IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHANN BREYER, Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 97-6515
DORIS MEISSNER, United States Immigration and Naturalization Service, Defendant.	:	

Findings of Fact, Applicable Legal Principles, Conclusions of Law, and Order

YOHN, J. September ___, 2002

This is a most unique and very troubling case, the ultimate resolution of which is an emotionally charged issue for both parties. Nevertheless, the court, as always, must find the facts from the evidence adduced at trial and apply the law as articulated by the U.S. Supreme Court and the Third Circuit to those facts, regardless of the result.

As this matter currently comes to bar, it requires the court to determine whether plaintiff Johann Breyer ("plaintiff" or "Breyer"), who was unaware until the early 1990s that there was even a chance that he is a birthright American citizen–and indeed, under the statutes in place at the time of his birth, did *not* enjoy United States citizenship–voluntarily relinquished that citizenship as a result of his service in the *Totenkopf Sturmbann* ("Death's Head") battalion of the *Waffen SS* in the 1940's during World War II.[1] It requires the court to make this

[1] To explain, Breyer was born on May 30, 1925 in Nova Lesna, a small village in the Upper Zips region of what was then Czechoslovakia. His mother, Katarina Breyer, was born in Manayunk, Pennsylvania and thus was a U.S. citizen at birth. However, at the time of

determination pursuant to the provisions of the Nationality Act of 1940, a statute that fifty years ago was replaced as the law governing expatriation. Moreover, and most fundamentally, it mandates that I make factual findings and legal conclusions regarding matters that, by all accounts, have long since been shrouded by the passage of time and obscured by the frailty of human memory.[2]

Breyer's birth, federal law provided for the conveyance of citizenship from a citizen father to his foreign-born child, but did not feature an analogous provision for the conferral of citizenship by an American mother unto a child born overseas. *See Breyer v. Meissner*, 214 F.3d 416, 421-22 (3d Cir. 2000). Accordingly, in 1925 plaintiff was not considered an American citizen.

As will be detailed more fully, *infra*, after serving in the *Waffen SS* during World War II, Breyer first came to the United States in 1952 under the Displaced Persons Act of 1948. He was naturalized in 1957. In 1991, the Office of Special Investigations of the Immigration and Naturalization Service ("INS") brought denaturalization proceedings against him on the ground that he had assisted in the persecution of persons on the basis of race, religion or national origin during his tenure in the *Waffen SS*. During the course of these proceedings, Breyer argued for the first time that if his naturalization was invalid, his mother's birth in Pennsylvania conferred upon him birthright American citizenship. The INS contested this assertion by pointing to the lack of a statutory provision for the matrilineal conveyance of citizenship to a foreign-born child at the time of plaintiff's birth, and Breyer argued that this discrepancy had deprived his mother of equal protection of the laws. The United States Court of Appeals for the Third Circuit agreed, and in 2000 invalidated this statutory scheme as violative of the Equal Protection Clause of the Fourteenth Amendment, as reverse-incorporated into the Fifth Amendment's Due Process Clause. *See Breyer*, 214 F.3d at 426; *see generally Vance v. Bradley*, 440 U.S. 93, 94 n.1 (1979) ("[T]he Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws."). Accordingly, Breyer presently is deemed to possess birthright American citizenship despite not having known of the possibility that he enjoys such citizenship until the early 1990s, and not having been found actually to be a United States citizen until 2000, three-quarters of a century after the date on which such citizenship was conferred. *See generally Breyer*, 214 F.3d at 429.

[2] Indeed, the two types of factual sources that were presented at trial in this case were 1) the expert testimony of historians familiar only with the character of the *Waffen SS* generally, and the efforts of this organization to recruit ethnic Germans living in Slovakia (a group of which plaintiff was a member from his birth through February 10, 1943); and 2) the recollections of plaintiff Johann Breyer himself, who at the time of trial was mere weeks from his seventy-seventh birthday and, while unquestionably sentient, consistently noted the imperfection of his anamneses of events that transpired sixty years ago.

Against this background, the court presently must answer a question that is relatively narrow in scope: Was the portion of Breyer's service in the *Waffen SS* that transpired following his eighteenth birthday–or any oath of allegiance to the Third Reich taken by plaintiff during that segment of his service–voluntary? If so, Breyer expatriated himself pursuant to both § 401(c) of the Nationality Act of 1940 and the Third Circuit's 2000 opinion in this case. *See Breyer*, 214 F.3d at 429-31. If not, he remains a U.S. citizen.

By contrast, I need not determine whether plaintiff is a U.S. citizen by birth. The Third Circuit has resolved that issue. Likewise, I need not determine whether plaintiff voluntarily joined the *Waffen SS*, as his induction into this organization transpired prior to his eighteenth birthday, and thus is non-expatriating per se under the prevailing statute. *See* Nationality Act of 1940 § 403; *Breyer v. Meissner*, 2001 WL 1450625, at *6 (E.D. Pa. Nov. 16, 2001). While indicia that plaintiff voluntarily enlisted in the *Waffen SS* may entail some value as evidence that his continued service following his eighteenth birthday was similarly voluntary, they are by no means determinative of this latter issue. Thus, the forthcoming findings of fact and conclusions of law are aimed at determining the voluntariness of the service rendered, and any oath of allegiance taken, by plaintiff subsequent to his attainment of the age of majority.[3]

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[3] Moreover, the court is not called on to assess in any general sense the moral culpability of Breyer or the organization in which he served. I mention this only because it would be somewhat disingenuous to proceed with these findings of fact and conclusions of law as if the historical context with which the court is concerned is not uniquely horrifying and galvanizing within the universe of modern human history. As has been stated adeptly by Stuart Eizenstat:

> [T]he Holocaust is one of those few issues that the more distant we are from it, the larger it looms. Each decade since the end of the war has seen greater, not lesser, attention, and that is an oddity. There are very few issues, which grow in magnitude as they are further away from the event. This is one of them. Perhaps

Findings of Fact

1. Plaintiff Johann Breyer was born on May 30, 1925 in Nova Lesna,[4] a small farming village located in the Upper Zips region of what was then Czechoslovakia. Agreed Findings of Fact and Conclusions of Law ("Agreed Findings") ¶ 1.

2. Slovakia became autonomous in 1938 when Germany dismantled Czechoslovakia. Slovakia declared its independence in March, 1939. Testimony of Plaintiff's Historical Expert Vladis Lumans ("Lumans"); Agreed Findings ¶ 5.

3. From 1939 through the end of World War II, Nova Lesna was located in Slovakia. Agreed Findings ¶¶ 1, 5.

4. From 1939 through the end of World War II, Germany exerted considerable influence over Slovakia, though it did not dictate Slovak policy. Testimony of Government's Historical Expert Ronald Smelser ("Smelser").

5. Slovakia was allied with Germany during World War II. Smelser.

6. Breyer's immediate family consisted of his father, Johann Breyer, Sr., a farmer who was born in 1891; his mother, Katarina Breyer, who was born in 1897; and his sister, Maria,

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> because it is the ultimate evil, because it takes so much time to absorb its lessons, and that those lessons have become universalized in Cambodia, in Rwanda, in ethnic cleansing in the Balkans, the Holocaust has taken on an even greater sense of urgency.

Stuart Eizenstat, *Keynote Address*, 25 Fordham Int'l L.J. 205, 208 (2001). In sum, although conscious of the nature of the backdrop to the instant dispute, the court is not charged with conducting a broad ethical evaluation of the actions taken by Breyer specifically, or by the *Waffen SS* generally.

[4] Although this village frequently was referred to at trial by its German name of "Neuwalddorf," I will use the modern name "Nova Lesna" to denote Breyer's birthplace.

who was born in 1921. Agreed Findings ¶ 2.

7. Though they resided in Czechoslovakia and later in Slovakia, Breyer's family was ethnically German ("*Volksdeutschen*"). Testimony of Plaintiff Johann Breyer ("Breyer").

8. There were roughly 150,000 ethnic Germans in Slovakia during the late 1930s and early 1940s, and the political and social interests of these *Volksdeutschen* were represented by the *Deutsche Partei* ("*DP*"), which translates as "German Party." Agreed Findings ¶¶ 11,12; Smelser.

9. The *DP* also provided financial subsidies to its members. Government's Exhibit ("Govt.'s Ex.") 51; Breyer.

10. Though it was functionally an instrument of the Third Reich, the *DP* did not have any legal control over its members. Smelser.

11. To be a member of the *DP* one had to be at least 18 years old. Lumans; Smelser.

12. Each member of Breyer's family was a member of the *DP*, but Breyer himself was not. Govt.'s Exs. 52(a)-(d).[5]

13. In several countries with large *Volksdeutschen* populations, Germany established ethnic German relations offices ("*VOMI*s"). Lumans.

14. The function of each *VOMI* was to organize the ethnic Germans and to ensure that they served the Reich's purposes. Lumans.

15. Indeed, the German political leadership considered *Volksdeutschen* as racial kin and saw

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[5] Although Govt.'s Ex. 52(e) allegedly is a copy of Breyer's own *DP* registration card, this card is not filled out as those pertaining to his family members are. Moreover, by the time Breyer turned 18, and thus became eligible for *DP* membership, he already was a member of the *Waffen SS*, serving at Buchenwald. Accordingly, I find that Breyer was not a member of the *DP*.

them as possessing an obligation to further the interests of National Socialism. Smelser.

16. Franz Karmasin was selected by the Slovak *VOMI* to head the *DP*, and his official position within the Slovak government was State Secretary for Ethnic German affairs. Agreed Findings ¶ 12.

17. Johann Horvay was the head of the *DP* in Nova Lesna. Breyer.

18. The *DP* had a paramilitary wing called the *FS*. Lumans.

19. Within the *FS* was an elite paramilitary group referred to as the *ET*, which had special ties to the*SS*. Lumans.

20. The *SS* was a Nazi political organization and was the executive arm of the Third Reich. Testimony of Government's Historical Expert Charles Sydnor ("Sydnor").

21. The *SS* enjoyed close ties with the *ET*, and many *ET* members were trained by members of the *SicherheitsDienst* ("*SD*"), a special security service within the *SS*. Lumans.

22. The *Waffen SS* was the military or armed wing of the *SS*. Agreed Findings ¶ 20.

23. The head of the *SS* was Heinrich Himmler and the Chief Recruiter for the *Waffen SS* was Gottlob Berger. Agreed Findings ¶ 15.

24. During World War II, the German Army ("*Wehrmacht*") had priority in inducting draft age citizens inside Germany, and the *Waffen SS* was restricted in obtaining manpower inside the Reich. Agreed Findings ¶ 16; Sydnor.

25. Accordingly, ethnic German communities in areas under Germany's control or influence outside the Reich constituted the best source of *SS* recruits. Agreed Findings ¶ 16.

26. At Himmler's urging, in early 1942 the *SS*'s Foreign Office and the Slovak *VOMI* consulted with the *DP* to devise a plan to obtain Slovak *Volksdeutschen* for membership

within the *Waffen SS*. Agreed Findings ¶ 17.

27. During the summer of 1942 the *DP* carried out a "cleansing campaign" that involved the removal of "asocials," i.e., those who were politically unreliable, racially impure, etc., from the party's ranks. Lumans.

28. These "asocials" were deported to Germany, and probably ended up in concentration camps. Lumans.

29. During the autumn of 1942, following the purging of these "asocials," the *Waffen SS* began recruiting ethnic Germans living in Slovakia. Lumans.

30. This drive was organized by the *DP*.

31. Prior to this point, the *Waffen SS* had been conducting "under the table" recruiting of Slovak *Volksdeutschen* without the assent of the Slovak government. Sydnor.

32. On September 1, 1942, the *Waffen SS* sent a telegram to the Slovak government requesting full blown conscription of Slovak *Volksdeutschen*. Govt.'s Ex. 4.

33. On November 16, 1942, during a meeting with Karmasin, Slovak Prime Minister Vojtech Tuka "completely ruled out" the idea of imposing an obligation on Slovak citizens to serve in the *Wehrmacht* or the *Waffen SS*. Govt.'s Ex. 5.

34. This negative reaction was a product of Tuka's concerns with maintaining the appearance of Slovak sovereignty and with avoiding the creation of a double standard regarding pay and benefit levels. Sydnor.

35. Specifically, the *Waffen SS* paid significantly more, and was more generous with respect to benefits, than the Slovak armed forces, and Tuka was concerned that if Slovak citizens were conscripted into the *Waffen SS* a double standard would be created whereby Slovaks

of German descent were compensated more favorably than were non-*Volksdeutsche* Slovak citizens. Sydnor.

36. On November 20, 1942, Tuka agreed to permit the *Waffen SS* to recruit volunteers from among the Slovak *Volksdeutschen*. Pl.'s Ex. 34; Sydnor.

37. This recruitment effort proceeded through the issuance of induction letters, which were sent to eligible ethnic German men. These letters instructed the recipient to report at a given time and place for a physical acceptance examination. If the recruit was deemed capable of serving, he was given an acceptance certificate and later received a written call up notification instructing him to again appear at a certain time and place for induction into the *Waffen SS*. Breyer; Sydnor; Govt.'s Ex. 14(a)-(d); Govt.'s Ex. 16.

38. There is substantial evidence that the recipients of these letters were under some degree of compulsion to report as instructed. Breyer; Plaintiff's Exhibit ("Pl.'s Ex.") 6 (internal *SD* document dated August 28, 1942 referring to the then-upcoming "inductions into the *Waffen SS*" as "mandatory volunteering"); Pl.'s Ex. 10 (report filed on February 11, 1943, i.e., one date after Breyer's induction into the *Waffen SS*, by a local *DP* leader with a higher ranking *DP* official listing all of the men who did not appear for their *Waffen SS* acceptance examinations "despite written summons," stating the excuse given by each, and requesting that each man be reported for "further prosecution"); Pl.'s Ex. 11 (internal *SD* document dated February 12, 1943 describing the desertion by 17 Slovak *Waffen SS* "volunteers" and stating that *SS* officials were "very unpleasantly surprised by the reactions of some ethnic Germans when the induction notices were delivered"); Pl.'s Ex. 13 (January 19, 1944 memo from Bratislava, Slovakia *SS* office to the *SS*'s main office in

Vienna referring to those who previously had failed to obey a call-up as "draft dodgers"); Pl.'s Ex. 15 (May 15, 1944 letter from the Reich's representative in Bratislava to the Reich foreign minister stating: "The initial *Waffen SS* operation, which has been underway in the German ethnic group in Slovakia since 15 January 1943, maintained the external appearance of being voluntary . . . [but] the leadership of the German ethnic group exerted a not insignificant moral pressure on its members to report for military service."); Pl.'s Ex. 18 (indicating that those *Volksdeutschen* who failed to appear at their acceptance examinations were to be punished by being drafted immediately into the Slovak army); Pl.'s Ex. 23 (November 20, 1942 appeal from Karmasin to all Slovak *Volksdeutschen* men aged 17 to 35 years, stating that "[e]very German of these ages is to report . . . without prompting" and that "those who shirk service to the community in these days will be met with contempt"); Pl.'s Ex. 24 (internal *SD* report dated December 14, 1942 referring to the "so-called voluntary influx" of Slovak *Volksdeutschen* into the *Waffen SS*, and stating that "[i]t's being said in circles of the *DP* that the *DP* has ordered all German men from 17 to 35 years old to appear at such and such a location and on such and such a date"); *id.* ("Appearing is supposedly an obligation, and failing to appear is to be punished correspondingly."); Govt.'s Ex. 10 (*FS* memo dated November 20, 1942 stating that "[e]ffective 23 November 1942, all men of our ethnic group between the ages of 17 and 35 will be examined for acceptance" and that "the troop leaders . . . are . . . held personally responsible for ensuring that no member of our troops fails to appear for the examination") Govt.'s Ex. 17 (*SD* report dated August 28, 1942 discussing "mandatory volunteering"); Govt.'s Ex. 20 (*SD* report dated December 28, 1942 stating that the

"recently planned last chance and voluntary follow-up induction is perceived by the Germans . . . as a 'drawn pistol'"); Govt.'s Ex. 25 (letter from the *DP* to a Slovak ethnic German who did not report for his acceptance examination as instructed setting forth a guilt-based appeal for the recipient to reconsider his decision); Sydnor (stating that there was de facto pressure exerted on ethnic Germans to report for inductions into the *Waffen SS*); *id.* (testifying that the *DP* controlled induction deferments,[6] which typically are associated with conscription); Deposition of Nova Lesna resident Marie Muhlenbecher at 49-50 (stating that those *Volksdeutschen* from Nova Lesna who served in the German armed forces did so because they were "called").

39. In order to appease Slovak national sensitivities regarding the nation's sovereignty, Germany overstated the extent to which these inductions were voluntary in nature. Lumans; Sydnor.

40. There is an even greater amount of evidence that this recruitment did not constitute genuine conscription, i.e., that those who enlisted in the *Waffen SS* during late 1942 through early June, 1944 did so as a matter of choice. Pl.'s Ex. 13 (January 19, 1944 memo from Bratislava, Slovakia *SS* office to the *SS*'s main office in Vienna referring to conscription into the *Waffen SS* as "potentially coming into effect"); Pl.'s Ex. 14 (April 18, 1944 memo to the Reich Foreign Minister stating that "ethnic Germans failed to obey call-ups into the *Waffen SS* . . . [but that t]here was no legal ground to take action against them"); Pl.'s Ex. 15 (May 15, 1944 letter from the Reich's representative in Bratislava to the Reich foreign minister indicating that voluntary means of recruiting Slovak

[6] It is unclear whether these deferments were permanent or temporary.

Volksdeutschen "had been exhausted since late 1943"); Pl.'s Ex. 16 (June 7, 1944 agreement between Germany and Slovakia providing that from that date forward "Slovak citizens of German nationality shall meet their military obligation . . . in the . . . *Waffen SS*"); Pl.'s Ex. 23 (appeal from Karmasin stating that "I expect those men who are found suitable to report voluntarily for *Waffen SS* service . . ."); Pl.'s Ex. 34 (recounting the acquiescence of the Slovak government to "the voluntary enlistment" of Solvak citizens of German nationality and of ages 17 to 35 in the *Waffen SS*); Govt.'s Ex. 2 (Slovak Legal Code of 1940 providing that "[t]he [Slovak] military obligation begins at the beginning of the year in which the citizen completes his 20th year," which in Breyer's case was 1945); Govt.'s Ex. 11 (report on the *Waffen SS* acceptance examination indicating that of 272 men in the "Kasmark[, Slovakia][7] [l]ocal [g]roup" receiving induction notices, only 208 reported as instructed); Govt.'s Exs. 15(a)-(c) (correspondence between the *Waffen SS* and various recruits dated February, March and August, 1942 indicating that the commitment to the *Waffen SS* was voluntary and for the duration of the war); Govt.'s Ex. 17 (August 28, 1942 *SD* report stating that "[i]nductions into the *Waffen SS*, for which the ethnic Germans are to report voluntarily, are to take place in Slovakia in the immediate future"); *id.* (discussing a "great distaste" among ethnic Germans "for joining the *Waffen SS*"); *id.* (stating that "for now a number of ethnic Germans do not seem inclined to heed th[e] call for mandatory volunteering"); Govt.'s Ex. 18 (September 19, 1942 *SD* report discussing a rumor that was circulating among the *Volksdeutschen* that all ethnic German

[7] Kasmark was located several miles from, and was a more substantial town than, Nova Lesna. Breyer.

men were to be inducted into the *Wehrmacht* or the *Waffen SS*, and stating that "[i]n response to this, there were allegedly large numbers of resignations from the *FS* and from the German Party"); *id.* (indicating that Karmasin, who repeatedly had indicated the mandatory nature of the recruiting effort, was "not taken seriously" and could not "exercise any influence"); Govt.'s Ex. 19 (*SD* report dated December 14, 1942 stating that "[m]any ethnic German men in the appropriate age group do not go to the induction at all," that these men "say with complete equanimity that they are not going for any reason, and since the matter is supposed to be voluntary, they will not allow themselves to be forced," and that "many men are prepared to accept any consequences the German Party has threatened them with, and they say with complete candor: 'Then we just won't be Germans . . . [t]here are other ethnic groups'"); Govt.'s Ex. 20 (*SD* report dated December 28, 1942 stating that a maximum of 30 to 40 percent of those ethnic Germans who received induction notices showed up for the volunteer induction, and that those who did not appear cited the voluntary nature of the inductions as their reason for disregarding their induction notice); *id.* (stating that 2 members of the Kasmark chapter of the *DP* resigned their party membership to avoid the inductions); Govt.'s Ex. 21 (*SD* report dated February 12, 1943 stating that "[t]he fact that the German population [of Slovakia] has seriously worsened can be attributed to the inductions of the ethnic Germans into the *Waffen SS* a month ago" and that "[t]he ethnic Germans indeed reported voluntarily, but believed they would never be inducted into the armed services"); Govt.'s Ex. 22 (March 8, 1943 *DP* report describing the low turnout among the *Volksdeutschen* for induction into the *Waffen SS* during the early portion of 1943 and stating that "[i]t was only during

the follow-up induction that it was pointed out to the ethnic Germans that they should report"); Govt.'s Ex. 23 (March 27, 1943 report stating that "[e]very ethnic German who could evade [*Waffen SS* recruitment] did so, especially in the farming regions"); Govt.'s Ex. 24 (memo to the Reich foreign minister stating that "[r]ecently it happened that ethnic Germans failed to obey call-ups into the *Waffen SS* . . . [b]ut there was no legal ground to take action against them"); Sydnor (opining that the statements of the *DP* and *Waffen SS* to the effect that the *Volksdeutschen* were obligated to report for induction can be dismissed as "Nazi bombast"); Sydnor (testifying that by the fall of 1943 only 60% of the ethnic Germans living in Slovakia had been inducted into the *Waffen SS*); Deposition of Nova Lesna resident Emilia Keresztenyova at 2 (testifying that there was little if any enthusiasm for the war in Nova Lesna, and that no efforts were made to encourage ethnic Germans to volunteer); Deposition of Nova Lesna resident Elvira Zaborsky at 26-27 (testifying that she did not know of any community-based pressure on Breyer to serve in the *Waffen SS*); Deposition of Nova Lesna resident Margarete Badke at 32 (testifying that she knew of no community pressure on Breyer to serve in the *Waffen SS*).

41. It was not until June 7, 1944 that Germany and the Slovak Republic entered into a treaty providing for the de jure conscription of Solvak *Volksdeutschen* into the *Waffen SS*. Govt.'s Ex. 1 (June 7, 1944 treaty between the Greater German Reich and the Slovak Republic providing that "[d]uring the duration of this war, Slovak citizens of German ethnicity will fulfill their compulsory military service obligation in the German *Wehrmacht - Waffen SS*").

42. The induction letters were sent in waves by the *Waffen SS*, with the first batch having

been sent in late 1942. Sydnor.

43. Subsequent waves of recruitment were necessitated by the generally poor turnout in response to the first wave. Govt.'s Ex. 22 (March 8, 1943 *DP* report stating that "[f]ew persons in [the Kasmark] region reported for the first induction . . .").

44. During the autumn of 1942, Breyer, who was seventeen years old,[8] received a letter sent in the first wave of *Waffen SS* recruiting drive. The letter instructed him to report on December 6th of the same year for a physical examination in Kasmark. Breyer Pl.'s Ex. 1 (indicating that entry examinations for the *Waffen SS* took place in Kasmark on December 6, 1942).

45. Upon receiving his notice to report, Breyer approached the mayor of Nova Lesna and inquired as to whether he was obligated to appear as instructed. Breyer.

46. The mayor informed Breyer that he was obliged to do so. Breyer.

47. On December 6, 1942, Breyer reported to Kasmark and received a physical examination. Agreed Findings ¶ 18; Pl.'s Ex. 1.

48. As a general matter, at *Waffen SS* entry examinations every ethnic German recruit was given an "acceptance and obligation certificate" which he was to sign. Govt.'s Ex. 14(a); Govt.'s Ex. 14(b).

49. This certificate stated: "I obligate myself to always work hard for the National Socialist State and Adolf Hitler's movement without reservation, setting aside my personal interests if necessary, to maintain the strictest party discipline, and to conscientiously carry out the orders of the Reichsfuhrer *SS* and of the officers assigned to me by him."

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[8] Plaintiff would not turn eighteen until May 30, 1943.

Govt.'s Ex. 14(a).

50. During early February, 1943, Breyer received a call up notification indicating that he had satisfactorily completed the physical examination, and that he was to report to Kasmark on February 10, 1943 for induction into the *Waffen SS*. Breyer.

51. On February 2, 1943–that is, at roughly the same time as Breyer received this notification–the German 6th Army surrendered at Stalingrad, an event which caused many *Volksdeutschen* to doubt the possibility of an eventual German victory. Sydnor.

52. Breyer again asked the mayor of Nova Lesna whether he was obligated to comply with this call up notification, and was told that his name was on a list of persons obligated to report, and thus that he did indeed have to go. Breyer.

53. Plaintiff also was told that if he ultimately was required to serve at a distant post the mayor–presumably in conjunction with local *DP* officials–would work for his release. Breyer.

54. On February 10, 1943,[9] Breyer reported to Kasmark and was shipped that same day to Buchenwald, Germany, where he was assigned to the *Totenkopf Sturmbann* battalion of the *Waffen SS*. Agreed Findings ¶ 19; Breyer.

55. The German word *Totenkopf* translates into "Death's Head," and to designate themselves as belonging to this division, members wore a skull and crossbones insignia on their shirt collars. Breyer; Sydnor.

56. After April 22, 1941, every *SS Waffen* unit assigned to a concentration camp was within

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[9] During the months of January through March, 1943, approximately 3,500 Slovak *Volksdeutschen* entered the *Waffen SS*. Pl.'s Ex. 2.

the *Totenkopf Sturmbann* battalion.[10] Sydnor.

57. As compensation for his service, Breyer received 25 deutschmarks per month, food, clothing, housing and medical care. In addition, he received paid annual leave and the heightened social status that was derived at that time from wearing a uniform and carrying a gun. Sydnor.

58. Upon arriving at Buchenwald, Breyer underwent 4 weeks of infantry training, and 2 additional weeks of special training in the use of an optical device employed in battle by forward observers to help direct artillery fire. Breyer.

59. Upon the conclusion of this training period, at which time he was still seventeen years old, Breyer swore an oath of allegiance to Adolf Hitler.[11] Sydnor.

60. Upon being inducted into the *Waffen SS*, Breyer was advise to abandon religion. Breyer.

61. There was a significant financial incentive for plaintiff to heed this advice, as secular individuals were not obligated to pay the Reich's significant church tax. Breyer.

62. Breyer refused to renounce his faith. Breyer.

63. As a means of denoting themselves as members of the *Waffen SS*, new inductees had their blood type branded on their upper arms. Breyer.

64. Breyer refused to be branded and does not bear such a mark (or any evidence that such a

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[10] Dr. Lumans testified that it was not the *SS Totenkopf Sturmbann*, but rather the *SS Totenkopf Verbande* battalion that was assigned to the concentration camps. Lumans. However, I find Dr. Sydnor's testimony to be the more authoritative of the two accounts, and thus I credit his testimony and discount that given by Dr. Lumans as to this particular point.

[11] Breyer testified contrarily, i.e., that the oath was read to the inductees, who did nothing but stand and listen. Breyer. I find Dr. Sydnor's account to be more compelling, and accordingly I credit his testimony.

mark was removed) today. Breyer.

65. No sanctions were imposed against him for this refusal. Breyer.

66. At the conclusion of the training period, Breyer was asked in front of roughly 100 men if he could shoot a person. Breyer.

67. He responded that he could not, and was assigned to guard a portion of the perimeter of the slave labor camp at Buchenwald that was believed by the *SS* to be a particularly unlikely point of escape for any of the prisoners there. Breyer; Sydnor (testifying that such an assignment for an individual who indicated that he could not shoot a person is consistent with the*Waffen SS* 's standard practice).

68. During his tenure at Buchenwald, no prisoner attempted to escape. Breyer.

69. Breyer was given no choice of assignments. Breyer.

70. While on perimeter duty, Breyer carried a weapon, but did not always load it. Breyer.

71. He did not tell his superiors that his weapon was sometimes unloaded. Breyer.

72. Breyer, like the other guards at Buchenwald, was told that the prisoners were "killers and robbers." Breyer.

73. Breyer's only contact with prisoners at Buchenwald came when he received his haircuts from prisoner barbers. Breyer.

74. During some of these encounters he spoke with the prisoner who was cutting his hair and learned that many of the camp inmates were not criminals, but rather were political prisoners. Breyer.

75. Breyer testified that he never harmed a prisoner at Buchenwald and that he never witnessed or heard of prisoners being beaten, shot or otherwise mistreated. Breyer.

76. Breyer testified that he was not aware of prisoner deaths due to malnutrition or beatings by the guards. Breyer.

77. Breyer was permitted to leave the camp when he was not on duty and to go into town. Breyer.

78. While at Buchenwald, Breyer received a pre-scheduled promotion. Breyer.

79. In December, 1943 or January, 1944 Breyer received a two week home leave, as was standard practice in the *Waffen SS*. Breyer.

80. He was told prior to taking this leave that if he did not return his family would be gravely harmed. Breyer.

81. Breyer took his leave, but returned as scheduled. Breyer.

82. While at Buchenwald during the spring of 1944, Breyer received a telegram indicating that his mother was extremely ill. Breyer.

83. Breyer presented the telegram to his superiors, and asked for an emergency home leave. Breyer.

84. This request was denied, and Breyer wrote to his parents to inform them that his efforts to obtain permission to return home had been unsuccessful. Breyer.

85. In this communique, Breyer also indicated that he would come home "one way or another." Breyer.

86. This letter was intercepted and censored by Breyer's superiors, and it was interpreted as a threat of desertion. Breyer.

87. As punishment for his perceived threat, Breyer was transferred to Auschwitz, Poland, where he was assigned to the 8th company of the *Totenkopf Sturmbann* battalion. Agreed

Findings ¶ 23; Breyer.

88. As a general matter, *SS* members were obligated to sign an oath[12] upon the commencement of their service at Auschwitz. Govt.'s Ex. 31(a)-(b).

89. There were three distinct "camps" located at Auschwitz, Poland. The first–Auschwitz I–was a slave labor camp. The second–Auschwitz II or Auschwitz/Birkenau–was an extermination camp. The third–Auschwitz III or Auschwitz/Monowitz–was a slave labor camp associated with the construction of a large rubber and chemical plant for IG Farben. Sydnor.

90. Breyer testified that he was stationed at Auschwitz I. Breyer.

91. The government presented some evidence that Breyer actually was stationed at Auschwitz II.[13] For example, Dr. Sydnor testified that the influx of prisoners into Auschwitz II

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[12] This oath read in full:

> I am aware that only the Fuhrer alone decides over the life and death of an enemy of the state. I am not permitted to physically harm or cause the death of any enemy of the state (prisoner). Any killing of a prisoner in a concentration camp requires the personal authorization of the Reichsfuhrer *SS*. I am cognizant that if I violate this obligation I will be held strictly accountable.

Govt.'s Ex. 31(a).

[13] In addition to the evidence recounted in Findings of Fact ¶¶ 91-93, the INS points to Defendant's Exhibit 33 in which Breyer's unit is listed at the "3rd *SS Totenkopf* Battalion, Auschwitz 2." However, I do not find this exhibit to be credible, as it contains several inconsistencies that cast a long shadow of doubt over its authenticity.

This exhibit is a request for support for dependents dated January 17, 1945. The government alleges that Breyer filed this request in Bratislava during his attempted return to Auschwitz after deserting in the fall of 1944. *See infra*. The document states that Breyer requested 150 crowns per day to pay outside helpers to aid in the operation of his family's farm. This request is suspect for a number of reasons. First, it misstates the size of the Breyer farm, which was roughly 13 Jochs in size, Breyer, as 27 Jochs. *See* Govt.'s Ex. 33. One Joch is approximately an 83 yard square, or 1.422 acres in size. *See* Russ Rowlett, *How Many? A*

during the spring of 1944 necessitated the transfer of Breyer's 8th company of the *Totenkopf Sturmbann* battalion to Auschwitz II, where it became the 4th company of that battalion.[14] Sydnor.

92. Moreover, whereas Breyer testified that the barracks in which he resided at Auschwitz were made of wood, the barracks at Auschwitz I–which formerly had been a Polish army complex–were made of brick. Breyer; Sydnor.

93. The barracks at Auschwitz/Birkenau, by contrast, were made of wood. Sydnor.

94. Breyer also was questioned about the composition of the guard towers at the particular Auschwitz camp at which he was stationed. He testified that these towers were made of stone. Breyer. This is consistent with plaintiff's testimony that he was stationed at Auschwitz I, as the towers at Auschwitz I were made of brick, whereas those at Auschwitz II were of two types: part wood/part brick, and entirely wood. Sydnor.

95. After weighing the evidence presented as to Breyer's specific assignment at Auschwitz, I find that he was stationed at Auschwitz I, not Auschwitz/Birkenau. (i.e. Auschwitz II).

Dictionary of Units of Measurement, available at http://www.unc.edu/~rowlett/units/dictJ.html. Accordingly, this document overstates the size of the Breyer family farm by over 100%, or nearly 20 acres. It is highly doubtful that Breyer himself would have made such a mistake. Second, the document also misstates both of his parents' birth years. *See id.* (stating that Breyer's father was born in 1889 and that his mother was born in 1895 when they actually were born in 1891 and 1897 respectively). Third, and most importantly, plaintiff knew that his family, like all of the Slovak *Volksdeutschen,* had been permanently evacuated from Slovakia on January 14, 1945. *See infra*. It simply defies credulity that Breyer would request to have support funds sent to his farm when he knew that neither he nor any member of his family would be there to receive them. Accordingly, sufficient indicia of untrustworthiness are present with respect to government's exhibit 33 that I will not consider this document in connection with these findings of fact.

[14] Sydnor also testified, however, that not every member of the 8th company was transferred to Auschwitz/Birkenau at that time. Sydnor.

96. Breyer testified that he informed his superiors at Auschwitz that he could not shoot a person–just as he had done at Buchenwald–and that he was assigned to be a perimeter guard at Auschwitz as well.[15] Breyer.

97. Breyer testified that the only difference between his responsibilities at Auschwitz and those he fulfilled at Buchenwald was that on two occasions during his tenure at Auschwitz he escorted prisoners from the work camp to a construction site and back. Breyer.

98. Breyer testified that he never harmed or mistreated anyone at Auschwitz, and that no prisoner tried to escape during his tenure there. Breyer.

99. Breyer saw railroad tracks and trains moving through the Auschwitz compound. Breyer.

100. Plaintiff testified that he never was required to either load or unload prisoners onto or from a train at Auschwitz. Breyer.

101. Breyer was aware that large scale murder was transpiring at Auschwitz. Breyer.

102. Breyer never sought to be transferred to any other type of service. Breyer.

103. Such a transfer may have been technically possible, but certainly would have been exceedingly difficult to obtain. Sydnor.

104. In a 1995 deposition Breyer stated that at no time during his service in the *Waffen SS* did

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[15] Dr. Sydnor testified that there was no such position as a "perimeter guard" at either Auschwitz I or II. Sydnor. Instead, he opined, the members of the *Waffen SS* who guarded the camps rotated assignments, and a given guard might have been positioned in a watchtower on Monday, and been guarding a work detail on Tuesday. Sydnor. Nonetheless, I credit Breyer's account that he guarded only a particular spot of the perimeter fence at Auschwitz–as he had at Buchenwald–because this is consistent with both his testimony that he informed his superiors that he was unable to shoot a person and Sydnor's testimony that such a restricted assignment was consistent with *Waffen SS* policy regarding a guard who indicated an inability to shoot a person. *See* Findings of Fact ¶ 67.

he request a transfer to combat duty because such was "out of the question completely." Breyer, 1995 Deposition at 185.

105. Many requests to transfer from a concentration camp to front line duty were denied. Sydnor.

106. Secrecy was of paramount concern at Auschwitz, and this was maintained in various ways, from refusing to permit the guards to venture into town to denying them transfers to other units that were unfamiliar with the specifics of what transpired at Auschwitz. Sydnor.

107. The unavailability of transfer to Breyer is further evidenced by the fact that Auschwitz was shorthanded during 1944, and needed every available guard. Sydnor.

108. There was, however, no official prohibition against transfers from the concentration camps. Sydnor.

109. There are documented cases in which *SS* members refused to obey orders or guard prisoners, and the punishments for these offenses ranged from involuntary transfer to placement in a concentration camp. Sydnor.

110. As an historical matter, the availability of transfers between units is "one of the grayest areas" regarding the nature of *Waffen SS* service. Sydnor.

111. While at Auschwitz, Breyer requested leave every week. Breyer.

112. An appeal for Breyer's permanent release from the *Waffen SS* was sent on April 6, 1944 from Karmasin to the *Waffen SS* Replacement Inspectorate. This appeal cited Breyer's parents' illness and the desperate need for him to come home to maintain the family farm as bases for the request. Agreed Findings ¶ 22; Govt.'s Ex. 28.

113. This appeal was denied. Breyer.

114. A second appeal for Breyer's permanent release from the *Waffen SS* was sent on April 18, 1944 from the director of the *DP*'s Kasmark district to Karmasin. This appeal cited the same considerations as did that sent by Karmasin nearly two weeks earlier. It also indicated that Breyer's "boss told him that he had been mustered in as a volunteer and could not be discharged." Govt.'s Ex. 29.

115. This appeal also was denied. Breyer.

116. Once an individual had been inducted into the *Waffen SS*, he was resigned to remain in the *Waffen SS* for the duration of the war. There was no way out.[16] Lumans; Sydnor; Govt.'s Ex. 15(b)-(c) (indicating that the commitment to the *Waffen SS* was for the duration of the war); Govt.'s Ex. 29 (stating that Breyer's "boss told him that he had been mustered in as a volunteer and could not be discharged").

117. Even those like Breyer who voluntarily enlisted in the *Waffen SS* were obligated to

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[16] Dr. Sydnor nonetheless opined that Breyer's service in the *Waffen SS* was voluntary, and he cited three bases for this opinion. The first basis was that Breyer was paid, provided with food and shelter, received leave and was promoted. Sydnor. Yet Dr. Sydnor also testified that the *Waffen SS* did not differentiate in terms of pay, provisions, leave or promotions between those serving voluntarily or involuntarily. Sydnor. The second basis for his opinion was that Breyer voluntarily entered the *Waffen SS*. Sydnor. However, he also conceded that this has no bearing on whether Breyer served voluntarily from May 30, 1943 onward. Sydnor. The third basis for Sydnor's opinion was that there was no evidence that Breyer ever has sought a transfer to any other *SS* unit. Sydnor. Yet he readily conceded that the chances that Breyer could have gotten out of the *Waffen SS* were functionally nil, especially given the unsuccessful requests for a hardship discharge that were made on his behalf. Sydnor. Given Dr. Sydnor's concessions regarding each of these points, it is evident that he lacked any genuinely compelling factual basis for his opinion that Breyer served voluntarily. Accordingly, I do not credit this opinion.

Dr. Smelser similarly expressed the view that Breyer's service was voluntary, but he conceded that this opinion was "speculative," and was equally likely as Breyer's contrary account. Smelser. Accordingly, I find that this opinion similarly lacks a compelling factual basis, and I do not credit it.

remain in the *Waffen SS* for the duration of the war. Sydnor.

118. Given that each testifying expert agreed at trial that, subsequent to his eighteenth birthday, Breyer had no conceivable chance to validly cease his service in the *Waffen SS*, *see* Findings of Fact ¶¶ 115-16, and that plaintiff accordingly was faced with the choice of either remaining in the *Waffen SS* or deserting (which he temporarily did)[17] and facing what he legitimately believed to be the most dire physical consequences for both himself and his family, *see* Breyer, I find that Breyer's service in the *Waffen SS* subsequent to his eighteenth birthday was involuntary.[18]

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[17] The fact that Breyer opted to desert the *Waffen SS* in the latter months of 1944, *see infra*, does not indicate that his service in that organization was rendered voluntarily. A contrary conclusion would produce the illogical result that a person in Breyer's position actually must remain in the service of a foreign military force in order to preserve his claim to United States citizenship. The government does not defend the validity of this position, and indeed, such a conclusion would be without any tenable factual or legal basis.

[18] This finding of involuntariness is consistent with those reached by numerous federal courts in cases featuring analogous factual circumstances. *See, e.g.*, *Mandoli v. Acheson*, 344 U.S. 133, 135 (1952) (finding involuntary the entry of the plaintiff–who was 23 or 24 years old at the time–into the Italian army, reasoning that "'[t]he choice of taking the oath or violating the law was, for a soldier in the army of Fascist Italy, no choice at all'") (citation omitted); *Perri v. Dulles*, 206 F.2d 586, 589 (3d Cir. 1953) ("The real question . . . is whether the plaintiff's military service . . . was voluntary in the sense that he could have secured release from it under the laws of Italy but did not do so."); *Dos Reis ex rel. Camara v. Nicolls*, 161 F.2d 860, 861, 866 (1st Cir. 1947) (holding that the petitioner had served involuntarily in the Portugese army where he was told that "the only alternative to service in the army was a concentration camp"); *United States v. Schiffer*, 831 F. Supp. 1166, 1187-88 (E.D. Pa. 1993) ("[A]nalysis of the case law involving claims of involuntary foreign military service (or service under duress) reveals that in order for the party opposing expatriation to carry his burden, he must establish, by a preponderance of the evidence, that he took steps to avoid service or, alternatively, that such action on his part would have proven meaningless. . . . Duress or involuntary service may be found where the alleged expatriate establishes that he faced a Hobson's choice between asserting United States citizenship and thereby subjecting himself or his family to penal or corporal punishment, on the one hand, or relinquishing his United States citizenship, on the other." (citing *Nishikawa v. Dulles*, 356 U.S. 129, 137 (1958))).

119. Plaintiff finally was granted two weeks leave to return to his parents' farm in August, 1944. Breyer.

120. According to *Waffen SS* procedures, Breyer was to report to the local *DP* leader upon arriving home. Govt.'s Ex. 34.

121. Upon the expiration of his leave, Breyer did not return, i.e., he deserted. Breyer; Deposition of Margarete Badke at 24-25, 36.

122. During the period of his desertion he remained in the vicinity of Nova Lesna, and hid in barns, in the woods, and in other such places as were available to him. Breyer.

123. He never ventured into the village during the day and never slept at home. Breyer,.

124. During the period of his desertion no one other than his parents knew that he had not returned to Auschwitz, though several people knew that he had come home on leave. Breyer.

125. No agent of the *Waffen SS* ever came looking for him or came to exact retribution on his family while he was hiding in Nova Lesna. Breyer.

126. He continued hiding until December, 1944, when his parents were told to get their bags ready, as the Slovak *Volksdeutschen* were being evacuated so as to avoid the wrath of the approaching Soviet army. Breyer.

127. On January 14, 1945 Breyer's parents were evacuated from Nova Lesna, never to return. Breyer.

128. Fearing that he would be discovered and shot as a deserter when the Germans arrived to evacuate the village, Breyer decided to attempt to return to his unit. Breyer.

129. He brought with him a letter from the mayor of his village explaining that his absence had

been necessitated by his family's dire need for him on their farm. Breyer.

130. He boarded a train that was headed for Auschwitz, but was stopped in Germany and told that the Soviets already were at Auschwitz, and that his unit (which was discerned from an examination of his dog tags) was fighting the Soviet army on the eastern front, which by then had receded to a point near Berlin. Breyer.

131. Breyer then rejoined his unit from Auschwitz and served as a forward observer. Breyer.

132. Although they did not understand why he would want to rejoin them when the war was clearly lost and almost over, the members of his battalion accepted him back upon learning of the note from the mayor of Nova Lesna. Breyer.

133. The unit soon exhausted its supply of artillery projectiles, and Breyer was assigned to infantry duty. Breyer.

134. Plaintiff was wounded in March, 1945. Breyer.

135. He recuperated for three weeks, and then returned to combat. Breyer.

136. On May 3, 1945, his unit surrendered to the Soviet army. Breyer.

137. After being captured, Breyer was shipped to the Czech Republic and placed in a prisoner of war camp. Breyer.

138. He was released after approximately three weeks of confinement. Breyer.

139. At this point he weighed 98 pounds, and was sent to an Austrian hospital where he regained his strength. Breyer.

140. After leaving the hospital, Breyer went to Bavaria where he found his parents in early 1946. Breyer.

141. The family could not return to Slovakia, as the *Volksdeutschen* had been banished from

the country, so Breyer became an apprentice to a tool and dye maker in Germany. Breyer.

142. In 1952, the United States was recruiting skilled metal workers to support the war effort in Korea, and Breyer applied to emigrate to America. Breyer.

143. Breyer arrived in the United States on May 13, 1952, started work the next day, and worked consistently until his retirement in 1992, roughly a year after the institution of the instant proceedings. Breyer.

Applicable Legal Principles

This matter currently is before the court pursuant to a remand issued by our Court of Appeals in 2000, and accordingly it is with the opinion in which that directive was contained that the present discussion must begin. As stated, *supra*, Breyer's mother was born in the United States[19] and accordingly enjoyed American citizenship at the time of plaintiff's birth, whereas his

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[19] Although the government does not agree that Katarina Breyer was born in this country, the INS's counsel conceded at trial that the government does not contest this point.

However, the government has asserted, albeit in an untimely manner, that even if she was born in the United States, Breyer's mother expatriated herself prior to plaintiff's birth by becoming a citizen of Czechoslovakia. The implication of such an expatriation, of course, would be that Katerina Breyer possessed no American citizenship to convey to plaintiff at his birth, thus leaving Breyer with no present claim to such citizenship, given the cancellation of his certificate of naturalization. *See Breyer*, 214 F.3d at 420 (noting this cancellation). Yet in a memorandum dated May 7, 2002, I held that to permit the INS to raise the issue of Katerina Breyer's expatriation for the first time at trial would violate both the mandate rule and the court's scheduling order in this matter. *See Breyer v. Meissner*, 2002 WL 922160, at *1 (E.D. Pa. May 7, 2002). Although I recognized that the issue was troubling, I concluded that it was not within the scope of the mandate from the Third Circuit and that it was egregiously untimely in that it was first raised by the government one month before trial, after ten years of litigation, after more than three years of litigating this particular action, and after all discovery in this action has been closed for months. To allow such a complicated new issue to be inserted at the last minute in the trial would be clearly prejudicial to the plaintiff. In that memorandum, however, I also noted that "[t]o the extent that the Third Circuit did not wish to foreclose this avenue of argumentation to the government, that . . . is a matter that must be clarified by [our Court of Appeals]." *Id.* at *5. This is significant because the forthcoming conclusions of law are predicated on the correctness of the court's May 7, 2002 holding. If, however, that holding was erroneous on both grounds,

father did not. *See supra* note 1. Yet the statutes that in 2000 governed the conveyance of American citizenship from citizen parents to children born outside the United States at the time of Breyer's birth–i.e., § 1993 of the Revised Statutes of 1874 and § 101(c)(2) of the Immigration and Nationality Technical Corrections Act of 1994 ("INTCA")[20]–together operated to confer United States citizenship only upon the progeny of citizen fathers and non-citizen mothers, but to deny American citizenship to the children of citizen mothers and non-citizen fathers. *See Breyer*, 214 F.3d at 422; *supra* note 1. Breyer argued that this statutory scheme deprived his mother of equal protection of the laws, and in 2000 the Third Circuit agreed, stating that "the disparate treatment of mothers that § 101(c)(2) perpetuates is arbitrary and irrational . . . [and that] as applied to Breyer's mother . . . violates equal protection. Johann Breyer should be entitled to American citizenship relating back to the time of his birth." 214 F.3d at 429.

However, the Court of Appeals proceeded to raise the possibility that, although a birthright United States citizen, Breyer expatriated himself by entering or serving in the *Totenkopf Sturmbann* battalion of the *Waffen SS* during World War II. *See* 214 F.3d at 429-31. While it recognized that expatriation can transpire only where the act in question was undertaken voluntarily and with the intent to relinquish United States citizenship, *see id.* at 429-31, the court

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then the ensuing legal conclusions may be undermined by a future finding after another trial that Katerina Breyer had voluntarily relinquished her American citizenship prior to plaintiff's birth.

[20] Specifically, § 101(c)(1) of the INTCA "conferred citizenship at birth to all persons born before noon . . ., May 24, 1934, to an American mother or father." Breyer, 214 F.3d at 422. However, § 101(c)(2) also stated "that the retroactive application of the amendment 'shall not confer citizenship on, or affect the validity of any denaturalization, deportation, or exclusion action against, any person who was excluded from, or who would not have been eligible for admission to, the United States under the Displaced Persons Act of 1948 . . . ." *Id.* (quoting 108 Stat. 4305, 4306 (1994)).

recounted a general description of enlistment in the *SS*, and in particular of the willingness with which young men entered this organization. *See id.* at 430-31 (quoting HELMUT KRAUSNICK et al., ANATOMY OF THE SS STATE 387 (1965)). Moreover, the court cautioned that a citizen's lack of knowledge of his status as a citizen would not preclude a finding that he acted with expatriating intent. It held:

> [A] voluntary oath of allegiance to a nation at war with the United States and to an organization of that warring nation that is committed to policies incompatible with the principles of American democracy and the rights of citizens protected by the American constitution–an organization such as the Death's Head Battalion–is an unequivocal renunciation of American citizenship whether or not the putative citizen is then aware that he has a right to American citizenship.

Id. at 431.

Although the Third Circuit thus indicated that Breyer's activities during World War II may have been undertaken voluntarily and with the intent to relinquish his American citizenship, it refrained from making conclusive factual findings as to these points. Instead, the court remanded the case with the direction that this court is to "make further findings concerning the circumstances under which Breyer joined the *Waffen SS* and the Death's Head Battalion to determine if his actions constitute a voluntary and unequivocal renunciation of any possible allegiance to the United States of America . . . ." *Id.*

Importantly, however, the Third Circuit did not specify in its 2000 opinion the law pursuant to which the question of Breyer's expatriation must be resolved. This is significant because the law governing the relinquishment of American citizenship has undergone dramatic alterations since the time of Breyer's entry into, and service in, the *Waffen SS*. *See Breyer v. Meissner*, 2001 WL 1450625, at *2 (E.D. Pa. Nov. 16, 2001). Especially relevant to this case is

the fact that although the actions of a minor were considered involuntary per se–and thus non-expatriating–in 1942, *see id.* (citing Nationality Act of 1940 § 403(b), 54 Stat. 1170), this legal tenet was abolished with the enactment of the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, as amended, 8 U.S.C. § 1481. *See id.*

Following the Third Circuit's 2000 remand, Breyer moved in this court for summary judgment on the voluntariness issue. In evaluating that motion, it was necessary for the court to answer the question that the Court of Appeals left unresolved, i.e., to determine which incarnation of federal expatriation law governs the voluntariness issue currently at bar in this case. After examining the nature of expatriation law generally, and the language of the specific statutes that could conceivably control the present matter, I concluded that the voluntariness–and, indeed, the expatriating character–of Breyer's actions must be determined pursuant to the Nationality Act of 1940. See Breyer, 2001 WL 1450625, at *4. This conclusion was based largely on the maxim that "expatriation is accomplished at the time of the expatriating act, not at the time of a subsequent adjudication." *Id.* at *3 (citations omitted).

Under the Nationality Act of 1940, Breyer's entry into, and subsequent service in, the *Waffen SS*, as well as any oath of allegiance to the Third Reich taken by him, cannot be deemed voluntary insofar as these events occurred prior to his eighteenth birthday.[21] *See*

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[21] I recognize that this legal determination may appear to be in tension with the Third Circuit's direction that if voluntary, Breyer's entry into the *Waffen SS* will be considered expatriating. *See Breyer*, 214 F.3d at 431. Indeed, at trial and in various motions, the government argued that the Third Circuit's remand should be read as essentially creating a basis for expatriation that is independent of any statutory ground, i.e., serving in the *SS Totenkopf Sturmbann* (or some equivalent group) as opposed to the armed forces of a foreign state. *See* Government's Memorandum of Law on Breyer's Nationality at 22-30 (arguing that "Breyer expatriated himself by assisting Nazi Germany in state sponsored persecutions of persons because of their race, religion or national origin"). The rationale for this distinction, according to

Nationality Act of 1940 § 403(b) ("No national under eighteen years of age can expatriate

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the government, is that the Death's Head Battalion undertook genocidal activities that were uniquely inconsistent with the rudiments of American democracy and citizenship as compared to those activities in which the *Wehrmacht* or the combat battalions of the *Waffen SS* engaged.

The problem for the government, however, is that despite having had ample opportunity to do so, Congress did not provide for expatriation where a citizen serves in (or pledges allegiance to) an organization that pursues ends that are incompatible with the fundamentals of American citizenship except insofar as it denoted as expatriating the swearing of allegiance to, or serving in the armed forces of, a foreign state. *See* Nationality Act of 1940 § 401. While the distinction drawn by the government may well be accurate as a matter of fact, this does not alter the fundamental legal tenet that the universe of expatriating actions is limited to those undertakings specifically delineated by Congress. *See* Nationality Act of 1940 § 408 ("The loss of nationality under this Act shall result solely from the performance by a national of the acts or fulfillment of the conditions specified in this Act."); *Afroyim v. Rusk*, 387 U.S. 253, 285 (1967) (discussing "Congress' authority to prescribe the methods and terms of expatriation"); *Kahane v. Sec'y of State*, 700 F. Supp. 1162, 1166 (D.D.C. 1988) ("A person loses his citizenship only if he voluntarily performs one of the expatriating acts enumerated by Congress in § 1481 [the modern embodiment of § 401], and if, in performing that act, he intends to relinquish his citizenship."). Put differently, as a function of our separation of powers, the judiciary may not graft a substantive common law addendum onto a statutory provision as part of its "penumbra," especially where that legislative enactment is neither unclear nor incomplete. *See generally Bob Jones Univ. v. United States*, 461 U.S. 574, 612 (1983) (Rehnquist, J., dissenting) ("[A]s this Court has said over and over again, regardless of our view on the propriety of Congress' failure to legislate we are not constitutionally empowered to act for them."). Accordingly, I will not read the Third Circuit's remand as taking the extraordinary step of carving any independent, common law basis for expatriation. This conclusion is reinforced with particular vigor by 1) the lack of any affirmative indication by our Court of Appeals that it was exceeding the scope of the expatriation provisions codified in § 401 of the Nationality Act of 1940; and 2) the fact that the Third Circuit did not consider in any form the applicability of that statute, much less the impact of § 403(b) thereof on Breyer's capacity to expatriate himself by swearing allegiance to, or serving in, the *Waffen SS* as a seventeen year old.

A corollary of this conclusion is that the availability to Breyer of transfer from either Buchenwald or Auschwitz to a *Waffen SS* combat battalion does not affect the voluntariness of his service during World War II. Because the Nationality Act of 1940 does not draw any distinction between the *Totenkopf Sturmbann* battalion and any other subdivision of the *Waffen SS*, *see* Nationality Act of 1940 § 401, the potential for movement within the *Waffen SS* would not render expatriating plaintiff's volitional service in a particular battalion thereof.

In sum, then, the court's conclusions of law are predicated on the supposition that Breyer's expatriation can result only from the voluntary undertaking of those actions that Congress specifically designated in § 401 of the Nationality Act of 1940 as constituting the relinquishment of United States citizenship.

himself under subsections (b) to (g), inclusive, of section 401."); *Perri*, 206 F.2d at 588-89 (stating that, while a minor, the plaintiff had taken an oath of allegiance to the King of Italy, but that "a citizen by birth who has not yet attained his majority cannot expatriate himself by taking an oath of allegiance to a foreign state . . . [e]xpatriation must be by voluntary act and the act of a minor is not regarded as voluntary in this sense"); *Breyer*, 2001 WL 1450625, at *2. As stated, *supra*, Breyer was born on May 30, 1925, and he turned eighteen on May 30, 1943. As also was discussed previously, Breyer's entry into the *SS Totenkopf Sturmbann* battalion occurred on February 10, 1943, and his swearing of an oath of allegiance to Adolf Hitler and the Third Reich at the conclusion of his basic training similarly transpired while he was a seventeen year old. As such, the only actions taken by Breyer that, if voluntary in nature, can entail expatriating effect are his continued service and swearing of any oath of allegiance to the Third Reich subsequent to his eighteenth birthday.[22] *See* Nationality Act of 1940 §§ 401(b)-(c).

In ascertaining the voluntariness of the oaths pledged and service rendered by Breyer, the court is to presume that these actions were undertaken of plaintiff's own volition. *See Vance v. Terrazas*, 444 U.S. 252, 267-70 (1980). Stated alternatively, the burden rests with Breyer to demonstrate by a preponderance of the evidence that the actions he took subsequent to his eighteenth birthday were involuntary, i.e., taken under duress.[23] *See id.* at 269 (stating that

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[22] The reason these actions will be deemed expatriating if undertaken voluntarily is that they are specifically delineated in §§ 401(b) and 401(c) of the Nationality Act of 1940 as entailing expatriating effect. Again, that Act governs the question of whether Breyer relinquished his American citizenship by virtue of the actions he undertook during World War II. *See Breyer*, 2001 WL 1450625, at *6.

[23] Binding precedent establishes that foreign military service under "duress" is necessarily involuntary in character. *See Stipa v. Dulles*, 233 F.2d 551, 555 (3d Cir. 1956) ("'Duress as we see it is a defense to expatriation'" (quoting *Doreau v. Marshall*, 170 F.2d 721,

"voluntariness is presumed and . . . duress is an affirmative defense to be proved by the party asserting it"); *id.* at 268 (noting that duress is to be proved by the citizen by a preponderance of the evidence); *United States v. Schiffer*, 831 F. Supp. 1166, 1187 (E.D. Pa. 1993) (same).

Before turning to the conclusions of law section, it is worthwhile to briefly remember the precise nature of the present action, as all of the foregoing factual findings and legal principles are significant only insofar as they impact plaintiff's right to the specific relief he seeks. Although this case has featured a wealth of legal and factual issues, and has been manifested in an equally wide range of procedural postures, it is, in its essentials, a straightforward declaratory judgment action. More precisely, Breyer seeks a declaration that he is a citizen of the United States of America. *See* Amended Petition for Declaratory Judgment Pursuant to 28 U.S.C. § 2201 and 8 U.S.C. § 1503(a) ("Amended Petition") at 5. Thus, the import of the foregoing legal principles is that if Breyer can be said to have demonstrated by a preponderance of the evidence that any oaths he took or service he rendered in the *Waffen SS* after his eighteenth birthday was involuntary in nature, then he is entitled to the declaration of citizenship that he seeks.

Conclusions of Law

1. Although voluntary as a matter of fact, plaintiff's entry into the *Waffen SS* was involuntary–and thus non-expatriating–as a matter of law because he was under the age of 18. *See* Nationality Act of 1940 § 403(b); *Perri*, 206 F.3d at 588-89.

2. Because Breyer has demonstrated by a preponderance of the evidence that his service in

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724 (3d Cir. 1948))). Duress or nonvoluntariness connotes an absence of choice or feasible alternatives due to factors beyond an individual's control.

the *Waffen SS* subsequent to his eighteenth birthday was involuntary, *see* Findings of Fact ¶ 118, it was non-expatriating as a matter of law. *See Nishikawa*, 356 U.S. at 133 ("[I]t is settled that no conduct results in expatriation unless the conduct is engaged in voluntarily." (citing *Mandoli v. Acheson*, 344 U.S. 133 (1952))); *Perkins v. Elg*, 307 U.S. 325, 334 (1939) ("Expatriation is the voluntary renunciation or abandonment of nationality and allegiance."); *MacKenzie v. Hare*, 239 U.S. 299, 311-12 (1915) ("It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen.").

3. Any oath of allegiance to Adolf Hitler or the Third Reich that was taken by Breyer subsequent to his eighteenth birthday was taken incident to his involuntary service in the *Waffen SS*, and accordingly was likewise involuntary. *See Pandolfo v. Acheson*, 202 F.2d 38, 41 (2d Cir. 1953) (holding that the plaintiff had not expatriated himself by swearing an oath of allegiance to Italy when that oath was taken as an incident of the plaintiff's involuntary service in the Italian army); *Alata v. Dulles*, 221 F.2d 52, 185-86 (D.C. Cir. 1952) (holding that an oath of allegiance to a foreign state taken during involuntary service in that state's military is likewise involuntary and therefore non-expatriating); *Gensheimer v. Dulles*, 117 F. Supp. 836, 839 (D.N.J. 1954) ("[I]f such an oath [of allegiance to Germany] was taken, it was the concomitant of [plaintiff's] conscription, and, like his subsequent military service, involuntary, and therefore could not effect his expatriation."); *Paracchini v. McGrath*, 103 F. Supp. 184, 188 (S.D.N.Y. 1952) (stating, albeit in dicta, that any oath of allegiance to Italy taken by the plaintiff during his involuntary service in the Italian army was similarly involuntary); *In re Gogal*, 75 F.

Supp. 268, 271 (W.D. Pa. 1947) (holding that although plaintiff swore an unconditional oath of allegiance to Czechoslovakia, he had not expatriated himself because that oath was taken as an incident of his involuntary service in the Czechoslovakian army).[24]

4. Because neither Breyer's service in the *Waffen SS* nor any oath he took subsequent to his eighteenth birthday was voluntary, and because these are the sole acts alleged by the government to have been expatriating in character, plaintiff Johann Breyer did not expatriate himself through his actions during World War II.[25]

5. Accordingly, Breyer is entitled to a declaration that he presently retains his United States citizenship.[26]

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[24] In reality, the government's oath-based argument is superfluous, though certainly not frivolous. If Breyer served voluntarily in the *Waffen SS* subsequent to his eighteenth birthday, then he expatriated himself pursuant to § 401(c) of the Nationality Act of 1940, regardless of whether he undertook any oath during the course of that service. If he did not serve voluntarily, than any oath taken during that service must also be considered involuntary, and thus non-expatriating.

[25] Given the involuntariness of his actions as an adult during World War II, it is unnecessary for the court to address the issue of whether Breyer intended by his actions to relinquish his American citizenship.

[26] The government contends that, pursuant to the Supreme Court's decision in *Nguyen v. INS*, 533 U.S. 53 (2001), the court is without the power to declare Breyer a United States citizen. *See* Defendant's Legal Memorandum at 25. This argument actually is rooted in a view set forth by Justice Scalia, concurring in the Court's judgment in *Miller v. Albright*, 523 U.S. 420, 452-59 (1998) (Scalia, J., concurring in judgment), and in its essentials is quite straightforward. As the INS recognizes, only Congress is vested with the authority to specify the terms on which American citizenship may be conveyed to individuals born outside the United States. *See* 8 U.S.C. § 1421(d); *Nguyen*, 533 U.S. at 71-73. Accordingly, the government contends, even if Congress were to enact a citizenship-conferral provision that violated the constitution, the judiciary would not be free–even upon finding such a constitutional violation–to declare a citizen an individual who had been denied citizenship by that provision. *See Nguyen*, 533 U.S. at 72 ("There may well be 'potential problems with fashioning a remedy' were we to find the statute unconstitutional." (quoting *Miller*, 523 U.S. at 451) (O'Connor, J., concurring in judgment)); *Miller*, 523 U.S. at 453 (Scalia, J., concurring in judgment) ("Even if we were to

Summary

As a result of the rulings of this court and the Third Circuit, and the agreement of

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agree that the [statutory provision in question] is unconstitutional, we could not, consistent with the limited judicial power in this area, remedy that constitutional infirmity by declaring petitioner to be a citizen or ordering the State Department to approve her application for citizenship. 'Once it has been determined that a person does not qualify for citizenship, . . . the district court has no discretion to ignore the defect and grant citizenship.'" (quoting *INS v. Pangilinan*, 486 U.S. 875, 884 (1988))). This is so, the INS asserts, due to the lack of any affirmative legislative enactment on which to base such a declaration. *See Miller*, 523 U.S. at 453 (Scalia, J., concurring in the judgment) ("If there is no congressional enactment granting petitioner citizenship, she remains an alien."). The government argues that, as applied to this case, this rationale requires that the court refrain from granting Breyer the declaration of citizenship that he seeks.

This argument, however, is unpersuasive because the issue presently before this court has nothing to do with the constitutionality of the statutory provisions that govern the conferral of United States citizenship to Breyer. As explained, *supra*, that issue was decided in Breyer's favor by the Third Circuit in 2000. It also was at that time that our Court of Appeals "h[e]ld that . . . Johann Breyer should be entitled to American citizenship relating back to his birth." *Breyer*, 214 F.3d at 429. It is unclear to the court whether the government advanced its contention regarding the Court of Appeals's authority to so hold in its briefing or argument before that court in 2000, or whether it sought rehearing or appealed that holding on this ground, but regardless, the Third Circuit's conclusion is now the law of the case, and as such is binding on this court. *See generally Breyer*, 2002 WL 922160, at **3-4 (discussing the law of the case doctrine generally, and the mandate rule specifically, and concluding that our Court of Appeals's holding that Breyer is entitled to citizenship dating back to the time of his birth is binding on the court). Indeed, as I indicated in 2001, "[t]o the extent that the Third Circuit's [holding] is in conflict with *Nguyen*, as the INS suggests, . . . that is an error properly rectified by the Court of Appeals." *Breyer*, 2001 WL 1450625, at *8 n.8.

By contrast, the issue currently before this court is whether Breyer expatriated himself–that is, voluntarily relinquished citizenship that he possessed from birth–through the actions he took during World War II. *See Breyer*, 214 F.3d at 431 (remanding this case for an expatriation analsysis). Of course, expatriation is a concept that is relevant only where the individual in question possesses citizenship which may be relinquished. *See Breyer*, 2001 WL 1450625, at *8 n.8. Thus, the issuance of the declaration sought by plaintiff would not operate to confer upon him citizenship that he did not otherwise possess by virtue of any legislative enactment, but rather to confirm that Breyer did not voluntarily relinquish the citizenship that he gained at birth pursuant to § 1993 of the Revised Statutes of 1874 and § 101(c)(2) of the INTCA, as interpreted by the Third Circuit. Accordingly, although the INS may be correct as a matter of law that the courts are powerless to declare an individual an American citizen in the absence of any affirmative congressional authorization, that simply is not what the court is doing in this case.

the government not to contest the issue, it is clear that plaintiff's mother, Katarina Breyer, was born in Manayunk, Pennsylvania and thus was a U.S. citizen by birth. This court and the Third Circuit have also concluded that the statutory scheme for the conveyance of citizenship to a foreign-born child at the time of plaintiff's birth in 1925 was a violation of the Equal Protection Clause of the Fourteenth Amendment, as incorporated into the Fifth Amendment's Due Process Clause and plaintiff was therefore a U.S. citizen at birth by virtue of his mother's citizenship (even though neither he nor his mother knew so at the time).

Plaintiff's service in the *Waffen SS* during World War II would normally be an expatriating act. However, the Nationality Act of 1940 specifically provided that no one could expatriate himself by entering or serving in the armed services of a foreign state when he or she was under the age of 18. Thus plaintiff's entry into the *Waffen SS* when he was only 17 years of age was not an expatriating act, even though I have found that as a factual matter he did so voluntarily.

Plaintiff remained in the *Waffen SS* after he was 18 years of age. Under prevailing authority of the U.S. Supreme Court and the Third Circuit this conduct is not an act of expatriation unless he did so voluntarily. I have found that plaintiff's conduct in remaining in the *Waffen SS* after he was 18 years of age was not a voluntary act (a finding which would seem to be corroborated by common sense). As a result, this was also not an expatriating act since it was done involuntarily.

The necessary result of these findings and conclusions is that the plaintiff, a U.S. citizen by birth, did not expatriate himself and remains a citizen of the United States today.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHANN BREYER, Plaintiff,	:	
v.	:	CIVIL ACTION
DORIS MEISSNER, United States Immigration and Naturalization Service Defendant.	:	NO. 97-6515

Order

AND NOW, this ____ day of September, 2002, upon consideration of plaintiff's Amended Petition for a Declaratory Judgment, after trial and in accordance with the aforesaid findings of fact and conclusions of law, **IT IS HEREBY ORDERED AND DECLARED** that:

1. Plaintiff's mother, Katarina Breyer, was a U.S. citizen by birth and, as a result, in accordance with the findings of this court and the Third Circuit, plaintiff was also a U.S. citizen at birth in 1925 by virtue of his mother's citizenship.

2. Plaintiff's entrance and service in the *Waffen SS* during World War II prior to his reaching the age of 18 was not an act of expatriation under the Nationality Act of 1940.

3. Plaintiff's service in the *Waffen SS* after he was 18 years of age was involuntary as a factual matter and, therefore, under prevailing authority of the U.S. Supreme Court and the Third Circuit was not an expatriating act.

4. As a result of the above, the court declares that Johann Breyer, a U.S. citizen by birth, did not expatriate himself and remains a citizen of the United States today.

IT IS HEREBY ORDERED that the clerk shall mark this action **CLOSED FOR STATISTICAL PURPOSES.**

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William H. Yohn, Jr., Judge