish that policemen in other areas occupied by the Germans were generally excluded under the DP Act.

31. The DP Act prohibits the issuance of a visa to any person who "assisted" in persecution; it does not require that such a person "actively assisted" in persecution, although the evidence shows that the defendant did actively assist.

In sum, the lower Court correctly applied Fedorenko to this case because it found that if defendant had truthfully disclosed the nature of his wartime employment to the IRO, DP Commission or State Department, he would have been found ineligible for the benefits of the IRO Constitution and the DP Act. This meets the standard of materiality in Fedorenko: "disclosure of the true facts would have made the applicant ineligible for a visa." 449 U.S. at 509.

3. Even if the Standard of Materiality in Chaunt Were Applicable to This Case, Defendant's Misrepresentations Were Material

Should this Court find that the facts concealed by defendant during the immigration process would not of themselves have rendered him ineligible for a DP visa, then this Court would have to decide whether the second prong of Chaunt is applicable to misrepresentations made at the time of applying for a visa. If the answer is yes, then the Court must decide whether that test of materiality has been satisfied by the facts of this case. The government believes that the answer to both questions must be affirmative.

Although the majority in Fedorenko did not address Chaunt's applicability to misrepresentations made at the time of applying for a visa, three Justices (Blackmun, Stevens and White) wrote opinions favoring application of the Chaunt materiality standards to cases of misrepresentations in visa applications.[32]

If this Court determines that the Chaunt rule is applicable to misrepresentations made at the visa application stage, Justice White's formulation of the second prong of Chaunt is the most succinct and appropriate:

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32. Several Courts of Appeals have also held that in appropriate circumstances, the Chaunt rule applies to misrepresentations at the visa application stage. See, e.g., Kassab v. Immigration and Naturalization Service, 364 F.2d 806 (6th Cir. 1966); United States v. Rossi, 299 F.2d 650 (9th Cir. 1962); Langhammer v. Hamilton, 295 F.2d 642 (1st Cir. 1961).

> The Government should be required to prove that an investigation would have occured if a truthful response had been given, and that the investigation might have uncovered facts justifying denial of citizenship. [449 U.S. at 538, n.8, (emphasis in original).][33]

In addition to the testimony of Michael Thomas and Exhibits 26E and 26L (i.e., official decisions of the DP Commission), which establish the per se exclusion of Ukrainian police, an ex-employee of the DP Commission testified that, at the very least, a disclosure of police duty during the War would have caused an immediate halt to an applicant's visa processing and an investigation by the DP Commission. (George L. Warren, A 592-593.) An ex-State Department consular official, who issued visas under the DP Act at the time of defendant's application, testified that if an inquiry revealed an applicant's service in the Ukrainian police during the Nazi occupation, that person would not have been eligible for a visa. (Chapin, A 1035.) Indeed, even someone who claimed only to have had clerical duties for the police would have been subjected to further inquiry. (A 1036-1037.)

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33. The propriety of this standard is dictated in large measure by common sense and practicality. Requiring the government in every denaturalization case to prove the existence of ultimate facts that, in and of themselves, warrant denial of citizenship (as defendant suggests) can only encourage an applicant to lie about his background, thereby forestalling an investigation that might reveal those ultimate facts at a time when the applicant has the burden of proving eligibility. See Berenyi v. Immigration Director, 385 U.S. 630-637 (1967). In many cases, an applicant's lie will never be discovered and the applicant will retain his fraudulently obtained citizenship without a challenge. But even if his deception is eventually bared, the applicant is better off for having lied because the passage of time no doubt will have made it more difficult for the government to uncover the disqualifying facts -- and the burden of proving ineligibility, by clear and convincing evidence, will have shifted to the government. See Schneiderman v. United States, 320 U.S. 118 (1943). Accordingly, the government belives that Chaunt and Justice White correctly hold that in order to establish materiality, the government need only prove that an investigation of defendant's background might have disclosed disqualifying information.

Justices Stevens and Blackmun opined in Fedorenko that the government's burden under Chaunt should include proof of the actual existence of disqualifying facts, rather than speculation about their existence. Although the government disagrees with this formulation for the reasons just stated, the facts of this case amply justify a finding of materiality under even this more stringent definition of the test.

All of the above evidence makes it quite clear that the record would have supported a conclusion that defendant's misrepresentations were material under the second prong of Chaunt, regardless of the formulation of the standard which might be applied (i.e., either Justice White's or Justice Blackmun's and Stevens'). Specifically, the record shows that defendant's admission of police service at the time of his visa application would, at the very least, have led to cessation of his visa processing while an investigation was conducted. Further, the government proved the existence of facts (i.e., defendant's assistance in persecution and voluntary assistance to the enemy) which would have disqualified defendant from IRO and DP Act eligibility. Accordingly, whether this Court were to adopt Justice White's formulation of Chaunt or the more exacting standard of Justices Blackmun and Stevens (see footnote 33, supra), the government has met its burden of proof.[34]

F. The Defendant's Due Process Contentions are Without Merit and Do Not Warrant Reversal of the Decision Below

While defendant's position at pages 42-50 of Appellant's Brief is far from clear, it appears that he urges (1) that this Court find that deposition testimony taken in the U.S.S.R. is inherently untrustworthy and must never be considered by a court and (2) that defense counsel's inability to travel freely and question unnamed persons in the U.S.S.R., even though such request was made informally by defense counsel, after he was already in the Soviet

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34. Defendant's argument that this Court should apply the standard of materiality in United States v. Riela, 337 F.2d 986 (3d Cir. 1964) is both confusing and misplaced. Riela involved inter alia misrepresentations made for the purpose of obtaining naturalization; there was no allegation that, as in this case and Fedorenko, misrepresentations were made for the purpose of obtaining a visa. This Court held that Riela's misrepresentations were governed by Chaunt's standard of materiality.

The inapplicability of Riela is apparent. First, to the extent that Fedorenko held that it may not be necessary to apply Chaunt in cases of visa misrepresentation under the DP Act, that same holding would apply to Riela. Second, Riela did not (indeed could not) alter the definition of materiality in Chaunt. Accordingly, if this Court decides that the analysis of Fedorenko is not sufficient to resolve this case, then the Court would need to apply the two-part standard of materiality in Chaunt. The decision in Riela, since it is merely a reaffirmation of Chaunt, would not alter this analysis.

Union, constitutes such a serious violation of defendant's due process rights as to mandate reversal of the opinion below without even a showing of materiality and necessity. Both contentions are unmeritorious.

1. There is No Precedent for Automatic Exclusion of Soviet Deposition Testimony. The Weight of Precedent and the Federal Rules Compel its Admission.

Depositions of six witnesses were taken in Lutsk, the Ukraine, U.S.S.R. from January 19 to January 22, 1981. To assure defendant a full opportunity for cross-examination, the government paid defense counsel's travel expenses to the Soviet Union. Defense counsel did, in fact, conduct vigorous cross-examination.

The trial court admitted these depositions into evidence. It cannot be determined from the District Court's opinion whether the Court relied on the Soviet depositions at all; after discussing the Soviet depositions, the Court stated that its factual conclusions, for the most part, were "based upon the testimony of the defendant and his witnesses, or other evidence not inconsistent with that testimony." (A 1689, Decision p. 20.) It is clear that there is sufficient evidence in the testimony of defendant, Mykola Kowalchuk, Abraham Getman, Moshe Lifschutz, and Shimeon Koret to support all of the District Court's factual findings. The District Court specifically stated that it did not rely on any of the Soviet witness testimony concerning the acts of defendant himself. At most, the Court relied on the Soviet testimony for corroboration of other evidence of the general conditions in Lubomyl and the activities of the Ukrainian militia. Although the government believes that the depositions should have been credited in their entirety, the District Court was not in error in crediting them only to a limited extent.

The Federal Rules of Civil Procedure contemplate the admission into evidence of deposition testimony taken in the Soviet Union and permit a court to weigh this evidence along with all other evidence. (Fed.R.Civ.P.

28(b)).[35] Depositions taken in the Soviet Union have been accepted into evidence in the following cases: United States v. Linnas, 527 F.Supp. 426 (E.D.N.Y. 1981), affirmed, 685 F.2d 427 (2d Cir. 1982), cert. denied, 103 S.Ct. 179 (1982); United States v. Koziy, 540 F.Supp. 25 (S.D.Fla. 1982); United States v. Osidach, 513 F.Supp. 51 (E.D.Pa. 1981); United States v. Palciauskas, 559 F.Supp. 1294 (M.D.Fla. 1983); United States v. Kairys, C.A. No. 80-C-4302 (N.D.Ill.); United States v. Sprogis, 82 CIV 1804 (E.D.N.Y.). Similarly, the Board of Immigration Appeals has repudiated the contention that Soviet deposition testimony is per se unreliable and has ruled that the admissibility and weight of such evidence should be determined on a case-by-case basis by the trial court. In re Maikovskis, A8-194-566 (Jan. 9, 1981) (GA 67-73.)

In Linnas, the trial court stated the following concerning Soviet depositions:

> 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 broadbrush 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 by the Soviet Union to a court or other governmental authority. [Citation omitted.]
>
> The defense was unable to come forward with any proof that any of the Government's evidence offered at trial, whether testimonial or documentary, was incredible or unauthentic in any respect. We find that defendant's defense by innuendo is without any merit.

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35. Under Rule 28(b), testimony for use at trial may be taken abroad in accordance with the provisions of foreign law. Accordingly, the Rule allows "departure from the requirements of depositions taken within the United States." See Note to 1963 Amendment, wherein the advisory committee specifically countenanced the procedure "in many non-common-law countries [where] the judge questions the witness * * * [and] the attorneys put any supplemental questions either to the witness or through the judge * * *."

* * *

> After reading the deposition transcripts and viewing portions of each of the videotapes taken in the Soviet Union, we find that the Government witnesses were credible. [527 F.Supp. at 433-434 (emphasis in original).]

Accord United States v. Koziy, 540 F.Supp. 25, 31 n.13 (S.D.Fla. 1982); United States v. Osidach, supra.[36]

Even courts in West Germany have confronted and rejected defendant's argument. In People v. Viktor Bernhard Arajs (37) 5/76 (1979) (GA 80-107), the three judge court stated the following concerning the testimony of witnesses deposed in the Soviet Union:

> The court has based significant findings on the read testimony of the witnesses, who were deposed by Soviet District Attorneys in June 1978 and in January 1979 pursuant to the petition of the court. * * * The court did not agree with the defendant's claim that these testimonies are generally unsuitable for the search for the truth. The repeatedly and emphatically expressed statement of the defendant, that these witnesses were under pressure and that they had to say what they were told to and feared for their lives if they did not incriminate him, is disproved by the manner and content of the testimonies as well as by the reliable testimony of the linguistic expert witness, Professor Dr. Kratzel.

(GA 82: Arajs Decision pp. 45-46 pp. 1-2 of translation.) Arajs was convicted of murder and sentenced to life imprisonment for crimes committed as part of a police unit involved in mass murder in Latvia.

The very limited purpose for which the trial court in the case at bar used the Soviet testimony (if it relied on it at all), when compared to the crediting of Soviet testimony in the cases cited above, certainly cannot be found to violate defendant's due process rights.

Even in United States v. Kungys, Civil Action No. 81-2305 (D.N.J. Sept. 28, 1983), cited at pages 44-47 of Appellant's Brief, the court credited the Soviet witnesses with respect to certain critical facts:

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36. See also United States v. Demjanjuk, 518 F.Supp. 1362 (N.D.Ohio 1981), aff'd, 680 F.2d 32 (6th Cir. 1982), cert. denied, 103 S.Ct. 447 (1982) (identification card showing that defendant was a concentration camp guard, received from Soviet archives, held to be authentic despite defense claims that it had been forged by Soviet authorities.)

> The Lithuanian depositions will be admitted for the limited purpose of establishing the happening of the killings in Kedainiai in July and August 1941. They will not be admitted as evidence that defendant participated in the killings.

Kungys decision, p. 69.[37]

Outside of the context of these denaturalization and deportation cases, testimony of persons behind the Iron Curtain has also been admitted and weighed by trial courts. See e.g., Danisch v. Guardian Life Insurance Co., 19 F.R.D. 235 (S.D.N.Y. 1956); Bator v. Hungarian Commercian Bank of Pest, 275 App. Div. 826, 90 N.Y.S. 2d 35, 37 (1st Dep't 1949); Ecco High Frequency Corporation v. Amtorg Trading Corp., 196 Misc. 405, 406, 94 N.Y.S. 2d 400, 402 (Sup.Ct. N.Y. County), 1949, aff'd), 276 A.D. 827, 93 N.Y.S. 2d 178 (1st Dep't 1949).

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37. In other respects, the Kungys decision is easily distinguished from the instant case:

> 1. The main reason for limiting the admissibility of the Soviet depositions in the Kungys case was the unavailability of prior statements of the Soviet witnesses. (See Kungys decision, pp. 65-69.) In the case at bar, all prior statements of the Soviet witnesses were turned over to defense counsel prior to his cross-examination of the witnesses.
>
> 2. In the case at bar, there was a great deal of evidence, including the testimony of defendant and Mykola Kowalchuk, corroborating the portions of the Soviet testimony which might have been relied on by the Court. The court in Kungys did not find similar testimony, decision p. 70.
>
> 3. The court in Kungys noted several procedural infirmities in the Soviet depositions (Kungys decision, pp. 59-62), while the lower court in this case stated that there was nothing "in the conduct of the depositions to suggest that the evidence is unworthy of belief" (Kowalchuk decision, p. 19, A 1688).
>
> 4. There was no evidence and, in fact, not even a claim, that Kowalchuk was in the Resistance during World War II. Such evidence was of record in Kungys, pp. 74-78.
>
> 5. Kowalchuk served in a formally organized police unit, while Kungys had not. (It should be noted that the court in Kungys found that the Lithuanian police were involved in killings in that case. Kungys decision, p. 31.)
>
> 6. Kowalchuk entered the United States under the Displaced Persons Act, which specifically excluded anyone who assisted in persecution or voluntarily assisted the enemy forces; Kungys entered the U.S. under the Immigration Act of 1924, which had no such provision. (Kungys decision, p. 83.)

In sum, the Federal Rules of Civil Procedure and the great weight of judicial precedent compel the conclusion that deposition testimony taken in the U.S.S.R. is to be treated like other testimony taken abroad -- it is to be admitted and weighed for probity on a case-by-case basis, along with all other relevant evidence introducted by the parties. A per se rule that all Soviet depositions are to be excluded, as urged by defendant, has been rejected by every court that has considered the issue. The District Court in the case at bar considered the arguments raised by defendant in connection with the reliability of Soviet witnesses, and viewed the videotaped depositions with that in mind. The very limited reliance which the trial court placed on those depositions (if it relied on them at all) is clearly proper and not a violation of defendant's due process.

2. The Defendant's Inability to Interview Unnamed Persons in the Soviet Union for Discovery Purposes Did Not Violate his Due Process Rights and Does Not Warrant Reversal

Defendant has based his due process argument on his claim that Soviet witnesses were unavailable to him. But at no time did he request to interview specific witnesses in the U.S.S.R., and he made no attempt to take depositions of Soviet witnesses.

Moreover, contrary to defendant's argument, defendants in these denaturalization proceedings do have the opportunity to have witnesses produced for examination at depositions in the Soviet Union.[38] Defense witnesses have in fact been called and examined in similar cases, and defendant in this case was notified on several occasions of that opportunity in this case. (See letters attached to Plaintiff's Response to Request for Admissions filed November 30, 1981, GA 116, 118.) Defendant simply did not avail himself of that opportunity.

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38. For example, in a case then pending in the Eastern District of Pennsylvania (United States v. Trucis, CIV 80-2321), depositions were held in the Soviet Union in November 1981. Counsel for Mr. Trucis requested the appearance of a witness; that witness appeared and was fully examined by defense counsel.

Given the government's experience in other cases, there is no reason to suppose that Soviet authorities would not have produced for deposition witnesses requested by defendant in this case. Therefore, defendant's failure or refusal to request the appearance of such witnesses cannot now be grounds for a claim that his due process rights were violated. To be sure, the defense does not have free-ranging authority to go door to door in the Soviet Union looking for witnesses,[39] but (a) neither does the U.S. government or its representatives, so the defense is not being unfairly disadvantaged,[40] and (b) such limitations on pre-trial activities is common to all civil law countries. The entire purpose of international legal assistance agreements (including letters rogatory) is to allow the foreign parties' representatives to avail themselves of the procedures of the host government's laws. So long as the assistance of the host country is extended even-handedly to both sides and serves to make witnesses available on request, neither party should be heard to complain that it was unable to conduct an investigation as it is accustomed to doing at home.

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39. The defense, by its own statements, did not even need to go door to door in the Soviet Union looking for witnesses. In his answer to the government's first set of interrogatories filed May 3, 1979, defendant stated that he knew of eighteen witnesses in the Soviet Union who he would like to call, but refused to disclose their names "due to possible reprisals." It is clear that due to defendant's personal knowledge of the facts in this case, he had an advantage over the government in identifying possible witnesses other than those whose names were supplied by the Soviet authorities. His failure to do so cannot be held against the government.

40. The government does not, as defendant suggests, merely put into evidence whatever the Soviet authorities provide. In this case, statements of 18 potential witneses were provided by the Soviet Union. These witness statements were all turned over to defense counsel. (See Plaintiff's Response to Defendant's Interrogatories, filed May 17, 1979.) The government then decided which of these potential witnesses it wanted to depose. Defendant could have done the same, as well as provide the names of any other potential witnesses he wanted to depose.

It must be emphasized that civil law countries do not permit United States attorneys to roam freely through their land, interviewing witnesses, conducting investigations, or taking statements and testimony from their citizens for use in judicial proceedings abroad:

> When American litigants wish access to witnesses, documents or things located beyond this nation's territorial boundaries, they must accommodate their desires to the fact that their local discovery principles and practices differ from the litigation rules and traditions which are the norms in most other nations.
>
> Foreign sovereigns and their officials frequently express concern when American discovery procedures or those of any other state extend to their territory, their citizens, and their various other interests. These concerns based on territorial sovereignty are heightened, however, in the case of American pre-trial discovery because of the way in which its procedures often are controlled in practice almost entirely by counsel rather than by a court exercising day-to-day supervision. The resulting virtually boundless sweep of the pre-trial procedures presently permitted by many American courts is so completely alien to the procedure in most other jurisdictions that an attitude of suspicion and hostility is created * * *.
>
> The clash of perspective is particularly intense in Civil Law Countries [e.g., the U.S.S.R.] where an American litigant encounters the doctrine of 'judicial sovereignty' — the set of rules and customs by which the courts do not merely supervise private parties' role in the gathering of evidence but themselves take the primary role in obtaining and presenting evidence. American counsel conducting an unsupervised deposition or the inspection of documents in American fashion in a Civil Law country may be improperly performing a public judicial act which is seen as infringing the foreign states' judicial sovereignty unless special authorization has been granted. [Carter, Obtaining Foreign Discovery and Evidence for Use in Litigation in the United States: Existing Rules and Procedures, 13 Int'l Law 5, 6 (1979).]

These limitations on discovery abroad have long been the subject of comment[41], and were certainly known to the drafters of the Federal Rules of Civil Procedure, who nevertheless specified that testimony taken under procedures different than those available to a domestic litigant is admissible. It is thus clear that the experience of defense counsel in the case at bar was no different than that of other counsel in litigation

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41. Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 Yale L.J. 515 (1953); Smit, International Aspects of Federal Civil Procedure, 61 Colum. L. Rev. 1031 (1961).

involving internationally obtained evidence and of itself does not warrant reversal.

Furthermore, the specific facts surrounding defense counsel's purported "requests to visit Lubomyl in order to investigate and/or interview potential witnesses" (Appellant's Brief, p. 43) are not stated in Appeallant's Brief and raise serious questions as to whether the request was even made in good faith. It is uncontested that defendant made no request to visit Lubomyl during the extensive preparations prior to the trip to the Soviet Union. Despite repeated requests by the government for names of witnesses defendant wished to depose, defendant provided no such names. (GA 116, 118.)

Defendant claimed that on or about June 22, 1981 (on the last day of the depositions) while in Lutsk, Ukraine, defense counsel requested permission to visit Lubomyl for the purpose of inspecting the area and/or to interview unnamed witnesses. (Defendant's Request for Admissions filed November 4, 1981, GA 109.)

The U.S. State Department official who served as an escort during the Soviet depositions, in an affidavit filed in the District Court, stated that defense counsel never made a request through her or the U.S. Embassy in Moscow to visit Lubomyl, interview witnesses, or inspect archival records in the Soviet Union. (GA 115.) One of the government attorneys present at the Soviet depositions (Coleman) likewise had absolutely no recollection of such requests. (GA 112.) The other government attorney present at the Soviet depositions (Riley) had a vague recollection that defense counsel may have requested during a coffee break that the American party be allowed to visit Lubomyl, but he does not recall that this included a request to interview witnesses or inspect documents. (GA 112: Plaintiff's Response to Request for Admission filed Novmeber 30, 1981.)

Such request was clearly not properly made. Defense counsel, because of his preparation for the trip to the U.S.S.R., was well aware of the requirements of transmitting requests through formal diplomatic channels and obtaining internal travel documents well in advance of departure for the Soviet Union.

Even assuming that a proper request had been made and denied, counsel's inability to freely travel and interview unnamed Soviet citizens who had unspecified knowledge of the events in question does not rise to the level of a violation of defendant's due process rights. In United States v. Greco, 298 F.2d 247 (2d Cir. 1962), cert. denied, 369 U.S. 820 (1962), defendant was convicted of transporting and receiving stolen Canadian securities. Defendant claimed that the conviction should be reversed because the theft, which was an essential element of the crimes charged, ocurred in Canada and he was denied his constitutional right to compulsory process in Canada. The Court rejected this argument and upheld the conviction on the following grounds:

> No application was made to bring witnesses from Canada and no motion was made to take testimony abroad. At no time did appellant state what witnesses, if any, he would have liked to bring to this country. Rather, he argues that he was convicted in violation of the Sixth Amendment since an essential element of the crimes charged was the theft which occurred in Canada and he did not have an absolute right to compel the attendance of Canadian witnesses on this issue. However, the Sixth Amendment can give the right to compulsory process only where it is within the power of the federal government to provide it. Otherwise any defendant could forestall trial simply by specifying that a certain person living where he could not be forced to come to this country was required as a witness in his favor. The fact that appellant could not compel the attendance of an unnamed witness for whom he never asked did not deprive him of any constitutional right.

298 F.2d at 251 (emphasis added). Accord United States v. Haim, 218 F.Supp. 922, 925-927 (S.D.N.Y. 1963); United States v. Wolfson, 322 F.Supp. 798, 819 (D.Del 1971), aff'd, 454 F.2d 60 (3d Cir. 1972), cert. denied, 406 U.S. 924 (1972). See also Martin-Mendoza v. Immigration and Naturalization Service, 499 F.2d 918, 921 (9th Cir. 1974), cert. denied, 419 U.S. 1113 (1975) (the Sixth Amendment right of compulsory process does not apply to deportation proceedings).

Furthermore, defendant has never made even the slightest proffer of how the unnamed Soviet witnesses could alter the disposition of this case. United States v. Valenzuela-Bernal, 458 U.S. _____, 73 L.Ed. 2d 1193 (1982) involved

a prosecution for transporting an illegal alien. Defendant was convicted, but the Ninth Circuit reversed the conviction, holding that the government violated the Fifth and Sixth Amendments when it deported alien witnesses before defense counsel had an opportunity to interview them.[42] The Supreme Court reversed the Court of Appeals, holding that:

> * * * A violation of these provisions [the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment] requires some showing that the evidence lost would be both material and favorable to the defense.
>
> Because prompt deportation deprives the defendant of an opportunity to interview the witnesses to determine precisely what favorable evidence they possess, however, the defendant cannot be expected to render a detailed description of their lost testimony. But this does not, as the Court of Appeals concluded, relieve the defendant of the duty to make some showing of materiality. Sanctions may be imposed on the Government for deporting witnesses only if the criminal defendant makes a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses. [73 L.Ed. 2d at 1206.]

United States v. Schaefer, 709 F.2d 1383, 1386 (11th Cir. 1983) also involved a criminal prosecution in which a potential witness was deported. The Court of Appeals reversed the district court's dismissal of the indictment holding that

> * * * A defendant cannot simply hypothesize the most helpful testimony the deported witness could provide. Rather, he must show some reasonable basis to believe that the deported witness would testify to material and favorable facts. * * * (defendant must make a plausible showing that the lost testimony "would have been," not might have been, material and favorable).

See also United States v. Fierros, 692 F.2d 1291, 1296 (9th Cir. 1983), cert. denied, 103 S.Ct. 3090 (1983).

The same is true in the case at bar. While defendant cannot be expected to describe in detail the testimony he expected to find in a door to door

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42. In the case at bar, of course, the U.S. government has not taken any actions which render witnesses unavailable; to the contrary, the government attempted to aid defense counsel in securing foreign witnesses.

search of Lubomyl, he must do something more than claim that he cannot be prosecuted because he could not conduct a door to door search in a foreign country.

Despite defendant's failure to make an adequate proffer, the District Court showed a solicitousness for his position far greater than the law demanded. The Court held that it would base its factual findings "upon the testimony of the defendant and his witnesses, or other evidence not inconsistent with that testimony." (Decision p. 20, A 1689.)[43] This measured response certainly does not bespeak a denial of due process.[44]

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43. Defendant contends that the trial court's determination that he was a member of the Lubomyl schutzmannschaft could only have been based on the testimony of the government witnesses. However, defendant's admissions that he performed significant functions for the schutzmannschaft and had his own office there supports the Court's finding. See footnote 11, supra.

44. The cases cited on page 47 of Appellant's Brief are distinguishable from the case at bar:

1. They involve some government action making the witnesses unavailable.

2. They involve specific, named witnesses.

The cases cited by defendant do not hold that the defendant must have greater access to the witnesses than the government; they hold that access must be equal. In the instant case, access was equal. Any failure by defendant to obtain witnesses was purely the result of defense counsel's failure to submit timely requests.

Furthermore, United States v. Mendez Rodriquez, 450 F.2d 1 (9th Cir. 1971) was in effect overruled by United States v. Valenzuela-Bernal, 458 U.S. __, 73 L.Ed. 2d 1193 (1982).

VI. CONCLUSION

For the foregoing reasons, the government respectfully requests that the judgment of the District Court revoking defendant's citizenship be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of January 1984, I caused service of the following upon John Rogers Carroll, Esquire, Suite 1206, 615 Chestnut Street, Philadelphia, Pennsylvania 19106, attorney for the Defendant-Appellant, by first class mail, postage-prepaid:

1. Two copies of Appellee's Brief

2. One copy of the Government's (Appellee's) Appendix

Jeffrey N. Mausner

Jeffrey N. Mausner
Trial Attorney