B. Kairys Never Made or Gave any Statements to the Displaced Persons Commission.

The Government alleges that Kairys made misrepresentations to and concealed material facts from the Displaced Persons Commission. (Cmplt. ¶¶15, 16, 19, 22(a), 27, 40, 41, 52). The Government failed to adduce any evidence that Kairys ever gave or made any statements -- much less misrepresentations -- to the DP Commission.

After the IRO certified an applicant as a "displaced person," the Commission then conducted its own investigation[49] of the applicant and made a determination -- based first on the IRO certificate -- of eligibility under the DP Act. (Tr. 648; DX 148, p.9170048).[50] The DP Commission rendered its decision in a final report. (GX 4).

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Government witness Curry admitted, "for there to be a disqualification under Section 10, any misrepresentation had to be made to somebody who was enforcing the DP Act." (Tr. 656). As Curry acknowledged, employees of the IRO were not "charged with enforcing the DP Act." (Tr. 656-58).

49/ Curry explained that if the applicant served -- as did Kairys -- with the U.S. Army, then the Army would have thoroughly checked its records. (Tr. 649). Kairys testified that, when he joined the Army, he turned over documents -- which the Government subsequently "erroneously destroyed" (DX 372) -- substantiating his identity and wartime whereabouts. (Tr. 1152). Based on its review, the Army's Counter-Intelligence Corps found "nothing derogatory" about Kairys. (DX 344).

50/ While it is true that Kairys had the burden or proving that he was "the concern of the International Refugee Organization" to qualify for a D.P. Act visa, Displaced Persons Act of 1948, ch. 647, §§2(b) & 10, 62 Stat. 1009,

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The Government offered no evidence that Kairys completed any forms or made any oral statements to the DP Commission. Leo Curry, the DP Commission official who handled Kairys's case, could remember nothing about it. (Tr. 663). From his examination of the final report on Kairys, Curry concluded that the Commission probably never interviewed Kairys. (Tr. 650-51). As for the DP Commission report (GX 4), Curry conceded that it cannot be said Kairys swore to the truth of any statements in the report because he never saw them. (Tr. 651-52). Kairys's signature, of course, appears nowhere on the D.P. Commission Report, GX 4.

There is no evidence Kairys ever even spoke to the D.P. Commission, much less that he misrepresented or concealed anything.

C. Kairys Made no Willful Misrepresentations or Concealments of Material Facts to the Vice Consul.

After the D.P. Commission prepared its final report, it sent it, and the associated documentation, to the American consular office, which issued United States visas. (Tr. 616, 696-97). The Government failed to prove, by the required

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the IRO certificate of eligibility and public documentation satisfied this burden. The regulations of the D.P. Commission provided that these documents "shall be accepted as establishing prima facie the existence of the matters stated therein. . . ." (DX 148, p.9170048; DPC Regs. §700.5, "Eligibility Proof"). Kairys's IRO certificate of eligibility thus satisfied his burden of proof.

"clear, unequivocal, and convincing evidence that does not leave the issue in doubt," that Kairys willfully misrepresented or concealed material facts in his dealings with the consular office.

Kairys testified to his contacts with the American Vice Consul in Stuttgart. Army officers conducted interviews with him about his desire to go to the United States and helped with the documentation before his appearance at the consular office. (Tr. 1156-58).[51/] The Army took Kairys and 18 to 20 men from his company to Stuttgart. (Tr. 1158). They were taken to the head of a long line waiting to see the consul and after only two or three minutes of processing, he was given an oath. (Tr. 1158-60). At most he was asked a "few" questions, including whether he was a member of the Communist Party.[52/] (Tr. 1173-74). Afterwards he signed the visa application under oath. (GX 5).

51/ The defense requested the Government, and in particular the Army, to produce all documents concerning Kairys. These documents would have included materials relating to the Army's assistance to Kairys in immigrating to the United States. The Army responded that it had no such documents because they had been transferred from Germany to a domestic depository and there "erroneously destroyed." (Tr. 1152-53; DX 372). This Government error prejudiced Kairys. Indeed, the favorable inference that the destroyed documents would have been helpful to Kairys's case must be accepted.

52/ The Government mistakenly describes the evidence when it claims that Kairys "admitted on cross-examination that he was questioned by the consular official concerning his background." (Gov't Br. 77). The testimony was that he was asked a "couple" or a "few" questions about "himself." (Tr. 1173).

Government witness Rhodes admitted that the visa application contained no question which required the applicant to disclose his service, if he had any, in a Nazi concentration camp. (Tr. 710). Moreover, the question whether an applicant had served as a concentration camp guard was not regularly specifically asked by consular officials. (Tr. 710). Because Kairys was never asked, there is no evidence to support the Government's claim that Kairys "willfully concealed" any alleged service as a Treblinka guard.[53/]

The Government claims that Kairys misrepresented his wartime whereabouts, identity, date and place of birth in his visa application. (Cmplt. ¶28).[54/] The Government admits,

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53/ The Government grounds its charge that Kairys made misrepresentations and concealments to the Vice Consul on the "expert" testimony of William C. Rhodes. Rhodes's testimony does not amount to the requisite "clear, unequivocal, and convincing" evidence. Unlike witness Jenkins in Fedorenko (449 U.S. at 498), Rhodes was not trained to administer the DP Act. (Tr. 692). Moreover, Rhodes was never specifically assigned to the job of issuing visas under the DP Act. (Tr. 692). Rhodes could not recall issuing "even so much as one" such visa. (Tr. 690). His testimony about what other consular officials did in interviewing applicants for D.P. Act visas is speculation. He himself had no recollection of conducting such an interview (Tr. 693-94), nor could he recall observing anyone else conduct one. (Tr. 694-95). The Government could have called a witness who knew what he was talking about. Rhodes did not. His testimony should have been excluded. Cufari v. United States, 217 F.2d 404 (1st Cir. 1954).

54/ The Government makes an additional charge in its brief which is not in its Complaint. The belated claim is that on his visa application Kairys misrepresented his occupation as "farmer." (Gov't Br. 78). No legal consequence can follow from this statement. The Supreme Court stated

(Footnote continued on following page)

however, that "[t]he only critical information which is incorrect concerns [Kairys's] wartime whereabouts." (Gov't Br. 77-78).[55/] The probabilities are that Army officials attended to the completion of Kairys's visa application before he even arrived at Stuttgart. The Government offered nothing to rebut this plausible explanation. Moreover, Kairys testified, without cross-examination, that no one at the consular office read him the visa application entry concerning his wartime whereabouts

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in Schneiderman, 320 U.S. at 160: "[W]e think the Government should be limited [in a denaturalization case], as in a criminal proceeding, to the matters charged in its complaint." The charge of misrepresentation of occupation appears nowhere in the Complaint. Moreover, the Government did not prove, by "clear, unequivocal, and convincing evidence that does not leave the issue in doubt" that the answer "farmer" was a willful misrepresentation of a material fact. As Kairys explained at trial, he had worked as a farmer and the Army had conducted training and tests which had established Kairys's qualifications as a farmer. (Tr. 1175-78; DX 7). Army officials instructed Kairys that he could give his occupation as farmer. (Tr. 1177). These facts rebut any implication of a willful misrepresentation. In addition, Government witness Rhodes admitted that a misstatement, even willful, of wartime occupation was not, standing alone, a sufficient basis on which to deny a visa. (Tr. 708). The Government thus failed to show that the "misrepresentation" was "material." La Madrid-Peraza v. Immigration & Naturalization Service, 492 F.2d 1297, 1298 (9th Cir. 1974); United States v. Rossi, 299 F.2d 650, 652-53 (9th Cir. 1962); United States ex rel. Leibowitz v. Schlotfeldt, 94 F.2d 263 (7th Cir. 1938).

55/ This concession necessarily followed from the Government's failure to prove that a misrepresentation of identity, date, or place of birth was material. The Government offered nothing to show that disclosure of the "true" facts would not have resulted in denial of a visa or even an investigation that might have uncovered facts warranting such a denial. Cf. Chaunt, 364 U.S. at 352.

before he signed the application. (Tr. 1175).[56/] As Government witness Curry acknowledged, an applicant could make a misrepresentation "without prejudice" by reason of lapse of memory or translation error. (Tr. 659).

The Government's failure to prove what questions the consular officials actually asked Kairys precludes a finding of "willful" misrepresentation or concealment. As the Court held in United States v. Profaci, 274 F.2d 289 (2d Cir. 1960), a failure of proof on this issue defeats a Government claim of willful misrepresentation or concealment:

> "From the Government's evidence, it thus appears, at most, that it was normal practice in 1927 to ask an applicant, "Were you ever arrested?" but that the practice and phraseology was not invariable or one compelled by statute, regulation, or order. But even so, we feel that the Government has failed to establish in a clear and convincing manner the content of the actual arrest question to which Profaci allegedly gave an intentionally false answer. And any doubts created by the Government's own evidence must be resolved in favor of the [citizen].

(274 F.2d at 291-92). See also Cufari v. United States, 217 F.2d 404 (1st Cir. 1954) (no proof of question actually asked). The Government's case suffers from the same infirmity here.

The Government's failure to prove that Kairys actually understood the question also bars a finding of willfulness. The visa application form is in English. There is no evidence

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56/ Cf. United States v. Tooma, 187 F.Supp. 928, 930 (E.D.Mich. 1960) ("It is significant that question 18 in the preliminary application was neither read nor explained to the defendant by the examiners. He was merely asked if he had read and truthfully answered the question.").

that it was actually translated or explained to Kairys. In fact, Kairys denied that the consular officials read him the entry concerning wartime whereabouts. (Tr. 1175). Once again, the Second Circuit's observations in Profaci apply:

> "Even if it were sufficiently proved that Profaci was specifically asked "Were you ever arrested?" the Government's proof does not convincingly demonstrate that the defendant actually understood the question to refer to arrests outside the United States, and especially to those preceding his hearing by more than five years. Such proof, we hold was essential . . . since illegal procurement as a ground for revocation of citizenship has been eliminated by the 1952 Act.57/

(274 F.2d at 292). Absent proof that Kairys was actually asked about his wartime whereabouts and that he actually understood the question, the Government cannot establish that Kairys made a "willful" misrepresentation.58/

57/ Standard canons of statutory construction and the ex post facto clause bar use of the 1961 addition of illegal procurement to the grounds for denaturalization to strip Kairys of citizenship he obtained in 1952. See Section III, infra.

58/ The Government shuns any direct analysis of the actual question on the visa application, GX 5. The actual entry requests: "That since reaching the age of 14 years I have resided at the following places, during the periods stated, to wit." As Rhodes conceded, of course, no question on the form, including the foregoing entry, actually required disclosure of concentration camp service. (Tr. 710). Moreover, the Government offered no evidence that Kairys supplied the responsive information to the consular officials or that they read and translated the entry to him before he signed the application. The question itself is hardly unambiguous. To "reside" may imply more than mere presence. It typically means to "dwell permanently or continously, have a settled abode for a time, have one's residence or domicile." (Webster's Third New Int'l.

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The Government also never showed that any "misrepresentation" Kairys made, even assuming it was "willful," was also material.[59/] To the contrary, Government witness Rhodes admitted that in order for any misrepresentation to be material, it had to "bear directly on eligibility." (Tr. 708). The Government offered nothing to show that the question of wartime whereabouts bore "directly on eligibility." The only evidence was to the contrary. Government witness Curry explained that a misrepresentation of wartime residence could be immaterial. (Tr. 659).

The Government never proved that Kairys ever made any willful misrepresentations to or concealments of material facts from the Displaced Persons Commission or the American Vice Consul. Its claims that Kairys must lose his citizenship by

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Dict.)(1961). An individual taken by the Germans during wartime from his home could readily and understandably exclude from his "residences" those places where the Germans put him. Under the circumstances, a false answer cannot support a finding of "willful misrepresentation or concealment." See Profaci, 274 U.S. at 292; Tooma, 187 F.Supp. at 930. Cf. United States v. Wall, 371 F.2d 398 (6th Cir. 1967) (perjury prosecution)("In a case where the question propounded admits of several plausible meanings, the defendant's belief cannot be adequately tested and it is necessary to determine what the question meant to him when he gave the disputed answer.").

59/ The Government strains to reconstruct the missing evidence on the issue of what Kairys told immigration officials. Thus, it argues (Gov't Br. 78): "On GX 7 (a 1949 D.P. registration record), defendant denied he had been a POW. . . . He now admits it was incorrect and claims he was a POW. (Tr. 1178-79)." But defendant did not fill in or sign GX 7. (Tr. 1179). Moreover, the question was "Do you claim to be a prisoner of war?" (GX 7). The card was not completed until 1949, when Kairys was in the U.S. Army. Moreover, Kairys never testified the information on GX 7 was "incorrect."

reason of these alleged misrepresentations or concealments must, therefore, fail.[60/]

D. The Government Failed to Prove Willful Misrepresentations or Concealments in Connection with Kairys's Application for Citizenship.

The Government also failed to prove, by "clear, unequivocal, and convincing evidence that does not leave the issue in doubt," that Kairys made willful misrepresentations or concealments of material facts in connection with his 1957 application for citizenship. This failure alone requires dismissal of Count I of the Government's Complaint.

Immigration Judge Anthony Petrone testified for the Government concerning naturalization procedures. Judge Petrone explained that the process entailed three steps. First, the would-be citizen completed and submitted an "Application to File Petition for Naturalization" (INS Form 400) (e.g., GX 8). (Tr. 576-77). The "preliminary examiner" then questioned the applicant about the information on the application. (Tr. 578).

60/ The Government's failure to prove that Kairys "willfully misreprsented or concealed material facts" in his visa application also defeats its charges: (i) that Kairys procured his citizenship by willful misrepresentation or concealment when he denied having given any false testimony to secure benefits (namely, his visa) under the immigration laws (Cmplt. ¶92; Gov't Br. 93-94), and (ii) that Kairys illegally procured his citizenship (Cmplt. ¶¶52-53) and procured his citizenship by willful misrepresentation or concealment (Cmplt. ¶29) because he lacked good moral character by reason of having given false testimony to obtain his visa. Each of these theories assumes that Kairys had lied in connection with his visa application. Because the Government failed to prove that Kairys had, in fact, lied to obtain his visa, the Government cannot sustain these alternative theories.

Second, a clerk typed up the "Petition for Naturalization" (INS Form 405) (e.g., GX 9) based on the verified information contained on INS Form 400. (Tr. 580). Another INS official called the "designated examiner" then went over the Petition (Form 405) with the applicant and his witnesses. (Tr. 581). Finally, the completed Petition was submitted to the Court with the designated examiner's recommendation. A designated examiner thereafter presented the INS recommendation to the Court and moved the applicant's admission to citizenship. (Tr. 582).

The Government represents, without any citation to the record, that in applying for citizenship, Kairys "concealed his membership in the SS Wachmannschaft, which he was required to reveal pursuant to a question on his Application to File a Petition for Naturalization," GX 8. (Gov't Br. 93-94).[61/]

61/ The Government apparently grounds this claim on question 9 of the Petition to File Application for Naturalization (GX 8). The Government, however, once again studiously avoids any analysis of the actual question. The question asks:

"What organizations, clubs, or societies in the United States or in any other country have you been a member of before the last 10 years." Kairys answered "None." The question, however, hardly amounts to an unambiguous request to disclose concentration camp service. The Government's own expert admitted that no question on GX 8 required disclosure of such service. (Tr. 594).

Recognizing the ambiguity of the question, the Government amended the question sometime after Kairys's naturalization. Cf. Tooma, 187 F.Supp. at 930.

Thus, the question on Fedorenko's 1969 citizenship application asked for disclosure of foreign military service. (Fedorenko, 449 U.S. at 497 n.9). Moreover, today the application is even more specific:

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Judge Petrone admitted, however, that no question on INS Form 400, GX 8, required Kairys to disclose his service, if any, as a camp guard. (Tr. 594). He testified only that it was a "general policy" of the INS examiners during those years to ask questions about an applicant's camp guard service.[62/] Judge

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> "During the period March 23, 1933 to May 8, 1945, did you serve in, or were you affiliated with, either directly or indirectly, any military unit, paramilitary unit, police unit, self-defense unit, vigilante unit, citizen unit, unit of the Nazi Party or SS, government agency or office, extermination camp, concentration camp, prisoner of war camp, prison, labor camp, detention camp or transit camp, under the control of or affiliated with: (a) the Nazi Government of Germany; (b) any Government in any area occupied by, allied with, or established with the assistance or cooperation of, the Nazi Government of Germany?
>
> "During the period March 23, 1933 to May 8, 1945, did you ever order, incite, assist, or otherwise participate in the persecution of any person because of race, religion, national origin, or political opinion?"

(App. B). This specificity is a far cry from the question which asked Kairys to disclose membership in "organizations, clubs, and societies." Kairys's answer "none," even if false, cannot support a finding of a "willful" misrepresentation.

> "[W]hen a question is not reasonably free from ambiguity, a clear understanding thereof and an intent to deceive are not to be readily implied merely from a false answer."

Profaci, 274 F.2d at 292. See also Tooma, 187 F.Supp. at 930.

62/ Judge Petrone testified that this policy stemmed from a directive from Washington. (Tr. 584-85). Judge Petrone did not have a copy of this directive (Tr. 588) and the Government never produced it in discovery or offered it in evidence.

Petrone could only "assume" that the preliminary examiner, Irving Schwartz, (Tr. 579), had asked Kairys this critical question in 1957. (Tr. 596).

The Government could have, but did not, call Irving Schwartz to testify as to what questions Kairys had actually been asked. Irving Schwartz is now an immigration judge like Judge Petrone, and indeed works for the Government in the same federal courthouse building where the case was tried. The Government's failure to call Judge Schwartz to testify, under these circumstances, creates an inference that his testimony would have been that he never asked anyone, including Kairys, about camp guard service.[63/] As the Supreme Court observed in Interstate Circuit Inc. v. United States, 306 U.S. 208, 226 (1939), when noting the defendants' failure to call the witnesses who had personal knowledge of the disputed facts: "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse."

The Government's failure to prove what questions the preliminary examiner, Irving Schwartz, actually asked Kairys, coupled with Judge Petrone's acknowledgment that none of the naturalization forms specifically required disclosure of camp

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63/ The Government claims that Kairys misrepresented his name and date and place of birth in his citizenship applications. (Cmplt. ¶¶10, 11). The Government offered no evidence and now makes no argument that these "misrepresentations," even if true, were "material." The Government made no showing the true facts "if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." Chaunt v. United States, 364 U.S. 350, 355 (1960).

guard service, precludes a finding that Kairys willfully concealed his alleged service in the SS Wachmannschaft. The Government simply failed to meet its burden of proof on the question of intent. See Nowak v. United States, 356 U.S. 660, 663-65 (1958); Baumgartner v. United States, 322 U.S. 665, 675 (1944); Profaci, 274 F.2d at 291-92; Cufari, 217 F.2d 404.64/

The Government's failure of proof also extended to the materiality of the facts which Kairys allegedly concealed or misrepresented. Judge Petrone acknowledged that previous service as a labor camp guard was not, standing alone, a bar to

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64/ Indeed, because of the close parallel of procurement of citizenship by willful misrepresentation and concealment to perjury, long-settled principles governing perjury prosecutions should govern here. Thus, a finding of "willful misrepresentation or concealment" should not be able to rest on the speculation offered by Rhodes concerning Kairys's visa application or the "assumption" tendered by Judge Petrone concerning the citizenship application. The "two witness rule" for perjury should apply here so that a conviction cannot stand on the "uncorroborated testimony of a single witness." Weiler v. United States, 323 U.S. 606, 608 (1945). The character and persuasiveness of evidence required to sustain a perjury conviction should also apply in the case of alleged "willful misrepresentations and concealments" to obtain citizenship. Thus, the standard here should be, as it is in a perjury case, that:

> "[T]he Government has the burden of proving by clear, convincing, and direct evidence to a moral certainty and beyond a reasonable doubt that the defendant knowingly and intentionally swore to a falsehood. The Government's proof must be by substantial evidence excluding to the satisfaction of the jury every other hypothesis than that the defendant in testifying as he did purposely misstated the fact knowing it to be false and untrue."

Van Liew v. United States, 321 F.2d 674, 679 (5th Cir. 1963). Under this standard, Rhodes's and Judge Petrone's testimony could not, as a matter of law, sustain a conviction.

the acquisition of American citizenship. He testified that he would have recommended to grant citizenship to a Baltic emigre who had been coerced by the Germans to serve as a guard but who had committed no acts of atrocities. (Tr. 597-98). Because camp guard service of this character was not a bar to the acquisition of citizenship, failure to disclose it was not a "material" concealment. United States v. Riela, 337 F.2d 986 (3d Cir. 1964); United States v. Rossi, 299 F.2d 650 (9th Cir. 1962); La Madrid-Peraza v. Immigration and Naturalization Service, 492 F.2d 1297 (9th Cir. 1974).

Because the Government failed to prove, by "clear, unequivocal, and convincing evidence that does not leave the issue in doubt" that Kairys willfully misrepresented or concealed material facts in his citizenship application, Count I of the Complaint must be dismissed.

III. THE GOVERNMENT MAY NOT DENATURALIZE KAIRYS FOR "ILLEGAL PROCUREMENT" OF CITIZENSHIP.

Four of the five counts of the Government's Complaint against Kairys demand his denaturalization, under §340(a) of the Immigration and Nationality Act, 8 U.S.C. §1451(a)(1976), on the grounds that he "illegally procured" his citizenship. (Cmplt. ¶¶32-55). The Government may not, however, proceed against Kairys on those grounds.

When Kairys obtained his citizenship in 1957, the "illegal procurement grounds" relied on by the Government were not a basis for denaturalization. Congress did not add "illegal procurement" to §340(a) until 1961. When Congress made the

addition, it made no provision for retroactive use of "illegal procurement" as a grounds to cancel citizenship obtained before the amendment.

The retroactive application of "illegal procurement" to Kairys's citizenship would violate what the Supreme Court has called "the first rule" of statutory construction: "[L]egislation must be considered as addressed to the future, not the past." Union P.R.R. v. Laramie Stock Yard Co., 231 U.S. 190, 199 (1913), quoted in Greene v. United States, 376 U.S. 149, 160 (1964). Such an application of the 1961 amendment to §340(a) also runs afoul of the constitutional prohibition against ex post facto prosecutions. U.S. Const. Art. I, §9, cl.3. The Government's claim that Kairys "illegally procured" his citizenship must, therefore, be dismissed.

A. The "First Rule" of Statutory Construction Bars Retroactive Use of "Illegal Procurement" as Grounds to Strip Kairys of his Citizenship.

The first paragraph of the Complaint sets forth the Government's sole statutory basis for its demand to denaturalize Kairys:

> This is an action brought pursuant to Section 340(a) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. §1451(a).

(Cmplt. ¶1). Section 340(a) of the Act now provides, in its pertinent part:

> It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may

> reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation . . . .

(8 U.S.C. §1451(a)).

When Section 340(a) was originally enacted on June 27, 1952, it did not, however, provide for denaturalization on the grounds of "illegal procurement" of citizenship. (See 66 Stat. 260 (1953)).[65/] When Kairys obtained his citizenship, July 16, 1957,

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65/ Previous denaturalization laws had provided for denaturalization on the basis of illegal procurement. See Section 15, Act of June 29, 1906 (34 Stat. 601 (1907)) and Section 338 of the Nationality Act of 1940 (54 Stat. 1158-59). In United States v. Stromberg, 227 F.2d 903 (5th Cir. 1955), the Court held that the "savings provision" of the Immigration and Nationality Act of 1952, §340(i), 8 U.S.C. §1451(i), did not preserve "illegal procurement" as a ground for denaturalization.

The deletion of "illegal procurement" from the grounds for denaturalization in 1952 was not a Congressional oversight. The legislative history of §340 reveals that Congress was aware of the change:

> "One of the major changes in existing nationality law provided by the bill is contained in section 340 which authorizes judicial revocation of naturalization. Under the provision of section 338 of the Nationality Act of 1940, revocation is possible where the naturalization was obtained by fraud or was procured illegally.
>
> "The bill changes the basis for judicial revocation of naturalization from fraud and illegal procurement to procurement by concealment of a material fact or by willful misrepresentation."

H. Rep. No. 1365, 82d Cong., 2d Sess. (1952), reprinted in 1952 U.S. Code Cong. and Admin. News 1741. See also S. Rep. No. 1137, 82d Cong., 2d Sess. 45 (1952).

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Section 340(a) still contained no provision for denaturalization on the basis of "illegal procurement." Only on September 26, 1961, some four years later, did Congress pass "An Act to Amend the Immigration and Nationality Act," to add "illegal procurement" to the grounds for denaturalization under Section 340(a). Pub. L. 87-301, §18; 75 Stat. 656 (1961).

The Government thus rests four of the five counts of its Complaint on this after-the-fact amendment to Section 340(a).

Rules of statutory construction preclude reliance on the 1961 change of law to strip Kairys of citizenship he obtained in 1957. In Union P.R.R. v. Laramie Stock Yard Co., 231 U.S. 190 (1913), the Supreme Court reiterated familiar principles:

> [T]he first rule of [statutory] construction is that legislation must be considered as addressed to the future, not to the past. The rule is one of obvious justice and prevents the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed. The rule has been expressed in varying degrees of strength, but always of one import, that a retrospective operation will

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The 1952 Act did not leave the Government without a remedy for illegal procurement. It did, however, provide the accused with more rights than the 1961 amendment adding "illegal procurement" to the grounds for denaturalization under § 340(a). Title 18, United States Code, Section 1425 (1976) has provided since 1952 that "whoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person" is guilty of a felony. By operation of 8 U.S.C. §1451(g)(1976), conviction under 18 U.S.C. §1425 also results in loss of citizenship. Under these provisions, the defendant enjoys all criminal law safeguards, including presentment to a grand jury, a jury trial, and the barrier of a statute of limitations. The Government claims that under the 1961 amendment to §340(a) the defendant does not specifically enjoy these protections.

> not be given to a statute which interferes with antecedent rights or by which human action is regulated, unless such be "the unequivocal and inflexible import of the terms, and the manifest intent of the legislature." United States v. Heth, 3 Cranch 399, 413; Reynolds v. McArthur, 2 Pet. 417; United States v. American Sugar Refining Co., 202 U.S. 563, 577.

(231 U.S. at 199).

The Seventh Circuit recently underscored the continuing strength of this settled doctrine:

> There are few principles of our law more ancient, and none more respected, than the canon which holds that laws are enacted for the future. A legislative pronouncement may not operate on acts which predate its passage. Neither may it serve to divest rights which have come into existence before its date of effect.

South East Chicago Commission v. Department of Housing & Urban Development, 488 F.2d 1119, 1122 (7th Cir. 1973).

Use of the 1961 amendment to strip Kairys of the citizenship he obtained in 1957 would amount to a retroactive application of the amendment. But "a legislative pronouncement may not operate on acts which predate its passage." South East Chicago Commission, 488 F.2d at 1122. The claimed "acts" by which Kairys obtained his citizenship occurred before and during 1957. Yet the Government claims that the 1961 amendment may "operate" to subject him to loss of that citizenship. Moreover, legislation may not "divest rights which have come into existence before the date of its effect." (488 F.2d at 1122). The Supreme Court has described naturalized citizenship as "rights solemnly conferred" under the judgment of naturalization. Schneiderman, 320 U.S. at 123. Those rights "came into existence" for Kairys in 1957. The Government seeks to employ

the 1961 amendment to "divest" him of them. The Government effort thus presents a classic attempt to secure retroactive effect to legislation.66/

Nothing in the Immigration and Nationality Act, the 1961 amendment, or its legislative history supports retroactive application of the "illegal procurement" grounds for denaturalization. In United States Fidelity and Guaranty Co. v. Struthers Wells Co., 209 U.S. 306, 314 (1908), the Supreme Court stated:

> There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong, and imperative that no other meaning can be annexed

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66/ See also Society for the Propagation of the Gosepl v. Wheeler, 22 Fed. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156) (Story, Circuit Justice) ("Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or create a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective . . ."); 2 Sutherland, Statutory Construction, §41.01 at 245 ("The terms 'retroactive' and 'retrospective' are synonymous in judicial usage and may be employed interchangeably. They describe acts which operate on transactions which have occurred or rights and obligations which existed before passage of the act.") Cf. United States v. Hall, 26 Fed. Cas. 84, 86 (C.C.D.Pa. 1809) (No. 15,285) (Washington, Circuit Justice) (An ex post facto law is one "which in relation to the offense or its consequences, alters the situation of the party to his disadvantage.") See generally Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 Minn.L.Rev. 775 (1938).

> to them or unless the intention of the legislature cannot be otherwise satisfied.67/

Public Law 87-301, which contained the 1961 amendments, says nothing about retroactive application of the "illegal procurement" grounds for denaturalization. See 75 Stat. 650-57 (1962). Similarly, the legislative history of the 1961 amendment says nothing of a Congressional intent to apply "illegal procurement" retroactively. See H. Rep. No. 1086, 87th Cong., 1st Sess. (1961), reprinted in 1961 U.S. Code Cong. & Admin. News 2950, 2982-84. Under these circumstances, nothing overcomes the "very strong presumption" that the 1961 amendment should only apply prospectively.

Nor does the "savings" provision (§340(i)) of the Immigration and Nationality Act of 1952, 8 U.S.C. §1451(i) (1976), save the Government's "illegal procurement" claims against Kairys. Section 340(i) was enacted as part of the original act in 1952. See 66 Stat. 262 (1953). It provides, as enacted, and unchanged to this day:

> The provisions of this section [namely, §340] shall apply not only to naturalization granted and to citizenship issued under the provisions of this subchapter [namely, Subchapter III, "Nationality and Naturalization," 8 U.S.C. §§1401-1503], but to any naturalization heretofore granted by any court, and to all certificates of naturalization and citizenship which may have been issued heretofore by any court . . .

67/ See also Winfree v. Northern P.R., 227 U.S. 296, 301 (1913); United States v. St. Louis, S.F. & T. Ry., 270 U.S. 1, 3 (1926); Union P.R. v. Snow, 231 U.S. 204, 213 (1913); Greene v. United States, 376 U.S. 149, 160 (1964); South East Chicago Commission v. Department of Housing and Urban Development, 488 F.2d at 1123.

"Naturalization heretofore granted" could mean only citizenship acquired before 1952, when the statute was enacted. Congress thus specifically provided for retroactive coverage of the 1952 statute to pre-1952 citizenship. Kairys's citizenship, by contrast, was acquired in 1957, "under the provisions of this subchapter." At that time, Section 340(a), one of the "provisions of this subchapter," said nothing about denaturalization for "illegal procurement" of citizenship.

When Congress added "illegal procurement" to the grounds for denaturalization in 1961, it did not provide, as it had done in 1952, for retroactive application of this grounds for denaturalization to pre-1961 citizenship. The "savings" provision demonstrates that Congress knew how to specify retroactive application of the denaturalization statutes when it wanted to do so. Because it did not do so in the case of its addition of "illegal procurement" in 1961, retroactive application is precluded. The Supreme Court's observation in Struthers Wells is pertinent here:

> If Congress had intended otherwise, we think it would have still further amended the original act by providing in plain language that the amendment should apply to all cases, and not be confined to the future.

(209 U.S. at 315).

Because "illegal procurement" was not added to the statutory grounds for denaturalization until 1961, some four years after Kairys obtained his citizenship, stripping him of his certificate on those grounds would entail a retroactive application of the 1961 amendment. In light of the silence of

Congress on this issue, canons of statutory construction bar the retroactive application which the Government seeks. Counts II through V of the Complaint, therefore, must be dismissed.

B. Retroactive Application of the 1961 Addition of "Illegal Procurement" to Kairys's 1957 Citizenship Violates the Ex Post Facto Clause of the Constitution.

Even if principles of statutory construction are disregarded, the Constitutional prohibition of ex post facto prosecutions stands as a further bar to the Government effort.

As shown above, reliance on "illegal procurement" as a grounds to denaturalize Kairys would amount to a retroactive application of the 1961 amendment to §340(a) to the citizenship Kairys obtained in 1957. In light of modern understanding of the value of citizenship and the consequences of denaturalization for the individual, the ex post facto clause (U.S. Const. Art. I, §9, cl. 3) of the Constitution bars retroactive application.

In Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), the Supreme Court first discussed, in dictum,[68/] the meaning of the

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68/ The Calder discussion of the ex post facto clause qualifies as dictum because the Court grounded its decision on the contract clause. As Mr. Justice Johnson explained in his concurrence in Satterlee v. Mathewson, 27 U.S. (2 Pet.) 380, 685 (1829):

> "It is obvious, in the case of Calder v. Bull, that the great reason which influenced the opinion of the three judges who gave an exposition of the phrase ex post facto, was that they considered its application to civil cases unnecessary, and fully supplied by the prohibition to pass laws impairing the obligations of contracts."

ex post facto clause. The Court's opinions emphasize that the clause principally operates to protect individual liberty:

> The prohibition, in the letter, is not to pass any law concerning, and after the fact; but the plain and obvious meaning of the prohibition in this; that the Legislatures of the several states shall not pass laws, after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it. The prohibition considered in this light, is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts, having a retrospective operation.

(3 U.S. (3 Dall.) at 390).[69/] See also Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 266 (1827).

The Court has also stated that the substance of the effect of the retroactive statute on the individual, not the label "criminal" or "civil" given the proceeding, governs in determining whether the ex post facto clause has been violated. Thus, in Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866), the Court invalidated a Missouri constitutional provision which, through the operation of an oath requirement, debarred certain individuals from some professions by reason of their participation in acts which were not prohibited when committed. The Court reasoned:

69/ Calder dealt with the ex post facto clause restriction on the states. The Constitution, of course, imposes the identical restriction on the Federal Government.

> The disabilities created by the constitution of Missouri must be regarded as penalties -- they constitute punishment. We do not agree with the counsel of Missouri that "to punish one is to deprive him of life, liberty, or property, and that to take from him anything less than these is no punishment at all." . . . The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.

(71 U.S. (4 Wall.) at 320).

These principles dictate that retrospective application of "illegal procurement" to denaturalize Kairys would amount to a punishment which the ex post facto clause prohibits. Denaturalization threatens an individual's liberty. Chaunt, 364 U.S. at 353. The Supreme Court has held that forfeiture of citizenship is penal and has "throughout history been used as a punishment." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 n.23 (1963). Moreover, denaturalization has consequences which "may be more grave than consequences that flow from conviction for crimes." Klapprott, 335 U.S. at 611.[70/] Retroactive application of a statute which would inflict these consequences on Kairys offends the basic rationale of the ex post facto clause.

The Government may rely on Johannessen v. United States, 225 U.S. 227 (1912), to avoid application of the ex post facto

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70/ Moreover, denaturalization under these circumstances would constitute a penalty under the Supreme Court's six-pronged analysis in Mendoza-Martinez, 372 U.S. at 168-69. See "Defendant's Memorandum in Opposition to the Government's Motion to Strike His Jury Demand," pp.22-29 (April 19, 1982).

clause to preclude retroactive application of "illegal procurement" to Kairys's case.[71/] Johannessen, however, concerned a citizenship certificate far different than the certificate Kairys obtained. Johannessen had obtained his by way of ex parte application.[72/] The Court described this citizenship as merely an "instrument granting political privileges . . . closely analogous to a public grant of land to make, use and vend a new and useful invention." (225 U.S. at 238).

Kairys, by contrast, obtained his citizenship by way of adversarial proceedings against the Government. (Tr. 588-90). The Supreme Court has called this kind of citizenship a "precious right," Schneiderman, 320 U.S. at 125, and a "priceless treasure." Fedorenko, 449 U.S. at 507. The Court has stated that this kind of citizenship "cannot be compared (as was done in Johannessen . . .) to an administrative grant of land or of letters patent. . . ." Schneiderman, 320 U.S. at 124 n.3.

Moreover, precious rights should not today turn on the Johannessen court's anachronistic characterization of citizenship as merely "an instrument granting political privileges." The Supreme Court has "rejected the concept that

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71/ Johannessen provides no basis for ignoring the canons of statutory construction which preclude retroactive application of the "illegal procurement" grounds for denaturalization. In Johannessen the challenged statute expressly provided for retroactive coverage. (225 U.S. at 274). In this case, of course, the belated 1961 amendments to §340(a) made no provision for retroactivity.

72/ See "Defendant's Memorandum in Opposition to the Government's Motion to Strike His Jury Demand," pp.6-8.

constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or a 'privilege.'" Morrissey v. Brewer, 408 U.S. 471, 481 (1972). In short, the discredited language of Johannessen applies neither by its terms nor its reasoning to Kairys's case. If the ex post facto clause does serve as a protection to individual liberties, as the Supreme Court has repeatedly said, then it protects Kairys's "most precious right" from a retroactive attack by the Government.

C. The Government Failed to Prove that Kairys "Illegally Procured" his Citizenship within the Meaning of Fedorenko.

The Government has argued from the outset that its case requires no legal analysis beyond a wooden application of the Fedorenko decision. (E.g., Gov't Br. 18 n.*). This simplistic approach ignores the self-described limitations of the Fedorenko decision and the Court's duties closely to examine the factual record itself, e.g., Nowak v. United States, 356 U.S. 660 (1958), and to construe both "the facts and the law . . . as far as is reasonably possible in favor of the citizen." Schneiderman, 320 U.S. at 122. This approach follows from the Supreme Court's injunction to the Courts to maintain a "jealous regard" for the rights of the citizen. Schneiderman, 320 U.S. at 120.

As a first limitation, the Supreme Court decided only that Fedorenko should lose the citizenship he obtained in 1970 by reason of its "illegal procurement." The Government may not proceed against Kairys for "illegal procurement" of citizenship, however, because that ground for denaturalization had been

eliminated in 1952 and not restored until 1961, four years after Kairys was naturalized. (See Sections III. A-B, supra). Congress itself recognized:

> Elimination of the illegality ground bars denaturalization under section 340 unless it is proved that the naturalized person has been guilty of wrongdoing amounting to concealment of a material fact or willful misrepresentation within the meaning of that section.

H.R. Rep. No. 1086, 87th Cong., 1st Sess., 38 (1961), reprinted in 1961 U.S. Code Cong. & Admin. News 2950, 2992. Section II demonstrated that the Government failed to prove that Kairys willfully misrepresented or concealed any material facts in connection with his immigration and naturalization.

Moreover, important factual differences distinguish Kairys's case from Fedorenko's. Fedorenko admitted he had "willingly" lied to the Displaced Persons Commission and the vice consul about his wartime activities in applying for his visa. (449 U.S. at 496-97, 500, 507). These lies disqualified Fedorenko for a visa under §10 of the D.P. Act, because "disclosure of the true facts about [his] service as an armed guard at Treblinka would, as a matter of law, have made him ineligible for a visa under the D.P. [Act]. . . ." (449 U.S. at 509). This conclusion rested on the D.P. Act's declaration that individuals who "assisted the enemy in persecuting civili[ans]" were ineligible for visa under the Act. (449 U.S. at 509-10). The Court found that Fedorenko was just such a person:

> [T]here can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting

> at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians.

(449 U.S. at 512-13 n.34). The Court then recognized that other factual situations could lead to different results: "Other cases may present more difficult line-drawing problems, but we need only decide this case." (Id.).

The facts in Fedorenko's case differ sharply from Kairys's, even assuming the Government places Kairys at the Treblinka Labor Camp. First, the evidence shows that in no sense was service at the Treblinka Labor Camp a voluntary affair. Men were either simply taken from prisoner of war camps ((GX 80, p.17 (Zvezdun); GX 81, pp.11, 14, 23, 43-44 (Kharkovskii)), or coerced to "volunteer" by witnessing the killing of others who declined. (GX 77, pp.14 (Amanaviczius). None knew what the service would entail beforehand. (GX 81, p.44 (Kharkovskii)). Once in the camp, there was no escape. Those who tried were shot. (GX 81, p.43 (Kharkovskii)). Those who went on leave had to return or their families would have been killed. (GX 77, p.17 (Amanaviczius)).

The "Kairys" of the Treblinka Labor Camp never hurt any of the inmates. No survivor could identify that "Kairys" as a perpetrator of murder or beatings. Government witness Amanaviczius testified that "Kairys" was not present at the bloody liquidation of the camp. Moreover, the Government declined to ask any witness other than Ivan Zvezdun whether the "Kairys" he knew had killed anyone. Shielded from cross-examination about his preparatory sessions with the KGB, Zvezdun

came up at his deposition with a story he had never told before. He claimed to have "witnessed" murders of two prisoners by "Kairys" and another guard (whom he could not identity) from a watchtower at a distance of 100 to 150 meters. This testimony does not deserve to be admitted in evidence, much less given any weight. The Government certainly did not prove by "clear, unequivocal, and convincing evidence that does not leave the issue in doubt," that its "Kairys" hurt or tried to hurt anyone at Treblinka.[73/]

This factual distinction makes a difference. Judge Petrone testified that he would have recommended an individual for citizenship whose concentration camp service paralleled that of the "Kairys" at Treblinka. (Tr. 597-98). Moreover, as Justice White observed, dissenting in Fedorenko, "one could argue that the words 'assist' and 'persecute' suggest that §2(a) would not apply to an individual whose actions were truly coerced." (449 U.S. at 527 n.3). The ordinary definition of "assist" is "to give support or aid" (Webster's Third New Int'l Dict. 1961), which implies a volitional act. E.g., Peterson v. Hopson, 29 N.E.2d 140, 148, 306 Mass. 597, (Mass. 1940) ("[A]ssistance imports a voluntary participation in the wrongful acts."). The record is devoid of any showing that a Baltic

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73/ The Government's failure to prove that Kairys committed murder or administered beatings at Treblinka defeats its claims that he "illegally procured" his citizenship because he lacked good moral character (Cmplt. ¶¶46-49) and that he obtained his citizenship by "willful misrepresentation" when he indicated on his naturalization papers that he had not committed any crimes entailing moral turpitude. (Cmplt. ¶29).

Treblinka guard named "Kairys" ever "voluntarily" participated in persecution.

Similarly, the absence of credible evidence of actual harm to prisoners precludes a finding of "persecution." In interpreting the term "persecution" under §243(h) of the Immigration and Nationality Act, 8 U.S.C. §1253(h) (1981), the Ninth Circuit observed:

> But there is nothing to indicate that Congress intended section 243(h) to encompass anything less than the word "persecution" ordinarly conveys -- the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive.

Kovac v. Immigration and Naturalization Service, 407 F.2d 102, 107 (9th Cir. 1969). See also Moghanian v. United States Department of Justice, 577 F.2d 141, 142 (9th Cir. 1978). No credible evidence shows that the "Kairys" of Treblinka actually "inflicted" harm on civilian prisoners. The Government's failure to prove by "clear, unequivocal, and convincing evidence that does not leave the issue in doubt" that the "Kairys" of Treblinka voluntarily assisted in inflicting actual harm on civilian prisoners removes this case from under Fedorenko and defeats the Government claim of "illegal procurement."

IV. LACHES BARS THIS PROSECUTION.

O.S.I. Director Allan Ryan recently spoke to the press about the current Nazi "war criminal" prosecutions. He stated:

> I've often said what we are doing now should have been done 30 years ago. All the witnesses are 30 years older, all the defendants are 30 years older, all the documents are 30 years older with all of the problems that that connotes.

(Chicago Lawyer, October 1982, p. 16 c.1). Kairys agrees. The Government's admitted fault in waiting decades before prosecuting limits his ability to present a defense. Important witnesses for Kairys's cause have died. The Government admits that it "erroneously destroyed" documents relevant to his defense. Defendant was denied a jury because the proceeding was deemed "equitable." Consequently, the equitable defense of laches bars this prosecution.

A. The Doctrine of Laches Applies Against the Government in this Case.

When Kairys claimed the right to the protection of a jury trial, the Government refused, citing Supreme Court statements terming denaturalization proceedings "equitable." (Gov't Mem. in Support of its Motion to Strike Def.'s Jury Demand (April 29, 1982), pp.1-2, 5). If this proceeding is "equitable," then Kairys may rely on the equitable defense of laches.

The Supreme Court has considered the question of the availability of the laches defense to the denaturalization defendant. Costello v. United States, 365 U.S. 265 (1961). Despite appellate opinions ruling out the defense in denaturalization cases, the Supreme Court declined to follow suit. (365 U.S. at 281). It held, instead, that Costello had not sustained the defense. (365 U.S. at 281-84). The only subsequent appellate opinion has likewise refused to rule out the availability of laches to an American threatened with confiscation of his citizenship. United States v. Oddo, 314 F.2d 115 (2d Cir.), cert. denied, 375 U.S. 833 (1963). Adherence to the Supreme

Court's injunction that in these cases "both the facts and the law should be construed as far as is reasonably practicable in favor of the citizen," Schneiderman, 320 U.S. at 122, results, on this record, in barring the Government's claims against Kairys by laches.

B. The Government's Admitted Fault in Long Delay Prejudiced Kairys.

In Costello, the Supreme Court applied the traditional elements of the laches defense: (1) lack of diligence in the plaintiff, and (2) prejudice to the defendant. (365 U.S. at 282). Both elements are present here, in spades.

The Government admits its lack of diligence. OSI Director Ryan acknowledges that these cases should have been brought thirty years ago. A congressional committee held hearings on the delay in investigating charges that Nazi "war criminals" were living in the United States. (DX 389-92). It directed the General Accounting Office to investigate. (DX 389, Alleged Nazi War Criminals, Hearings Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary, House of Representatives, 95th Cong., 1st Sess. (1977)). The GAO concluded that the Immigration and Naturalization Service's "investigations of most cases before 1973 were deficient or perfunctory. In some, no investigation was conducted." (DX 389, p. 162).[74/]

74/ Congress authorized the Government Accounting Office to investigate whether the delay was a product of a "conspiracy" within the Government. The GAO's report states: "While GAO concludes that no widespread conspiracy existed,

(Footnote continued on following page)

The Government has been particularly derelict in this case. Kairys first came into contact with the United States when he joined the Army Labor Service Company in 1947, 35 years ago. He had been in the United States over 30 years and a citizen for more than 23 years before the Government chose to move against him. The Swidersky case, which the Government has identified as the source of the evidence allegedly most damning to Kairys, began in 1969. Nonetheless, the Government waited until 1980 before acting.

The long delay has prejudiced Kairys. Five important witnesses from Lithuania who could have substantiated Kairys's identity and wartime whereabouts have died.75/ (Tr. 1147-50).

(Footnote continued from the preceding page)

it cannot absolutely rule out the possibility of undetected, isolated instances of deliberate obstruction of investigations of some alleged Nazi war criminals." (DX 389, p.161).

75/ For example, Kairys testified that the late Dr. Puzinas was one of several individuals who could have substantiated his whereabouts during the Second World War. Dr. Puzinas was an part-time instructor at the Vilnius high school which Kairys attended. The Government asserts that that memory of Mrs. Puzinas, the late doctor's widow, contradicts Kairys's testimony. According to the Government, Dr. Puzinas "was not a teacher at any high school in Vilnius and did not engage in any other part time work." (Gov't Br. at 76). Mrs. Puzinas's testimony indicates otherwise. As she stated:

> Q. Just to be clear, you have no knowledge of your husband working as an instructor at the gymnasium in Vilnius do you?
>
> A. No, never, I don't know for sure.
>
> * * *
>
> As I was telling, he might have given some lectures.

(Footnote continued on following page)

Moreover, Harrison Dick, the Vice Consul who personally handled Kairys's visa application, has also died. (Tr. 701). The Supreme Court has noted that, as here, laches

> is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or the witness or witnesses. . . .

Hammond v. Hopkins, 143 U.S. 224, 250 (1892).

Beyond the death of witnesses, the Government's delay in prosecution has resulted in the loss of significant documents. The "CM/1 Form" or "Fragebogen" which Kairys submitted to the IRO has disappeared. So have Kairys's entire Army records -- save those he kept himself. The Army records included not only documents which Kairys gave to the Army substantiating his identity and wartime whereabouts (Tr. 1152), but also records relating to any Army investigations of Kairys (Tr. 649) prepared as part of Kairys's efforts while in the Army to go to the United States. (Tr. 1156-59). These Army records, the Government concedes, were transferred from Germany to the United States and "erroneously destroyed" in the 1950's. (DX 372).

The death of witnesses and the Government's own destruction of documents substantially prejudiced Kairys's defense. The prejudice caused by avoidable delay takes on increased importance in the light of the many doubts created by

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(Footnote continued from preceding page)

(Tr. 1309). Mrs. Puzinas and defendant's recollection are not inconsistent. The Government proffered no other witness to contradict Kairys's claims.

the evidence here. Since "laches goes to the difficulty of proof," Hudson v. Alabama, 493 F.2d 171, 173 (5th Cir. 1974), the demonstrated loss of vital defense evidence justifies the defense of laches agains the Government here.

Conclusion

The Government's evidence leaves a trail of doubt at every turn. Treblinka survivors who could have made a positive identification of Kairys did not. Treblinka guards who made "identifications" did so in questionable circumstances from a questionable photo on questionable photospreads. The Government's key documents, produced by a known forger with an animus towards Kairys, proved riddled with inconcistencies the Government could never answer.

Moreover, the facts concerning Kairys's immigration and naturalization remain in a fog. The evidence fails to show that Kairys was even asked whether he served at Treblinka, much less that he lied. These doubts doom the prosecution, for denaturalization demands they be silenced:

> "We cannot escape the conviction that the case made out by the Government lacks that solidity of proof which leaves no troubling doubt in deciding a question of such gravity as is implied in an attempt to reduce a person to the status of alien from that of citizen."

Baumgartner, 322 U.S. at 670. "Troubling doubts" remain in this Government attempt against Liudas Kairys. Those "troubling doubts" require his acquittal.

DATED: October 18, 1982

Respectfully submitted,

Fred H. Bartlit, Jr.

David E. Springer

Thomas O. Kuhns

Philip S. Beck

200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

Counsel for Defendant, LIUDAS KAIRYS

CERTIFICATE OF SERVICE

I, DAVID E. SPRINGER, one of the attorneys for the defendant, hereby certify that on October 18, 1982, I caused a copy of "Defendant's Post-Trial Brief" to be served upon plaintiff's counsel, Linda Wawzenski, and on October 19, 1982 to be served upon Neal Sher, Norman Moscowitz, Clarice Feldman and Eli Rosenbaum.

David E. Springer

APPENDIX

Figure 3.28. Code numbers appearing on printed forms often give information about the source and date of printing. In this case the third group of digits, 31, indicates a 1931 printing.

typesetting or the presswork, can be derived from a study of the document itself, which may have some value in the investigation of the problem. Many standard forms prepared by letterpress or offset have printing codes that identify their source (Figure 3.28). Thus certain questions can be answered from the printed document alone, but far more can be told by comparison of it with known material, a problem discussed more fully in Chapter 12.

Engraved and Lithographed Forms

Questions regarding the origin or genuineness of engraved or lithographed material are encountered in document problems from time to time. While these documents resemble ordinary printed material, the methods of preparation are different.[44]

The finest-quality work is produced by engraving or etching a reusable steel or copper plate to print engraved letterheads, business cards, and similar material. In reusing, it is always possible that slight flaws may be found in the plate due to mishandling, but this is unusual. Otherwise it would be difficult to distinguish the work of different runs. Letterheads, currency, and stock and bond certificates are common documents prepared by engraving today.

This class of printing can be easily distinguished from lithographed forms, since the engraving produces raised ink while lithographs are smooth surface printing. The lithograph process is similar to offset printing in the final product. Birth, marriage, and baptismal certificates, some letterheads, and check blanks are among the common documents prepared by lithography. In the majority of problems, however, the most valuable information is derived from comparison of the disputed material with specimens from known sources or different printings, rather than from the disputed document alone.

[44]Forms of either class are printed from solid plates rather than from the assembled pieces of type used for ordinary (letterpress) printing. Engraved (intaglio) printing uses a plate with the design cut into the face; offset printing is produced from a smooth plate in which only the printing areas hold ink.

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

OMB NO. 1115-0009
Approval Expires 1/31/84

APPLICATION TO FILE PETITION FOR NATURALIZATION

Mail or take to:
IMMIGRATION AND NATURALIZATION SERVICE

FEE STAMP

(See INSTRUCTIONS. BE SURE YOU UNDERSTAND EACH QUESTION BEFORE YOU ANSWER IT. PLEASE PRINT OR TYPE.)

ALIEN REGISTRATION
(Show the exact spelling of your name as it appears on your alien registration receipt card, and the number of your card. If you did not register, so state.)
Name .....
No. .....

Section of Law ..... (Leave Blank)

Date: .....

(1) My full true and correct name is..... (Full true name without abbreviations)

(2) I now live at..... (Number and street)

..... (City, county, state, zip code)

(3) I was born on..... (Month) (Day) (Year) in..... (City or town) (County, province, or state) (Country)

(4) I request that my name be changed to.....

(5) Other names I have used are:..... (Include maiden name) Sex: ☐ Male ☐ Female

(6) Was your father or mother ever a United States citizen?..... ☐ Yes ☐ No
(If "Yes", explain fully)

(7) Can you read and write English?..... ☐ Yes ☐ No

(8) Can you speak English?..... ☐ Yes ☐ No

(9) Can you sign your name in English?..... ☐ Yes ☐ No

(10) My lawful admission for permanent residence was on..... (Month) (Day) (Year) under the name of

..... at..... (City) (State)

(11) (a) I have resided continuously in the United States since ..... (Month) (Day) (Year)

(b) I have resided continuously in the State of ..... since ..... (Month) (Day) (Year)

(c) During the last five years I have been physically in the United States for a total of ..... months.

FROM -	TO -	STREET ADDRESS	CITY AND STATE
(a) ....., 19.....	PRESENT TIME		
(b) ....., 19.....	....., 19.....		
(c) ....., 19.....	....., 19.....		
(d) ....., 19.....	....., 19.....		

(14) (a) Have you been out of the United States since your lawful admission as a permanent resident?..... ☐ Yes ☐ No
If "Yes" fill in the following information for every absence of *less than 6 months*, no matter how short it was.

DATE DEPARTED	DATE RETURNED	NAME OF SHIP, OR OF AIRLINE, RAILROAD COMPANY, BUS COMPANY, OR OTHER MEANS USED TO RETURN TO THE UNITED STATES	PLACE OR PORT OF ENTRY THROUGH WHICH YOU RETURNED TO THE UNITED STATES

(b) Since your lawful admission, have you been out of the United States for a period of 6 *months or longer?*..... ☐ Yes ☐ No
If "No", state "None"; If "Yes", fill in following information for every absence of more than 6 months.

DATE DEPARTED	DATE RETURNED	NAME OF SHIP OR OF AIRLINE, RAILROAD COMPANY, BUS COMPANY, OR OTHER MEANS USED TO RETURN TO THE UNITED STATES	PLACE OR PORT OF ENTRY THROUGH WHICH YOU RETURNED TO THE UNITED STATES

(15) The law provides that you may not be regarded as qualified for naturalization, if you knowingly committed certain offenses or crimes, even though you may not have been arrested. Have you ever, in or outside the United States:

(*a*) knowingly committed any crime for which you have not been arrested? ☐ Yes ☐ No

(*b*) been arrested, cited, charged, indicted, convicted, fined or imprisoned for breaking or violating any law or ordinance, including traffic regulations? ☐ Yes ☐ No

If you answer "Yes" to (*a*) or (*b*), give the following information as to each incident.

	WHEN	WHERE (City)	(State)	(Country)	NATURE OF OFFENSE	OUTCOME OF CASE, IF ANY
(*a*)						
(*b*)						
(*c*)						
(*d*)						
(*e*)						

(16) List your present and past membership in or affiliation with every organization, association, fund, foundation, party, club, society or similar group in the United States or in any other country or place, and your foreign military service. (If none, write "None.")

(*a*) ..... 19..... to 19.....
(*b*) ..... 19..... to 19.....
(*c*) ..... 19..... to 19.....
(*d*) ..... 19..... to 19.....
(*e*) ..... 19..... to 19.....
(*f*) ..... 19..... to 19.....
(*g*) ..... 19..... to 19.....

(17) (*a*) Are you now, or have you ever, in the United States or in any other place, been a member of, or in any other way connected or associated with the Communist Party? (If "Yes", attach full explanation) ☐ Yes ☐ No

(*b*) Have you ever knowingly aided or supported the Communist Party directly, or indirectly through another organization, group or person? (If "Yes", attach full explanation) ☐ Yes ☐ No

(*c*) Do you now or have you ever advocated, taught, believed in, or knowingly supported or furthered the interests of Communism? (If "Yes", attach full explanation) ☐ Yes ☐ No

(18) During the period March 23, 1933 to May 8, 1945, did you serve in, or were you in any affiliated with, either directly or indirectly, any military unit, paramilitary unit, police unit, self-defense unit, vigilante unit, citizen unit, unit of the Nazi Party or SS, government agency or office, extermination camp, concentration camp, prisoner of war camp, prison, labor camp, detention camp or transit camp, under the control of or affiliated with:

(a) the Nazi Government of Germany ☐ Yes ☐ No

(b) any Government in any area occupied by, allied with, or established with the assistance or cooperation of, the Nazi Government of Germany? ☐ Yes ☐ No

(19) During the period March 23, 1933 to May 8, 1945, did you ever order, incite, assist, or otherwise participate in the persecution of any person because of race, religion, national origin, or political opinion? ☐ Yes ☐ No

(20) Have you borne any hereditary title or have you been of any order of nobility in any foreign state? ☐ Yes ☐ No

(21) Have you ever been declared legally incompetent or have you ever been confined as a patient in a mental institution? ☐ Yes ☐ No

(22) Are deportation proceedings pending against you, or have you ever been deported or ordered deported, or have you ever applied for suspension of deportation? ☐ Yes ☐ No

(23) (*a*) My last Federal income tax return was filed..... (year) Do you owe any Federal taxes? ☐ Yes ☐ No

(*b*) Since becoming a permanent resident of the United States, have you:

—filed an income tax return as a nonresident? ☐ Yes ☐ No

—failed to file an income tax return because you regarded yourself as a nonresident? ☐ Yes ☐ No

(If you answer "Yes" to (*a*) or (*b*) explain fully.)

(24) Have you ever claimed in writing, or in any other way, to be a United States citizen? ☐ Yes ☐ No

(25) (*a*) Have you ever deserted from the military, air, or naval forces of the United States? ☐ Yes ☐ No

(*b*) If male, have you ever left the United States to avoid being drafted into the Armed Forces of the United States? ☐ Yes ☐ No

(26) The law provides that you may not be regarded as qualified for naturalization if, at *any* time during the period for which you are required to prove good moral character, you have been a habitual drunkard; committed adultery; advocated or practiced polygamy; have been a prostitute or procured anyone for prostitution; have knowingly and for gain helped any alien to enter the United States illegally; have been an illicit trafficker in narcotic drugs or marijuana; have received your income mostly from illegal gambling, or have given false testimony for the purpose of obtaining any benefits under this Act. Have you ever, *anywhere*, been such a person or committed any of these acts? (If you answer yes to any of these, attach full explanation.) ☐ Yes ☐ No

(27) Do you believe in the Constitution and form of government of the United States? ☐ Yes ☐ No

(28) Are you willing to take the full oath of allegiance to the United States? (See Instructions) ☐ Yes ☐ No

(29) If the law requires it, are you willing:

(*a*) to bear arms on behalf of the United States? (If "No", attach full explanation) ☐ Yes ☐ No

(*b*) to perform noncombatant services in the Armed Forces of the United States? (If "No", attach full explanation) ☐ Yes ☐ No

(*c*) to perform work of national importance under civilian direction? (If "No", attach full explanation) ☐ Yes ☐ No

(30) (*a*) If male, did you ever register under United States Selective Service laws or draft laws? ☐ Yes ☐ No

If "Yes" give date.....; Selective Service No.....; Local Board No.....; Present classification.....

(*b*) Did you ever apply for exemption from military service because of alienage, conscientious objections, or other reasons? ☐ Yes ☐ No

If "Yes," explain fully.....

(31) If serving or ever served in the Armed Forces of the United States, give branch.....;
from ....., 19..... to ....., 19....., and from ....., 19..... to ....., 19.....
☐ inducted or ☐ enlisted at.....; Service No.....;
type of discharge..... (Honorable, Dishonorable, etc.) .....; rank at discharge.....;
reason for discharge ..... (Alienage, conscientious objector, other)
☐ Reserve or ☐ National Guard from..... 19..... to.....

(32) My occupation is .....

List the names, addresses, and occupations (or types of business) of your employers during the last 5 years. (If none, write "None.")
List present employment FIRST.

From	To	Employer's Name	Address	Occupation or Type of Business
(a) ....., 19	Present Time			
(b) ....., 19	....., 19			
(c) ....., 19	....., 19			
(d) ....., 19	....., 19			

(33) Complete this block if you are or have been married.

I am..... (Separated, married, divorced, widowed) The first name of my husband or wife is (was).....

We were married on..... at..... He or she was born at.....
..... on..... He or she entered the United States at (place).....
..... on (date)..... for permanent residence and now resides ☐ with me
☐ apart from me at ..... (Show full address if not living with you)

He or she was naturalized on..... at.....; Certificate No.....,
or became a citizen by ..... His or her Alien Registration No. is.....

(34) How many times have you been married?..... How many times has your husband or wife been married?..... If either of you has been married more than once, fill in the following information for each previous marriage.

Date Married	Date Marriage Ended	Name of Person to Whom Married	Sex	(Check One) Person Married Was Citizen ☐ Alien ☐	How Marriage Ended
(a)				☐ ☐	
(b)				☐ ☐	
(c)				☐ ☐	
(d)				☐ ☐	

(35) I have.....children: (Complete columns (a) to (h) as to each child. If child lives with you, state "with me" in column (h), otherwise give city and State of child's residence.)
(Number)

(a) Given Names	(b) Sex	(c) Place Born (Country)	(d) Date Born	(e) Date of Entry	(f) Port of Entry	(g) Alien Registration No.	(h) Now Living at

(36) **READ INSTRUCTION NO. 6 BEFORE ANSWERING QUESTION (36)**

I.....want certificates of citizenship for those of my children who are in the U.S. and are under age 18 years that are named below.
(Do) (Do Not)

(Enclose $15 for each child for whom you want certificates, otherwise, send no money with this application.)

.....
(Write names of children under age 18 years and who are in the U.S. for whom you want certificates)

If present spouse is not the parent of the children named above, give parent's name, date and place of naturalization, and number of marriages

.....

Signature of person preparing form, if other than applicant.	SIGNATURE OF APPLICANT
I declare that this document was prepared by me at the request of applicant and is based on all information of which I have any knowledge. SIGNATURE	ADDRESS AT WHICH APPLICANT RECEIVES MAIL
ADDRESS: DATE:	APPLICANT'S TELEPHONE NUMBER

TO APPLICANT: DO NOT FILL IN BLANKS BELOW THIS LINE.

NOTE CAREFULLY.—This application must be sworn to before an officer of the Immigration and Naturalization Service at the time you appear before such officer for examination on this application.

AFFIDAVIT

I do swear that I know the contents of this application comprising pages 1 to 4, inclusive, and the supplemental forms thereto, No(s). ....., subscribed to by me; that the same are true to the best of my knowledge and belief; that corrections numbered ( ) to ( ) were made by me or at my request; and that this application was signed by me with my full, true, and correct name, SO HELP ME GOD.

..... (Complete and true signature of applicant)

Subscribed and sworn to before me by applicant at the preliminary investigation ( ) at .....

this ..... day of ....., 19.....

I certify that before verification the above applicant stated in my presence that he/she had (heard) read the foregoing application, corrections therein and supplemental form(s) and understood the contents thereof.

..... (Naturalization examiner)

..... (For demonstration of applicant's ability to write English)

(1st witness. Occupation) .....

(2nd witness. Occupation) .....

Nonfiled .....

..... (Date, Reasons)

NOTICE TO APPLICANTS:

Authority for collection of the information requested on this form and those forms mentioned in the instructions thereto is continued in Sections 328, 329, 332, 334, 335 or 341 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1439, 1440, 1443, 1445, 1446 or 1452). Submission of the information is voluntary inasmuch as the immigration and nationality laws of the United States do not require an alien to apply for naturalization. If your Social Security number is omitted from a form, no right, benefit or privilege will be denied for your failure to provide such number. However, as military records are indexed by such numbers, verification of your military service, if required to establish eligibility for naturalization, may prove difficult. The principal purposes for soliciting the information are to enable designated officers of the Immigration and Naturalization Service to determine the admissibility of a petitioner for naturalization and to make appropriate recommendations to the naturalization courts. All or any part of the information solicited may, as a matter of routine use, be disclosed to a court exercising naturalization jurisdiction and to other federal, state, local or foreign law enforcement or regulatory agencies, Department of Defense, including any component thereof, the Selective Service System, the Department of State, the Department of the Treasury, Central Intelligence Agency, Interpol and individuals and organizations in the processing of the application or petition for naturalization, or during the course of investigation to elicit further information required by the Immigration and Naturalization Service to carry out its function. Information solicited which indicates a violation or potential violation of law, whether civil, criminal or regulatory in nature may be referred, as routine use, to the appropriate agency, whether federal, state, local or foreign, charged with the responsibility of investigating, enforcing or prosecuting such violations. Failure to provide any or all of the solicited information may result in an adverse recommendation to the court as to an alien's eligibility for naturalization and denial by the court of a petition for naturalization.

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