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

Memorandum and Order

YOHN, J. May ___, 2002

Presently before the court is the motion in limine of plaintiff Johann Breyer ("plaintiff" or "Breyer") to preclude litigation of the expatriation of Katarina Susanna Breyer. For the reasons that follow, the motion will be granted.

I Background

This case stems from the ongoing efforts of the United States Immigration and Naturalization Service ("INS") to deport Breyer. The fundamental dispute presently underlying this contest is whether plaintiff currently is a citizen of the United States. If he does enjoy American citizenship he is not subject to deportation, but if he is not a citizen the INS may physically remove him from this country.

The factual basis for the INS's desire to deport Breyer has been recounted at length by both this court and the Third Circuit. *See Breyer v. Meissner*, 214 F.3d 416, 418-21 (3d Cir. 2000); *Breyer v. Meissner*, 2001 WL 1450625, at *1 (E.D. Pa. Nov. 16, 2001).

Accordingly, I will provide only a brief sketch of the empirical background against which the instant motion must be evaluated. Breyer was born on May 30, 1925 in the Czechoslovakian village of Nova Lesna. On February 10, 1943, at the age of 17, he was inducted into the SS *Totenkopf* ("Death's Head") Battalion of the Waffen SS, a paramilitary subdivision of the Third Reich.[1] Plaintiff's responsibilities in this unit initially were comprised of guarding the perimeter of the concentration camp located at Buchenwald, Germany, and he later performed the same function at Auschwitz, Poland. Breyer came to the United States in 1952 under the Displaced Persons Act of 1948, and was naturalized in 1957.

In 1991, the Office of Special Investigations of the INS summoned Breyer and questioned him regarding his previous Nazi affiliations, the existence of which he admitted. Subsequently, on April 21, 1992, the government brought suit against plaintiff in this court in an attempt to denaturalize him as a precursor to his deportation. Although Breyer conceded in connection with that action "that he was ineligible for displaced person's status as a result of his war time activities," and that his naturalization consequently was invalid, . . . "he contended that [his citizenship could not be revoked on this basis] because, when he entered this country in 1952, he did so lawfully, as a United States citizen." *Breyer*, 214 F.3d at 419-20. Specifically, he averred that his mother had been born in Manayunk, Pennsylvania, and that he accordingly had gained American citizenship at birth. The INS contested this claim, and the court held a four day bench trial to determine where Breyer's mother, Katarina Susanna Breyer, had been born. I concluded that she had indeed been born in the United States.

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[1] As a condition of his induction Breyer swore an oath of allegiance to Adolf Hitler. *See Breyer*, 2001 WL 1450625, at *1.

Although both § 1993 of the Immigration and Naturalization Act ("INA")–the statute governing the conveyance of citizenship from an American mother to her child that was in place at the time of plaintiff's birth–and § 101(c)(2) of the INA–which in 1994 replaced § 1993 as the law controlling this conveyance–both denied citizenship to Breyer based on his mother's American citizenship, in 2000 these statutes were deemed by the Third Circuit to deprive Katarina Breyer of equal protection of the laws as guaranteed by the Fourteenth Amendment.[2] Accordingly, the Court of Appeals "determined that Johann Breyer should have been entitled to American citizenship from the date of his birth."[3] 214 F.3d at 429. However, the court left open the question of whether plaintiff expatriated himself through the actions he took during World War II. Although it held that the taking of "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," *id.* at 431, the Court of Appeals remanded the case to this

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[2] Under these statutes Breyer would have been considered an American citizen had his father–as opposed to his mother–been a citizen of the United States at the time of his birth.

[3] Although I am bound by this conclusion, I feel compelled to note that there is some tension between this statement and the fact that the Court of Appeals previously vacated the finding that Breyer's mother was born in the United States. Moreover, the Third Circuit's determination that the operation of §§ 1993 and 101(c)(2) of the INA was an invalid basis for concluding that plaintiff is not a birthright American citizen does not answer the query whether there exists one or more alternate bases for finding that Breyer did not gain United States citizenship at birth. For example, if, as the government argues in connection with the instant motion, Katarina Breyer expatriated herself prior to plaintiff's birth, then Breyer could not be considered an American citizen. The determination that Breyer is entitled to birthright American citizenship has foreclosed these potential avenues of argumentation. I, of course, am obligated to abide faithfully by the Court of Appeals's conclusion. To the extent that this is a matter that would benefit from clarification, this is a task that is appropriately left to that court.

court for a determination of the voluntariness of Breyer's actions. *See id.* Plaintiff moved for summary judgment on the voluntariness issue, but I denied this motion in an order dated November 16, 2001. Consistent with the Third Circuit's directive and with the disposition of Breyer's summary judgment motion, a trial currently is scheduled in this matter for mid-May of this year so that the question of whether Breyer voluntarily relinquished his United States citizenship may be resolved.

On March 20, 2002, as he was preparing for trial, Breyer alleges, the INS notified plaintiff's counsel that it intends to litigate the question of whether Katarina Breyer expatriated herself prior to plaintiff's birth by becoming a citizen of Czechoslovakia. If so, then Breyer's claim to American citizenship by birth would evaporate. Plaintiff responded to this notification by filing the instant motion in limine to preclude the government from arguing that Breyer's mother relinquished her United States citizenship prior to May 30, 1925.

Plaintiff raises several arguments in support of this motion. First, he contends that "[i]t is impossible to effectively try the issue of Katarina . . . Breyer's expatriation without the benefit of discovery and appropriate expert witness assistance." Plaintiff's Motion in Limine ("Motion") ¶ 4. However, he asserts, the period during which expert discovery was to be conducted in this case expired on September 28, 2001. *See id.* Breyer further argues that he would be greatly prejudiced by a ruling permitting the litigation of his mother's expatriation.[4]

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[4] Specifically, plaintiff asserts that he conducted discovery in preparation for trial that was "consistent with the scope of the remand," i.e., limited to the voluntariness issue. Pl.'s Reply at 2. Given the closeness of trial, Breyer avers, to require him now to conduct and complete discovery on the complicated issue of whether his mother relinquished her American citizenship would be patently unfair. Moreover, he argues, it is possible to determine whether Katarina Breyer expatriated herself only upon an informed examination of numerous historical documents from various early twentieth century nation-states, including Austria, Hungary,

Reply to the Government's Response to Plaintiff's Motion in Limine ("Pl.'s Reply") at 2. Second, plaintiff asserts that the proposition that he attained American citizenship at birth is now the law of this case, and therefore cannot be revisited. In support of this argument Breyer points to 1) the Third Circuit's explicit holding that "'we have determined that Johann Breyer should have been entitled to American citizenship from the date of his birth,'" Plaintiff's Memorandum in Support of the Motion in Limine ("Pl.'s Memo.") at 1 (quoting 214 F.3d at 429); and 2) the fact that in its 2000 opinion in this case the Court of Appeals took judicial notice of this court's finding that Katarina Breyer was an American citizen. *See id.* at 2-4 (citing 214 F.3d at 418-19 n.2). Third, in a similar vein, Breyer contends that the Third Circuit's remand in the instant matter–pursuant to which this case presently comes to bar–was limited to an examination of the voluntariness of his actions during World War II. By addressing the question of Katrina Breyer's citizenship at the time of plaintiff's birth, Breyer posits, the court would be revisiting the already-decided question of whether he is a birthright American citizen, and thereby exceeding the scope of the Court of Appeals's remand. *See id.* at 1-2; Motion ¶ 5; Pl.'s Reply at 1-2.

The INS contests each of these assertions. It argues first that because the Third Circuit took judicial notice of this court's finding that Katarina Breyer was an American citizen at the time of plaintiff's birth in the context of a motion to dismiss, the validity of this finding was something that simply was assumed–not affirmatively decided–by the Court of Appeals. Therefore, the government avers, this determination is not the law of this case. *See*

Austro-Hungary, Czechoslovakia and the United States. *See id.* He contends that the services of an historical expert would necessarily be employed in "untangling the overlay of . . . legal relationships" that bear on the question of Katarina Breyer's citizenship. Yet he asserts that it is impractical to retain an expert–and impossible for such an individual to complete his or her perusal of the evidence of record in this case–in the time remaining before trial.

Memorandum of Law in Support of the Government's Opposition to Plaintiff's Motion in Limine ("Govt.'s Memo.") at 1-3. Second, the INS contends that because this court's 1993 determination that Breyer's mother was in 1925 a United States citizen was vacated by the Third Circuit, *see United States v. Breyer*, 41 F.3d 884 (3d Cir. 1994), *vacating* 841 F. Supp. 679 (E.D. Pa. 1993), it has no preclusive effect. *See* Govt.'s Memo. at 3-5 (citing *Boston Firefighters Union Local 718 v. Boston Chapter, NAACP*, 468 U.S. 1206, 1211 (1984) (Blackmun, J., dissenting)). Third, the government raises the straightforward argument that it cannot be precluded by the law of the case doctrine from arguing that Katarina Breyer expatriated herself by becoming a citizen of Czechoslovakia because that issue never has been raised or addressed in any way during the course of this litigation. *See* Govt.'s Memo. at 5 ("'The doctrine of law of the case comes into play only with respect to issues previously determined.'" (quoting *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979)).

II Discussion

There are two distinct reasons why the government may not presently litigate the issue of Katarina Breyer's expatriation prior to May 30, 1925, and I will discuss each in turn.

A. The Mandate Rule

Since the inception of the three-tier American judicial system, the United States Supreme Court, the circuit courts of appeals and the district courts have existed in a rigidly hierarchical relationship. *See generally Casey v. Planned Parenthood*, 14 F.3d 848, 857 (3d Cir. 1994) (describing the "'allocation of authority' established by the three-tier system of federal

courts" (quoting *Litman v. Massachusetts Mut. Life Ins. Co.*, 825 F.2d 1506, 1508 (11th Cir. 1987))); Wythe Holt, *"To Establish Justice": Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1423 (1989) (noting that the Judiciary Act of 1789 established a "highly-articulated, three-tiered, hierarchical judicial system"). While the district courts are bound strictly by the decisions of the courts of appeals, these appellate tribunals–like the district courts–are in turn constrained by the holdings of the Supreme Court. Although this sort of discussion may appear to be simplistic and unnecessary, it is often the case that such axiomatic principles get obscured in the shuffle of complex legal issues, especially when such issues are presented in a case that has negotiated as tortuous a procedural path as the instant matter has followed. Indeed, such a reminder is especially functional in this case, as to permit the government to litigate the issue of whether Katarina Breyer relinquished her citizenship prior to plaintiff's birth would be to violate this rudimentary tenet of federal jurisprudence.

As stated by the Third Circuit, "[l]aw of the case rules have developed 'to maintain consistency and avoid reconsideration of matters once decided during the course of a continuing lawsuit.'" *Casey*, 14 F.3d at 856 (quoting Charles A. Wright et al., 18 *Federal Rules and Practice* § 4478 (1981)). As the *Casey* court went on to recognize, "[o]f these, the most compelling is the mandate rule," *id.*, which holds that "'an inferior court has no power or authority to deviate from the mandate issued by an appellate court.'" *Id.* (quoting *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948)). Our Court of Appeals has on another occasion articulated this doctrine as follows:

> It is axiomatic that on remand for further proceedings after decision by an

> appellate court, the trial court must proceed in accordance with the mandate and the law of the case as established on appeal. A trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.

Banker's Trust Co. v. Bethlehem Steel Corp., 761 F.2d 943, 949 (3d Cir. 1985). Indeed, this rule must be applied not blindly, but rather in a manner that incorporates a recognition of the broader substantive context in which the mandate is issued, and of the matters that necessarily fall within–and outside of–its scope. *See generally id.* at 950 (holding that, on remand, a trial court "may consider . . . [only] those issues not expressly or implicitly disposed of by the appellate decision"). As applied, this rule prohibits a trial court from revisiting any question that was settled by the appellate tribunal from which it receives a remand. *See Casey*, 14 F.3d at 857; *Quern*, 440 U.S. at 347 n.18 ("On remand, the 'Circuit Court may consider and decide any matters left open by the mandate of this court.'" (quoting *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895)))

In its remand in the present matter, the Court of Appeals directed this court to undertake "further proceedings consistent with this opinion." *Breyer*, 214 F.3d at 432. In that opinion, as indicated, *supra*, the court could not have been more explicit in its pronouncement that "we have determined that Johann Breyer should have been entitled to American citizenship from the date of his birth."[5] *Id.* at 429. Importantly, not only did the Court of Appeals explicitly so hold, but moreover, the proposition that Breyer attained United States citizenship at birth is a categorically necessary implication of the Third Circuit's subsequent direction to this court. As

[5] To reiterate, the court also took judicial notice of this court's 1993 conclusion that Katarina Breyer was born in the United States. *See* 214 F.3d at 418-19 n.2.

discussed previously, after explicitly stating that plaintiff is a birthright American citizen, the Court of Appeals then raised the question of whether Breyer subsequently expatriated himself by voluntarily pledging allegiance to the Third Reich. *See id.* at 431. The court remanded this action for a determination of whether plaintiff's actions during World War II "constitute[d] a voluntary and unequivocal renunciation of any possible allegiance to the United States of America . . . ." *Id.* Indeed, the court later confirmed the limited nature of its directive to this court. *See id.* ("On remand, the District Court must determine whether Breyer's acts constitute such a renunciation."). By remanding this case for such a determination–indeed, in reaching the issue of the expatriating effect of Breyer's wartime actions at all–the court necessarily determined that Breyer possessed citizenship which could potentially be renounced. As I recognized in the November 16, 2001 denial of plaintiff's motion for summary judgment:

> [T]he only possible meaning of the Third Circuit's direction to engage in a voluntariness determination for purposes of expatriation analysis is that Breyer is to be considered a citizen. Indeed, the question of expatriation is relevant only where the person who committed the expatriating act is a citizen in the first place. Put differently, the matter before this court does not concern the conferral of citizenship upon Breyer. Instead, as per the Third Circuit's remand, I must determine whether Breyer voluntarily relinquished the citizenship that was bestowed upon him at birth.

Breyer, 2001 WL 1450625, at *8 n.8.

It is true that in issuing its mandate in this case the Court of Appeals had not considered the issue of Katarina Breyer's expatriation. Seizing on this point, the INS contends that it is not precluded by the law of the case doctrine from arguing that Katarina Breyer relinquished her American citizenship because this was a matter that was never decided in this action. Yet this argument fails because the Court of Appeals held that Breyer attained citizenship

at birth. An *ipso facto* corollary of this conclusion is that nothing transpired prior to May 30, 1925 that deprived plaintiff of the right to American citizenship at birth. Importantly, the mandate rule prevents lower courts from entertaining arguments as to questions that were both explicitly *and implicitly* decided by appellate tribunals. *See, e.g., United States v. Tenzer*, 213 F.3d 34, 42 (2d Cir. 2000); *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 94 F.3d 1407, 1410 (10th Cir. 1996), *cert. dismissed*, 520 U.S. 1152 (1997); *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 3 F.3d 877, 880 (5th Cir. 1993), *cert. denied* 511 U.S. 1032 (1994). By arguing that Katarina Breyer relinquished her citizenship prior to May 30, 1925, the INS would be questioning whether Breyer attained American citizenship at birth, and thus relitigating an issue that was implicitly decided by the Third Circuit nearly two years ago. This effort is in irreconcilable tension with the mandate rule.

As indicated, *supra*, the government further argues that because this court's determination that Katarina Breyer was born in the Philadelphia area was vacated, it has no preclusive effect. Accordingly, the INS posits, it is not presently barred from contesting Breyer's status as a birthright United States citizen. It is of course true that vacated judgments or determinations entail no preclusive effect. *See generally, Boston Firefighters Union Local 718 v. Boston Chapter, NAACP, Inc*, 486 U.S. 1206, 1211 (1984) (Blackmun, J., dissenting); *Oracare DPO, Inc. v. Merin*, 972 F.2d 519, 522 (3d Cir. 1992) (citation omitted). Yet in this case, the determination that Breyer attained American citizenship at birth is derived not from the judgment of this court that was vacated in 1994 by the Third Circuit, *see Breyer*, 41 F.3d at 893, but rather from the language and unavoidable implication of the Court of Appeals's own subsequent decision in this case. *See Breyer*, 214 F.3d at 429-32. Accordingly, the government's argument

is inapposite to the facts presented in the present matter.

The INS's alternate argument–i.e., that because the case currently is before the court on a remand from a denial of defendant's motion to dismiss, the factual assumptions made by the Court of Appeals in connection with its evaluation of that motion similarly have no preclusive effect–is likewise unpersuasive in light of the Third Circuit's 2000 opinion in this matter. The government might be correct in so arguing if the Third Circuit's only indication that Breyer is a birthright American citizen was its statement that "we take judicial notice of [the district court's] earlier finding [that Katarina Breyer was born in the United States]." *Breyer*, 214 F.3d at 418-19 n.2. However, the court's statement that "we have determined that Johann Breyer should have been entitled to American citizenship from the date of his birth," *id.* at 429, was not an assumption made in order to dispose of the then-pending 12(b)(6) motion. Quite the contrary, such was the conclusion reached by the Court of Appeals following an exhaustive analysis of every contrary argument that had been made to date by the government. Although it is true, as the INS notes, that in my November, 2001 memorandum in this matter I indicated that plaintiff's "mother's birthplace may still be disputed by the government," that statement referred merely to the fact that it was unclear whether the INS concedes that Katarina Breyer was born in the United States, as, it appears, it does not. *See* Govt.'s Memo. at 3 n.1 (indicating merely that the INS "does not choose to relitigate" this issue).

Although I am cognizant of the accuracy of the government's contention that the denial of a motion pursuant to Fed. R. Civ. P. 12(b)(6) ordinarily does not preclude the movant from raising different, potentially dispositive arguments during subsequent points in the litigation, I simply am unable to entertain the INS's argument that Katarina Breyer relinquished

her citizenship prior to May 30, 1925 and remain faithful to the mandate that I have been given by the Court of Appeals. To the extent that the Third Circuit did not wish to foreclose this avenue of argumentation to the government, that, as stated above, is a matter that must be clarified by that court.

B. The Court's Scheduling Order in this Matter

In response to the government's April 13, 2001 motion to set a discovery timetable for expert witnesses, I issued an order dated April 18, 2001 requiring that such discovery be completed by September 28, 2001. As plaintiff notes, to evaluate the INS's contention that Katarina Breyer expatriated herself by becoming a citizen of Czechoslovakia in the early 1920s, it is necessary to scrutinize numerous documents (in several languages) from a variety of European nation-states, some of which have not existed for the better part of a century. Plaintiff unquestionably is correct in positing that such a review cannot be completed without the benefit of expert assistance, and that there simply was no way for him to foresee prior to the expert discovery deadline the need to retain an individual qualified to provide such assistance. Moreover, the government's terse response to plaintiff's scheduling-based contention–i.e., that "Katarina Breyer died over thirty years ago . . . [that a]ll the known facts are in the Plaintiff's possession or are a matter of public record . . . [and that i]t is difficult to see what benefit additional discovery or the use of expert assistance would be," Govt.'s Response ¶ 4–is blatantly inadequate. Indeed, the fact that plaintiff's mother is long-since deceased in no way lessens the need for an expert's interpretation of the documents that shed light on the character and import of the actions she took more than three-quarters of a century ago, when she was very much alive.

Nor does it excuse the government's failure to provide plaintiff with the notice required by the court's April 18, 2001 order as to the need to procure the services of an expert capable of providing such an interpretation. It is far too late in the course of this multi-faceted litigation, which has no doubt caused great distress and expense for all parties involved, to raise such a completely novel and likely complicated issue.

For this reason as well, then, the government may not litigate at the current stage of this case the issue of Katarina Breyer's expatriation.

III Conclusion

In sum, there is no way to reconcile the INS's desire to argue that Katarina Breyer relinquished her citizenship prior to May 30, 1925 with the Third Circuit's directive to undertake further proceedings that are consistent with its 2000 decision in this action. Moreover, even disregarding the applicability of any law of the case doctrine in this matter, the government's effort to raise this issue at the present stage of the litigation conflicts with the court's April 18, 2001 scheduling order. For both of these reasons, Breyer's motion in limine will be granted.

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 May, 2002, upon consideration of plaintiff's motion in limine (Doc. # 69), plaintiff's memorandum of law in support thereof, defendant's response thereto (Doc. # 71), defendant's memorandum of law in support thereof, and plaintiff's reply thereto (Doc. # 72), it is hereby ORDERED that plaintiff's motion is GRANTED.

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William H. Yohn, Jr., Judge