person were filling this role it would not be objectionable, but in effect one of the parties to the proceeding was also acting as judge. The prosecution of the case is a joint OSI-Soviet endeavor. The fact that the Soviet authorities had completed their investigative phase of the case and had turned over the fruits of their work to the OSI does not transform them into neutral observers. They remained part of the prosecution team and in fairness the officer who presided at the depositions should not have been a part of that team.

Moreover, in the case of the government's two most critical witnesses - Jonas Dailide and Juozas Kriunas - the presiding procurator was Jurgis Bakucionis. Data concerning Bakucionis is set forth in The Chronicle of the Catholic Church in Lithuania, an underground, illegal publication appearing approximately six times a year. It documents Soviet violations of human rights, particularly those of a religious nature. A summary of the Chronicle's references to Bakucionis (Exh. D-32) shows him to be an aggressive prosecutor of persons charged with offenses involving the exercise of religious practices or evidencing loyalty to national Lithuanian interests.6/

Each deposition commenced with a warning by the Soviet procurator to the witness of his obligations under Soviet law. Each had previously signed a protocol after interrogation by Soviet investigators investigating this case (most likely representatives of the KGB). Then the procurator questioned the witness in broad general terms, such as "What do you know about

the execution of the Soviet activists and the Jews in Kedainiai?" (Narusevicius Dep. at 9). This of course called for personal knowledge and knowledge based on all manner of reports and statements of others, with no means of distinguishing one form of knowledge from the other.

In the case of the critical witness Juozas Kriunas, who had spent ten years in a Soviet labor camp, it was not enough that Procurator Bakucionis presided. In addition, as one of the OSI interrogators announced to the witness and for the record, "Present at this deposition is Mr. Zhukov, from the Soviet Procurator General's Office." It was the first day of testimony in Lithuania. Perhaps Zhukov was there as a courtesy to the OSI. Perhaps he was there to remind the hapless Kriunas of his obligations to the Soviet authorities.

Observing the deposition it was disturbing to note the extreme deference which the OSI attorneys paid to the Soviet procurator, who was in reality nothing more than their partner in the prosecution of the case. It was disturbing to note the manner in which representatives of the Department of Justice adopted the phraseology of the Soviet Procurator - for example, always referring to the government and Communist Party leaders shot at Babeniai as "Soviet activists." No doubt this was done unconsciously. However, this deference to the Soviet officials cannot have been lost on the witnesses and it emphasizes the

unwarranted role assigned to a Soviet procurator in a case where the rights of a United States citizen are being tried in a court of the United States.

After the Soviet procurator opened each deposition with his questioning of the witness, an OSI attorney commenced his examination. The government's method of questioning the witnesses compounded the difficulties created by the procurator's sweeping generalized questions. The government attorneys persisted time and again to pose blatantly leading questions, drawing upon the protocols which the witnesses had signed and upon the answers which the witnesses had given to the procurator's questions. Before I concluded that the deposition testimony cannot be admitted for the purpose of implicating defendant in the Kedainiai killings, I attempted to separate the most clearly objectionable questions from less objectionable ones, but the entire proceeding was improperly affected by this form of questioning.

Despite the fact that Judge Meanor's October 14, 1981 order required that defense counsel have the opportunity "to conduct a full and free cross-examination of each witness", and despite the fact that the government's attorneys were directed not to instruct any witness not to answer, the actions of the procurator seriously limited the effect of these requirements.

When defendant's attorney sought to cross-examine Devidonis about the Soviet investigation of his role in the 1941 events, the procurator instructed him, "Mr. Berzins, will you

please give questions in the matter of the deposition?" (Devidonis Dep. at 67). Even the government attorney recognized that this constituted a totally unwarranted limitation of cross-examination and suggested that if the questions dealt with defendant's participation or if Devidonis was giving incriminatory testimony against himself, the inquiry should be permitted. The procurator then questioned the witness whether he knew anything about defendant (which he did not) and ascertained from the witness that he said nothing during his 1977 and 1966 investigations which were not truthful. This apparently was designed to show that there was no information of the nature which the government attorneys suggested might be the subject of cross-examination. However, even the government missed the point. A critical question was not only what Devidonis said about defendant in 1977 and 1967. A critical question was whether at those times he attributed to persons other than defendant responsibility for acts of which defendant is now charged.

Cross-examination of one of the government's two most important witnesses, Juozas Kriunas, was limited by the procurator. For example, after having established that Kriunas had signed a protocol in 1946 as well as in 1977 defense counsel pursued the matter of the protocols further, only to be met with an instruction from the procurator: "I would like to remind you once more, Mr. Berzins, that we are investigating Kungys' case and not the biography of the witness and not the relations of Mr.

Kriunas with the Soviet authorities." (Kriunas Dep. at 59). As the foregoing portions of this opinion should suggest, the relation of all the witnesses with the Soviet authorities is absolutely critical in determining the reliability, and thus the admissibility, of the depositions taken in Lithuania. Here cross-examination on that subject was limited, if not foreclosed.

Also during the Kriunas cross-examination the procurator sought to cut off the witness' response. As defense counsel examined concerning the disposition of the clothing of the persons who had been shot, a subject well within the scope of the direct examination, the procurator stated to Kriunas, "I would ask the witness to give a short answer, and I would ask Mr. Berzins, in order not to waste time ...." (Kriunas Dep. at 81).

On occasion the OSI attorneys impeded defense counsel's efforts to obtain information about prior statements given by the witnesses, making silly objections, thus compounding the difficulties of defense counsel who confronted one opponent across the table and one at the head of the table. For example, after establishing that Silvestravicius had testified at the trial of a person named Gylys who had been charged with participation in the Kedainiai killings, defense counsel asked him at how many other trials he had testified. The government attorney broke in with an objection asserting that the question had not specified that it related to trials arising out of the

Kedainiai killings. (Silvestravicius Dep. at 77). The objection was completely unwarranted as it was perfectly obvious that the Kedainiai killings were the only subject of all the questions.

Another factor which suggests the degree of Soviet involvement in and orchestration of the depositions is the use of interpreters provided by Intourist, also an agency of the Soviet Union. The interpreters appeared to be highly qualified. There is no evidence of any complete misinterpretations. However, it is clear from the testimony of defendant's witness, Daiva Kezys, a Lithuanian interpreter, and from other evidence that translations were skewed to throw a favorable light upon Soviet procedures and to cast the most favorable light possible upon the witnesses' testimony implicating defendant. There were strategic omissions of testimony, obviously for the same reason. For example, when Narusevicius was shown a folder containing six photographs (one of them of defendant) and was asked if he could recognize anyone, his answer was translated as: "No, I can't recognize. They all look so different. No, I can't." (Narusevicius Dep. at 52). Omitted from the translation was the witness' answer: "You can chop my head off - I don't know." The omitted phraseology is significant both in itself and for the cross-examination it might have elicited.

It is unnecessary to recount the numerous shadings of meaning resulting from the apparent bias of the interpreters. Use of an Intourist employee was a violation at least of the spirit of Judge Meanor's order that the interpreter be a person

"disinterested in the outcome of the lawsuit." It is always possible to retranslate the entire deposition testimony if necessary, but that would not assist defense counsel who had to cross-examine on the basis of the translations made on the scene. The subtle shadings of meaning and omissions during translation are simply further indicia of the interest of the Soviet authorities in the outcome of these proceedings and of the methods which may have been employed to influence the outcome.

D. Questions Raised by the Content of the Depositions: The preceding discussion suggests that the Soviet authorities had an interest in the outcome of this case and that the practices employed by the Soviet authorities in this case (to the extent it is possible to ascertain what they were) were consistent with practices known to be used in political cases. The preceding discussion also shows that at the depositions themselves cross-examination directed to prior statements of witnesses and their dealings with Soviet authorities was limited by the rulings of the procurator. This does not establish that the incriminating testimony necessarily was false, but it raises serious doubts.

There is within the deposition testimony itself some evidence of improper pressures having been applied to the witnesses. All had been interrogated by Soviet authorities in 1976 or 1977 and the interrogators wrote down in the form of a protocol what each witness purportedly told them. The protocols were furnished to the OSI and ultimately to defense counsel. The

OSI attorneys used the protocols to "refresh the recollection" of witnesses whose testimony varied from the account given in the protocols.

The testimony of two witnesses suggests that the interrogators may have attributed to the witnesses statements which they had not made.

The procurator interrogated defendant's sister-in-law, Juzes Rudzeviciene, as to the date and place of defendant's birth. This was a significant question because defendant is charged with having falsely stated the date and place of his birth in his immigration and naturalization papers. In response to the procurator's questions Rudzeviciene replied, "I don't know. I don't know anything about his family." The procurator then pointed out to her: "Witness Rudzeviciene, on the 26th of February, in 1977, you gave testimony to the Kedainiai Judge Janushkevicius, and then you testified that you know that Kungys was born in Shalialai District, in 1915." Despite the efforts of the procurator to persuade Rudzeviciene that she must have known this fact in 1977, Rudzeviciene insisted she never knew defendant's date and place of birth. If that is true, as seems likely, the statement in the protocol was an invention of the interrogators.

More dramatic is the contrast between Dailide's original testimony during the government's direct examination and the statements he is purported to have made in his 1977 protocol. Significantly, perhaps, he does not recall whether he read the protocol.

In any event, as described above, the statements attributed to him in the protocol are far more damaging to defendant than his prior testimony. When confronted with the protocol his demeanor changed remarkably. He was reduced to acknowledging, in effect, that if a matter was stated in the protocol it must be true. One is left to speculate whether Dailide had forgotten what he told the Soviet investigators in 1977 or whether the Soviet investigators had written a protocol which departed markedly from what Dailide actually said. One is also left to speculate whether what is stated in the protocol is true, whether what Dailide first testified to is true or whether both the protocol and the original testimony are false insofar as it relates to defendant.

One thing can be said with certainty. Dailide never used the language attributed to him in the protocol. He testified at length during the deposition taken in this case and it is possible to ascertain his manner of speech. It is inconceivable that he would have used the words attributed to him such as "the bourgeois nationalist gang members" and the

"Hitlerite soldiers". That language was the invention of the Soviet interrogators. One can only speculate how much more of the protocol was the invention of the interrogators.

There are parts of the Dailide testimony given prior to the OSI attorney's reference to the 1977 protocol which raise questions as to its accuracy. Most of the observers of the killing of the Jewish prisoners described with considerable consistency the attack by Slapoberskis upon one of the guards and the German commandant at the edge of the pit. Dailide, on the other hand, describes an escape attempt of Slapoberskis at a considerable distance from the pit which is totally different from the other accounts of the Slapoberskis episode. (Dailide Dep. at 61). Also Dailide in his unrefreshed testimony stated that he and defendant were boarders at 3 Radvilu Street in the critical summer of 1941. On cross-examination he stated in seeming contradiction to the direct testimony that the boarders at that time were the owners, two of their daughters, the wife of a Red Army Officer and himself, with no reference to defendant. (Dailide Dep. at 107).

The accuracy or inaccuracy of the protocols is a critical issue. The various witnesses would have had to have had extraordinary courage to disavow any statement contained in a protocol. The depositions were presided over by a procurator, an officer of the legal system under whose auspices the protocols were prepared. To have disavowed the protocols would have constituted a serious criticism of the system itself. Each

witness who gave testimony implicating defendant in the killings was unusually vulnerable to pressure from Soviet authorities. Dailide testified to his own participation with defendant in the events at Babeniai Forest and on the Smilga River. He had never been subjected to charges for this conduct, but the threat of prosecution remains. Kriunas had already served 10 years' imprisonment for his role in the killings. When testifying he was confronted not only with the presence of the local procurator, but also with the presence of a representative of Moscow's Procurator General's Office. He clearly would not lightly risk a return to the Soviet penal system.

Like Dailide, Silvestravicius has never been tried for his role in the 1941 killings. Also like Dailide he has been a frequent witness in cases against others. He too is under pressure to conform to the wishes of Soviet authorities and must recognize that prosecution for his role in the Kedainiai killings is always possible.

E. The Missing Evidence: None of the foregoing established conclusively that Soviet authorities did in fact unduly influence the testimony of the deposition witnesses in this case. It does establish that there is a very grave risk that they may have done so and that there has been a totally inadequate opportunity to investigate this question.

There was documentary material in existence which most likely would have been of substantial assistance in determining whether the protocols and thus the testimony in this case were

truthful insofar as they relate to defendant. The only protocols made available were those prepared in 1977. At that time defendant was the target of the investigation being conducted by the OSI and the Soviet authorities. If evidence was to be manipulated against him it would have been done at that time.

However, each of the three witnesses who incriminated defendant signed protocols or gave testimony about the critical events on earlier occasions when defendant was not the target. Dailide returned to Kedainiai in 1944 and told the local KGB office of his wartime activities. In 1945 or 1946 he signed a protocol after being interviewed in the procurator's office concerning the 1941 killings. In 1946 Kriunas also signed a protocol concerning the killings in Kedainiai. Silvestravicius testified approximately 10 years ago against Gylys in a trial in which Gylys was charged with having led a detachment of civilians who assisted the Germans during the killings in Kedainiai. In the present case the government charges that Gylys was defendant's deputy in the detachment led by defendant. Thus all the evidence at his trial could be crucial in the present case.

The importance of those protocols and trial testimony is obvious. The statements were made and the testimony given at a time much closer to the event, when memories would be far fresher than they are now - 40 years later. Further, defendant probably was not a target on those occasions, and a comparison of the facts related then with the facts related when defendant

became a target might well disclose whether evidence has been distorted or manufactured for the purpose of implicating defendant.

The government elected to collaborate in the prosecution of this case with the Soviet Union, a totalitarian state. It has accepted the assistance of Soviet authorities, particularly the testimony of witnesses who had been interrogated by Soviet investigators and from whom statements had been obtained by those interrogators.

Knowing the nature of the Soviet legal system, the government had an obligation to make every effort to ensure that the testimony it received under the auspices of the Soviet authorities was not tainted by the known Soviet practices designed to obtain the desired results in a particular case even at the expense of the truth. If the government deputizes a totalitarian state to obtain for it evidence to be used in a United States court, the government must take whatever steps are necessary to ensure that the evidence was not coerced or otherwise tainted by improper pressures.

The government has not fulfilled its responsibilities in this regard in this case. If it did not know about the earlier testimony and protocols of the Lithuanian witnesses prior to the taking of their testimony in Vilnius in 1982, its investigation was inadequate. If it did know about that material prior to the taking of those depositions, it was remiss in failing to insist upon its production. The government cannot

excuse its failure to turn this material over to defendant, as it sought to do during the Kriunas deposition, on the grounds that it had not received the material from the Soviet government. (Kriunas Dep. at 97). At the very least, if the OSI attorneys first learned of the earlier testimony and protocols at the deposition sessions, they should then have insisted that the Soviet authorities produce them. If they were met with a refusal, then suspicions should have been aroused.

During the trial I directed the government to proceed through diplomatic channels or through whatever other channels were available to it to obtain the earlier testimony and protocols. The trial was not held on consecutive days and there was ample time during the period from its commencement on April 5, 1983 until its conclusion on June 14 to obtain the documents. On June 14, however, the government reported that in response to its request, "... a return phone call was made by the Minister of Foreign Affairs to the American Embassy that while efforts continue to locate the protocols relating to the Kungys case, it is highly doubtful that they can be located by June 14th. Soviet authorities are not even certain the protocols still exist." (Trial Transcript at 1283). No reference was made to the requested trial transcripts but the government's attorneys assumed that the reference to protocols was also a reference to transcripts. I am left with the distinct impression that the Soviet authorities simply do not wish to produce this material. The most likely reason for not wishing to produce it is that it

would reflect adversely on the 1977 protocols and therefore on the Lithuanian deposition testimony. The net result is that the best evidence from which the accuracy of this testimony can be determined is unavailable and most likely is being withheld by one of the two governments cooperating in the prosecution of this case. Under these circumstances the United States government must accept responsibility for the acts and omissions of its partner.

F. Conclusion: 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. In summary, the reasons for this ruling are: (i) The Soviet Union, which cooperated with the United States government by making these witnesses available, has a strong state interest in a finding that defendant participated in the Kedainiai killings; (ii) The Soviet legal system on occasion distorts or fabricates evidence in cases such as this involving an important state interest; (iii) These depositions were conducted in a manner which made it impossible to determine if the testimony had been influenced improperly by Soviet authorities in that a Soviet procurator presided over the depositions, a Soviet employee served as translator, evidencing actual bias in the manner of translation, and the procurator limited cross-examination into the witnesses' prior statements and dealings with Soviet authorities; (iv) The content of the deposition testimony

suggests that the Soviet interrogators distorted the witnesses' testimony when they prepared the 1977 protocols; and (v) the United States government failed to obtain and the Soviet government refused or failed to turn over earlier transcripts and protocols of the witnesses which most likely would have disclosed whether the testimony in this case was the subject of improper influence. Exclusion of the deposition testimony except for the limited purpose specified above is consistent with the course followed by Judge Fullam in United States v. Kowalchuk, Docket No. 77-118 (E.D. Pa. July 1, 1983). In United States v. Linnas, 527 F. Supp. 426 (E.D.N.Y. 1981) the Court relied upon video-taped depositions taken in the Soviet Union. However, in that case defendant's counsel did not choose to attend, the indicia of unreliability existing in the present case were not found to exist, and there was strong corroborative evidence.

Without the use of the deposition testimony the most that the government can establish, viewing its evidence in its most favorable light, is that defendant, despite his claims to the contrary, was in Kedainiai in July and August 1941, that he was a member of the Sauliai, that he misrepresented the date and place of his birth in his various immigration and naturalization papers, and that he failed to disclose in his immigration visa and alien registration forms that he was in Kedainiai at any time during the period from 1940-1942.

In order to justify revocation of citizenship, the evidence must be "clear, unequivocal, and convincing," such as not to leave "the issue in doubt". Schneiderman v. United States, 320 U.S. 118, 125 (1943). "Any less exacting standard would be inconsistent with the importance of the right that is at stake in a denaturalization proceeding." Fedorenko v. U.S., 449 U.S. 490, 505 (1980). As stated by the Third Circuit Court of Appeals in U.S. v. Riela, 337 F.2d 986, 988 (1964):

> This burden is substantially identical with that required in criminal cases - proof beyond a reasonable doubt. [Citing Klapprott v. United States, 335 U.S. 601, 612 (1949).]

The admissible evidence is insufficient to sustain the government's charges that defendant participated in the July and August 1941 killings in Kedainiai.

IV. Facts Pertaining to Defendant

It is now necessary to turn to the facts about defendant established by the evidence other than the depositions video-taped in the Soviet Union.

Defendant was born on September 21, 1915 in the Village of Reistru, Silales County, Lithuania. He had four brothers and five sisters, and during his childhood he lived at his parents' farm near Reistru Village. After attending local schools, he began studying for the priesthood at the Catholic Seminary at Telsiai in September 1932. In 1938 he left the seminary without having received Holy Orders and in July of that year, when Lithuania was still independent, he began military service. In September 1939 he graduated from the Lithuanian Cadet School in

Kaunas and was commissioned as junior lieutenant. He served in the Lithuanian Army until November, at which time he was either demobilized or resigned.

Thereafter he obtained employment with the Lithuanian Bank and was assigned to the branch at Kedainiai in late 1939. When he lived in Kedainiai he boarded at the home of the parents of his wife-to-be at No. 3 Radvilu Street. In June 1940 the Soviet Union occupied Lithuania. Defendant remained at the bank in Kedainiai. On June 22, 1941 the Germans attacked the Soviet Union and quickly occupied all of Lithuania.

There is a major dispute between the parties as to when defendant left Kedainiai. Defendant asserts that in late June or July 1941 he went to Kaunas and commenced working in a printing plant on or about July 6. He produced a certificate of the concern for which he claims to have worked stating that he worked there as of that date. (Exh. A-13). The certificate is somewhat suspect inasmuch as the date when defendant was supposed to have commenced work was a Sunday and its letterhead is written in both Lithuanian and German. This would have represented a rather rapid transition, since the Soviet Army had been driven from the City less than two weeks before the July 6 date. However, it was certainly not beyond the capabilities of a printing concern to run off such a letterhead and after the German occupation it would have been imprudent to have continued using a Russian designation.

The government contends that defendant did not leave Kedainiai until mid-October 1941, when both sides agree he again entered Telsiai Seminary. The evidence is persuasive that the government's version of the events is correct. Defendant submitted to the Kedainiai branch of the bank a letter dated October 10, 1941 resigning effective October 16, 1941. (Exh. B-17). On September 12, 1981 defendant wrote to a person who might have been able to assist him with pertinent information, stating, "I lived in Kedainiai from December, 1939 until October, 1941. I worked at the Bank of Lithuania." (Exh. K-1). I find, therefore, that defendant remained in Kedainiai until October 1941. If there were admissible evidence tending to show that defendant played a part in the killings in Kedainiai in July and August 1941, the falseness of defendant's testimony that he was in Kaunas during those months would tend to corroborate the evidence of his complicity in the killings. Since such evidence is lacking, however, the falseness of defendant's testimony as to the date he left Kedainiai bears primarily upon his credibility generally.

Defendant remained at Telsiai only briefly, leaving after Christmas 1941. He moved to Kaunas where he first went to work for a printing plant and then went to work for a small brush and broom factory, employing perhaps 12 or 15 persons. It was owned and managed by a husband and wife and defendant served as a clerk-bookkeeper. While in Kaunas defendant married Sofija Anuskeviciute, the daughter of the persons with whom he had

resided while living in Kedainiai. Mrs. Kungys had been studying dentistry and during the war years commenced practicing her profession.

Defendant claims to have pariticipated in the resistance movement referred to above and described in the testimony Vydaudas Vidiekunas. According to defendant he worked with a man named Broius Budginas and together they stole printing equipment for the use of the resistance and printed underground newspapers. There is some independent evidence to support this claim, and there is evidence suggesting that the claim should be viewed with suspicion.

At the end of a March 27, 1981 interview of defendant by attorneys for the OSI, defendant finally admitted that he had given false information in all his immigration and naturalization proceedings as to the date and place of his birth. From the outset he had informed the United States authorities that he was born on October 4, 1913 in Kaunas. The truth, of course, was that he had been born on September 21, 1915 in Reistru.

When on March 27, 1981 defendant admitted that the information as to the date and place of his birth was false, he explained that he made the change in April 1944 because he was being hunted by the German authorities. The German authorities had learned of the identity of members of the Lithuanian resistance in Kaunas in that month. Defendant informed the OSI attorneys that he was warned to stay away from a meeting at which he would have been arrested and that he thereupon, with the

assistance of members of the resistance, obtained a new identification card from the Kaunas Burgomaster's Office showing the false date and place of birth. (Exh. A-1). The card is dated April 26, 1944.

Four considerations cast doubt upon defendant's contention. (i) In his answers to interrogatories submitted in November 1981 defendant stated, in apparent conflict with his March statement, that the reason he obtained the false identification card was to avoid mobilization into the German Army. However, this is not necessarily inconsistent with his March 27, 1981 account since a major objective of the resistance was to enable Lithuanians to avoid conscription by the Germans. (ii) The photograph on the identification card supposedly issued in April 1944 was obviously taken from the same negative as the photograph which accompanied his 1947 visa application, suggesting that perhaps defendant forged the identification card in Germany. It is possible, as he claims, that he brought the negative with him when he fled from Lithuania. (iii) Defendant asserts that he applied for the false identification card in response to the arrest of members of the resistance. According to the Lithuanian Encyclopedia (Exh. T-4), "... the arrests of Vlikas members and their close associates began on April 29-30, 1944," after the date when the card was supposed to have been issued to defendant. However, there is always the possibility that the Encyclopedia is in error or that there were other arrests at about that time. Vidiekunas testified that he was

arrested on May 4 or 5 but that other members of the resistance had been arrested two weeks previously, which would have been before April 26. (iv) Finally, I fail to understand how merely changing the place and date of birth on an identification card could protect defendant from arrest. As long as he retained the same name it would seem that the Germans could readily identify and arrest him.

Notwithstanding the doubtful nature of the April 26, 1944 identification card, there is some independent support for defendant's claim that he performed work for the resistance, namely, the deposition testimony of Walter Jansen and the trial testimony of Vidiekunas.

Jansen testified that he lived in Kedainiai and worked for the local government during the German occupation from 1942 to 1944. He and his wife knew the family of defendant's future wife Sofija and visited them often at their home on Radvilu Street. During the 1942-44 period defendant visited at the Radvilu Street home three or four times, according to Jansen. Each time he brought and gave to Jansen approximately 10 copies of an underground, anti-German newspaper printed on 2-1/4 x 5" paper. Jansen testified that defendant told him he was in the underground and assisted by doing printing work. (Jansen Dep. at 40, 44-48, 54).

At the time he applied for his visa in 1947 defendant presented to the American Vice Consul a certificate dated June 18, 1946 from the Ex-Political Prisoners Committee to the effect

that defendant had participated in the resistance movement. (Exh. A-2). The certificate was signed by Vidiekunas, whose participation in the resistance, arrest and confinement in Germany are described above. After liberation by the Allied Forces in 1945, Vidiekunas became a member of the Ex-Political Prisoners Committee. One of the purposes of the Committee was to protect prisoners of war and others from the Russians who sought to deport into Soviet occupied territory those who fled from the Baltic countries. The Committee, after checking, certified those who it determined had participated in the resistance.

Vidiekunas testified, truthfully I am convinced, that "... Mr. Budginas and some other person which I can't remember at this time" told him about defendant's underground activities. (Trial Transcript at 930-931). Budginas told him that he and defendant stole a printing press and transported it out of Kaunas, and that they were engaged in organizing an underground newspaper. Unfortunately Budginas is dead. He did not work in the same underground group as Vidiekunas, but they were imprisoned together in Germany, and Vidiekunas had every reason to rely upon him. It seems unlikely that after his own dangerous service in the anti-German underground Budginas would provide false testimony to assist a person who had collaborated with the Germans. On the other hand it is possible he would have done so to protect a fellow Lithuanian from possible deportation by the feared and hated Russians.

In sum, the evidence is conflicting and much time has passed. It is impossible to state with any degree of certainty whether defendant did or did not participate in the resistance movement.

In any event, defendant worked at the brush and broom factory in Kaunas until July 1944 when the Soviet Army crossed the Lithuanian border. He and his wife then went to his father's farm in Reistru where he worked for farmers until October 1944.

Defendant's flight from Lithuania and eventual settlement in Germany is best described by Yuozas Koncius, who for the last 27 years has been a high school teacher in Illinois and whose testimony has the ring of complete truthfulness.

In October 1944 the Soviet Army occupied the Lithuanian town where Koncius attended school and closed the school. Unable to return to his own home town because of the start of a Soviet offensive, Koncius and several school friends went to defendant's father's farm in Reistru. Koncius had known defendant's brothers in school.

The day after arriving at the farm the boys helped defendant's father bury family possessions, as the front was expected to reach the area momentarily. Shelling began at the end of the day. Defendant, his wife and a sister arrived at the farm with a horse and wagon. He told them, "Youngsters, if you want to save your necks, get in the wagon and let's get going. This is not a place to stay." (Trial Transcript at 1206).

Defendant and the group in the wagon joined the columns of refugees fleeing the Soviet Army and proceeded to and crossed the German border, where the journey continued. After several days they were stopped by German police. The men were taken off the wagon and the women went on. The men were placed under guard in a barn during the night and during the day were set to work digging trenches.

In some manner communication was made with the women and during the second or third night defendant, his brothers and Koncius escaped and rejoined the women. The horse was hitched to the wagon and the party proceeded westward, traveling by night and resting during the day. Upon reaching the Danzig Corridor they remained with a Polish family for a week, helping on the farm. The horse and wagon were sold and with the proceeds defendant was able to bribe officials and obtain train tickets to Tuebingen in the western part of Germany.

In Tuebingen the group was placed in a refugee camp from which defendant and his brothers went out into the countryside to find work. The men joined prisoners of war and other displaced persons working on neighboring farms. Defendant and his family found work and a place to live in nearby Poltringen. They stayed there or in neighboring towns until the area was captured by Allied Forces and the end of the War in Europe in May 1945. Until that time and thereafter defendant and his wife were required to register with local authorities. These records all reflect that he was born in Taurage (Reistru)

Lithuania (not Kaunas). A few show his date of birth to be September 9, 1908; a few show his date of birth to be October 4, 1913; most show his date of birth to be September 21, 1915. Some of the information in these records concerning defendant's wife is incorrect.

During the period after the War before defendant applied for his visa he sought to take courses given to certain displaced persons without charge at Tuebingen University. In his applications defendant set forth the correct date and place of his birth. He exaggerated somewhat the importance of his role at the brush and broom factory in Kaunas, describing his work as "industrial concern manager". (E.g., Exh. N-2).

In January of 1947 visa applications were processed by vice-consuls stationed at American consulates in Germany, one of which was located at Stuttgart. An applicant was required to fill out forms seeking an immigration visa and an alien registration form and to submit with the forms verifying documents such as birth certificates and police reports. These forms were checked preliminarily by local persons employed by the consulate, and if they were found to be in order they were sent to a vice-consul for further review. If the vice-consul also found the forms to be in order he scheduled an interview with the applicant and sought to verify at the interview the information given. Of particular interest in the case of Eastern Europeans was the applicant's residences and occupations during the 1939-

1945 period, since that information tended to indicate the applicant's relationship to the Nazi occupation forces. If satisfied after the interview, the vice-consul forwarded the papers to the consul for issuance of a visa when one became available under the quota.

Defendant and his wife applied to the consulate in Stuttgart for a visa and alien registration form in January 1947. In his application forms (Exh. A-3, A-4) defendant stated that he had been born on October 4, 1913 in Kaunas and that between 1940-1942 he had lived in Telsiai, Lithuania. He stated that during the past five years he had engaged in the following activities: "student, dental technician, farm and forestry work". In support of his statements as to date and place of birth defendant submitted the April 26, 1944 identification card supposedly issued by the Kaunas Burgomaster's Office (Exh. A-1), the certificate of the Ex-Political Prisoners Committee signed by Vidiekunas (Exh. A-2), a certificate as to defendant's date and place of birth issued by the National Delegate of the Vatican for the Lithuanians in Germany and Austria (Exh. A-6) and a police record of the City of Fellbach, Germany.

Thus, as charged by the government and as conceded by the defendant, defendant misrepresented and concealed in his visa application forms the date and place of his birth, the places of his residence during the period 1940-1942 and his occupation as a clerk, bookkeeper, accountant. The government has withdrawn its

charges that defendant misrepresented the facts of his marriage, and the government has not established the other misrepresentations which it alleged in the pretrial order.

I cannot understand what benefit defendant expected to achieve by placing his birth in Kaunas rather than Reistru and by dating his birth October 4, 1913 rather than September 21, 1915. It would not, as the government suggests, insulate him from charges of war crimes as long as he continued to use his own name. Defendant had evidence of his place of birth in his possession (Exh. A-18), and with a few exceptions the German municipal records reflected both the correct date and the correct place of his birth. (Exh. J-1 - J-15). He could just as well have obtained a correct certificate from the Vatican Delegate as an incorrect one. Further, his forms named the town of Reistru as the residence of his parents. Of course, once started on a falsehood, it becomes ever more difficult to return to the truth.

Ironically, it would appear that had defendant given the correct information in his visa application form, his visa nevertheless would have been issued. There is nothing to suggest that his having been born on September 21, 1915 in Reistru would have had any effect whatsoever. Seymour Maxwell Finger, who served as a vice-consul in Stuttgart in January 1947 testified that disclosure of a period of residence in Kedainiai in 1941 would not have raised any questions in his mind. This is to be expected because there were few if any significant districts in Lithuania, or in all of Eastern Europe for that matter, in which German atrocities against the Jewish population did not take

place. Defendant's wife's visa application listed her birth place and residence in Kedainiai. Professor Finger also testified that he would not have denied a visa even to the manager of a 15-employee brush and broom factory, although he might have wished to have asked questions on the subject during the personal interview with the applicant.7/

Based upon the information that was given by defendant, the United States Consulate at Stuttgart issued defendant on March 4, 1948 Quota Immigration Visa No. 114 pursuant to the provisions of the Immigration Act of 1924, Pub. L. No. 68-139, 43 State. 153, as amended. Defendant entered the United States on April 29, 1948 upon presentation of his visa.

On May 29, 1948 defendant executed an Application for Certificate of Arrival and Preliminary Form for a Declaration of Intention (Form N-300). (Exh. A-7). He again misrepresented the date and place of his birth. He did not, as originally charged by the government, misrepresent the facts of his marriage.

On October 23, 1953 defendant executed an Application to File Petition for Naturalization and an attached Statement of Facts for Preparation of Petition (Form N-400). (Exh. A-10). The documents were false as to defendant's date and place of birth and in that they stated that defendant had not previously given false testimony to obtain benefits under the immigration and naturalization laws. The government has withdrawn its charges that these documents contain false statements as to defendant's marriage and the evidence does not sustain the government's charge that "Defendant swore that he had never

committed a crime involving moral turpitude when in fact he had participated in the persecution and murder of over 2000 unarmed civilians."

On October 23, 1953, at a naturalization examination defendant reviewed the N-400 Form and swore that the contents were true. On the same date defendant executed under oath at a naturalization examination a Petition for Naturalization (Form N-405). (Exh. A-11). Again defendant misrepresented the date and place of his birth. The government has withdrawn its charge that in the document he misrepresented the facts of his marriage.

On February 3, 1954 the United States District Court of this District granted defendant's petition for naturalization and issued to him a Certificate of Naturalization. (Exh. A-12).

In the 1960's, as described above, the Soviet government resumed its investigations of Baltic emigres on charges of war crimes and collaboration with the Germans, disseminating these charges both in the Soviet Union and in western countries, particularly the United States. In the late 1970's cooperation between the Soviet authorities and the OSI in the prosecution of alleged war criminals commenced. In 1981 this action was instituted to revoke defendant's citizenship.

V. Effect Upon Defendant's Citizenship

The government seeks to revoke defendant's citizenship pursuant to Section 340(a) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1451(a). That Section, in its present form, provides for revocation of a naturalized citizen's order and certificate of naturalization if they "were illegally

procured or were procured by concealment of a material fact or by willful misrepresentation." The government proceeds on both of these statutory grounds - (i) illegal procurement and (ii) concealment of a material fact or willful misrepresentation.

A. Illegal Procurement: Citizenship is illegally procured if there is a failure to comply with any of "the congressionally imposed prerequisites to the acquisition of citizenship." Fedorenko v. United States, 449 U.S. 490, 506 (1981). In the present case the government urges that defendant's citizenship was illegally obtained because it lacked two congresionally imposed prerequisites: (i) lawful admission into the United States by means of a lawfully acquired immigration visa, 8 U.S.C. § 1427(a)(1) and 8 U.S.C. § 1429 and (ii) good moral character, 8 U.S.C. § 1427(a)(3).

The government asserts that defendant's visa was unlawfully obtained for three reasons: because (i) he had committed acts of persecution and murder, (ii) his misrepresentations and concealments rendered his visa illegally procured and (iii) disclosure of truthful information would have resulted in further investigation and denial of his visa. Reasons (ii) and (iii) coincide with the second statutory ground for the government's action, i.e., concealment of a material fact or willful representation. They will be discussed below in that context.

Reason (i), acts of persecution and murder, finds its legal basis in the requirement in effect at the time that defendant obtained an immigration visa that aliens "who had been

guilty of, or who had advocated or acquiesced in, activities or conduct contrary to civilization and human decency on behalf of Axis countries," or similar acts during World War II, were inadmissible into the United States. Act of May 22, 1918 (40 Stat. 559), as amended by the Act of June 21, 1941 (55 Stat. 252) and Presidential Proclamation No. 2523 of November 14, 1941 (55 Stat. 1696), 10 Fed. Reg. 8995, 8997, 9000 (1945); 8 C.F.R. §§ 175.52(a), 175.53(j), 53(k) (1947s); 22 C.F.R. § 58 (1947s). However, as set forth above, the government has not established "by clear, unequivocal and convincing evidence which does not leave the issue in doubt" that defendant committed acts of persecution and murder. Schneiderman v. United States, 320 U.S. 118, 158 (1976). Thus the factual predicate for this claim of illegal procurement has not been established.

The government asserts that defendant lacked the prerequiste of good moral character (i) because he participated in the murder and persecution of unarmed civilians and (ii) because he gave false testimony for the purpose of gaining benefits under the Immigration and Nationality Laws.

The factual basis for the first reason has not been established. The government asserts that false testimony alone without proof of the materiality of the testimony is sufficient to establish lack of good moral character. I do not so read the Supreme Court case cited by the government in support of that proposition. Berenyi v. District Director, 385 U.S. 630 (1967). In that case the Court noted specifically that the "question asked of the petitioner was certainly material and relevant."

385 U.S. at 638. The Chaunt case and its progeny, discussed below, certainly do not support the government's position. Therefore, again insofar as misrepresentations, under oath or otherwise, are concerned, the government's illegal procurement ground overlaps its concealment or misrepresentation ground.

Apart from charges of concealment and misrepresentation the government has not established its illegal procurement allegation. In view of this conclusion it is unnecessary to address defendant's argument that he cannot be charged with illegal procurement since at the time when he applied for a visa and for citizenship the Immigration and Nationalities Act did not contain the "illegally procured" language, see United States v. Riela, 337 F.2d 986 (3d Cir. 1964) in which the Court stated, "The legality of the defendant's naturalization must be determined under the applicable provisions of the statutes as they were at the time of his admission to citizenship." (At 989).

B. Concealment and Misrepresentations: Throughout his visa and citizenship proceedings defendant misrepresented the date and place of his birth. In addition in his application for a visa defendant failed to disclose (and therefore concealed) his presence in Kedainiai during the 1940-42 period and he failed to disclose (and therefore concealed) that he had been a bookkeeper-clerk in the Kaunas brush and broom establishment during the 1941-44 period. Defendant in effect perpetuated these non-disclosures or concealments throughout his naturalization proceedings by representing that the information contained in his visa application was correct. The determination must be made

whether these misrepresentations and concealments constitute "concealments of a material fact" or "willful misrepresentation" within the meaning of Section 340(a).

Guidance in making this determination is provided by the Supreme Court decisions in Chaunt v. United States, 364 U.S. 350 (1960) and Fedorenko v. United States, 449 U.S. 490 (1981).

In Chaunt the United States petitioned under Section 340(a) to revoke and set aside the order admitting petitioner Chaunt to citizenship on the ground that the order had been obtained by concealment of a material fact or by willful misrepresentation in his petition for naturalization and in his examination under oath. The district court cancelled petitioner's naturalization finding that he had concealed and misrepresented three arrests, his membership in the Communist Party and his lack of allegiance to the United States. The court of appeals affirmed, reaching only the question of concealing the arrests.

The Supreme Court emphasized, as it has done many times before and since, that in view of the grave consequences to the citizen, "naturalization decrees are not lightly to be set aside - the evidence must indeed be 'clear, unequivocal, and convincing' and not leave 'the issue ... in doubt.'" 364 U.S. at 353. Probably moved by this consideration the Court, reversing the judgment of the court of appeals, formulated a rule which narrows considerably the kinds of concealments and misrepresentations which will provide a basis for denaturalization:

> Suppressed or concealed facts, if known, might in and of themselves justify denial of citizenship. Or disclosure of the true facts might have led to the discovery of other facts which would justify denial of citizenship.

364 U.S. at 352, 353.

> On this record the nature of these arrests, the crimes charged, and the disposition of the cases do not bring them, inherently, even close to the requirement of "clear, unequivocal, and convincing" evidence that naturalization was illegally procured within the meaning of § 340(a) of the Immigration and Nationality Act.

364 U.S. at 354.

> An arrest, though by no means probative of any guilt or wrongdoing, is sufficiently significant as an episode in a man's life that it may often be material at least to further inquiry. We do not minimize the importance of that disclosure. In this case, however, we are asked to base materiality on the tenuous line of investigation that might have led from the arrests to the alleged communist affiliations.

364 U.S. at 354, 355.

> We only conclude that, in the circumstances of this case, the Government has failed to show by "clear, unequivocal, and convincing" evidence either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship.

364 U.S. at 355.

It is clear from the two part Chaunt rule that not all false statements or concealments made during the naturalization process will form a basis for revocation of citizenship, even

when the person seeking citizenship made the false statements or concealments under oath. The dissent in Chaunt emphasized this point, noting, "It is nowhere suggested, for example, that the petitioner's falsehoods were the result of inadvertence or forgetfulness - that they were anything but deliberate lies." (At 356). This approach reflects the extreme care which the Supreme Court exercises when dealing with revocation of citizenship. The Chaunt rule superseded the rule which theretofore had prevailed in the Third Circuit as set forth in United States v. Montalbano, 236 F.2d 757 (1956). The Chaunt rule is reflected in the Third Circuit opinion in United States v. Riela, supra.

In Fedorenko, the government sought to revoke petitioner Fedorenko's citizenship both on grounds of illegal procurement and on grounds of concealment and misrepresentation. Petitioner failed to disclose in his application for a visa that he had served during World War II as an armed guard at the Nazi concentration camp at Treblinka, Poland. The Displaced Persons Act under which petitioner sought admission to the United States excluded individuals who had "assisted the enemy in persecuting civilians" or who had "voluntarily assisted the enemy forces ... in their operations."

The district court held that the petitioner did not come under the Act's exclusion of persons who had assisted in the persecution of civlians because he had served involuntarily. The district court, applying the Chaunt rule, also held that although disclosure of petitioner's service as a Treblinka guard would

have prompted an investigation into his activities, the government had failed to prove that such an inquiry would have uncovered any additional facts warranting denial of a visa. The court of appeals reversed, disagreeing with the district court's interpretation of the second part of the Chaunt rule. The court of appeals held that the second Chaunt test requires only clear and convincing proof that (a) disclosure of the true facts would have led to an investigation and (b) the investigation might have uncovered other facts warranting denial of citizenship.

The Supreme Court affirmed the court of appeals but on different grounds. It found that petitioner gave false information in connection with his application for a visa under the Displaced Persons Act, thus bringing into play the Act's provision (analogous to Section 340(a)) that "[a]ny person who shall willfully make a misrepresentation for the purposes of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." 62 Stat. 1013. The Court added, "This does not, however, end our inquiry, because we agree with the Government that this provision only applies to willful misrepresentations about 'material' facts. The first issue we must examine then, is whether petitioner's false statements about his activities during the war, particularly the concealment of his Treblinka service, were 'material.'" 449 U.S. at 507, 508.

The Court did not decide whether the Chaunt test of materiality applied. It noted that Chaunt involved statements made during applications for citizenship whereas Fedorenko

involved statements made during applications for visas prior to entry into the United States. The present case, of course, involves statements made both when defendant applied for a visa and when defendant applied for citizenship.

As to the visa application stage the Court held that "[a]t 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. The Court then held that the true facts about petitioner's service as an armed guard at Treblinka would, as a matter of law, have made him ineligible for a visa under the Displaced Persons Act. Thus his certificate of citizenship was revocable as "illegally procured" under § 340(a).

The concurring and two dissenting opinions in Fedorenko analyze in some detail the second Chaunt test of materiality.

Justice Blackmun, concurring, failed "to see any relevant limitation in the Chaunt decision or the governing statute that bars Chaunt's application to this case. By its terms, the denaturalization statute at the time of Chaunt, as now, was not restricted to any single stage of the citizenship process. Although in Chaunt the nondisclosure arose in response to a question on a citizenship application form filed some years after the applicant first arrived in this country, nothing in the language or import of the opinion suggests that omissions or false statements should be assessed differently when they are tendered upon initial entry into this country. If such a

distinction was intended, it has eluded the several courts that unquestioningly, have applied Chaunt's materiality standard when reviewing alleged distortions in the visa request process." 449 U.S. at 519.

Justice Blackmun concluded that the minimal test of materiality set forth in Fedorenko was equivalent to the first test of Chaunt - facts which if known would have warranted a denial of eligibility are material. Thus application of the Chaunt test to the Fedorenko facts would have produced the same result. Justice Blackmun rejected the court of appeals test "which would have diluted materiality":

> The Court of Appeals reasoned that materiality was established if the nondisclosed facts would have triggered an inquiry that might have uncovered unproved and disqualifying facts. See 597 F.2d 946, 950-951 (CA5 1979). By concluding that the Government has demonstrated the actual existence of disqualifying facts - facts that themselves would have warranted denial of petitioner's citizenship - this Court adheres to a more rigorous standard of proof. I believe that Chaunt indeed contemplated only this rigorous standard, and I suspect the Court's reluctance explicitly to apply it stems from a desire to sidestep the confusion whether Chaunt created more than one standard.
>
> Chaunt, to be sure, did announce a disjunctive approach to the inquiry into materiality, but several factors support the conclusion that under either "test" the Government's task is the same; it must prove the existence of disqualifying facts, not simply facts that might lead to hypothetical disqualifying facts.

. . .

> ... I conclude that the Court in Chaunt intended to follow its earlier cases, and that its "two tests" are simply two methods by which the existence of ultimate disqualifying facts might be proved. This reading of Chaunt is consistent with the actual language of the so-called second test; it also appears to be the meaning that the dissent in Chaunt believed the Court to have intended.
>
> Significantly, this view accords with the policy considerstions informing the Court's decisions in the area of denaturalization. If naturalization can be revoked years or decades after it is conferred, on the mere suspicion that certain undisclosed facts might have warranted exclusion, I fear that the valued rights of citizenship are in danger of erosion.

449 U.S. at 523-526.

In his dissent Justice White disagreed with Justice Blackmun's interpretation of Chaunt's materiality test, stating:

> Under the District Court's interpretation of the second Chaunt test and that urged by petitioner, the Government would be required to prove that an investigation prompted by a complete truthful response would have revealed facts justifying denial of citizenship. The Court of Appeals and the Government contend that under the second Chaunt test the Government must prove only that such an investigation might have led to the discovery of facts justifying denial of citizenship. In my opinion, the latter interpretation is correct.

449 U.S. at 528.

In a footnote Justice White explained what the burdens of proof would be under his interpretation of Chaunt:

> The Government should be required to prove that an investigation would have occurred if a truthful response had been given, and that the investigation might have

> uncovered facts justifying denial of citizenship. The defendant could rebut the Government's showing that the investigation might have led to the discovery of facts justifying denial of citizenship by establishing that the underlying facts would not have justified denial of citizenship.

449 U.S. at 538, ftn.8.

In his dissenting opinion Justice Stevens concluded that the Court's construction of the Displaced Persons Act was erroneous and, disagreeing with Justice White, that the court of appeals had misapplied the Chaunt test. Concerning the second prong of the Chaunt test he wrote:

> The Court and the parties seem to assume that the [second] Chaunt test contains only two components: (1) whether a truthful answer might have or would have triggered an investigation, and (2) whether such an investigation might have or would have revealed a disqualifying circumstance. Under this characterization of the Chaunt test, the only dispute is what probability is required with respect to each of the two components. There are really three inquiries, however: (1) whether a truthful answer would have led to an investigation, (2) whether a disqualifying circumstance actually existed, and (3) whether it would have been discovered by the investigation. Regardless of whether the misstatement was made on an application for a visa or for citizenship, in my opinion the proper analysis should focus on the first and second components and attach little or no weight to the third. Unless the Government can prove the existence of a circumstance that would have disqualified the applicant, I do not believe that citizenship should be revoked on the basis of speculation about what might have been discovered if an investigation had been initiated. But if the Government can establish the existence of a disqualifying fact, I would consider a willful misstatement material if it were more probable than not that a truthful

> answer would have prompted more inquiry. Thus I would presume that an investigation, if begun at the time that the misstatement was made, would have been successful in finding whatever the Government is now able to prove. But if the Government is not able to prove the existence of facts that would have made the resident alien ineligible for citizenship at the time he executed his application, I would not denaturalize him on the basis of speculation about what might have been true years ago.

449 U.S. at 537.

To summarize: Chaunt and Fedorenko in combination leave us with a number of rules which could be applied in determining if defendant's misstatements and concealments were material and therefore a basis for loss of citizenship under Section 340(a). Certain of the rules are inconsistent.

Chaunt itself states that to succeed under Section 340(a) the government must prove (i) that facts were suppressed which, if known, would have warranted denial of citizenship or (ii) that disclosure of the true facts might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship. The first Chaunt test is clear and unambiguous and courts have had no difficulty applying it. Interpretation and application of the second Chaunt test, however, is in a process of evolution, as evidenced by the four opinions in Fedorenko.

The majority opinion in Fedorenko did not decide whether Chaunt is applicable at the visa application stage and therefore did not address itself to either Chaunt test. It did hold that at the visa application stage at the very least a

misrepresentation is material if disclosure of the true facts would have made the applicant ineligible for a visa. In effect the Court applied the first Chaunt test to the visa application proceedings.

Justice Blackmun concluded that there is in reality only one Chaunt test, that the so-called second test is simply another method of stating what the government must establish, namely the existence of facts which would disqualify a person from citizenship.

Justice White would give independent effect to the second Chaunt test. According to his formulation of that test materiality would be established if the government proves by clear, unequivocal and convincing evidence that an investigation would have occurred if a truthful response had been given and that the investigation might have uncovered facts justifying denial of citizenship.

Justice Stevens concluded that the second Chaunt test required that the government establish by the requisite quantum of evidence that a truthful answer would have led to an investigation and that disqualifying circumstances actually existed. If those two elements were proved, Justice Stevens would presume that the investigation would have been successful in discovering the disqualifying facts.

It is necessary to apply these various tests to defendant's misrepresentations and concealments to determine whether they were "material" within the meaning of Section 340(a) as applied by the Supreme Court. In doing so I have been mindful

of Justice Stevens' cautionary observation in Fedorenko, that "[t]he gruesome facts recited in this record create what Justice Holmes described as a sort of 'hydraulic pressure' that tends to distort our judgment." 449 U.S. at 538.

I believe that it is most probable that when the Supreme Court decides the question it will apply Chaunt to the visa application stage as well as the citizenship application stage. There is no reason I can think of not to do so. The concurring and dissenting Justices in Fedorenko applied Chaunt to both stages. In any event the Fedorenko majority opinion suggests some tests will be applicable to the visa application stage similar to the Chaunt test or tests. I have concluded that defendant's concealments and misrepresentations both singly and in the aggregate do not meet the requirement of materiality under any of the formulations set forth above.

Clearly the first Chaunt test is not met. None of the suppressed facts, if known, would have warranted denial of citizenship. Birth in Reistru on September 21, 1915, residence in Kedainiai during part of the 1940-1942 period, and employment in whatever capacity in a mom and pop brush and broom establishment are not facts which, if known, would have warranted denial of citizenship.

By the same token, the minimal test under Fedorenko's majority opinion has not been met. Disclosure of these facts would not have made defendant ineligible for a visa.

Finally, defendant's misrepresentations and concealments would not be deemed material for Section 340(a) purposes under any of the interpretations of the second Chaunt test.

Justice Blackmun's view that under either Chaunt test the government must establish facts which would disqualify a person from citizenship forecloses the government here. The government has not established such facts by admissible evidence.

Justice Stevens' formulation of the second Chaunt test required that the government must establish not only that a truthful answer would have led to an investigation but also that disqualifying circumstances actually existed. Actual existence of the disqualifying circumstances has not been established.

Under Justice White's interpretation of the second Chaunt test the government must establish by the requisite quantum of evidence that truthful and complete responses by defendant would have resulted in an investigation and that the investigation might have uncovered facts justifying denial of citizenship. The government's own proofs tend to establish that truthful answers by defendant would not have resulted in an investigation. Certainly there was nothing which would excite suspicion in the fact that defendant was born in Reistru in the year 1915. Professor Finger, a vice-consul who passed on visa applications at the time defendant and his wife applied, testified that the fact of residence in Kedainiai during 1940-42 would not have raised any questions in his mind. He also testified that wartime employment in a management capacity in a

15 employee brush and broom factory in Kaunas might have prompted him to ask further questions at the personal interview. This is far from proof by clear, unequivocal and convincing evidence that an investigation would have occurred if defendant had given truthful responses to all four of the matters as to which his answers were false. It is unnecessary to pursue the second phase of Justice White's formulation to determine if an investigation might have uncovered facts justifying denial of citizenship. Even by the least onerous test of materiality (Justice White's formulation) the government has failed to establish concealment of a material fact or willful misrepresentation.

The government's proofs are inadequate to establish any of the bases for revocation of defendant's citizenship. Judgment, therefore will be entered for the defendant. The defendant's attorneys are requested to submit an appropriate form of order.

DATED: September 28, 1983.

DICKINSON R. DEBEVOISE
U.S.D.J.

FOOTNOTES

1. During the course of this action the government withdrew its charges that defendant misstated the facts of his marriage.

2. I have refrained throughout this opinion from characterizing the events which must be described - the systematic, mass killings of Jewish people - limiting myself to a recital of the facts. Adjectives or expressions of horror on my part would be inadequate and an intrusion. If anyone can do justice to the dead, it must be the poet, the theologian, the philosopher, the writer, e.g., Schwarz-Bart, The Last of the Just (Atheneum 19[illegible]).

3. Some confusion of terminology results from the use made of the term "partisan". Sometimes the German reports used the term to refer to the Lithuanians who joined the local auxiliary police forces to assist in maintaining order and, in some cases, to participate in the gathering of Jewish residents into the ghettos and in the mass killings. Sometimes the term is used in the German reports to refer to groups resisting German occupation authorities. The reports quoted in this opinion usually use the term in the former sense.

4. In addition to the Jewish dead, there were others, e.g., "5 communist functionaries", "1 Lithuanian woman", "19 Russian communists", "2 murderers", "2 Lithuanian NKVD agents", "1 mayor of Jonava who gave the orders to burn the city of Jonava", "1 Lithuanian who stripped the bodies of German soldiers", "432 Russians", "56 Lithuanians (all active communists)", "3 gypsies, 1 gypsy woman, 1 gypsy child", "mentally ill: 269 men, 227 women, 48 children", "4 Russian POW's", "1 German citizen who married a Jew", "1 Reichs-German who had converted to the Jewish belief and had visited a rabbinical school", and "15 terrorists of the Kalinin Group". Two poignant entries recorded the killing in Kaunas on November 25 and November 29 of "175 Jewish children (resettled from Berlin, Munich and Frankfurt am Main)" and "152 Jewish children (resettled from Vienna and Breslau)".

5. There was one incident which is described in a number of the depositions of eyewitnesses to the killings. One of the prisoners, Slapoberskis, a strong man, attacked a Lithuanian participant named Czygas, dragged him into the ditch, grabbed his pistol and choked him. This episode, which bears on the reliability of the deposition testimony, is described in meticulous detail by Vladislovas Silvestravicius, an employee at

the Kedainiai beer bottling plant who was one of the three truck drivers ordered to transport the infirm prisoners from Zirginas to the execution site:

Q Did any of the Jews fight at the ditch or try to escape?

A Only that only Jew I was mentioning earlier, Slapoberskis, who strangled Czygas.

Q Did you see Slapoberskis fighting with Czygas?

A Yes, I saw it.

Q Tell us what you saw?

A Someone undressed, and he had eyeglasses. They were neatly dressed and not -- it was happening not far from my truck. And that Jew started telling Czygas that, "I am the same person like you." And Czygas caught him partially by his clothes, and this way the Jew was unstripped.

And then Czygas took out the pistol, which was noticed by Slapoberskis, And this Jew was a heavily built person. And then he grabbed Czygas by the collar and dragged together with him -- and dragged him together into the ditch.

And in the ditch Slapoberskis was holding Czygas with one hand, by his neck, and with the other hand he was -- and with the other hand he fired the pistol at the German.

The German was a commandant. But he missed him. Then he -- then the German jumped into the ditch and managed to free Czygas, but the German himself was grabbed by Slapoberskis. Then Jankunas, the person I mentioned earlier, he was also a very heavily built person. At the same time Slapoberskis was struck -- striking the German on his head with the pistol, and at the same time Jankunas jumped into the ditch.

Q Did Slapoberskis survive or was he killed?

A And then when Jankunas jumped into -- no.

And when Jankunas jumped into the ditch he freed the German away, whereas he himself was grabbed by Slapoberskis. And Jankunas had a knife with him, near -- I.) his belt, and then he killed Slapoberskis with that knife.

Q Did Czygas survive?

A No. He died on the way to the hospital.

Silvestravicius Dep. at pp. 55-56.

6. Three examples of the summaries of articles in the Chronicle prepared by Father Casimir Pugevicius, a Roman Catholic Priest illustrate the nature of Bakucionis' role as procurator:

The case of five persons arrested during a crackdown against ethnographers in Lithuania and Latvia was brought to trial in Vilnius and prosecuted by Assistant Chief Prosecutor Bakucionis. Prosecutor Bakucionis accused Sarunas Zukauskas of instigating the ethnocentric organization and asked the court to pass the maximum sentence of seven years under Article 68 of the LSSR Criminal Code/ "anti-Soviet agitation and propaganda". Chronicle No. 10, Mar. 5, 1974, pp. 20, 23.

Prosecutor Bakunionis represented the state in the trial of Viktoras Petkus, which began on July 10, 1978. Petkus was a member of the Lithuanian Group to Monitor the Helsinki Accords. Petkus was sentenced to three years in strict regime labor camp, and five years of internal exile. Chronicle No. 34, p. 6.

Responding to a summons, Father Alfonsas Svarinskas, Pastor of the Catholic Church in Vidukle, reported on September 3, 19- to the Prosecutor's Office of the Lithuanian SSR in Vilnius, at Gogolio g.4, office no. 55. He was met by Prosecutor Bakucionis who, calling the priest "an especially dangerous recidivist", had him don striped concentration camp clothing, and led him to another prosecutor for charges.

7. Professor Finger also testified that in January 1947 under applicable regulations a visa applicant who had no close relatives in the United States was not eligible for a visa unless he could prove that he was a victim of Nazi persecution. The testimony and regulations in evidence in this case suggest that Professor Finger was in error on this point, although perhaps there was an informal policy at the Stuttgart consulate to prefer Nazi victims. In any event, despite the questions which the evidence raises as to defendant's claim that he participated in the resistance movement, the government's charge that these claims are false is not supported by clear, unequivocal and convincing evidence. Therefore the certificate as to defendant's participation in the resistance (Exh.A-2) has not been established to be false in that respect.

CIMAS:

THE WHITE HOUSE
WASHINGTON

- 6 people from ADP
- use of Soviet evidence
- not to talk about specific case

Patty

THE WHITE HOUSE
WASHINGTON

Pls put on my calendar

Date October 7

Suspense Date _____

MEMORANDUM FOR: Dick Hauser

FROM: **SHERRIE M. COOKSEY**

ACTION

_____ Approved

_____ Please handle/review

_____ For your information

__X__ For your recommendation

_____ For the files

_____ Please ~~see~~ call me

_____ Please prepare response for _____ signature

_____ As we discussed

_____ Return to me for filing

COMMENT

Thank you.

THE WHITE HOUSE

WASHINGTON

October 6, 1983

MEMORANDUM FOR PAULA DOBRIANSKY, NSC
MICHAEL GALE, OPL
SHERRIE COOKSEY, GC

F.W.

FROM: LINAS KOJELIS

SUBJECT: Meeting with Americans for Due ~~Process~~

As you may recall, I spoke with you some time ago about the concerns of Americans for Due Process (ADP), a coalition of East European-American groups concerned about the activities of the Justice Department's Office of Special Investigation. ADP has requested a meeting with White House staff to explain their specific concerns regarding OSI's use of Soviet evidence and the Constitutional rights of the defendants in these cases.

I would like to invite you to a meeting with representatives of ADP on Friday, October 14, in Room 194 at 10:00 a.m. I believe it will be both useful and informative.