

ORIGINAL

# TRANSCRIPT OF PROCEEDINGS

IN THE UNITED STATES SUPREME COURT

JUOZAS KUNGYS,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 86-228
	)	
UNITED STATES	)	

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

Pages: 1 through 51

Place: Washington, D.C.

Date: October 13, 1987

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 -----x  
4 JUOZAS KUNGYS, :

5 Petitioner :

No. 86-228

6 v. :

7 UNITED STATES :

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

10 Tuesday, October 13, 1987

11 The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States  
13 at 10:02 a.m.

14 APPEARANCES:

15 DONALD J. WILLIAMSON, ESQ., Westwood, New Jersey; on behalf  
16 of the Petitioner.

17 ROBERT H. KLONOFF, ESQ., Assistant to the Solicitor General,  
18 Department of Justice, Washington, D.C.; on behalf of the  
19 Respondent.

C O N T E N T S

ORAL ARGUMENT OF

PAGE

DONALD J. WILLIAMSON, ESQ.

on behalf of Petitioner

11

ROBERT H. KLONOFF, ESQ.

on behalf of the Respondent

21

DONALD J. WILLIAMSON, ESQ.

on behalf of the Petitioner - Rebuttal

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

2 CHIEF JUSTICE REHNQUIST: The oral argument first  
3 this morning in No. 86-228, Kungys against the United States.

4 Mr. Williamson, you may proceed whenever you are  
5 ready.

6 ORAL ARGUMENT OF DONALD J. WILLIAMSON

7 ON BEHALF OF PETITIONER

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

10 This is the reargument of a denaturalization case  
11 involving whether a final judgment of a federal court granting  
12 naturalized citizen to an immigrant can be vacated on the  
13 grounds he misrepresented in his immigration papers that he was  
14 two years old, and that he was born in a city instead of a  
15 town.

16 At the time the Petitioner was granted his  
17 citizenship in 1954, Section 340 A of the Immigration and  
18 Nationality Act of 1952, which is 8 USC 1451(a), provided, in  
19 pertinent part, shall be the duty of the United States  
20 attorneys to institute proceedings for the purposes of revoking  
21 and setting aside the order admitting such person to  
22 citizenship, and cancelling a Certificate of Naturalization on  
23 the ground that such order and Certificate of Naturalization  
24 were procured by concealment of a material fact or by willful  
25 misrepresentation.



1           The District Court expressly found that the  
2     Petitioner, had he given the correct information on his visa  
3     application form, his visa nevertheless would have been issued,  
4     and that there is nothing to suggest that his having been born  
5     on September 21, 1915, in Reistru, would have had any effect  
6     whatsoever.

7           The Court of Appeals agreed with that finding, and,  
8     indeed, it did not declare that any of the findings of the  
9     District Court were clearly erroneous as was required by Rule  
10    52(a). Nevertheless, the Court of Appeals reversed the  
11    judgment of the District Court and by construing the  
12    alternative approach to materiality in Chaunt, as permitting  
13    proof that disclosure of Petitioner's true date and town of  
14    birth would have resulted in an investigation notwithstanding  
15    the fact that the District Court expressly found that the  
16    government's own proofs indicated that no investigation would  
17    have resulted.

18           Nevertheless, the Court of Appeals, in effect, drew  
19    an inference in favor of the government that the disclosure of  
20    the truth of his correct date and place of birth would have led  
21    to residency records in Germany, and from those residency  
22    records you could draw a further inference that he was not a  
23    victim of Nazi persecution.

24           A former vice counsel, but one who had not processed  
25    the Petitioner's papers, had testified that that was an

1 ultimate disqualifying fact. In other words, if you are not a  
2 victim of Nazi persecution, you are not eligible for a  
3 nonpreference "immigration visa".

4 However, as indicated by the statement at oral  
5 argument by the government, there was no such statute. There  
6 was no such regulation, and therefore there is no ultimate  
7 fact.

8 So the posture of the case at this point is that the  
9 government has no proof of any ultimate disqualifying fact.  
10 And their argument, therefore, is that Chaunt does not require  
11 proof of an ultimate disqualifying fact. And their further  
12 argument is that any misrepresentation, irrespective of  
13 materiality, is sufficient to have constituted a legal  
14 procurement, because the words "illegally procured" were  
15 reinstated in the Section 1451 by an amendment in 1965, which  
16 was seven years after Mr. Kungys or the Petitioner was granted  
17 his citizenship.

18 The short argument to the fact that a nonmaterial  
19 misrepresentation cannot be the basis for denaturalization is  
20 that the statute, Section 1451, explicitly requires that the  
21 misrepresentation or concealment be as to a material fact.

22 QUESTION: Well, Mr. Williamson, you say in effect  
23 then that the part of 1451 that talks about misrepresentation  
24 covers the waterfront so far as denaturalization is concerned,  
25 and that you can't bring other forms of misrepresentation in

1 under the head of illegally procured?

2 MR. WILLIAMSON: Yes, what I argue, and in fact what  
3 I think is reasonable clear is that when Congress sets forth  
4 that the basis for denaturalization when it comes explicitly to  
5 a misrepresentation must, in effect, be procured by a  
6 concealment of a material fact, that is clear language; clear  
7 in the sense that it certainly the requirement of materiality  
8 is clear.

9 To argue, in effect, because there are  
10 nonmisrepresentational forms of conduct that can in effect  
11 constitute illegal procurement irrespective of whether there is  
12 a misrepresentation, i.e., such as if a person has contracted a  
13 dangerously contagious disease and is unaware of, they could  
14 still be denaturalized; i.e., if a person engaged in rape and  
15 if there was no such question asking whether you, in effect,  
16 had engaged in rape; or whether or not you had aided the  
17 illegal entry of other aliens, those are the examples which  
18 were used in the legislative history in 1961 to indicate the  
19 reason for the change.

20 But that doesn't mean in point of fact that when you  
21 attempt to use illegal procurement as the arguments made by the  
22 government in the case of Fedorenko, and there is an  
23 interesting statement in the brief on page 18 of solicitor  
24 general, whether Petitioner's citizenship is considered to be  
25 illegally procured, or procured by misrepresentation, the

1 primary basis for its revocation, Petitioner's false  
2 representations concerning his whereabouts during World  
3 War II.

4 Accordingly, we agree that Petitioner's wartime  
5 activities, specifically his guard duty at Triblinka must be  
6 shown to be material facts within the meaning of 8 USC 1451(a).  
7 That was the case -- the government argued that in Fedorenko in  
8 its brief. This is the brief of the United States in that  
9 case. And, indeed, that particular portion of the brief, I  
10 believe, was the basis when Justice Marshall speaking for the  
11 majority in Fedorenko indicated that notwithstanding the fact  
12 that the petitioner there had misrepresented his country of  
13 birth on his visa, but that did not end the judicial inquiry.  
14 Justice Marshall speaking for the majority court said, "We  
15 agree with the government that that does not end the judicial  
16 inquiry, because the test is still materiality."

17 Indeed, the question there was still materiality as  
18 to whether or not the status of being a concentration camp  
19 guard, in effect, was a predicate for denaturalization. And,  
20 indeed, that particular case was an illegal procurement case.

21 QUESTION: Mr. Williamson.

22 MR. WILLIAMSON: Yes.

23 QUESTION: Even if you are correct that there is a  
24 requirement of materiality, ordinarily a material fact is one  
25 that is important to the decision-maker, rather than one that



1 is necessarily decisive. Isn't there a difference there?

2           You seem to be arguing that materiality means it has  
3 to be a fact that is decisive rather than something merely  
4 important to making the decision.

5           MR. WILLIAMSON: Yes. I think it's an academic  
6 discussion on behalf of the client I represent, because I don't  
7 think the misrepresentations that he made in his petition for  
8 naturalization or his visa application were even important.  
9 However --

10           QUESTION: Well, certainly that's debatable.

11           MR. WILLIAMSON: Yes. However, not important in the  
12 sense that it obviously could not have affected the decisions  
13 to whether the visa, and it certainly doesn't affect the  
14 ability to grant the citizenship.

15           But I would also state --

16           QUESTION: But it might be important to the decision  
17 whether to grant it.

18           MR. WILLIAMSON: Well, once the decision is made to  
19 grant the visa, the vice counsel loses his jurisdiction. At  
20 that point in time its a judicial determination, and the  
21 determination of what is important or not important goes to the  
22 question of whether, (a) he was eligible in the first instance,  
23 or (b) whether he was in the categories that are excludable.

24           And this traces all the way back, and it's very  
25 interesting because I traced the history as to whether or not

1 even with respect to a visa, it had to be a material fact and  
2 one which is beyond important, i.e., that is really is decisive  
3 because that is the alternative dictionary meaning. Having  
4 great consequences is one of the definitions which I saw in a  
5 dictionary.

6 QUESTION: Well, what if we think it means just  
7 important to the decision?

8 MR. WILLIAMSON: Well, then I would argue, in effect,  
9 that in light of the nature of the misrepresentations which  
10 were made in preceding cases, that none of these  
11 misrepresentations rise to the dignity of those particular  
12 cases.

13 QUESTION: Mr. Williamson, suppose these lies were  
14 told expressly with the intention of getting a benefit under  
15 the immigration laws?

16 MR. WILLIAMSON: Well --

17 QUESTION: Would that not be a material  
18 misrepresentation? And if he succeeded and he got the visa  
19 because the lies he told were believed, and whoever the  
20 immigration officer was consequently accommodated him and gave  
21 him the visa.

22 MR. WILLIAMSON: Well, let me say this. If in fact  
23 it was not a false perception, in other words, if indeed he  
24 perceived that these lies were significant, then merely the  
25 question of intent --

1           QUESTION: I am just wondering whether or not he did.  
2 If in fact they were told, for the purpose of getting something  
3 from the immigration officer, and he succeeded, wouldn't that  
4 end the inquiry?

5           MR. WILLIAMSON: Well, according to Judge Learned  
6 Hand, it would not.

7           The cases trace back all the way to the case of  
8 United States v. Iorio Day. There is a case in which the  
9 petitioner there, or the person who sought to obtain the visa,  
10 denied that he had ever been in prison. Obviously, he  
11 perceived that denying that he had ever been in prison was  
12 significant and that his perception would naturally be that  
13 that would influence the vice counsel.

14          What Judge Learned Hand said in Iorio v. Day was it's  
15 true that the relator is bound to tell the truth. But if what  
16 he suppressed was irrelevant to his admission, its mere  
17 suppression would not debar him.

18          So the first question comes down to at most whether  
19 the facts, had he disclosed them, would have been enough to  
20 justify the refusal of a visa or exclusion upon entry. The  
21 appellant did not suppress from the vice counsel facts which  
22 would have justified in refusing a visa had he disclosed it.

23          So that in other words --

24          QUESTION: Was this speaking of 1101, or was it 1451?

25          MR. WILLIAMSON: No, this was speaking in terms of

1 what is the predicate necessary to deport an alien. In that  
2 particular instance, what Judge Learned Hand was addressing  
3 himself was the 1924 Act. The 1924 Act is the same act under  
4 which this Petitioner was brought in. And he was not  
5 addressing himself to 1001. What he was addressing himself to  
6 was, in effect, whether or not this particular immigrant could  
7 be, or alien could be deported because his visa wasn't valid.

8 QUESTION: Well, he may be quite correct in what he  
9 says there as far as 1451(a) is concerned.

10 MR. WILLIAMSON: Right.

11 QUESTION: I thought we were talking here about a  
12 materiality requirement for 1101(f)(6).

13 MR. WILLIAMSON: Well, 1101(f)(6), in my judgment,  
14 does not come into play, because, in effect, 1101(f)(6) is  
15 simply the means of determining whether or not a person is  
16 qualified for naturalization. And this court as far back as  
17 Scheiderman has always distinguished between naturalization and  
18 denaturalization.

19 Here, in effect, we're not talking about the burden  
20 that the applicant has to bear in order to be naturalized.  
21 We're talking about the burden that the government has to bear  
22 in order to vacate a judgment of a court. And that's why, of  
23 course, the evidence has to be clear, convincing,  
24 unequivocal.

25 QUESTION: Shifting the burden doesn't -- shifting



1 the burden of who has to prove it doesn't change what has to be  
2 proven.

3 MR. WILLIAMSON: No, I think that the distinction  
4 covers more than shifting of the burden. The distinction goes  
5 to the very nature of the right that is at stake. And I  
6 believe that, as Justice Blackman indicated in his concurring  
7 opinion in the Fedorenko case, that once we discuss the  
8 question of citizenship already granted, in order to vacate it  
9 the only section of the statute which applies is 1451(a).

10 But in any event, each of the courts that have  
11 addressed this issue --

12 QUESTION: Textually, how do you get to that?

13 MR. WILLIAMSON: Well, textually the way that I get  
14 to it is that 1451 states the requirements for  
15 denaturalization. And it states that it must be procured by  
16 the misrepresentation of a material fact.

17 When it comes to illegal procurement, as Justice  
18 Brennan indicated in the Costello case, the reason for the  
19 inclusion of the language of misrepresentation of material fact  
20 was to distinguish between intrinsic fraud and extrinsic fraud,  
21 but clearly it was not the situation given a lucid definition  
22 of misrepresentation.

23 There is nothing in the legislative history to  
24 suggest that. There is nothing in the legislative history to  
25 suggest the incorporation of 1101, or 1101(f)(6). So that I

1 would suggest that the distinction goes beyond the mere burden  
2 of proof.

3 But in any event, getting back to Justice O'Connor's  
4 question if I may, I think that it's more than simply the mere  
5 dictionary meaning. When we look at Black's Law Dictionary,  
6 Black's Law Dictionary addresses I think a more pertinent  
7 aspect of it, because it goes to the question of material fact  
8 in the context of the law, in the context of a contract, and  
9 the contracts of insurance policies, in the context of a  
10 pleading, in a context, for example, of a Motion for Summary  
11 Judgment.

12 In those particular instances the cause and effect  
13 relationship of materiality, it's without which the particular  
14 contract wouldn't have been granted. The insurance policy  
15 wouldn't have issued.

16 So in this particular instance, it has to be more  
17 than simply important. It is a but for requirement, and I  
18 believe the language of the statute indicates that pretty  
19 clearly, because it doesn't simply say material fact in the  
20 abstract. It says procured by, not capable of being procured  
21 by, not could have been procured by, but procured by -- very  
22 strong word.

23 And again as indicated by Justice Douglas, it was  
24 referred to in the other opinions, fraud and misrepresentations  
25 are strong words. Strong words require a vigorous burden of

1 proof. They require a vigorous application before we vacate a  
2 judgment of a court. And what the government is seeking is a  
3 soft definition of a harsh term.

4 So to merely say it's important, I would suggest,  
5 does not do justice to the rights that are at stake here.  
6 These consequences of denaturalization are far more serious  
7 than fine and imprisonment. And I don't mean to trivialize  
8 fine and imprisonment, and I don't mean to trivialize the fact  
9 of lying. Obviously, lying is not to be encouraged.

10 On the other hand, anytime that a person "lies" it  
11 doesn't necessarily mean that under any of the statutes the  
12 mere fact of lying results in consequences.

13 QUESTION: I don't know. This was all about 1947,  
14 was it?

15 MR. WILLIAMSON: Yes.

16 QUESTION: Most of these visas were?

17 MR. WILLIAMSON: Yes.

18 QUESTION: And we had a great many immigration  
19 officers, I gather, handling these applications, did we not?

20 MR. WILLIAMSON: There was clearly a policy that  
21 because of the pressures in Europe, because of so many  
22 displaced persons that were there, that there was all efforts  
23 were to be made to bring these immigrants in.

24 QUESTION: Well, suppose, however, there were an  
25 administrative practice at that time that if anyone admitted

1 that he had lied, as Kungys did, that automatically he would be  
2 denied a visa.

3 MR. WILLIAMSON: But there wasn't any such  
4 administrative practice, and indeed --

5 QUESTION: I'm just asking what if there had been.

6 MR. WILLIAMSON: Well, if there had been, then the  
7 question really would be, in effect, is would that have been  
8 totally --

9 QUESTION: In other words, if he didn't confess that  
10 he had lied, that as soon as they detected that he had he would  
11 automatically be denied as a matter of administrative practice.

12 MR. WILLIAMSON: Lying as to anything?

13 QUESTION: Yes.

14 MR. WILLIAMSON: If he lied as to anything, then I  
15 would suggest that the vice counsel is not the final  
16 determinant. The final determinant at that time would have  
17 been the counsel, attorney counsel for the State Department.  
18 And in turn, that would be reviewed by a court.

19 When those situations at that time were reviewed by  
20 the court such as in the Tepper case, Judge Irving Kaufman  
21 indicated in that case the question is not whether or not the  
22 vice counsel would have decided that he lied, and therefore  
23 would have in effect denied the visa. The question is whether  
24 or not he had done so on a ground specifically excludable by  
25 law. And the fact of the matter is that the regulation then in



1 effect specifically stated that the grounds of exclusion are  
2 those grounds which are specifically listed in the application  
3 for the visa, and any law is not set forth there.

4 What is set forth in the visa application refers to  
5 misrepresentation as to a material fact. The test has always  
6 been a material fact.

7 Indeed, getting back to Justice Scalia's question  
8 about whether or not you could bring in other statutes. The  
9 fact of the matter is that the courts have never held that any  
10 lie even in those statutes. They have, in effect, engrafted a  
11 judge made interpretation of even 1001, but notwithstanding the  
12 language "any misstatement". It means, in effect, any material  
13 misstatement, so it excludes innocuous lies.

14 In addition to which the courts have even accepted  
15 the question of the exculpatory no, because, for example, on  
16 this visa application what you had was the specific question,  
17 18(c) I believe it was, have you ever in effect made any  
18 misrepresentations in order to gain benefits under the act.  
19 The simple answer is no.

20 The courts have engrafted into similar language under  
21 1001, the defense that's not covered by it because otherwise in  
22 effect you would be violating the privilege against self-  
23 incrimination and other particular policy considerations. So  
24 we have always looked to the question of materiality.

25 QUESTION: Well, Mr. Williamson, don't we have to go

1 through -- isn't it necessary to go through the same sort of an  
2 inquiry at the naturalization stage?

3           Something might be immaterial at the visa stage and  
4 quite material at the naturalization stage.

5           MR. WILLIAMSON: Yes, I agree that you must go  
6 through the inquiry at the naturalization stage. But, again,  
7 for example by virtue -- in Fedorenko.

8           In Fedorenko, Fedorenko indicated to the examiner at  
9 the time that he had lied with respect to his country of birth.  
10 And the examiner at that time said that's of no concern to us.  
11 So in point of fact, it really comes down to whether at that  
12 stage, and again it's not any lie, but whether or not they  
13 could have legitimately denied naturalization. And the  
14 question would be the significance of a lie.

15           Let me give an illustration. Suppose, for example,  
16 we had a --

17           QUESTION: Well, at the naturalization stage if he  
18 had said, yes, I lied on my visa application.

19           MR. WILLIAMSON: Yes.

20           QUESTION: Then there would have been an inquiry what  
21 did you lie about.

22           MR. WILLIAMSON: Correct.

23           QUESTION: And you would have gotten into where he  
24 lived and what he did at the critical time, wouldn't you?

25           MR. WILLIAMSON: Well, what you have gotten into is

1 the truth. And the question is what is the consequence of the  
2 truth, and that's what we have said that the test was in  
3 Chaunt.

4 QUESTION: Well, living in this particular -- living  
5 in this particular city might have -- at that time might have  
6 meant something different to the person presiding over the  
7 naturalization than --

8 MR. WILLIAMSON: Not in this case.

9 QUESTION: -- over the visa.

10 MR. WILLIAMSON: Not in this case. The District  
11 Court specifically held, relying upon the evidence of the  
12 government of vice counsel, the residence in Kedainiai was of  
13 no effect whatsoever.

14 QUESTION: I know that's at the visa stage.

15 MR. WILLIAMSON: Even at --

16 QUESTION: That's at the visa stage, and the reason  
17 is that probably nobody knew there were any events that had  
18 happened at that time.

19 MR. WILLIAMSON: There was no knowledge that any  
20 events happened in 1954 when he was granted his citizenship  
21 either.

22 QUESTION: Well, everybody knew that. Everybody knew  
23 what had gone on at that time.

24 MR. WILLIAMSON: In 1954, there was no indication  
25 with respect to Kedainiai that had any significance whatsoever.

1 But let me turn around the other way. What he said  
2 was --

3 QUESTION: Well, at least there was no -- nobody  
4 expressly expressed that in the District Court or the Court of  
5 Appeals.

6 MR. WILLIAMSON: The reason for it is --

7 QUESTION: Did they?

8 MR. WILLIAMSON: They did not address whether in  
9 1954, but what said in effect no investigation would have  
10 resulted as a result of the disclosure of the truth.

11 But let me put it the other way. If in point of fact  
12 there was concern about Lithuania at that time, he indicated he  
13 was born in Kaunas. A greater number atrocities occurred in  
14 Kaunas than elsewhere.

15 And let me also say that his application was  
16 processed at the same time as his wife. She indicated she  
17 lived in Kedainiai. In addition to which we have other people  
18 who testified, such as Juozas, who indicated they lived in  
19 Kedainiai. Kedainiai was of no significant to the grant of the  
20 petitions for naturalization either.

21 QUESTION: Well, that's your version of the record.

22 MR. WILLIAMSON: Well, I don't know of any other  
23 version, with all due respect.

24 QUESTION: Well, it isn't a version of any court that  
25 I know of.



1 MR. WILLIAMSON: Well, the Court of Appeals was  
2 fairly strong in its language.

3 QUESTION: Well, the Court of Appeals ruled against  
4 you.

5 MR. WILLIAMSON: Well, not on that particular issue.

6 QUESTION: Exactly, but on the materiality ground  
7 they did.

8 MR. WILLIAMSON: Well, when it came to that  
9 particular issue, they indicated that there was no evidence  
10 that the government had knowledge.

11 In any event, I don't have the exact -

12 QUESTION: That's all right. Go ahead, go ahead.

13 MR. WILLIAMSON: -- page of it, but I would suggest,  
14 Mr. Justice, that indeed the Third Circuit Court of Appeals on  
15 that particular issue said with respect to the residence in  
16 Kedainiai, we agree with the District Court that that finding  
17 was not material.

18 QUESTION: But it didn't address at the  
19 naturalization stage either.

20 MR. WILLIAMSON: They addressed it, I believe, in its  
21 totality when they had to come to the conclusion that the  
22 disclosure of the truth of the residence in Kedainiai would not  
23 have been material. It would not have been material in the  
24 context of the case either to the visa application or to the  
25 grant of citizenship since those are both of the issues.

1           And, indeed, since we're attempting to fall back the  
2   naturalization representations back at the visa stage to go to  
3   the question of illegal procurement, I would suggest to you  
4   that that finding by the District Court and, in effect, the  
5   indication not only by the Court of Appeals that it wasn't  
6   clearly erroneous, but that they agreed with it indicted that  
7   my version of it I think is supported by the record.

8           I have noticed that my light is on. I would like to  
9   reserve the balance of my time for rebuttal.

10          CHIEF JUSTICE REHNQUIST: Thank you, Mr. Williamson.

11          We will hear now from you, Mr. Klonoff.

12          ORAL ARGUMENT OF ROBERT H. KLONOFF

13          ON BEHALF OF THE RESPONDENT

14          MR. KLONOFF: Mr. Chief Justice, and may it please  
15   the Court:

16          The denaturalization laws are quite clear. There are  
17   two separate grounds for denaturalizing someone.

18          Number one, a material misrepresentation ground, and  
19   number two, illegal procurement. And Mr. Williamson has never  
20   responded to our textual argument that illegal procurement is a  
21   separate and distinct form of denaturalization.

22          QUESTION: But, Mr. Klonoff, ordinarily when you are  
23   construing a statute such as 1451, the section we're talking  
24   about, where it covers quite elaborately the ground of  
25   misrepresentation as the basis for denaturalization, and then

1 something else is there, illegal procurement, you would not  
2 think that illegal procurement embraced also misrepresentation  
3 which is elaborately covered in virtually the next sentence.

4 MR. KLONOFF: Well, I have two answers for that, Mr.  
5 Chief Justice.

6 First of all, as we have explained, the requirements  
7 for false testimony under illegal procurement are quite  
8 different than the requirements for material misrepresentation.  
9 And there are category of cases in which the government could  
10 prove illegal procurement, but not material misrepresentation  
11 and vice-versa, and I'll get to that in a minute.

12 The second point, however, is that that is simply not  
13 the way the legislative history suggests Congress was focusing  
14 on this. The illegal procurement legislative history in 1961  
15 reveals that Congress' purpose was to bring in all of the  
16 1101(f).

17 Now Mr. Williamson says that this court should pick  
18 and choose. But Congress said that 1101(f) defines who does  
19 not have good moral character, and Congress made clear in 1961  
20 that individuals who lacked good moral character could be  
21 denaturalized under an illegal procurement theory.

22 Now if it were correct that Congress did not want to  
23 bring --

24 QUESTION: Simply because they lacked it, they had to  
25 do nothing but lack it at the time?

1 I mean, let's suppose they made no misrepresentations  
2 concerning the fact that they had been convicted of a murder  
3 which is one of the bases of bad moral character.

4 MR. KLONOFF: Well, textually that's a different --  
5 the statute 1101(f)(6) does not refer to false testimony about  
6 the other subsections of (f). It talks about any false  
7 testimony given for the purpose of obtaining immigration  
8 benefits.

9 QUESTION: No, but let me finish my question.

10 The fact is that this individual had been convicted  
11 of a murder, didn't misrepresent anything about it. It is  
12 later found that he had been convicted of a murder. And you  
13 say that the illegally procured language in 1451 then enables  
14 the government to back, because it made a mistake when he was  
15 naturalized, to denaturalize him.

16 MR. KLONOFF: That's correct. And in fact that --

17 QUESTION: Any mistake in the original naturalization  
18 can form the basis for denaturalization under 1451.

19 MR. KLONOFF: Well, not any mistake. It has to -- if  
20 somebody was naturalized when they did not meet the  
21 requirements for naturalization can be denaturalized. This  
22 court has been clear on that in cases going back to Ginsberg in  
23 which --

24 QUESTION: You're really hanging on a thin string if  
25 you have been naturalized now, aren't you?



1           QUESTION: Does that mean -- I wanted to follow up  
2 on that if you don't mind, Judge Scalia.

3           Does that mean a habitual drunkenness is a basis for  
4 not being of good moral character? That would me, I  
5 understand then, that the government would always be open to  
6 review the past history of any naturalized citizen to find if  
7 at the time he was naturalized he was in fact sufficiently  
8 alcoholic to fit into that category.

9           MR. KLONOFF: We think that's exactly what Congress  
10 intended. We would urge the court to examine the 1961  
11 legislative history.

12          QUESTION: And any other ground that would show a  
13 lack of good moral character at the time remains a permanent  
14 form of jeopardy for the naturalized citizen.

15          MR. KLONOFF: That's what we believe Congress  
16 intended. Congress in fact pointed out that, for example,  
17 Mr. --

18          QUESTION: Well, in that situation -- let me take it  
19 one step further.

20          Supposing a person realizes that although he  
21 inadvertently did disclose some disqualifying circumstance  
22 after he has been here for 20 years living a blameless life, he  
23 realizes that there is this blot on his record. Is there any  
24 way he can correct the record?

25          Can he come in and say, look, I made this mistake. I

1 didn't do any -- you know, is there any way he can protect  
2 himself from that risk by making appropriate disclosures 20  
3 years later?

4 MR. KLONOFF: Certainly one ground would be in a form  
5 of prosecutorial discretion not to bring a denaturalization --

6 QUESTION: Well, but I thought the statute was  
7 mandatory on 1451(a).

8 MR. KLONOFF: Well, I was going to follow up with  
9 that. That is -- the statute does seem to suggest that the  
10 U.S. Attorney shall bring --

11 QUESTION: It says so in so many words.

12 MR. KLONOFF: We think that when Congress in '61  
13 restored illegal procurement, they were talking about  
14 individuals who got in who had committed murders, for example,  
15 but were never asked, did you commit a murder. And Congress  
16 was frustrated at the fact that in those cases where somebody  
17 never qualified for naturalization the government was powerless  
18 to act.

19 It must be remembered we're only talking about a  
20 category of people who were not entitled to citizenship in the  
21 first place. We're not talking about bringing --

22 QUESTION: Yes, but don't you think illegally  
23 procured means something different from received without proper  
24 qualification? Don't you think there is some more active  
25 connotation to illegally procured?

1 MR. KLONOFF: That's not the view that this court has  
2 taken. I was going back, for example, to the Ginsberg case  
3 where the court said that where somebody didn't meet the  
4 qualification of citizen because a proceeding was held in  
5 chambers rather than open court, the court said this person  
6 lacked a statutory requirement for citizenship, and therefore  
7 it was illegally procured.

8 All I can suggest is that the court examine the  
9 legislative history in '61, because we would submit it's fully  
10 consistent with the position we are taking.

11 QUESTION: Let me ask one other question.

12 I hadn't reexamined the Fedorenko case, but your  
13 opponent seemed to say you shifted your position. Is that  
14 correct?

15 MR. KLONOFF: We did not, Mr. Justice Stevens. In  
16 counsel's reading of our brief, he failed to note an important  
17 fact. Namely, the government did not argue 1101(f)(6) to this  
18 court in Fedorenko. We were not addressing that issue at all.

19 QUESTION: But what he read seemed to suggest that  
20 you in effect conceded that it would not apply.

21 MR. KLONOFF: We conceded --

22 QUESTION: Or at least impose any higher standard.

23 MR. KLONOFF: We conceded with respect to Section 10  
24 of the Displaced Persons Act that there was a materiality  
25 requirement as to that statute. And as we explained in our

1 supplemental brief, we think the purposes of the Displaced  
2 Persons Act were quite different than the purposes of good  
3 moral character statute, 1101(f)(6), and that it was  
4 appropriate, we felt, for a court to read materiality into  
5 Section 10.

6 We in no way addressed whether there was a  
7 materiality requirement under 1101(f)(6).

8 QUESTION: So any position you advanced in Fedorenko  
9 would still be your position.

10 MR. KLONOFF: Absolutely. We have no --

11 QUESTION: We can rely on that.

12 MR. KLONOFF: -- question, number one, as to the  
13 material misrepresentation aspect. The statute speaks in terms  
14 of concealment of a material fact or willful misrepresentation.  
15 We don't retract our concession that the misrepresentation must  
16 be material also. That's under the material misrep part of  
17 1451(a).

18 We similarly have conceded, and still do that there  
19 is a materiality requirement under Section 10 of the DP Act.  
20 But this is quite a bit different for two reasons.

21 Number one, neither one of those statutes in any way  
22 addressed someone's good moral character. And as we have  
23 explained, someone who deliberately lies under oath for the  
24 purpose of obtaining immigration benefits, we submit, does not  
25 possess good moral character. So the purposes are quite



1 different, we would submit. And, therefore --

2 QUESTION: So if you deliberately lie under oath for  
3 the purpose of obtaining naturalization, you do not possess  
4 good moral character even though the misrepresentation may not  
5 be material.

6 MR. KLONOFF: That's our position, and on the other  
7 hand the government has to show that the person's intent was to  
8 obtain immigration benefits. And as we have explained, that's  
9 a difficult burden. And ordinarily if a lie has absolutely  
10 nothing to do with any of the issues of immigration, it's going  
11 to be exceedingly difficult for the government to show that the  
12 person's intent in lying was to obtain immigration benefits.

13 QUESTION: Indeed, there is not a whole lot of  
14 difference between that and a materiality requirement, is  
15 there?

16 MR. KLONOFF: Well, there is a difference.

17 QUESTION: You have to assume that the person is  
18 stupid; that is that although he thinks this fact does not have  
19 any significant bearing upon whether he will be naturalized or  
20 not, he nonetheless lies about it.

21 MR. KLONOFF: I don't think you have to -- you have  
22 to assume that someone is misinformed. Let me just give an  
23 example that may illustrate the point.

24 An individual is applying for a government benefit,  
25 let's say naturalization or a visa, and his wife is present.

1 And he is under the mistaken impression that age is relevant to  
2 the decision that the government is making. And so in order to  
3 obtain the government benefit he deliberately lies about his  
4 age.

5 Now we think that's the type of case that fits into  
6 the good moral character provision. The person with the intent  
7 to --

8 QUESTION: -- no materiality?

9 MR. KLONOFF: Well, if he is mistaken that age has  
10 nothing to do -- I'm assuming no materiality just for purposes  
11 of the hypothetical.

12 That person clearly lacks good moral character, we  
13 would submit, regardless of whether age is material.

14 QUESTION: Do you think a young man who lies about  
15 his age to get into the Marines never could have good moral  
16 character?

17 MR. KLONOFF: I'm not sure. It really would --

18 QUESTION: Under your argument, I would think he's  
19 conclusively presumed to have bad moral character.

20 MR. KLONOFF: We think that Congress made that  
21 conclusive presumption. This isn't something that we're  
22 inventing. We are construing the statutory language.

23 Let me just round the situation out. Let's say that  
24 age is fundamentally important to the decision that's being  
25 made, but the person doesn't know this. He lies about his age

1 not because he's trying to obtain immigration benefit, but  
2 because his wife is sitting there next to him and throughout  
3 their marriage he has lied about his age and he doesn't want to  
4 tell the truth.

5 Now, that type of lie is willful. He clearly was  
6 lying deliberately, but he wasn't lying to obtain immigration  
7 benefits. That is where the material misrep provision fits in.  
8 He has made a material misrepresentation and it's willful, but  
9 he doesn't fit within the good moral character provisions.

10 So we would submit that the two statutes really do  
11 reach out to different types of people, and that that is  
12 precisely what Congress intended.

13 QUESTION: Mr. Klonoff, did the District Court in  
14 this case ever determine the purpose for which the Petitioner  
15 lied?

16 MR. KLONOFF: He did, Justice O'Connor. And  
17 counsel --

18 QUESTION: Was it determined that it was for the  
19 purpose of obtaining immigration benefits?

20 MR. KLONOFF: He did. I would refer the court to  
21 page 120(a) of Petitioner's appendix. The District Court, in  
22 describing the visa documents, stated that the documents were  
23 false in that they stated the defendant had not previously  
24 given false testimony to obtain benefits under the Immigration  
25 and Naturalization Laws.

1 QUESTION: You are reading from 120(a) of?

2 MR. KLONOFF: 120(a) of the Petitioner's appendix.

3 The paragraph beginning, "On October 3, 1953". It's the second  
4 half of the second sentence.

5 The court necessarily had to have found in making the  
6 observation that Petitioner lied on his visa papers that the  
7 reason for his lying was to obtain immigration benefits.  
8 Otherwise, he would have been telling the truth.

9 QUESTION: Well, now you are relying on the sentence  
10 that says, "The documents were false as to defendant's date and  
11 place of birth."

12 MR. KLONOFF: Right.

13 QUESTION: "And in that stated that defendant had not  
14 previously given false testimony to obtain benefits under the  
15 Immigration and Naturalization Laws."

16 MR. KLONOFF: That's correct. If the District Court  
17 believed that the purpose of the lie was not to obtain  
18 immigration benefit, he could not have made that finding.

19 QUESTION: But it's a rather opaque finding, isn't  
20 it?

21 MR. KLONOFF: Well, it isn't --

22 QUESTION: It's certainly not explicit.

23 MR. KLONOFF: Well, we think that if -- I mean, there  
24 is no other explanation for that statement other than that the  
25 court concluded that the purpose of the lies was for



1 immigration benefits.

2 It's consistent, by the way, with the rest of the  
3 District Court's opinion, because the District Court concluded  
4 that the government didn't qualify in 1101(f)(6) grounds for  
5 one reason; namely, his conclusion that 1101(f)(6) required  
6 materiality.

7 Had the District Court felt that the statements were  
8 not given for the purpose of obtaining immigration benefits,  
9 one would have assumed, given this thorough opinion, that the  
10 District Court would have rejected the government's argument  
11 not only because of the materiality point, but also because of  
12 the purpose of the lies.

13 We think that when that statement is read in  
14 conjunction with the court's finding that the government didn't  
15 qualify under 1101(f)(6) only because of the materiality which  
16 the court read into the statute, we think it is reasonably  
17 clear.

18 I would agree that the court did not state  
19 affirmatively, I hereby find, but we think that that's --

20 QUESTION: Well, not only that. We don't really know  
21 from -- it's not only secondhanded sort, but it's also that we  
22 don't know what test the court was using with respect to the  
23 language for the purpose of obtaining benefits.

24 MR. KLONOFF: Well, Justice Scalia --

25 QUESTION: We don't know that that court, that the

1 District Court had in mind the same theory about the two kinds  
2 of lies about age that you have just given us.

3 MR. KLONOFF: Well, Judge Scalia, certainly the court  
4 would not require before the government could rely on a  
5 District Court finding of fact that the District Court couple  
6 it with an exhaustive legal analysis. I mean, of course we  
7 don't know exactly --

8 QUESTION: No, all I require is that I know what the  
9 District Court is talking about, and I don't really know what  
10 the District Court means here by false testimony to obtain  
11 benefits. I just have to take on faith that it means what you  
12 say that phrase means, which doesn't -- you know, that's not an  
13 obvious meaning.

14 MR. KLONOFF: Well, certainly there is absolutely  
15 nothing in the opinion to suggest to the contrary, we would  
16 submit. I mean, the District Court certainly didn't say that  
17 that was not its purpose. The District Court wondered why  
18 somebody would lie about these things, but we think that this  
19 is the closest thing there is to a finding, but let me follow  
20 up on that because this relates to points we made both in our  
21 opening and our supplemental briefs.

22 However that intent requirement is proven, it would  
23 be difficult for the government to prove it in a situation  
24 where you have one lie that's inconsequential, that doesn't  
25 relate to issues of immigration or naturalization.

1           However, when you have a pattern of lies, it becomes  
2 inescapable that the person's intent was to obtain immigration  
3 benefits.

4           Here, for example, what's quite powerful, we would  
5 submit, is that the individual not only lied at the visa stage  
6 but at the naturalization stage. He has given a number of  
7 explanations. He was trying to evade the Germans, trying to  
8 avoid conscription. Those explanations are meaningless at the  
9 naturalization stage. There was absolutely no reason for  
10 someone to perpetuate those lies many years later when the  
11 person was safely in the United States.

12           So we would submit that that pattern of false  
13 testimony at every purpose extending, by the way, to testimony  
14 in 1975 before an immigration --

15           QUESTION: But at the naturalization stage could he  
16 have acknowledged that he had lied in order to obtain benefits  
17 under the Act; namely, a visa and so forth, and still been  
18 eligible for citizenship?

19           MR. KLONOFF: Well, we doubt that he would have  
20 acknowledged --

21           QUESTION: No, but if he had acknowledged, would he  
22 have been eligible for citizenship?

23           MR. KLONOFF: He may not have. He probably would not  
24 have.

25           QUESTION: He would not have under your theory.

1 MR. KLONOFF: He probably would not have. There are  
2 many, many --

3 QUESTION: Then how do you -- I mean, if once he has  
4 made a lie, he's hooked. He's got to stick to his story or he  
5 will never get in. Isn't that --

6 MR. KLONOFF: Well, that's certainly not a reason for  
7 this court to sanction it.

8 QUESTION: No, no, I'm not. But I don't see how the  
9 second lie really compounds the first. You can rely just --  
10 you are emphasizing how bad he was by saying he didn't  
11 straighten it out at the naturalization stage. But he couldn't  
12 have.

13 MR. KLONOFF: Well, because it goes to his intent.  
14 If his real intent was not to obtain immigration benefits, then  
15 he would have straightened it out.

16 The question that I was asked had to do with his  
17 intent, and we would submit that if his intent was to obtain  
18 immigration benefits, he would perpetuate the lie. If his lie  
19 was given for another reason, then he could straighten it out  
20 and he would be entitled --

21 QUESTION: Well, maybe the lie was given for another  
22 reason. Maybe the lie was given for another reason, but he  
23 knew that if he didn't make it he wouldn't get in, because he  
24 can't. Once he has lied -- having committed one lie, he's  
25 through.



1 MR. KLONOFF: I would respectfully --

2 QUESTION: And one lie for the purpose of getting  
3 some benefit. He think he will be better off if he describes  
4 himself as born in a different city, and that's not true.

5 MR. KLONOFF: With all respect, Justice Stevens, I  
6 would submit if somebody had an intent other than to obtain  
7 immigration benefits, and he explained that to the  
8 naturalization examiner, here is why I lied, it was not to  
9 obtain immigration benefits. It was because I afraid of being  
10 conscripted. He would still be eligible for citizenship.

11 QUESTION: No, no, no. I'm assuming with you the  
12 first lie was when he thought he had to misrepresent his age;  
13 it would be advantageous to him. He's dead.

14 MR. KLONOFF: That's correct, that as he would be if  
15 he was able to get into the country having successfully  
16 concealed that he had been convicted of a murder, or one of the  
17 other good moral character requirements. We don't think there  
18 is anything anomalous about that.

19 In fact, we would submit that if there is any anomaly  
20 there, it's for Congress to correct. These kinds of extreme --

21 QUESTION: Do we take it that one has an intent to  
22 procure it falsely if one merely has an intent to procure what  
23 he believes he is entitled to more promptly than would  
24 otherwise occur; is that an intent to procure it falsely?

25 I mean, what he says here is that he lied about his

1 age and his place of birth because some of the documents that  
2 he had that had been prepared by the Germans had those things  
3 on them. And in order to facilitate the process, he was  
4 worried if he came up with different places it would take a lot  
5 longer.

6 But in his mind he didn't think it would make any  
7 difference where he was born really, or whether was a couple of  
8 years younger or older. He just didn't want the process to  
9 take longer than it otherwise would.

10 Now is that intending to procure it falsely, or  
11 simply to facilitate the proper procurement of it.

12 MR. KLONOFF: Let me respond to that in two ways.

13 First of all, in the facts of this case that  
14 explanation doesn't withstand scrutiny. He had in his  
15 possession documents that bore his true date and place of  
16 birth. So he did not -- that explanation is simply without  
17 merit.

18 QUESTION: Is there a finding to that effect that  
19 that couldn't be the basis of --

20 MR. KLONOFF: The District Court --

21 QUESTION: I mean it depends on what the District  
22 Court means by --

23 MR. KLONOFF: He never argued --

24 QUESTION: -- to obtain benefits which you and I  
25 agree it never said what it means by it.

1           MR. KLONOFF: That argument was made for the first  
2 time in this court at oral argument. There is no finding. His  
3 argument throughout this case is that the reason he lied was to  
4 avoid conscription in the German Army.

5           QUESTION: Do we know that the District Court did not  
6 mean that by to obtain benefits when it said had not previously  
7 given false testimony to obtain benefits under the  
8 immigration -- do we know that that's not what the District  
9 Court was talking about?

10          MR. KLONOFF: Well, as I said, we don't know exactly  
11 what the District Court was talking about. It isn't as clear  
12 as it could have been in the sense of elaboration. We submit  
13 that it's sufficient for a finding, but let me respond further  
14 to your question.

15           Somebody who lies in order to get ahead of the pack  
16 or to push the process along absolutely fits within what the  
17 government is arguing here, because the court has to remember,  
18 this is a quota system, and the quota is going to run out. And  
19 if somebody lies to get ahead of the pack, he's going to get a  
20 visa that otherwise would have gone to someone else who went  
21 through the honest process of getting correct identification  
22 documents.

23           So we would submit that someone like that also lacks  
24 good moral character if his purpose is to jump ahead of the  
25 pack and get immigration benefits.

1           If I could --

2           QUESTION: You know, there are a lot of people that  
3 came to this country who were given different names at Ellis  
4 Island. The immigration officer couldn't pronounce the name,  
5 and they said, well, Sam, is that okay? Yeah, that's my name  
6 Sam. Now his name wasn't Sam.

7           Did he give that name to procure the visa, or to  
8 procure admission to the United States, falsely to procure?

9           MR. KLONOFF: That's a factual question in each case,  
10 we would submit.

11          QUESTION: He just wants to facilitate the thing.  
12 The guy will never learn how to spell Salvator, or whatever the  
13 name is, and the officer -- it's happened very often.

14          MR. KLONOFF: It has to be a question of fact. If  
15 the person had adopted a false I.D. many, many years earlier  
16 for a totally different purpose --

17          QUESTION: No, no, there is no evil purpose except to  
18 facilitate getting in. I don't want to be here, you know,  
19 trying to straighten out what the proper spelling of my name  
20 is. He says Sam, what do I care; Sam is fine.

21          MR. KLONOFF: If he adopted a false identity to  
22 facilitate getting in and jumped ahead of the pack --

23          QUESTION: Do you consider that facilitating getting  
24 in?

25          MR. KLONOFF: We would.



1 QUESTION: Just to facilitate -- to make it quicker  
2 so the fellow doesn't have to figure out how to spell Salvator.

3 MR. KLONOFF: That would be our position. That's  
4 consistent with the statutory --

5 QUESTION: Wow, that's a tough position, and I think  
6 there are probably a lot of people that are excludable.

7 MR. KLONOFF: Well, let me say that whether or not  
8 there are people excludable under what Congress defined, that  
9 shouldn't necessarily bear on the statutory construction issue,  
10 It's for Congress to decide whether or not that is a correct  
11 policy of excluding people who made those kinds of laws.

12 I would refer this court to two recent cases in the  
13 deportation context: Hector and Phinpathya.

14 Phinpathya, it was available to the alien to make all  
15 kinds of absurd arguments that a brief absence from the United  
16 States would totally disqualify somebody for claiming  
17 suspension of deportation. And this court held correctly that  
18 the plain language of the suspension statute required that any  
19 absence broke that continuity of physical presence, and that it  
20 was for Congress to change the law.

21 QUESTION: But here you are not dealing with anything  
22 quite as clear as the plain language. What you are talking  
23 about is the phrase "illegal procurement" inserted into Section  
24 1451 in 1961. And you have to go back to make legislative  
25 history arguments to say that you don't construe 1451, as

1 amended, the way you normally would.

2 MR. KLONOFF: Well, we don't think that -- our  
3 argument does not depend on legislative history. We think that  
4 Congress restoring the words "illegal procurement" is quite  
5 clear that somebody who lacked a qualification for citizenship  
6 could be denaturalized. That's the text of the statute.

7 You go on and look at the '61 legislative history,  
8 and that fully corroborates the government. We would submit  
9 that in an analysis of statutory construction the burden should  
10 have been on the petitioner to come in and show through  
11 legislative history that Congress meant something else.

12 The legislative history bolsters our argument, but it  
13 is no way essential to it. We think that the text is  
14 dispositive.

15 Let me move briefly if I could to the issue of  
16 materiality unless there are any more questions on the  
17 1105(f)(6) point.

18 We would agree with the observation made by Justice  
19 O'Connor, and in fact that's central to our argument of  
20 materiality. That in no other area of the law, and Petitioner  
21 has cited none, has materiality been construed to require a  
22 dispositive fact.

23 Now the government has argued for a criminal standard  
24 of materiality. It has also construed Chaunt as a would/might  
25 test as I have explained previously the last time the case was

1 argued, and as we have explained at length in our brief. But  
2 whether or not the court goes with the would/might test, or the  
3 criminal test, or some other test, for example, the TSC test,  
4 the important point that the government is making here is that  
5 this court should not require proof of a dispositive fact.

6 In that regard, let me just note counsel's heavy  
7 reliance on one case, the Day case from 1929, the Second  
8 Circuit case. It has nothing to do with the issues here for  
9 several reasons. It wasn't a construction of 1451, and  
10 furthermore, I would urge the court to look at Landon v. Clark  
11 which we cite in our brief, the First Circuit case from 1956,  
12 which traces the law subsequent to Day, and indicates that even  
13 in the Second Circuit the court had backed away from any  
14 requirement of a dispositive fact.

15 And we would submit the law is quite clear as we have  
16 laid out in our brief, both before and after Chaunt, that the  
17 courts have not required a dispositive fact in order to  
18 establish materiality. We would submit that there are several  
19 reasons why this court should reject the argument of the  
20 dispositive fact.

21 First of all, our interpretation is more consistent  
22 with the text of the statute. If you were to require a  
23 dispositive fact under the material misrepresentation clause,  
24 that would essentially render that ground for denaturalization  
25 meaningless, because the government would have demonstrated

1 illegal procurement in every case, and it would be entirely  
2 irrelevant whether the person lied or told the truth.

3 QUESTION: But, of course, that's only true if we buy  
4 that part of your first argument. I mean, we have not yet read  
5 illegal procurement quite as broadly as that, I think.

6 MR. KLONOFF: Well, we would submit that in Ginsberg,  
7 even in Fedorenko itself, the court has read illegal  
8 procurement to mean somebody who obtained citizenship without  
9 possessing the statutory qualifications.

10 If the court is going to retreat from those cases,  
11 then it's an open issue. But we would submit that Fedorenko  
12 traces the law from Ginsberg to that decision. We would submit  
13 that that is the law; that illegal procurement dealt with  
14 someone who didn't possess the requirements. But that is true,  
15 our argument depends on that link.

16 Secondly, and I'll only briefly touch upon this, a  
17 standard that requires a dispositive fact gives the alien every  
18 incentive to lie, as Justice White pointed out in his  
19 dissenting opinion in Fedorenko. The burden of proof shifts at  
20 the denaturalization stage, and it will be more difficult for  
21 the government later on to uncover disqualifying facts.

22 Related to that point --

23 QUESTION: Of course, it is an incentive, it is  
24 perjury, isn't it if it -- and so the incentive is to be  
25 willing to commit a crime?



1           MR. KLONOFF: Well, except that a person who is  
2 trying to get over here, a person in another country who is  
3 faced with the situation where if he's denied a visa it's  
4 essentially unreviewable, he's not thinking about whether he is  
5 going to be prosecuted for perjury or not.

6           QUESTION: Well, at the naturalization stage though.

7           MR. KLONOFF: The naturalization stage, there is  
8 some --

9           QUESTION: Some deterrent.

10          MR. KLONOFF: There is some deterrent with the  
11 perjury law, we would acknowledge, but we don't think it's a  
12 sufficient deterrent where somebody is seeking something like  
13 naturalization and where the fact it's being hidden is really  
14 buried in his past, and one could safely hope that he could get  
15 past the short statute of limitations for a perjury conviction.

16          Related to those points, we would submit that if  
17 individuals are given a license to lie, it makes it very, very  
18 difficult for the immigration officials to do their job  
19 properly. As the material is revealed, there are very few vice  
20 counsels to process these applications. They don't have big  
21 staffs to go out and investigate every case, and they rely very  
22 heavily on the truthfulness of the applicants. And if they are  
23 going to --

24          QUESTION: Mr. Klonoff, excuse me for interrupting,  
25 but your time -- I do want one piece of information that I

1 don't know about which you may not get to.

2 Do we know in this crucial phrase of the District  
3 Court saying that the defendant -- his documents were false in  
4 that they stated that defendant had not previously given false  
5 testimony to obtain benefits, we have already gone around on  
6 whether it knew what it meant by "to obtain benefits." Did it  
7 know what it meant by "false testimony"?

8 Do we know that the District Court was interpreting  
9 the phrase "false testimony" as you concede in your brief it  
10 should be interpreted to refer only to oral testimony, and not  
11 to statements in writing, oral testimony under oath?

12 MR. KLONOFF: We don't know that.

13 QUESTION: We don't know that.

14 MR. KLONOFF: We don't know that.

15 Let me say further though, we have argued throughout,  
16 and we are quite clear in our supplemental brief that testimony  
17 has its limited definition. Petitioner has never quarreled  
18 with the government that he had given testimony. That's quite  
19 clear from the joint appendix, page 157, for example, dealing  
20 with the naturalization stage.

21 The testimony of the naturalization examiner is that  
22 the preliminary examiner would check off each question that was  
23 asked of the applicant under oath. So we would submit that on  
24 that issue of whether there is testimony, there really hasn't  
25 been any dispute. Plus, the record is overwhelming.

1           We don't know, and again I would submit that I know  
2 of no case in which a court has required before it will accept  
3 the finding of fact that a district judge lay out in detail its  
4 understanding of testimony. We think testimony is a well  
5 established term in the case law. We think the District  
6 Court's finding was supported by the evidence, and  
7 consequently, the court should not require that the district  
8 judge have given an analysis of what it means by testimony. We  
9 don't think a remand on that issue would be necessary,  
10 particularly since there really has been no dispute on that  
11 point.

12           Finally, let me make this point in terms of the  
13 standard of proof of materiality. Much of Petitioner's  
14 argument has rested on the theory that somehow if the court  
15 adopts that standard it's going to lead to unfairness in the  
16 immigration process that Justice Scalia's question seemed to  
17 references that people are going to be denaturalized for  
18 inconsequential lies, and that somehow there is going to be an  
19 unfairness in the system.

20           Let me point out, however, that since 1952 when the  
21 misrepresentation clause was enacted, 1451(a), the courts have  
22 almost unanimously interpreted materiality the way the  
23 government has urged, and after Chaunt, with the exception of  
24 the Tenth Circuit, they have continued to do so.

25           So the test of materiality that the government has

1 urged has been the law for over three decades, and we would  
2 submit --

3 QUESTION: It's not materiality that we are worried  
4 about; illegally procured. It's the 1101 provision that is  
5 drawn into 1451 by the phrase "illegally procured" that's the  
6 problem.

7 MR. KLONOFF: Well, certainly -- I see my time is up.  
8 Thank you.

9 CHIEF JUSTICE REHNQUIST: You can answer the  
10 question.

11 MR. KLONOFF: If the court is not worried about the  
12 government's test of materiality, that's all the better from  
13 our position. Counsel was worried in his briefs, and I was  
14 responding to the concerns he had raised.

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Klonoff.  
16 Mr. Williamson, you have four minutes remaining.

17 ORAL ARGUMENT BY DONALD J. WILLIAMSON

18 ON BEHALF OF THE PETITIONER - REBUTTAL

19 MR. WILLIAMSON: Thank you, Your Honor.

20 Addressing the question which Justice Stevens raised  
21 as to whether or not I had overstated what the government had  
22 conceded in the brief in Fedorenko, I was interpreting Section  
23 10 of the Displaced Persons Act. The key language which they  
24 say implied in that brief a coterminous requirement of  
25 materiality in illegal procurement was the phrase "to gain



1 admission."

2 I submit that there is no difference in kind between  
3 the phrase "to gain admission" and to "gain a benefit" in the  
4 language referred to in Section 1101(f)(6).

5 So although the government wasn't addressing 1106 at  
6 that time, it was because of the fact that they recognized that  
7 the displaced person argument to gain admission equaled  
8 material. It follows a fortiori that that would also be  
9 material.

10 QUESTION: What force do you think that a statement  
11 in a brief by a former solicitor general years ago has on this  
12 case?

13 MR. WILLIAMSON: I think that you gave it that force,  
14 Mr. Justice Marshall, when you speak for the majority in  
15 Fedorenko said, we agree with the government that Section 10  
16 requires materiality.

17 QUESTION: But then if you had written the opinion.

18 MR. WILLIAMSON: Yes, I think it's the opinion of the  
19 Supreme Court that gave it that force.

20 QUESTION: I write them. I don't explain them.

21 (Laughter.)

22 MR. WILLIAMSON: I would also argue that a fortiori,  
23 the reason the government didn't raise the argument at that  
24 time because they did not perceive that it would be persuasive.

25 But getting back to Justice Scalia's question as to

1 whether or not the court made a finding when it simply was, in  
2 effect, addressing itself to the question of the check mark on  
3 to gain admission, I think that the court in context was simply  
4 indicating that the same misrepresentation was repeated in the  
5 petition, because that was contained on page 120 of the  
6 Appendix C.

7 But if you go back to page 118, the court makes a  
8 finding. It says, "I cannot understand what benefit defendant  
9 expected to achieve by placing his birth in Kaunas rather than  
10 Reistru, by dating his birth October 4, 1913 rather than  
11 September 21, 1915." And the finding that had defendant given  
12 the correct information, his visa would have nevertheless been  
13 issued.

14 Later on in the opinion at page 123, the court simply  
15 reasserts that the government asserts that he lacked the  
16 prerequisite of good moral character because he gave false  
17 testimony for purpose of gaining benefits under the Act.

18 That's not a finding of fact. That's a conclusion of  
19 law. It's an erroneous conclusion of law, because of the fact  
20 of the requirement materiality as perceived in Fedorenko.

21 In any event, there is no testimony presented by the  
22 government at the District Court level as to what the  
23 Petitioner's intent was at the time he made the  
24 misrepresentation. There is, however, testimony as to why the  
25 Petitioner in German gave the documents that he did. That is

1 to say, why did he make everything consistent with his internal  
2 Lithuanian passport, and everything consistent with, and I'd  
3 point to the joint appendix, and the joint appendix is on page  
4 29, Exhibit 1(s). That's the Lithuanian ex-political prison's  
5 certificate dated June 18, 1946, and the significance of that  
6 certificate was explained in the testimony at the District  
7 Court level that the purpose why the Lithuanian committee in  
8 the camps were giving these certificates is because the Soviet  
9 representatives on the committee were screening applicants for  
10 purposes of expatriation to the Soviet Union, or taking them  
11 out of the camps.

12 And this further exhibit on page 69, Exhibit 53(d),  
13 in which it confirms that. This is the letter of the War  
14 Department, Special Staff, Civil Division, and it refers to,  
15 "an intensive screening program initiated in mid-June 1946",  
16 the exact time that he received that certification.

17 So obviously he'd want to be in a position of having  
18 to indicate to a Soviet representative in the camp that his  
19 internal Lithuanian passport --

20 CHIEF JUSTICE REHNQUIST: Your time has expired, Mr.  
21 Williamson.

22 The case is submitted.

23 (Whereupon, at 10:58 o'clock a.m., the case in the  
24 above-entitled matter was submitted.)

25

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2  
3 REPORTER'S CERTIFICATE

4 DOCKET NUMBER: 86-228

5 CASE TITLE: Juozas Kungys v. United States

6 HEARING DATE: October 13, 1987

7 LOCATION: Washington, D.C.

8 I hereby certify that the proceedings and evidence  
9 are contained fully and accurately on the tapes and notes  
10 reported by me at the hearing in the above case before the  
11 Supreme Court of the United States.

12  
13 Date: October 13, 1987

14  
15  
16 Margaret Daly  
17 Official Reporter

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