

ORIGINAL

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86-228

TITLE JUOZAS KUNGYS, Petitioner V. UNITED STATES

PLACE Washington, D. C.

DATE April 27, 1987

PAGES 1 thru 55



(202) 628-9300
20 F STREET, N.W.

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -x
3 JUOZAS KUNGYS, :

4 Petitioner :

5 v. :

No. 86-511

6 UNITED STATES :

7 - - - - -x
8 Washington, D.C.

9 April 27, 1987
10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:57 o'clock a.m.
14

15 APPEARANCES:

16 DONALD J. WILLIAMSON, Newark, N.J.;

17 on behalf of Petitioner

18 ROBERT H. KLONOFF, Washington, D.C.;

19 Assistant to the Sol. Gen.

20 Department of Justice

21 on behalf of Respondent

22 DONALD J. WILLIAMSON, Newark, N.J.;

23 on behalf of Petitioner - Rebuttal
24
25

C O N T E N T S

ORAL ARGUMENT OF	PAGE
DONALD J. WILLIAMSON, Newark, N.J.;	
on behalf of Petitioner	3
ROBERT H. KLONOFF, Washington, D.C.;	
Assistant to the Sol. Gen.	
Department of Justice	
on behalf of Respondent	23
DONALD J. WILLIAMSON, Newark, N.J.;	
on behalf of Petitioner - Rebuttal	53

1 P R O C E E D I N G S

2 CHIEF JUSTICE REHNQUIST: Mr. Williamson, you
3 may proceed whenever you're ready.

4 ORAL ARGUMENT OF

5 DONALD J. WILLIAMSON

6 ON BEHALF OF PETITIONER

7 MR. WILLIAMSON: Mr. Chief Justice, and may it
8 please the Court:

9 This denaturalization case raises the issue as
10 to how to determine the materiality, or lack of
11 materiality of a misrepresentation in a visa application
12 and a petition for naturalization when the truth would not
13 have resulted in the ineligibility of the naturalized
14 citizen for either a visa or for citizenship.

15 Here the Third Circuit transformed the
16 immaterial misrepresentations of date and town of birth by
17 applying evidentiary standard less than and inconsistent
18 with that required by the long-standing requirement of
19 Schneiderman of an evidentiary standard of proof that is
20 doubt free. And it applied that diluted standard to reach
21 a non-existent ultimate disqualifying fact.

22 QUESTION: You say a standard that is doubt
23 free, Mr. Williamson?

24 MR. WILLIAMSON: Doubt free.

25 QUESTION: Is that beyond a reasonable doubt?

1 MR. WILLIAMSON: It is at least, according to
2 this Court in (inaudible) the equivalent of the criminal
3 beyond a reasonable doubt.

4 QUESTION: I don't think of beyond a reasonable
5 doubt as being doubt free.

6 MR. WILLIAMSON: The language of clear,
7 convincing and unequivocal which does not leave any issue
8 in doubt, I would characterize as doubt free.

9 QUESTION: Well, clear and convincing has been
10 thought of a standard between a preponderance and beyond a
11 reasonable doubt.

12 MR. WILLIAMSON: But, this Court went further in
13 *Schneiderman* to indicate that it not only has to be clear,
14 convincing and unequivocal, but it will leave no issue in
15 doubt and any inference of fact or law as far as
16 reasonably as possible it should be drawn in favor of the
17 citizen.

18 But, I would argue in terms of the application
19 to this case that doubt free is more of a short end
20 expression in my having to completely repeat each time
21 that language of the Court.

22 But nevertheless, if we're to take literally the
23 *Chaunt* second prong of the second expression of the second
24 prong then this Court is likewise free to take literally
25 the language in *Schneiderman* which is doubt free and which

1 in the concurring opinions is fairly clear that this Court
2 was trying to avoid any potentiality of having two classes
3 of citizenship and therefore did in fact make the standard
4 of proof as vigorous as possible.

5 When the applications of the fact to this
6 particular case the District Court was able to apply all
7 of the formulations of Chaunt and Fedorenko, taken in
8 combination, and under none of those standards did it find
9 the misrepresentations to be material.

10 What happened here however is that the Third
11 Circuit tried to get from point A, the suppressed truth by
12 drawing an inference as to a residency permit in which
13 correspondence indicated that it was issued without
14 special restrictions and from that it drew a tendentious
15 inference that that would have led to a conclusion that
16 the naturalized citizen was not a victim of Nazi
17 persecution.

18 I think we demonstrate fairly clearly that the
19 law and the regulations at that time had no such
20 requirement that one had to be a victim of Nazi
21 persecution. So that the ultimate disqualifying fact to
22 which the Third Circuit, I reach this conclusion is in
23 essence a false premise and its logic was bound to fail
24 since it didn't exist.

25 But in addition to which the case illustrates

1 that you cannot have a standard which you can characterize
2 as it did as probability and still in effect comply with
3 safeguarding the rights of the denaturalized citizens.
4 Because what they did there is they turned Schneiderman
5 upside down and instead of drawing the inferences in favor
6 of the citizen they draw the most tenuous inference in
7 favor of a government.

8 In point of fact, the inference is neutral
9 because every person whether or not a citizen of Germany
10 at the Third Reich at that time, or even today, who is in
11 Germany whether it be a citizen, or displaced person, or
12 foreigner, has to register and the registration is a
13 simple bureaucratic act.

14 All it does is establish that the neutral fact
15 that one resided in Tubingen. Now the irony is that the
16 establishment of the residence in Poltringen rather, at
17 that time, established that the petitioner was a displaced
18 person who was covered by the Presidential Directive of
19 December 22nd, 1945.

20 Now that was incorporated specifically on
21 December of 1946, in the Federal Regulations incorporated
22 the Truman Directive as part of the priority for Non-
23 preference Immigration Quota Visas.

24 The Third Circuit looked at the President Truman
25 Directive in isolation and did not take into consideration

1 that indeed it was incorporated in the regulations. As a
2 result of which they came to the improper conclusion that
3 was a mere generalized statement instead of in fact a
4 Presidential Order directing that all displaced persons
5 would, in effect, receive a priority under a
6 Non-preference Quota Immigration Visa standard.

7 This Court has never applied the second prong of
8 Chaunt even in Chaunt. And as a result of which it is
9 dicta and I would submit that if it is to be taken
10 literally, it is impossible to reconcile the dicta in the
11 second prong of Chaunt with the Schneiderman test.

12 What has happened is we have two formulations in
13 Chaunt within two pages. One on Page 353 and one Page
14 355. The latter one picks up the word, "possibly," and
15 the question has in effect, plagued the Courts of Appeals
16 as to how one applies the test and where, in effect, what
17 part of the phraseology it modifies.

18 Whereas it is reasonably clear that in Chaunt
19 this Court in effect did say that you had to connect the
20 suppressed fact, there the arrests, to an ultimate
21 disqualifying fact, their communist affiliation, and what
22 the Court said is that the attempted connection by the
23 government at that time was too tenuous and in addition to
24 which it said as part of its holding that no investigation
25 would have been conducted because there, there was a

1 disclosure which, in effect, that disclosure did
2 precipitate an investigation.

3 Similarly here, although the petitioner did in
4 fact misstate his date and town of birth, he disclosed his
5 residence in Poltringen and in Tübingen in Germany prior
6 to the end of the war. That was disclosed and it did not
7 trigger off an investigation by the Vice Counsel to look
8 at the records in Tübingen. But we don't know that it did
9 not because the Vice Counsel in effect, indicates in the
10 application for visa, police dossier available.

11 A police dossier meant that they went to the
12 available public records of the jurisdiction in which the
13 individual resided. So that presumably we would have gone
14 to Poltringen or Tübingen and what would they have found?

15 Contrary to the indications of faulty review by
16 the Third Circuit, they would have found the original
17 document which we have in our Joint Appendix. That is the
18 original register of Ammerbuch, which in effect is the
19 district which controlled the residential permits there.

20 And there it contains the same information which
21 is reflected in the internal passport. It contains the
22 statement that he was born in Kaunas and born in Canniest
23 on the incorrect date. So that in point of fact there is
24 no connection, proper connection on the factual basis to
25 go from point A, the truth of the true date and place of

1 birth which the District Court properly held would not
2 have led anywhere because that would not have created any
3 type of suspicion.

4 In addition to which it could not connect to
5 something which is the residence rather the appropriate
6 fact was to disclose fact which connected to the residence
7 and which is his residence in Poltringen which is on the
8 application.

9 But in any event, the whole exercise is an
10 exercise in futility if at the end the ultimate
11 disqualifying fact doesn't exist. There was no
12 requirement that one had to be a victim of Nazi
13 persecution in order to get a visa.

14 And equally important there is no exclusion
15 which excludes someone who's not a victim of Nazi
16 persecution from obtaining a visa. This naturalized
17 citizen received his visa under the 1924 Act and the Third
18 Circuit at least says that you should determine the
19 validity of either the visa or the citizenship petition
20 judged by the law in effect at the time that he obtained
21 it.

22 Under the 1924 Act, since he received his visa
23 in 1948 having applied for it in February of 1947, the law
24 at that time was that the visa shall specify the
25 nationality, which quota the immigrant is coming into and

1 such additional information necessary for the proper
2 enforcement of the immigration laws.

3 And what they provided for is one form, but that
4 one form was an attempt to cover many different
5 applications. As a result of which some of the questions
6 that are asked in the form have no relevance or in the
7 standards here no materiality to the ultimate decision to
8 be arrived at.

9 By way of illustration the form requires that
10 you set forth your age. Of course the age is relevant if
11 you are attempting to obtain a first preference because,
12 excuse me, a second preference, obtain a second preference
13 because the second preference is available to unmarried
14 children under the age of 21 years old.

15 Obviously if the petitioner attempted to make
16 himself, an alien, an unmarried alien under the age of 21
17 years then clearly that would have been material. But the
18 difference of the two years from 30 to 32 years was
19 meaningless piece of information. It was not necessary
20 for the proper enforcement of the immigration laws at that
21 time.

22 Similarly, he did not attempt, for example, it
23 asked whether or not he's married and indeed he disclosed
24 the fact of his marriage, but that marriage had no
25 relevance to the Non-preference Immigration Quota Visa

1 which he obtained.

2 Although it would have had relevance to a first
3 preference, so that in point of fact information is
4 requested in that form which is not necessary to
5 enforcement of the laws. In addition to which the Act of
6 --

7 QUESTION: Mr. Williamson?

8 MR. WILLIAMSON: Yes.

9 QUESTION: As I understand one of your points is
10 that the Court of Appeals here engaged in improper fact
11 finding under our Icicle Seafoods decision of last term.

12 MR. WILLIAMSON: Yes.

13 QUESTION: And are you going to discuss that in
14 your oral argument?

15 MR. WILLIAMSON: I believe that as one of the
16 bases of which to reverse I also believe that it is a
17 relevant consideration here because it goes to the
18 question of the District Court applying each one of the
19 standards in Fedorenko as particularly relevant to the
20 opinion of Justice White. (Inaudible).

21 QUESTION: I would find it helpful. --

22 MR. WILLIAMSON: All Right.

23 MR. WILLIAMSON: -- speaking only for myself, if
24 you could point out factually, not with theories, just
25 where the Court of Appeals went wrong in what you claim to

1 be it's fact finding?

2 MR. WILLIAMSON: All right. The District Court
3 found --

4 QUESTION: I would agree with the Chief Justice
5 on that. I would like to have you comment.

6 MR. WILLIAMSON: Yes. The District Court found
7 that no investigation would have been conducted had the
8 truth of the suppressed facts been disclosed. And he
9 obviously was not clearly erroneous because no suspicion
10 would have been aroused by a man who made himself two
11 years older, by a man who placed himself in a city rather
12 than a town in Lithuania.

13 QUESTION: Well, now did the Third Circuit find
14 that clearly erroneous?

15 MR. WILLIAMSON: Well the Third Circuit used the
16 language of apply a clearly erroneous test, but that's not
17 what they did. What they did in effect is to say that an
18 investigation would have been conducted and the way in
19 which they did it is they looked to the discrepancies of
20 the documents which are ultimately discovered and they
21 reasoned backward from the discrepancy of the document
22 back from the truth.

23 But, it's not the consequence of the lie that's
24 significant, it's the consequence of the truth. Would the
25 truth have led to an investigation. And that's what this

1 Court, as I read it, in Fedorenko said. Would the truth,
2 if disclosed, have led to an investigation?

3 Now the reason why I argue, in effect, that the
4 Court of Appeals made a de novo finding is that although
5 when you apply a mixed question of law and fact, it may be
6 that the legal standard is something which they could
7 address themselves to.

8 But they cannot change the factual component
9 unless it is clearly erroneous and here they changed the
10 factual component of whether an investigation would have
11 been conducted.

12 But if I may also follow up on the dissent, if
13 you would, of Mr. Justice White in Fedorenko. The
14 District Court found that since no investigation would
15 have been conducted it would have satisfied that test.

16 But I would also submit that the test would
17 likewise be satisfied because under these particular
18 circumstances the naturalized citizen did rebut Mr.
19 Justice White's suggestion that if you have a probability
20 test and it establishes a presumption, that presumption is
21 a rebuttable presumption.

22 But nevertheless you still have to reach an
23 ultimate disqualifying fact. Here the petitioner did
24 rebut the presumption as to whether or not one had to be a
25 victim of Nazi persecution and he did it very simply.

1 He did in the first instance by his cross
2 examination. The Third Circuit reached the false premise
3 by examining only the direct examination of Former Vice
4 Counsel Finger.

5 QUESTION: I was curious about that too. It
6 seemed to me that the Court of Appeals treated his
7 testimony as if it had to be believed. And I thought the
8 District Court could totally disbelieve the testimony of
9 any witness whether interested, or not.

10 MR. WILLIAMSON: Not only could he, but he did.
11 Now in a very genteel way he said that the law and the
12 regulations in effect suggest that Mr. Finger was in
13 error, but perhaps there was an informal policy. But
14 that's not what the immigration laws say.

15 As I've indicated in our Joint Appendix and also
16 in the attachment to the reply brief. The only way in
17 which one could refuse a visa is on grounds in the law
18 itself or in the regulations and there they don't exist.
19 And what we've --

20 QUESTION: But, of course, if it's essentially a
21 question of a fact --

22 MR. WILLIAMSON: Credibility.

23 QUESTION: -- you don't have to prove you're
24 right. All you have to prove is there was a dispute which
25 the District Court was entitled to resolve either way.

1 MR. WILLIAMSON: And which he resolved in favor
2 of the naturalized citizen. Once again, however, the
3 Third Circuit, when you asked me whether or not they had
4 made de novo findings, they obviously did on the most
5 erroneous of fashions. That is to say they didn't look at
6 the cross examination and they didn't look at the federal
7 regulations, nor did they look at the Presidential
8 Directive.

9 QUESTION: I'm interested in that. Was in fact
10 no regulation in existence?

11 MR. WILLIAMSON: No regulations existence.

12 QUESTION: Even though Ambassador Finger, then
13 Vice Counsel said he was relying on one.

14 MR. WILLIAMSON: He said the policy was embodied
15 in the regulations which the government attorney showed me
16 during my trial preparations. There was a three week
17 recess call in which the government was given the
18 opportunity to produce that regulation. They didn't, I
19 did.

20 I produced the regulation which was the one I
21 referred to in the Federal Register of December of 1946.
22 Now in addition to that, since that time we have looked at
23 every conceivable source of historical evidence including
24 the literature at the time, including the INS monthly
25 reviews, the contemporaneously written articles, all of

1 those appear in the Appendix of the amici in support of
2 the petition for certiorari.

3 QUESTION: So, it remains a puzzlement what it
4 was that the government did show Mr. Finger, or whether he
5 just --

6 MR. WILLIAMSON: Or if they showed him anything.

7 QUESTION: Or if they showed him anything.

8 MR. WILLIAMSON: Or, if in effect, we have
9 merely a faulty memory, in effect, he would like to
10 believe that that was the particular case. But obviously
11 it didn't exist and there's no factual support for his
12 testimony which the District Court found was in error.

13 QUESTION: And there was also testimony by, was
14 it the counsel at the time, who had no recollection of any
15 such --

16 MR. WILLIAMSON: Yes, the government in its --

17 QUESTION: Policy.

18 MR. WILLIAMSON: -- brief says that that's
19 simply a telephone conversation which was in evidence, but
20 it is in evidence because the alternative that the
21 District Court judge gave was, either we adjourn the trial
22 and go there and take the deposition of Mr. Schilling, or
23 we take his deposition by telephone with me listening, or
24 in effect you agree that the transcript goes in without
25 cross examination.

1 QUESTION: The transcript of what?

2 MR. WILLIAMSON: The transcript of the telephone
3 conversation I had with Mr. Schilling who was the
4 individual actually processed the naturalized citizen's
5 petition, visa petition which the government chose not to
6 use, instead to use Mr. Finger.

7 Presumably the bases for not using him was Mr.
8 Schilling was uncooperative and had no memory and in
9 effect what we have instead is Mr. Finger who was
10 cooperative and had a memory of something which doesn't
11 exist and never existed and there's no support for.

12 In addition to which the government has not
13 produced a refusal card. If in fact, the absence of being
14 a victim of Nazi persecution was a disqualifying fact then
15 there would be refusal cards which would show that as to
16 some individuals.

17 QUESTION: Mr. Williamson, may I come back to
18 the facts?

19 MR. WILLIAMSON: Yes.

20 QUESTION: Do you deny that the petitioner in
21 this case knowingly lied every time he had the opportunity
22 to do so?

23 MR. WILLIAMSON: Oh, yes.

24 QUESTION: You do?

25 MR. WILLIAMSON: I do. Because what we have

1 here --

2 QUESTION: Didn't he have the correct documents
3 in his possession and didn't he falsify the documents he
4 filed and signed, swore to? (Inaudible).

5 MR. WILLIAMSON: The reason I answered your
6 question the way in which I did, Mr. Justice Powell, is
7 this: Your question was so broad --

8 QUESTION: All right. You (Inaudible) --

9 MR. WILLIAMSON: -- that it picks up many
10 different statements, but if you're asking me whether or
11 not, the same misrepresentation of his date and place of
12 birth was made throughout then the answer to your question
13 is, yes. And if you're asking me whether --

14 QUESTION: May I interrupt you now?

15 MR. WILLIAMSON: Yes, I'm sorry.

16 QUESTION: And those misstatements were wilfully
17 and knowingly made?

18 MR. WILLIAMSON: Those statements were
19 intentionally made.

20 QUESTION: Right.

21 MR. WILLIAMSON: I think that wilful embodies
22 within it a concept of mens rea or a black heart and in
23 this particular instance there's no black heart because we
24 have --

25 QUESTION: He just wanted to be a United States

1 citizen.

2 MR. WILLIAMSON: No. What he did is he made a
3 misjudgment and the misjudgment that he made was that in a
4 procrustean way he tried to conform the application to his
5 internal Lithuanian passport which was the best record of
6 a public record of the country to which he owed allegiance
7 which was basically the test.

8 Now, the so-called other documents that you're
9 talking about, none of them were public records and
10 doubtful that they would have satisfied a requirement to
11 obtain the particular visa.

12 Now the particular instance here, however,
13 there's a certain irony. The reason why he had the
14 misstated date and place of birth on the internal
15 Lithuanian passport was to avoid conscription into the
16 Nazi Army at a time when there was an order seeking
17 mobilization of the Lithuanians under the most dire and
18 harshest of repressions to the Lithuanians. Point of fact
19 that happened four days --

20 QUESTION: But that wasn't the application for
21 the visa.

22 MR. WILLIAMSON: Pardon?

23 QUESTION: I thought Justice Powell was talking
24 about the application for the visa.

25 MR. WILLIAMSON: Yes, I'm saying why it wasn't

1 --

2 QUESTION: But, that had nothing to do with him
3 going in the military did it?

4 MR. WILLIAMSON: It had nothing with him going
5 into the military. It had the reason why --

6 QUESTION: He was (inaudible).

7 MR. KLONOFF: -- he thought, he made the
8 misjudgment that he had to put down the same date and
9 place of birth as he had on his passport.

10 QUESTION: Do you say that to tell a deliberate
11 lie is a misjudgment?

12 MR. WILLIAMSON: I'm not trying to, in effect,
13 minimize the fact that he lied.

14 QUESTION: Isn't it a fact that he didn't want
15 to be found out to have murdered 4,000 people?

16 MR. WILLIAMSON: Well, Your Honor, that I would
17 take severe issue with. The fact of the matter is that
18 this individual defended himself against those kind of
19 charges and the District Court found them unreliable and
20 inadmissible and I respectfully suggest that if we had the
21 most heinous crime committed in the United States of a
22 similar type of nature no court, no responsible court
23 would have admitted the evidence or found it to be
24 reliable that existed in this particular court. So I
25 would take very serious issue with that as to how this

1 gentleman have under our system having proved --

2 QUESTION: (Inaudible) lie.

3 MR. WILLIAMSON: No, it is not in the least Your
4 Honor. And I take serious issue with it, but what it does
5 raise in effect, is it shows how the tremendous high
6 (inaudible) pressure of the nature of the accusations in
7 effect, makes it very difficult to deal with these
8 particular issues and it does distort judgment.

9 And I think that what we have to do under our
10 system of justice in order for it to work and work
11 effectively is we have to see whether or not it's capable
12 of handling cases like this so that the allegations if not
13 proved don't bear upon the considerations of the other
14 issues.

15 And the issues here are whether or not the
16 misstatement as to his date and place of birth can be a
17 sufficient grounds for, in effect, denaturalizing him.

18 QUESTION: Mr. Williamson, let me get it clear
19 why you say he was misrepresenting. You say that he
20 thought that the best documentation that he had available
21 was his Lithuanian passport so he recited the date and
22 place of birth that was on that?

23 MR. WILLIAMSON: Yes. You have, under the --

24 QUESTION: Why didn't he use the same reasoning
25 when he gave testimony to the German officials for the

1 other documents that contained the correct date and place
2 of birth?

3 MR. WILLIAMSON: When you look at the actual
4 document, the initial registration, he did the same thing
5 to the "German authorities," and that was the German
6 authorities (inaudible). Now it is true on a different
7 and subsequent page and after the allied occupation it
8 does contain the correct date and place of birth.

9 QUESTION: After the allied occupation?

10 MR. WILLIAMSON: That's correct. After the
11 allied occupation.

12 QUESTION: All the documentation that shows the
13 correct date and place of birth is after the allied
14 occupation?

15 MR. WILLIAMSON: That is correct. And that
16 documentation was in fact, available to the Vice Counsel
17 because of the fact he disclosed each one of those
18 residences where it would appear. The document is very
19 clear. The only ambiguity that arises from it is the fact
20 that it says born in Kaunas but has to Taurage.

21 Taurage is a different county than Kaunas. But
22 the Kaunas place of birth and the incorrect date of birth
23 are, in effect, in the initial registration document.
24 Those other documents you see are reports which are
25 reflected off of that document, but it is not until after

1 the allies occupy that the other correct information is
2 reflected.

3 And that's a faulty review again of the Third
4 Circuit which was picked up by the government, but it's
5 available in the Joint Appendix for the examination of the
6 Court. It's the fold out document that we have in there
7 and I have in it's original form for that particular
8 reason.

9 I see that I've less than five minutes. If
10 there are no further questions, I'd like to reserve my
11 additional time for rebuttal.

12 QUESTION: Thank you, Mr. Williamson.

13 MR. WILLIAMSON: Thank you.

14 QUESTION: We'll here now from you Mr. Klonoff.

15 ORAL ARGUMENT OF

16 ROBERT H. KLONOFF

17 ON BEHALF OF RESPONDENT

18 MR. KLONOFF: Mr. Chief Justice, and may it
19 please the Court:

20 The issue in this case is how to balance two
21 important interests, a naturalized citizens right to
22 citizenship versus the government's need for truthful
23 answers by applicants for visas and for citizenship.
24 The issue arises in the context of the case involving
25 willful and deliberate lies at every stage of the process.

1 And in answer to Justice Powell's question the
2 record is clear and it's been conceded throughout that
3 these lies were willful, and I would cite to Pages 9A and
4 46A of the petitioner's Appendix, the decisions of the
5 Court of Appeals and the District Court.

6 The Court of Appeals is absolutely clear that
7 these were conceded to be willful. And I will get, in
8 detail, during the course of this argument to the nature
9 of these lies because, in fact, a number of misstatements
10 were given during Mr. Williamson's arguments and I want to
11 clear up precisely what the nature of the misstatements
12 were and how they occurred during the proceedings.

13 The standard of materiality urged by the
14 government in this case requires proof by clear convincing
15 and unequivocal evidence that there would have been an
16 investigation and that that investigation might have
17 uncovered disqualifying facts.

18 Now I think Mr. Williamson confuses two
19 different issues here. He indicates that the use of the
20 phrase, "might" somehow dilutes the clear, convincing and
21 unequivocal standard. But, in fact, he's confusing two
22 separate issues.

23 For example, in the criminal perjury cases the
24 standard of proof is proof beyond a reasonable doubt. The
25 question of materiality is whether or not there is a

1 tendency to influence the decision-maker and the question
2 whether there's a tendency to influence the decision-maker
3 has to be proven by a reasonable doubt. So we submit
4 there's no dilution of the proper standard.

5 QUESTION: What would, might, whatever, tell me
6 why the listing of birth date two years earlier and a
7 different location in the country instead of in the city
8 of Kaunas would have provoked an investigation.

9 MR. KLONOFF: Well, let me say there are four
10 separate patterns of lies. It isn't just date and place
11 and birth. Mr. Williamson, throughout the litigation and
12 again in this Court, ignores what the government believes
13 to be the most crucial lie, namely where the petitioner
14 was during the time of the atrocities.

15 QUESTION: Yes, but what about the date and
16 place of birth alone?

17 MR. KLONOFF: Well, the Court of Appeals found
18 date and place of birth alone to be enough, the analysis
19 that we --

20 QUESTION: Well, what's your position on that?

21 MR. KLONOFF: We submit that that's correct.
22 (Inaudible).

23 QUESTION: Well, why would that have led to an
24 investigation as Justice Scalia asked?

25 MR. KLONOFF: Well, first of all and this goes

1 also to Chief Justice Rehnquist's question about whether
2 or not there was an error of law or an error of fact.
3 What the District Court did is it said, let's look at a
4 fact in isolation per se.

5 For example, if someone came in and said, I was
6 born in 1915, are you disqualified based on that fact per
7 se? If that were the analysis, then virtually no fact of
8 identity would be material. For example, somebody could
9 come in and give a totally fictitious name, but then when
10 it --

11 QUESTION: You tell me how it would have led to
12 investigation? Granted that it wouldn't have disqualified
13 him and you need not show that it would have disqualified
14 him automatically.

15 MR. KLONOFF: (Inaudible).

16 QUESTION: How would it have led to an
17 investigation? Somebody would say, ah ha, he was not born
18 in 1933, he was born in '31. That will set me to, why
19 would that set anybody to investigate?

20 MR. KLONOFF: Well, what happens Justice Scalia,
21 the way this process works is first the applicant provides
22 documentation, he then fills out the application forms and
23 he's then interviewed under oath and given the information
24 and the testimony in terms of triggering an investigation
25 which the Court of Appeals correctly said was undisputed

1 is where the person, well, first provides --

2 QUESTION: You said the Court of Appeals said it
3 was undisputed, but are you suggesting that the District
4 Court doesn't have the right to disbelieve someone's
5 testimony just because there isn't any contradictory
6 testimony?

7 MR. KLONOFF: Well, we're not suggesting that.
8 Nowhere in the record does the District Court indicate
9 that it disbelieved (inaudible).

10 QUESTION: Why does the District Court have to
11 indicate that it disbelieves? So long as it didn't make a
12 finding in accordance with that testimony the District
13 Court may have disbelieved it.

14 MR. KLONOFF: Well, --

15 QUESTION: I mean, I think the Finger testimony
16 doesn't do you any good at all up here.

17 MR. KLONOFF: Well, what the District Court did
18 wrong, we would submit, is not looking at discrepancies
19 created by later lies. What Vice Counsel Finger explained
20 is --

21 QUESTION: Well, but, what I'm saying is that
22 you may be right as to the discrepancies, but I don't
23 think you have any business relying up here on any of the
24 explanations of Vice Counsel Finger. Because the District
25 Court was free to disbelieve him.

1 MR. KLONOFF: But, with all respect, Chief
2 Justice Rehnquist, the District Court did not reach the
3 issue of the discrepancies at all.

4 QUESTION: Are you saying that the District
5 Court was not free to disbelieve Finger?

6 MR. KLONOFF: The District Court certainly could
7 have disbelieved Finger.

8 QUESTION: Well okay then why are you relying on
9 what he said in your explanation. Because the District
10 Court could have disbelieved him.

11 MR. KLONOFF: That's correct. What we're doing,
12 we're reviewing the record as to the analyses undertaken
13 by the Court of Appeals.

14 QUESTION: Yes, but I suggest you not rely on
15 the Finger testimony.

16 MR. KLONOFF: Well, but the District Court did
17 not specifically refuse to rely on it.

18 QUESTION: No, but you agree it could have
19 disbelieved it?

20 MR. KLONOFF: It could have. But, what the
21 Court of Appeals found was an error of law, in other
22 words, that Vice Counsel Finger explained that the way the
23 process worked is --

24 QUESTION: Yes, but again, you're relying on his
25 testimony. The District Court could have found his

1 testimony totally false.

2 MR. KLONOFF: Well, that's correct. And perhaps
3 on an issue where the District Court didn't address this
4 precise issue, perhaps one approach could be for this
5 Court to remand for the purpose of having the District
6 Court specifically address --

7 QUESTION: That's what Icicle Seafood says,
8 doesn't it?

9 MR. KLONOFF: That is correct. We have taken
10 the position that the Court of Appeals had a basis in
11 viewing the record to be undisputed on these particular
12 points and therefore --

13 QUESTION: But, what does undisputed mean?

14 MR. KLONOFF: Well, it means that there is no
15 evidence to the contrary.

16 QUESTION: Well, but that isn't the testimony
17 you, that isn't the way you ordinarily review a District
18 Court finding of fact. You can say the testimony of
19 Witness A before the District Court was undisputed.
20 Nobody contradicted this witness, and yet if the District
21 Court, sitting as a fact finder, says, I don't believe a
22 word that witness says, the fact that the witness was
23 undisputed doesn't make any difference.

24 MR. KLONOFF: No, I understand that. And I
25 would just again reiterate that there was no finding that

1 Vice Counsel Finger was not credible.

2 But in any event, in answer to Justice Scalia's
3 question, the course of investigation would have been
4 triggered by an inconsistency between the earlier lie and
5 the later telling of the truth because at each stage of
6 the process the individual is asked to provide this
7 biographical information.

8 And having supplied false documents, if he then
9 comes in and gives the truth an investigation would be
10 triggered and it was required by regulation as a result of
11 the inconsistency of this basic biographical information.
12 The same thing is true within that organization.

13 QUESTION: If you believe Finger?

14 MR. KLONOFF: That's right. Or, Goldberg. And
15 as to Justice Goldberg, the District Court didn't discuss
16 the evidence at all.

17 QUESTION: But there was no reason for the
18 District Court to be required to believe Justice Goldberg,
19 was it?

20 MR. KLONOFF: That's correct. We don't disagree
21 on that, Mr. Chief Justice.

22 QUESTION: See, I still don't understand this.
23 You mean, since he lied the first time in the visa
24 application, had he told the truth the second time in the
25 naturalization application, the inconsistency between the

1 two would have set an investigation afoot.

2 MR. KLONOFF: Exactly. That's a fact.

3 QUESTION: And that investigation would of
4 looked into why. Why is that the man said that he was
5 born in 1931 when he was born in 1933?

6 MR. KLONOFF: Exactly. But, first of all --

7 QUESTION: And why is it that he said he was
8 born in Kaunas instead of, where was he born?

9 MR. KLONOFF: That's correct. In Taurage. And
10 that's correct. Those are two --

11 QUESTION: So what? What would that
12 investigation have led to? Absolutely nothing.

13 MR. KLONOFF: Well, we submit that that's not
14 correct.

15 QUESTION: Those specific facts couldn't make
16 any difference at all.

17 MR. KLONOFF: Well, again, first of all at the
18 visa stage there was a requirement that people tell the
19 truth about biographical information. This was supported
20 by the case law at the time. And so the very discovery of
21 the discrepancy would have disqualified the applicant from
22 obtaining a visa.

23 QUESTION: Oh, you're saying any, oh, you are
24 eliminating therefore the requirement which I thought, I
25 thought the case has established up to now that any

1 misrepresentation has to be not only willful, but material
2 in order to disqualify.

3 MR. KLONOFF: Well, what the (inaudible) --

4 QUESTION: You're saying, if we find somebody
5 making a willful misrepresentation whether it's material
6 or not, whether it would have caused him to be
7 disqualified from naturalization or from a visa, or not,
8 it's enough.

9 MR. KLONOFF: No, that's not, it's much narrower
10 than that. The cases deal at that time specifically with
11 identity with information that Congress specifically
12 required that an applicant provide as to those specific
13 pieces of information. The case law at the time was quite
14 clear that it was per se grounds for denial. So that's
15 just one avenue. Let me explore your question further.

16 QUESTION: Wait, excuse me. It was per se
17 grounds of denial. Any misrepresentation whether it was
18 material, or not?

19 MR. KLONOFF: Well, the cases held that because
20 identity was so fundamental to the inquiry of
21 investigation that misstatements of identity were in
22 essence deemed material per se. Only a small category of
23 misstatements known as identity.

24 But, let me pursue it further because wholly
25 apart from the identity point there are additional

1 avenues, one of which is what the Court of Appeals went
2 off on, the fact that the investigation would have
3 revealed that the petitioner was not a victim of
4 persecution and that this was a requirement at the time.
5 Now, we would note in that regard first of all that we
6 conceded hat --

7 QUESTION: Is that uncontested that it was
8 required at that time?

9 MR. KLONOFF: Well, it was --

10 QUESTION: That's what Finger said.

11 QUESTION: That's what Finger said. Nobody else
12 said.

13 QUESTION: Substantiated by a regulation which
14 didn't exist.

15 MR. KLONOFF: And again, I would note to the
16 Court that if the question has to do with whether or not
17 this type of issue should have been dealt with first in
18 the first instance by the District Court that that maybe
19 the procedure to have dealt with.

20 But, I'm just answering, in terms of the remand,
21 but I'm answering Justice Scalia's question about the
22 avenues of investigation. And if we can assume for a
23 moment that Vice Counsel Finger was correct, and if we've
24 noted in our brief and supported historically by the
25 actual numbers of the visas, virtually all of the visas at

1 the time in this part of the world were going to Jews who
2 by definition, were victims of persecution.

3 Petitioner himself provided the most important
4 evidence of the existence of the requirement. He
5 submitted a document for the very purpose of proving that
6 he was a victim of persecution.

7 And finally, petitioner offered evidence at
8 trial, a Mr. Zabarskis, who had testified that he was not
9 a victim of persecution, but nonetheless got a visa. But
10 as the government showed, he too represented himself to be
11 a victim of persecution.

12 QUESTION: Excuse me. I still don't understand
13 how all of this ties into the birth date and the place of
14 birth. What does that have to do with whether he's a
15 victim of persecution, or not?

16 MR. KLONOFF: Because what Vice Counsel Finger
17 indicated is that if a discrepancy develops between a
18 document and the other information, the first thing that
19 will be done is to look at the police records in the city
20 of prior residence of the individual.

21 That investigation, we submit, would have
22 uncovered the documentation indicating first of all that
23 petitioner was living without restriction in Nazi Germany.
24 Secondly, the very identity of the false date and place of
25 birth would of revealed to the Vice Counsel that the

1 document --

2 QUESTION: Mr. Klonoff, does the government's
3 case here depend on accepting the truth of the statements
4 of Finger and Goldberg?

5 MR. KLONOFF: Yes, I mean, well --

6 QUESTION: The judgment ought to be reversed or
7 vacated if you don't rely on their statements?

8 MR. KLONOFF: Well, if we don't, two things:
9 First of all, if the Court is not prepared to rely on Vice
10 Counsel Finger and Goldberg we would submit that the
11 proper approach would be to properly define the test of
12 materiality and then to remand so that the District Court
13 can consider these issues in the first instance. District
14 Court is really never considered the issue of discrepancy
15 for example. It has never really considered --

16 QUESTION: (Inaudible). Is it not also critical
17 of the government's case that not being a victim of
18 persecution is a disqualifying fact?

19 MR. KLONOFF: Well, or that not necessarily is a
20 matter of statute. We concede there's no statute of
21 regulation --

22 QUESTION: And it's a fact you would have
23 prevented him from getting a visa had it been known?

24 MR. KLONOFF: That's not critical since we've
25 given several other possible grounds of investigation.

1 One of which is, by the way, under the "would and might"
2 standard that the investigation would have led to an
3 investigation that might have shown the petitioner was in
4 fact a persecutor, or committed the war crime --

5 QUESTION: That's what I wanted to find out.
6 You are relying on a reading of the standard which would
7 allow, even though it had not been proved that he was such
8 a persecutor, what you're saying is there might be some
9 other evidence out there that might have been discovered
10 that might have shifted the scales on the fact issue and
11 might have led to the conclusion that he was in fact a
12 persecutor?

13 MR. KLONOFF: Well, that's correct. His --

14 QUESTION: Isn't that always true? I mean, in
15 unsettled conditions in Europe there that if you use the
16 "might" language literally it's all, once you get over the
17 hurdle of saying you would have triggered an investigation
18 would you not always win on the ground that they might
19 have found something disqualifying?

20 MR. KLONOFF: Well, we don't think so. We think
21 that there's considerable content to the "might" part of
22 the test explained by the attorney general in 1961. That
23 "might" requires some showing of a basis for ultimate
24 disqualification. It doesn't require a preponderance of
25 the evidence, but it requires a considerable showing.

1 Here we have petitioner lying about the very
2 fact of where he lived during the war. That's the fact
3 that the District Court found for the government. That is
4 some support although the --

5 QUESTION: What you're saying in effect is that
6 they might have discovered evidence that would have
7 corroborated evidence that was otherwise insufficient?

8 MR. KLONOFF: That's correct. That even the
9 government didn't prove --

10 QUESTION: So, if they get a little evidence of
11 persecution, you'd always pass that "might" hurdle, I
12 suppose?

13 MR. KLONOFF: No, we don't think so. But, even
14 though the government --

15 QUESTION: Well, how much evidence do you have
16 to have on that issue of persecution?

17 MR. KLONOFF: Enough to raise a serious question
18 about whether, in fact, the government could have made its
19 case. Let me further answer though your question about --

20 QUESTION: Reasonable suspicion enough, or
21 probable cause? What is the standard?

22 MR. KLONOFF: We would think that reasonable
23 standard --

24 QUESTION: If there's reasonable suspicion that
25 he was engaged in this kind of activity, you satisfied the

1 "might" hurdle.

2 MR. KLONOFF: We would think, once we've first
3 shown that there would have been an investigation.

4 QUESTION: Right. Once you say you would have
5 triggered some kind of an investigation --

6 MR. KLONOFF: Let me first though if I could --

7 QUESTION: Found the reasonable suspicion here.
8 What would have justified that reasonable suspicion?

9 MR. KLONOFF: Well again, the Vice Counsel would
10 have found through the discrepancies that petitioner lied
11 about the very place he was during the atrocities. The
12 investigation as the evidence indicates, would have led
13 the Vice Counsel to the displaced person's camp where
14 there were --

15 QUESTION: Were there no atrocities in the place
16 where he said he was? I mean, you know, you mentioned,
17 what's the name of that city where --

18 MR. KLONOFF: Taurage (inaudible).

19 QUESTION: There were atrocities all over
20 Lithuania.

21 MR. KLONOFF: Well, that's correct. But this is
22 --

23 QUESTION: So, I mean, you can always say, yeah,
24 he lied because he, you know, are you sure the city he
25 said he was in didn't have atrocities as well?

1 MR. KLONOFF: Well, that's not the point. If he
2 lied about where he was no one in the place where he
3 claims to have been would be able to link to him to
4 atrocities there. So no one could prove that he committed
5 atrocities in Teisiai.

6 But, let me just move back briefly to the
7 question about whether or not the case depends on Vice
8 Counsel Finger and Vice Counsel Goldberg. We've also
9 given an alternative analysis that doesn't depend
10 specifically on the acceptance of that testimony and that
11 has to do with the issue of good moral character.

12 And we would submit that without regard at all
13 to the credibility findings that are made that an
14 individual who lies repeatedly on these critical types of
15 facts has demonstrated a lack of good moral character
16 under the statute and that would provide a basis for
17 disqualification. Let me --

18 QUESTION: Did the courts below rely on that?

19 MR. KLONOFF: Well, the courts dealt with it and
20 they dealt with it, both of them rejected it.

21 QUESTION: Did they rely on that as a basis for
22 denaturalization?

23 MR. KLONOFF: They did not. They, both the
24 Third Circuit and the District Court rejected that
25 argument. They held that for purposes of good moral

1 character, the Chaunt materiality standard applies in that
2 context. If I could very briefly --

3 QUESTION: What is the meaning of the
4 materiality standard if you adopt that position? That is,
5 the lie has to be material, but of course, anybody who
6 lies doesn't have good moral character, so a lie doesn't
7 have to be material.

8 MR. KLONOFF: Well --

9 QUESTION: Why would you need a materiality
10 standard?

11 MR. KLONOFF: Well there's a difference and
12 there's a question of overlap. We're not saying that any
13 lie, regardless of its significance is enough to show that
14 you lack good moral character.

15 What we're saying is, is that here in the
16 context of lies that could have proven a basis for
17 perjury, and we cite the Ramos case for example, that
18 where somebody has repeatedly committed perjury that he
19 has demonstrated a lack of good moral character.

20 QUESTION: Well what makes it perjury as opposed
21 to just a lie if it isn't materiality?

22 MR. KLONOFF: Well, but the materiality test,
23 again, this assumes just hypothetically, regardless
24 of whatever the Court adopts with respect to Chaunt,
25 the materiality test in the perjury context is

1 well-established. And that requires only that there be a
2 tendency to influence the decision-maker and we suggest
3 that under that test of materiality it's clear the
4 petitioner's lies were material for criminal purposes.

5 So, regardless of the Chaunt test, we would
6 submit that somebody who is engaged in repeated acts of
7 perjury has established a lack of good moral character.

8 Let me briefly, if I could, review the entire
9 scenario of misstatements because they really are quite
10 dramatic in the context of this case. Petitioner
11 repeatedly lied about his identity at the very time he was
12 telling the truth to the Germans. And it's simply not
13 correct as petitioner would indicate that he also lied to
14 the Nazi Germans.

15 And I would refer the Court to Page 117A of the
16 petitioner's Appendix where the District Court found as a
17 fact that all of the documents reflected the, that were
18 submitted to the Germans, both Nazi and after, reflected
19 his true place of birth and almost all reflected his true
20 date of birth. So, clearly he was giving truthful
21 information to the Germans.

22 It was also found as a fact that he had a
23 identifying document on him with a true place of birth and
24 that he didn't disclose that document to the Immigration
25 officials. Now, his explanation that he's given, namely

1 avoiding conscription into the German Army simply makes no
2 sense because it doesn't explain why he would tell the
3 truth to the Germans and then lie to the American
4 officials.

5 QUESTION: Why did he lie to the American
6 officials? What's your theory about why he lied to the
7 American officials and told them he was born --

8 MR. KLONOFF: Well, the theory we've had --

9 QUESTION: -- two years later, or earlier.

10 MR. KLONOFF: -- throughout this case, as is
11 typical of many of the cases that have been brought in
12 this area, people are trying to shade their identities so
13 that they can not be linked with certain atrocities. And
14 that goes hand and hand --

15 QUESTION: But, he wasn't born where the, you
16 know, if he had been born where the atrocities occurred, I
17 could understand it.

18 MR. KLONOFF: Well --

19 QUESTION: But, neither the place where he
20 actually was born, nor the place where he said he was born
21 was the place where the atrocities occurred.

22 MR. KLONOFF: No, but if, for example, someone
23 came in later and provided testimony that the person who
24 they saw and they knew of who committed the atrocities was
25 the person who was born in so and so town, he can come in

1 having lied and said, well that's not me, I was born in a
2 different place and I have a different year of birth.

3 But, certainly the most critical lie, we have
4 submitted, is his lie about his residence during the war.
5 And his lie has been really a spectrum of lies because he
6 told the immigration officials at the visa stage that he
7 had not resided in Kadainiai.

8 For a two year period, he listed just Teisiai.
9 He kept changing around so that by the time the
10 investigation occurred of this case he admitted that he
11 was there until the beginning of July, but left right
12 before the atrocities. And the District Court
13 specifically found that he was there until October of 1941
14 and, therefore, was there during the time the atrocities
15 occurred.

16 And finally, he lied about his occupation, and
17 there, there's further testimony. Vice Counsel Finger
18 indicated that at a minimum, had an individual come in and
19 represented that he had worked in this plant manager
20 capacity, even of say 15 employees, that would have
21 triggered further questioning by the Vice Counsel.

22 Now, if I could just discuss briefly the general
23 considerations concerning the test of materiality. We
24 would submit that the government's test of materiality,
25 the test we urge is the proper one that this Court should

1 adopt for several reasons.

2 First of all, petitioner's standard of
3 materiality creates an incentive for visa and citizenship
4 applicants to lie and then later rewards the person for
5 his successful lies. And many of the questions that the
6 Court is asking today, it's troublesome to know exactly
7 what the line of investigation would have been and this is
8 the reason why a standard of what Counsel calls doubt free
9 materiality simply is not right, because the government
10 was denied the opportunity back in 1947, of investigating
11 these facts.

12 The government has the right to get the true
13 identity of the person so that it can make the
14 investigation at the time and determine at the time
15 whether or not the person has the necessary requirements.
16 So we submit that the government standard properly
17 balances those two interests.

18 Secondly, --

19 QUESTION: (Inaudible).

20 MR. KLONOFF: -- our standard, Justice White, is
21 what you suggested in your dissenting opinion in Fedorenko
22 that there would have been an investigation that might
23 have led to the discovery of disqualifying facts and that
24 that has to be proven by clear, convincing and unequivocal
25 evidence.

1 And I would say in that regard, in addition to
2 the Attorney General opinion in 1961 endorsing that
3 standard, virtually every court both before and after this
4 Court's Chaunt decision has endorsed that standard. The
5 only exception is a split decision by the 10th Circuit and
6 some dictum by the 9th Circuit.

7 But, beyond that the endorsement for this point
8 of view has been sweeping and virtually unanimous by the
9 courts who recognize exactly what I'm arguing today this
10 difficult problem where an individual lies about critical
11 information, who he is, and then tries to come in later
12 after he's gotten his citizenship through the lie and then
13 said, well United States you can't show precisely what an
14 investigation would have uncovered 40 years ago. That's
15 the problem with the very standard that the petitioner
16 urges.

17 QUESTION: Yeah, I know a lot of people who
18 misrepresent their birth date and I really don't consider
19 that they're misrepresenting who they are. That's a
20 little --

21 MR. KLONOFF: There's a question, Justice
22 Scalia, and you've raised it there that one of the
23 requirements is that the statement be willful and that it
24 be willful in a sense of trying to deceive the immigration
25 officials, so somebody who's lying for vanity purposes or

1 whatever --

2 QUESTION: It's a different point and it seems
3 to me quite hyperbolic to say that someone who gives the
4 wrong birth date, or for that matter a wrong town of birth
5 is misrepresenting who they are.

6 MR. KLONOFF: Well, we think so. Let's take --

7 QUESTION: (Inaudible).

8 MR. KLONOFF: I don't know how common Mr. Kungys
9 name is at the time, but let's take the name John Smith.
10 If somebody lies about their date and place of birth it is
11 absolutely meaningless to give a name John Smith.

12 You just cannot do any investigation of who that
13 person is, so we would submit that the date and place of
14 birth are crucial. Congress specified them. The very
15 beginning of the statute that we have quoted as an
16 Appendix to our brief.

17 Congress listed only a few items that they
18 required of all applicants and date and place of birth
19 were among them. And the courts, as we've said, have
20 given specific attention to the identity issue. The
21 second point in terms of --

22 QUESTION: (Inaudible) asking us to overrule or
23 cut back on Chaunt?

24 MR. KLONOFF: Not at all. We submit that the
25 test we're proposing is a faithful interpretation of

1 Chaunt and in fact, the cases that we've cited post Chaunt
2 are relying on the literal language of the second Chaunt
3 prong.

4 So, we submit that and this is entirely
5 consistent with Justice Douglas' concern in his opinion
6 that visa and citizenship applicants tell the truth. That
7 truthfulness is a fundamental part of the immigration
8 system and that a standard that gives no attention to that
9 whatsoever is one that really is unworkable.

10 Now related to my first point in terms of the
11 incentive to lie is the fact that once there is a lie,
12 either at the visa or the citizenship stage you have
13 deprived the government officials of the opportunity to do
14 their job properly.

15 They simply cannot investigate an individual's
16 bonafides if the standard that's endorsed is one that
17 essentially says, which is what petitioner's standard
18 would do, that you can give a completely false identity,
19 because that would be the effect of endorsing the
20 "would-would" standard.

21 You could give a completely false identify
22 because no one could say 40 years later that had I given a
23 true name, or had I given a true date of birth those facts
24 per se would have disqualified me.

25 QUESTION: Why don't you use the standard that's

1 used for the criminal statute 1001? I mean, apart from
2 the fact that you have one vote here for "would-might"
3 which I don't denigrate. I mean, that's --

4 MR. KLONOFF: Well, let me say, the
5 "would-might" standard --

6 QUESTION: -- a good reason but why don't you
7 use the one that we have a lot of case law on?

8 MR. KLONOFF: Well, we've suggested --

9 QUESTION: The Federal Perjury Statute?

10 MR. KLONOFF: We've suggested that as an
11 analogy, in fact, the would-might standard is more
12 stringent than the standard in the criminal context. The
13 criminal context only requires that there be a tendency to
14 influence the decision-maker.

15 The government standard is requiring that there
16 would have been an investigation, not only that there
17 might have been or that there would be a tendency to.
18 And, in fact, one case, the Sixth Circuit Kassab decision
19 specifically endorsed a "might-might" standard which is
20 more comparable to the criminal law.

21 But, let me just say we would have no objection
22 whatsoever if this Court endorsed as the standard of
23 materiality in this context, the standard that's applied
24 in the perjury context and perhaps that would be a way to
25 rid some of the confusion of this area by having a two

1 prong standard --

2 QUESTION: Does the --

3 MR. KLONOFF: -- that would be

4 QUESTION: Does the record in this case tell us
5 who made the investigations in Germany at the time? Say
6 that, you say there would have been an investigation
7 triggered. What would the counsel's office have done?

8 MR. KLONOFF: Well, the Vice Counsel testified,
9 both he himself would investigate plus he had employees
10 who would do it. They would interview people at displaced
11 persons camp, they would go to the police records of the
12 individual's prior residence, they would look at prior
13 applications.

14 QUESTION: How big a staff did he have?

15 MR. KLONOFF: These were not large staffs and
16 it's critical to note that these people relied on the
17 truthfulness of the applicants. There simply were not the
18 resources to go out and conduct a massive investigation
19 for each applicant. And that again is a further reason --

20 QUESTION: But basically, the Vice Counsel
21 himself would of gone out and checked the records and so
22 forth?

23 MR. KLONOFF: He would have done some, or he had
24 staff who assisted him in that regard. And it was sort of
25 an ad hoc decision-making process. There's not a lot in

1 the record on the specifics.

2 QUESTION: And what about it, with reference to
3 Judge Goldberg's testimony? If he had thought an
4 investigation was necessary what would the naturalization
5 Judge do?

6 MR. KLONOFF: He testified quite clearly that if
7 he had found a discrepancy --

8 QUESTION: Right.

9 MR. KLONOFF: -- In biographical information he
10 would have referred the case to the immigration officials
11 for deportation proceedings. So the naturalization
12 examiner wouldn't personally be involved, but the
13 investigation would be a government investigation into
14 possible prosecution of a deportation.

15 QUESTION: I see.

16 MR. KLONOFF: So that's how it would work in
17 that context. Let me just make a couple of other points
18 and both of these, by the way, are fully supported by a
19 standard of materiality that endorses the criminal
20 standard.

21 The standard the petitioner proposes is more
22 onerous than in any other area of the law, criminal,
23 civil, I would refer the Court to the TSC case for
24 example, the tort examples. In no other context is there
25 a requirement that you prove an ultimate disqualifying

1 fact.

2 Now since Congress did not define materiality in
3 the statute, principals of statutory construction would
4 suggest that you would go to well-established meanings of
5 the term such as the criminal context. You would not
6 start from scratch and propose a definition that has
7 absolutely no support anywhere in the law.

8 QUESTION: Mr. Klonoff, before you get off, one
9 thing's troubling me about, let's assume that Finger's
10 testimony is properly evaluated by the Court of Appeals
11 and assume that we can't find any regulation, which you
12 haven't been able to, that says it's only victims of Nazi
13 persecution who would have been admitted on a visa.

14 MR. KLONOFF: Yes.

15 QUESTION: Now you say, nonetheless, it would
16 have been a relevant misrepresentation if Finger, on his
17 own was using that as a criteria. That would be enough to
18 render the misrepresentation which would have shown that
19 he was not a victim of Nazi persecution relevant --

20 MR. KLONOFF: If this were a well-established,

21 --

22 QUESTION: Yeah.

23 MR. KLONOFF: -- If this were a legitimate
24 policy --

25 QUESTION: Well-established. Suppose it were

1 well-established that Finger was giving preference to
2 blue-eyed people and was not allowing any brown-eyed
3 people in and he writes down blue eyes on the thing.

4 MR. KLONOFF: Well that's not, I mean, that is
5 not a legitimate policy carrying out the intent of the
6 regulation. Our point is --

7 QUESTION: Nor was Fingers if the regulation
8 doesn't say there's a preference or the victim is not --

9 MR. KLONOFF: The emphasis in the regulation, I
10 would ask that --

11 QUESTION: What do you do with my hypothetical?
12 Clearly not a relevant misrepresentation, is it?

13 MR. KLONOFF: That's not an effort to further
14 the effort the concern of Congress and the President to
15 try to get the neediest people visas. What Finger is
16 talking about is a sub-category where you identify the
17 most needy people and you say that these people who have
18 been victims of persecution are going to be the one, the
19 Court has to remember there were many, many people
20 applying for visas. Way more than were eligible under the
21 quota system and therefore, a decision on Meade had to be
22 made.

23 And we would simply ask therefore, that the
24 Judgment of the Court of Appeals be affirmed.

25 QUESTION: Thank you, Mr. Klonoff. Mr.

1 Williamson you have three minutes remaining.

2 REBUTTAL ARGUMENT OF

3 DONALD J. WILLIAMSON

4 ON BEHALF OF PETITIONER

5 MR. WILLIAMSON: Yes, thank you, Your Honor.

6 Justice Scalia, Page 53 of the Joint Appendix
7 contains the initial entry records under the so-called
8 Third Reich. The translation of that is on Page 56 of
9 Block Form indicating the date of birth which is the same
10 on the internal passport, Kaunas which is the same as the
11 internal passport, the only differential is Terage, which
12 is a county. It's a misstatement of the county. So I
13 accurately stated that in fact he did give the same
14 misinformation to the Nazi authorities.

15 Insofar as the statement that in 1948, that the
16 courts in connection with whether or not to justify the
17 refusal of a visa or the exclusion upon entry did not hold
18 for materiality. I suggest that the government read Pages
19 25 and 26 of our brief.

20 The Second Circuit in *Iorio v. Day*, a 1929 case
21 which was used as the predicate for a ruling of the
22 attorney general says, it is true that the realtor was
23 bound to tell the truth in his application. If what he
24 suppressed was irrelevant to his admission, the mere
25 suppression would not debar him.

1 But, I would like to speak to the test because
2 this case gives an excellent illustration as to why the
3 tests should be certitude tests to be consistent with
4 Schneiderman. After the Soviet deposition of the sister-
5 in-law was taken, she indicated that she was unaware that
6 her sister was married.

7 Based upon that testimony, the government
8 amended the complaint to allege that he misrepresented the
9 fact of his marriage.

10 Now it is possible that the petitioner was not
11 married in Lithuania. It is also possible that he was
12 married in Lithuania. So a possibility test under those
13 circumstances, if that was sufficient to rely on that
14 evidence would have in effect, disqualified this
15 individual under their test, the so-called identity,
16 marriage being a factor and I agree with you when it
17 didn't change his name, he didn't change his identity.

18 Now, as to probability Mrs. Kungys testified
19 that she was married in Kaunas on August 24, 1943. She
20 submits as part of the INS file of the government, her
21 internal passport, it had stamped on it the marriage
22 bureau of Kaunas with a number.

23 The government did not insist before they
24 amended the complaint to allege a misrepresentation of a
25 marriage that the simple fact of requiring the Soviets to

1 produce the marriage register of that date, she gave them
2 the date and the number.

3 What the Soviets did is typical of their
4 subjugation of their concept of justice to the interests
5 of the state. They waited until after the date that the
6 case was scheduled for trial. It was then re-scheduled.
7 The Soviets, seven weeks later produced the marriage
8 register of Kaunas, same number, same date that Mrs.
9 Kungys said.

10 So, in effect, what you have here is when you
11 require a certitude test on the government, what you are
12 doing is saying government do your job. Conduct an
13 effective investigation because if you rely upon Soviet
14 evidence, which is unreliable, you're going to get half
15 truths. But if you insist upon certitude and you do your
16 investigation accurately --

17 QUESTION: Mr. Williamson, your time has
18 expired.

19 The case is submitted.

20 (Whereupon, at 11:57 a.m., oral argument in the
21 above-entitled case was submitted).
22
23
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#86-228 - JUOZAS KUNGYS, Petitioner V. UNITED STATES

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY

Paul A. Richardson

(REPORTER)

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'87 MAY -6 P4:06