BEFORE THE BOARD OF IMMIGRATION APPEALS

UNITED STATES DEPARTMENT OF JUSTICE

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In the Matter of BOLESLAVS MAIKOVSKIS, : A8 194 566

Respondent. :

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GOVERNMENT'S MEMORANDUM OF LAW IN SUPPORT OF ITS APPEAL BY CERTIFICATION OF THE IMMIGRATION JUDGE'S DENIAL OF AN ORDER FOR THE TAKING OF DEPOSITIONS IN LATVIA

The Government Requests Oral Argument And That This Matter be Argued and Decided On An Expedited Basis.

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Preliminary Statement

This matter is a deportation proceeding in the Immigration Court in New York City, the Honorable Francis J. Lyons presiding. By Notice of Motion dated April 5, 1978, the Immigration and Naturalization Service (hereinafter "the Service") moved the Immigration Court for an order pursuant to 8 C.F.R. § 242.14(e) 1/ to take the depositions of six named witnesses currently residing in Latvia, and the deposition of any other person residing in the Soviet Union who has personal knowledge of the facts relating to this case. In its supporting affidavit the Service stated that the witnesses were unavailable to testify at the proceedings in New York.

1/ 8 C.F.R. §242.14(e) provides:

"Depositions. Either at his own instance or on application of the trial attorney or the respondent, after due notice to all parties, a special inquiry officer may, if satisfied that a witness is not reasonably available at the place of hearing and that his testimony or other evidence is essential, order the taking of a deposition. Such order may prescribe and limit the content, scope, or manner of taking the deposition, may direct the production of documentary evidence, and may authorize the issuance of a subpoena by the officer designated to take the deposition in the event of the refusal or willful failure of a witness within the United States, after due notice, to appear, give testimony, or produce documentary evidence. Testimony shall be given under oath or affirmation and shall be recorded verbatim. The order of the special inquiry officer to take a deposition shall identify the witness and shall specify the title of the

[footnote continued]

The Service also asserted in the affidavit that, because of the nature of the charges of deportability and the time and place of the events which form the basis for these charges, the testimony sought was essential within the meaning of the relevant regulations.

The Immigration Court, in an order dated August 22, 1978, found that the witnesses were unavailable to testify in New York and that their testimony was essential to the government's case. However, it denied the government's motion on the basis that fair depositions, with "a proper opportunity to confront the witnesses on cross examination before an officer or tribunal with some degree of neutrality," could not be taken in the USSR. (Order on Motion to Take Depositions (hereinafter referred to as "Order"), page 4.)

The Government submits this memorandum in support of its appeal by certification of that order.

[footnote continued] officer before whom the deposition is to be taken, shall set forth the immigration district having administrative jurisdiction over the place where the witness is situated but not the time, date, or place for the taking of the deposition, and shall state whether direct and cross-examination shall be by oral examination or written interrogatories or in combination. The Federal Rules of Civil Procedure shall be used as a guide to the extent practicable. In the United States, examination of the witness should take place before a special inquiry officer; abroad, preferably before a Service officer in a locality where he is authorized to interview witnesses in expulsion proceedings, elsewhere preferably before a United States consular officer. The witness shall be notified on Form I-260 to appear for examination. Copies of such notices shall be furnished to the parties to the proceeding. Both the respondent's copy and the record of hearing shall reflect advice as to his privilege to examine the witness and to be represented by counsel at such time. The officer presiding at the taking of the deposition shall note but not rule upon objections and he shall not comment on the admissibility of evidence or on the credibility and demeanor of the witness."

Background of the Case

1. Allegations

The respondent, Boleslavs Maikovskis, is a native and citizen of Latvia who entered the United States on December 22, 1951 as a permanent resident under the Displaced Persons Act of June 25, 1948, as amended, 50 U.S.C., Appendix, §§ 1951 et seq. This deportation proceeding was initiated by a Superseding Order to Show Cause and Notice of Hearing issued on December 20, 1976. Additional Charges of Deportability were subsequently served upon respondent. (The Superseding Order to Show Cause and Additional Charges of Deportability are attached hereto as Exhibit A.)

The Order to Show Cause and Additional Charges allege that respondent is deportable pursuant to Sections 241(a)(1) and 241(a)(19) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1251(a)(1), (19), because he procured his visa by wilful misrepresentation and because he ordered, incited, assisted, or otherwise participated in the persecution of persons because of race, religion, national origin, or political opinion. The Order to Show Cause alleges that respondent, in seeking to establish eligibility for an immigrant visa, falsely stated that he was employed as a bookkeeper for the Latvian Highway Department from 1941 to 1944, while he was in fact a policeman in Rezekne, Latvia. 2/ The Order to Show Cause also alleges that during the German occupation of Latvia, respondent participated in murders and assaults on Jews, including women and children, and that he participated in the arrests and executions of peaceful civilian

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2/ Respondent has subsequently admitted, in statements given to Service investigators, that he was Captain of the Second Police Precinct in Rezekne. See Statement, attached hereto as Exhibit B, pages A27, A33, A47.

inhabitants of the village of Audrini, Latvia and the burning of the village.

2. Proceedings to Date

Five Israeli witnesses testified in the deportation proceeding in October and December 1977. 3/. On October 25, 1977, the government called respondent as a witness. Respondent refused to testify on the grounds that he could not be compelled to testify and invoked his privilege under the Fifth Amendment. The Immigration Judge ruled that respondent could be called as a witness but that he could invoke his Fifth Amendment privilege against self-incrimination. The court further ruled that it was without power to compel respondent to testify under threat of contempt. Respondent was called to testify several other times in November and December 1977, but each time he invoked the Fifth Amendment.

The United States District Court for the Southern District of New York ruled on March 10, 1978 that respondent could not assert the Fifth Amendment under the facts present in this case, and issued an order directing respondent to answer questions which had been submitted. (U.S. v. Maikovskis, M18-304.) This ruling was upheld by the Second Circuit Court of Appeals on September 13, 1978. (Docket No. 78-6079.)

3/ During this testimony, the Immigration Court issued an order barring the public from the deportation hearing. Members of the general public sought an injunction in the United States District Court for the Southern District of New York to have the hearings opened to the public. The injunction was granted by the U.S. District Court on November 8, 1977. (Pechter v. Lyons, 77 Civ. 5190.)

On April 5, 1978, the Service, by Notice of Motion, requested the Immigration Court to issue an order under 8 CFR §242.14(e) allowing the government to take foreign depositions of various individuals currently residing in Latvia. This motion was accompanied by the supporting affidavit of Martin Mendelsohn, Esq., Chief of the Special Litigation Unit for the Service. (Notice of Motion and Affidavit attached hereto as Exhibit C.) In Mr. Mendelsohn's affidavit he stated inter alia that records supplied to the Service by the U.S.S.R. reflected that respondent had been convicted in absentia in Latvia of High Treason under Article 59, Part I, Latvian Criminal Code, for directing and/or participating in (1) the destruction of the village of Audrini, Latvia and the mass murder of its residents during the Second World War; (2) the extermination of Latvian residents of Jewish and Gypsy origin during the Second World War; and (3) the deportation of Latvian residents to forced labor in Nazi Germany (Mendelsohn Affidavit ¶ 3). Mr. Mendelsohn also stated that based upon information and belief, each of the witnesses whose deposition was sought had testified at respondent's Latvian criminal trial (Mendelsohn Affidavit ¶ 4) and that the United States Government's efforts to secure the attendance of these witnesses in the present proceeding had been unsuccessful (Mendelsohn Affidavit ¶¶ 6 & 7). Finally, Mr. Mendelsohn stated that any written interrogatories supplied by the respondent to these witnesses would be propounded, in the event respondent and/or his counsel chose not to attend the depositions (Mendelsohn Affidavit ¶ 9).

By affidavit dated April 28, 1978, respondent's counsel opposed the Service's motion on the following grounds: (1) "The United States has

never recognized the occupation and incorporation of Latvia into the Soviet Union"; (2) the purported inadmissibility of respondent's Latvian criminal conviction in these proceedings precluded the examination of the witnesses by deposition pursuant to 8 C.F.R. § 242.14(e); (3) the government had not sufficiently demonstrated what the testimony of the proposed witnesses would be or what efforts had been made to secure their presence in the United States; (4) the procedure of permitting respondent to submit written interrogatories in lieu of attendance by respondent's counsel deprived respondent of the right of cross-examining these witnesses and, therefore, if the Court were to order the depositions the government must be required to bear the "necessary and incidental expenses" of respondent's counsel for his participation in these proceedings. (Affidavit attached hereto as Exhibit D.)

In an affidavit dated May 16, 1978, the government addressed respondent's argument that any order for the taking of depositions should require the government to pay the travel expenses of respondent's counsel. The government noted that an alien's financial status could not be a determinative factor in the enforcement of our immigration laws. Further, it was noted that even if the Immigration Court assumed the alien's financial status relevant to this motion, no evidence supporting the respondent's claim of inadequate means had been submitted. With respect to respondent's objections regarding the government's efforts to secure the presence of the witnesses and the substance of their testimony, the government submitted substantial documentation demonstrating that the proposed witnesses were unavailable and that their first hand observations

were essential to the prosecution of this action. (Affidavit attached hereto as Exhibit E.)

By affidavit dated June 9, 1978, respondent replied again to the Government's motion. While conceding the witnesses' unavailability, counsel opposed the proposed depositions on the ground that he expected their testimony to be the same as that previously elicted during the 1965 Latvian trial. Counsel claimed that these depositions would, therefore, give the 1965 proceeding "an air of legality" which it allegedly "does not have in this country." (Affidavit attached hereto as Exhibit F.)

In June 1978, Judge Lyons reconvened the hearing on the motion for depositions, and requested an income affidavit from respondent and briefing on the question of whether conducting depositions in Latvia would constitute recognition by the United States of Latvia. Respondent submitted an affidavit of income on July 6, 1978. (Attached hereto as Exhibit G.) The government submitted its memorandum of law in support of its motion to take depositions, briefing the recognition question as well as other legal issues, on July 14, 1978. (Attached hereto as Exhibit H.)

The Immigration Judge denied the motion for the taking of depositions in Latvia on August 22, 1978. In his order he stated:

> "Events of recent days and weeks make it perfectly clear that the process of Soviet justice and the operation of the Soviet Criminal Justice system is devoid of credibility and carries with it the condemnation of free men everywhere including the President of the United States. It is, therefore, inconceivable to me that I, as an official of this Government, should take it upon myself to delegate to a Soviet prosecutor the taking of testimony concerning events which that same prosecutor's office used as a basis for respondent's in absentia conviction. It is highly improbable that any fair testing of

> the truth of such testimony before a soviet court or prosecutor would be available to anyone in the Soviet Union. To suggest that the process of confrontation and cross examination would be available even if the respondent and his attorney were present is to suggest the impossible." (Order, page 3.)
>
> "It is my conclusion that either on the basis of my limited authority or in the exercise of my discretion it would be inappropriate for me to order the taking of depositions before a Soviet prosecutor." (Order, page 5)

(The Order is attached hereto as Exhibit I.)

Before the foregoing order was issued, lawyers for the government had traveled to Latvia in July 1978 to obtain statements from the proposed witnesses and to clarify the procedure that would be followed in Latvia for taking depositions. Four of the six witnesses 4/ were questioned by Soviet officials in the presence of the U.S. government lawyers; the U.S. government lawyers were then allowed to ask their own questions. (A transcript of these proceedings is attached hereto as Exhibit K.)

Expected Testimony of the Latvian Witnesses

Each of the proposed deponents has previously given statements and testified at Soviet criminal proceedings regarding respondent and the events occurring during the German occupation of Latvia. 5/ On this basis,

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4/ Two of the witnesses were ill at the time. See Hospital Certificates of Vladislav Leish and Anufrii Dervinieks, attached hereto as Exhibit J.

5/ In addition to the July, 1978 statements of the four Latvian witnesses who were not ill, all six witnesses had been questioned by Soviet officials in 1976, in response to a request by INS. (1976 statements of all six witnesses are attached hereto as part of Exhibit E.) All six had also given statements or testified in connection with the 1965 trial in which respondent was convicted in absentia. Some of the witnesses have also testified in connection with war crimes trials held in Germany. All of this testimony was given in Latvia.

the government expects each of these witnesses to testify that respondent was chief of the Second Police Precinct of Rezekne, Latvia from 1941 to 1944, and that he committed, or participated in the commission of, atrocities that render him deportable under Section 241(a)(19) of the Immigration and Nationality Act of 1952, 8 U.S.C. §1251(a)(19).

Ianis Ianovich Kalnin'sh is expected to testify as follows: Kalnin'sh was the leader of a police unit under respondent's command from 1941 to 1944. Respondent ordered police in Kalnin'sh's unit and in other units to round up Jews and shoot them, and the police did so.

Anton Yanovich Zhukovskis is expected to testify as follows: Zhukovskis served as a policeman in one of the units under respondent's command from 1941 to 1944. Zhukovskis personally saw respondent present at a large scale execution of Jews. At this execution, respondent was in charge of the policemen guarding the execution site, to see that no Jews escaped.

In December 1941 or January 1942, two policemen were shot in the village of Audrini, Latvia. To avenge this, respondent organized an execution squad which shot between 150 and 250 peaceful civilian inhabitants of the village of Audrini, including women and children, in the Anschupani Hills near Rezekne. Respondent prepared the site of the execution and posted guards along the road to the site to prevent the escape of any of the Audrini residents. Zhukovskis was in charge of one of the guard units posted by respondent. Respondent was present during the

execution of the Audrini residents and then during the shooting of 15 to 18 Soviet prisoners of war. After the execution was carried out, respondent ordered Zhukovskis and other policemen to kill any survivors.

Onufriy Kazimirovich Dervaniyeks is expected to testify as follows: Dervaniyeks was a policeman in one of the units under respondent's command from 1941 to 1944. Dervaniyeks was present when respondent and respondent's superior officer ordered the arrest of all men, women and children of the village of Audrini. He was also present when respondent and his superior officer later ordered the village burned down.

Aleksandr Vintsevich Reidzans is expected to testify as follows: Reidzans was a policeman in a unit under respondent's command from 1941 to 1944. Reidzans was present when respondent called for policemen to take part in the killing of the Audrini residents. Respondent declared that it was the duty of policemen of the Second Precinct to carry out these executions. Reidzans did not witness the Audrini executions, but saw trucks traveling to the Anschupani Hills and then heard gunshots coming from the Anschupani Hills while at his guard post on the day of the executions.

Anton Konstantinovich Miglinieks is expected to testify as follows: Miglinieks was a policeman in a unit under respondent's command from 1941 to 1943. In the autumn of 1941 (in a separate incident from the execution of the residents of Audrini) respondent ordered Miglinieks to guard the road leading to the Anschupani Hills to prevent passersby from seeing what was going on and to prevent anyone from escaping from the Anschupani Hills.

While at his post, Miglinieks heard trucks coming and going, volleys of gunshots, and screams coming from the Anschupani Hills.

At a later time, respondent summoned Miglinieks' unit to the Second Precinct Station and asked for volunteers to participate in the execution squad for the Audrini residents.

Vladislav Dominikovich Leysh is expected to testify as follows: Leysh was a policeman in a unit under respondent's command from 1941 to 1944; during part of that time he was senior policeman of the unit. Respondent, as Chief of the Second Police Precinct, directed all police activities within the territory covered by Leysh's unit. All arrests in the territory were carried out on respondent's orders.

On one occasion, respondent ordered the public hanging of a Jew who had been hidden in the village of Dzergilova. Respondent ordered the villagers to witness the hanging, and threatened them with a similar fate if they hid Jews. On respondent's orders, Leysh took part in the arrest -- which respondent led -- of those villagers who had hidden the victim.

ARGUMENT

I. THE BOARD SHOULD ACCEPT CERTIFICATION OF THIS APPEAL, EVEN THOUGH IT IS INTERLOCUTORY IN FORM, BECAUSE (1) IT RAISES AN IMPORTANT ISSUE IN THE ADMINISTRATION OF THE IMMIGRATION LAWS AND (2) THE GOVERNMENT WILL SUFFER IRREPARABLE INJURY IF IT MUST WAIT UNTIL A FINAL ORDER IN THIS CASE BEFORE APPEAL.

Although the Board of Immigration Appeals does not ordinarily entertain appeals from interlocutory decisions of Immigration Judges, the regulations do not preclude interlocutory appeals, and the Board has recognized their propriety in situations similar to this one. In Matter of Ku, Interim Decision #2506 (BIA 1976), the Board's most recent discussion of the subject, the Board set forth the circumstances in which it would review interlocutory decisions, either by certification or appeal, as follows:

> "On occasion, we may assume jurisdiction by certification if an interlocutory order raises a significant issue involving the administration of the immigration laws. See Matter of Seren, Interim Decision 2474 (BIA 1976). In addition, certain orders, although interlocutory in form, may be far-reaching in effect and have a sufficient degree of finality to warrant appeal jurisdiction. See Matter of Fong, Interim Decision 2280 (BIA 1974)."

In the instant case, the Immigration Court's denial of the government's request for depositions in Latvia raises very significant issues involving the administration of the immigration laws. The Court has in effect ruled, before any testimony has been taken, that the testimony of these witnesses (and, by implication, any other witnesses in communist countries) will be entitled to no weight whatsoever. 6/ The government

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6/ The immigration judge stated the following in that regard:

> "Indeed, the problem of proof of the allegations sought to be proven may be insurmountable, even if the depositions were taken under the Convention on the Taking of Evidence Abroad in Civil and Commercial

[footnote continued]

believes that this proscription, if allowed to stand, would substantially and unfairly prevent it (not to mention respondents who seek exculpatory testimony in communist countries) from obtaining necessary and probative evidence in a significant number of deportation proceedings.

The issue of obtaining deposition testimony of witnesses in Soviet and Eastern European countries will be of essential importance in a large number of deportation cases which have been filed and are likely to be filed in the future by the government against alleged Nazi war criminals. (See Affidavit of Walter Rockler, Director, Office of Special Investigations, United States Department of Justice, attached hereto as Exhibit L.) The importance of this issue is underscored by recent passage of Section 241(a)(19) of the Immigration and Nationality Act, 8 U.S.C. Section 1251(a)(19), as amended by Section 103, Act of October 30, 1978, P.L. 95-549, 92 Stat. 2065 7/ and by the fact that a new unit of the

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[footnote continued]

Matters. The absence of personal confrontation and demeanor evidence deprives the trier of the facts of one of his most valuable tools . . . I have already stated my view that any genuine challenge to the testimony of these witnesses before Soviet prosecutor would not be tolerated." (Order, page 4.)

7/ That section reads as follows:

"Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who...

(19) during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with--

(A) the Nazi government of Germany,

(B) any government in any area occupied by the military forces of the Nazi government of Germany,

(C) any government established with the assistance or cooperation of the Nazi government of Germany, or

[footnote continued]

Justice Department, the Office of Special Investigations, has recently been established to locate alleged Nazi war criminals and to institute denaturalization and deportation actions against them, where justified. Many of the cases this office has brought or will bring will depend on testimony of witnesses currently residing in the Soviet Union, Poland, and other Eastern European countries. In many cases it will be difficult or impossible to bring these witnesses to the United States to testify, as, indeed, all parties agree it is in this case. The only practicable means of securing their testimony is by deposition. Denying the government the opportunity of taking these depositions could allow probable war criminals to live out the rest of their lives in America, free from appropriate legal action. Indeed, if the order below is applied to respondents who seek depositions to secure exculpatory testimony (and we see no reason why it would not be), persons accused of war crimes and immigration fraud would be unfairly hampered in presenting their defense.

This appeal also raises the broader but equally important issue of the scope of an immigration judge's discretion to refuse to order depositions under 8 CFR § 242.14(e) when a witness is not reasonably available at the place of hearing and his testimony is essential. The Immigration Court's order denying the request for depositions specifically found that the Latvian witnesses are unavailable to testify in the United

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[footnote continued]

(D) any government which was an ally of the Nazi government of Germany,

ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion."

States and that their testimony is essential to elements of the government's case. (Order, pages 4-6.) As we discuss below, there are clear limits on the Immigration Judge's discretion in such circumstances. (See pages 19-26, infra.)

The necessity of an interlocutory appeal in this case is emphasized by the irreparable injury the government may suffer if these depositions are not taken soon. The proposed deponents range in age from 62 to 80, and at least two have a history of health problems. (See footnote 4, supra.) If the government is forced to complete its case, wait for the respondent to put on his case, wait for a decision by the Immigration Judge, and then take an appeal to the Board of the Immigration Judge's deposition order, it is entirely possible that some of the witnesses the government seeks to depose will have died, and their testimony will be irretreivably lost.

The urgency of deposing aged witnesses is well recognized. Rule 27(a)(3) of the Federal Rules of Civil Procedure provides for the taking of depositions to perpetuate testimony prior to institution of an action or pending appeal where doing so may "prevent a failure or delay of justice," and courts have held that the advanced age of a witness is an important consideration in such an inquiry. See, e.g., DeWagenknecht v. Stinnes, 250 F.2d 414, 417 (D.C. Cir. 1957) (witness seventy-four years of age, motion for Rule 27 depositions granted); In re Boland, 79 F.R.D. 665 (D.D.C. 1978).

Moreover, courts have also recognized the importance of allowing an interlocutory appeal of a denial of a motion to perpetuate testimony by deposition. The Third Circuit in Ash v. Cort, 512 F.2d 909, 911 (3d Cir.

1975) stated that "[u]nlike the usual discovery motion, the denial or grant of which has been considered interlocutory and non-appealable, motions to perpetuate testimony must be judged by different standards." 512 F.2d at 911.

> "Our holding that Rule 27 relief is reviewable is compatible with traditional rules of finality as stated in Eisen v. Carlisle & Jaquelin, 417 U.S. 156, 4 S.Ct. 2140, 40 L.Ed.2d. 732 (1974) . . . Eisen states a two pronged test for determining finality. The district court's order must not be tentative, informal or incomplete and it must deal with a collateral matter, which could not effectively be reviewed on appeal from the final judgement. 417 U.S. at 171. Clearly the district court's order on this matter is not incomplete. The possibility that testimony will be lost forever unless review is afforded immediately brings this case within the second Eisen test. Review of the final judgment can, in no way, mitigate a loss of testimony from a witness' death, or from the destruction of evidence sought to be preserved by the Rule 27 motions." 512 F.2d at 912 n.12. (emphasis added.)

See also Crateo, Inc. v. Intermarls, Inc., 536 F.2d 862 (9th Cir. 1976), cert. denied, 429 U.S. 896 (1976); Mosseller v. United States, 158 F.2d 380 (2d Cir. 1946).

In Texaco, Inc. v. Borda, 383 F.2d 607 (3d Cir. 1967), the court of appeals granted a writ of mandamus, holding that the district court judge had abused his discretion in refusing to grant defendant leave to take plaintiff's deposition "in view of the prevailing factual circumstances." 383 F.2d at 608. In particular, the court of appeals noted that "[t]he circumstance that '[the plaintiff] is 71 years old' is quite meaningful." 383 F.2d at 609. 8/

8/ The requirements for a writ of mandamus concerning an interlocutory order in the federal courts are, of course, much stricter than the requirements for an interlocutory appeal or certification to the BIA, as set forth in Matter of Ku, Matter of Seren and Matter of Fong, supra. As

[footnote continued]

While the Board has required only that an interlocutory appeal, to be proper, raise a "significant issue involving the administration of the immigration laws," (Matter of Ku, supra; Matter of Seren, Interim Decision 2474 (BIA 1976); Matter of Fong, Interim Decision 2280 (BIA 1974)), and while this case raises such an issue, the irreparable injury likely in this case is an additional reason for the Board to hear this interlocutory appeal. 9/ The government's appeal of the Immigration Judge's order denying it the opportunity to depose men ranging in age from 62 to 80 years

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[footnote continued] the Supreme Court stated in Kerr v. United States District Court, 426 U.S. 394, 402 (1976) "The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." The extraordinary nature of this writ is no doubt due in part to the fact that interlocutory appeals to Courts of Appeals are limited by statute (28 USC 1292) and the writ is not to be used as a substitute for appeal. Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964); Kerr v. United States District Court, supra, 426 U.S. at 403.

9/ The Immigration Judge suggested to the government that

> "if they are convinced that my position in this respect [denying the order for depositions] is incorrect, that they take whatever testimony they choose in whatever manner they choose, upon prior notice to the respondent of their intention, advising of the time, place and manner in which they propose to conduct the interrogation of the witnesses. The work product will have been preserved and they will not have been harmed by the absence of a formal order."

(Order, pages 5-6.) This, of course, will not solve the problem. Without an order from the Immigration Court, there is no reason for respondent's counsel to attend, and every reason to stay away. The Immigration Judge has already expressed his view that the depositions would be of no value, even if taken with respondent's counsel present and allowed to conduct cross examination. It can hardly be imagined that the Immigration Judge would accord any weight to statements taken without cross examination.

old should receive the same quick review that is possible in the federal courts. 10/

10/ Federal courts recognize the imminence of irreparable injury as a basis for an interlocutory appeal in other situations as well. In the federal courts, the situations in which an interlocutory order may be appealed are set forth by statute. 28 U.S.C. Section 1292. Although interlocutory review of orders dealing with temporary restraining orders are not within the statutory jurisdiction of courts of appeals, "[t]he cases seem to be edging slowly toward a principle that rulings with respect to temporary restraining orders are appealable on a sufficiently strong showing of potentially irreparable injury." Wright, Law of Federal Courts (3rd ed.), pages 513-514. See also Massachusetts Air Pollution and Noise Abatement Committee v. Brinegar, 499 F.2d 125 (1st Cir. 1974). A factor appeals courts may consider in determining whether to grant interlocutory review is that "[a]n erroneous ruling may mean either that subsequent trial court proceedings must be duplicated later, or that they will be adversely affected without any later opportunity for correction." Wright, Miller, Cooper & Gressman, Federal Practice and Procedure (1977 ed.), Section 3920, page 6. See also, Colonial Times Inc. v. Gasch, 509 F.2d 517, 523 (D.C. Cir. 1975).

II. THE IMMIGRATION COURT ERRED IN REFUSING TO ORDER THE TAKING OF DEPOSITIONS IN LATVIA.

8 CFR § 242.14(e) provides that "a special inquiry officer may, if satisfied that a witness is not reasonably available at the place of hearing and that his testimony or other evidence is essential, order the taking of a deposition." The Immigration Judge found in our case that "[t]he witnesses . . . are not available outside of the Soviet Union." (Order, page 5.) Eyewitness testimony of respondent's participation in mass murder is clearly relevant to his deportability. The Immigration Judge recognized the essential nature of this testimony:

> "[T]he depositions are sought by the Government for the purpose which they state in their motion, the proof of essential elements in their case otherwise not available anywhere else in the world. It follows that if that evidence is not produced that part of the case itself falls." (Order, page 6.)

The prerequisites to the granting of an order for the taking of depositions are therefore met. 11/ While the regulation states that the Immigration Judge "may," if satisfied that these prerequisites are met, order the depositions, it does not state on what grounds an immigration judge may properly refuse to issue such an order. We do not contend that an Immigration Court must order depositions in all cases in which a witness is not available at the hearing and his testimony is essential. Our

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11/ This disposes of respondent's third ground for opposition to the depositions, as set out in paragraph 4 of his affidavit of April 28, 1978. See page 6, supra.

position here is simply that the Immigration Court's reason for refusing to order depositions in this case was improper. 12/

As noted, the Immigration Judge denied the motion to take depositions in Latvia based on his a priori belief that fair depositions could not be taken in the Soviet Union. While we submit that such a belief is mistaken, and that fair depositions -- that is, depositions in which the witness can testify fully and truthfully, subject to cross-examination — can indeed take place on Soviet soil, 13/ it is not necessary for the Board to decide that question now. The order to allow depositions should issue. The depositions will then take place. Respondent's counsel can attend or, at

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12/ In Colonial Times, Inc. v. Gasch, 509 F.2d 517, 520 (D.C. Cir. 1975), the court of appeals stated the following concerning Rule 30(b)(4) of the Federal Rules of Civil Procedure:

> "The problem of interpretation raised by the Subpart and its commentary is a result of the fact that the rule states that the judge 'may' issue an order permitting depositions by other than stenographic means. The Rule does not state what grounds a trial judge may offer for a refusal to issue such an order."

The court of appeals held that the district court had erred in refusing to issue such an order. See also Ash v. Cort, 512 F.2d 909 (3d Cir. 1975).

13/ The taking of testimony in this case will be presided over by an official of the General Procurator's Office of the U.S.S.R., under the criminal and procedural laws of the place where the deposition is held (in this case Latvia). Attorneys for the government and for the defense will be allowed to be present and to question the witnesses.

Article 174 of the Latvian Criminal Code provides for a prison sentence of up to five years upon conviction of wilfully giving false testimony in an official proceeding such as this. (Translation of Article 174 attached hereto as Exhibit M.)

Courts of the Federal Republic of Germany (West Germany) have taken testimony in Latvia in War Crimes cases. On the basis of information received from German authorities who participated in such proceedings, defense counsel could ask as many questions as they wanted and none of the witnesses seemed to be under pressure from Soviet authorities.

his option, may submit interrogatories that can be put to the deponents. (See footnote 13, supra.) Assuming that the government (or, for that matter, the respondent) then tenders the deposition transcripts 14/ as evidence, the immigration judge can examine the transcripts to determine if indeed they are fair and can rule on their admissibility. Counsel can report any unfairness in the proceedings to the trial judge. If the judge admits the transcripts into evidence, he can give them the weight to which they are entitled.

In this way, whatever legitimate concerns may exist about the fairness of the depositions can be decided in the only informed manner possible — after they have been taken, when they are offered into evidence or, having been admitted, when they are accorded their proper weight as evidence.

Not only is the Immigration Judge's order faulty as a matter of reasoning, but it is without support in the law. 8 CFR §242.14(e) provides for the taking of depositions abroad. It contains no exclusion for communist countries. Moreover, it states that depositions abroad are to be taken "preferably" before a Service officer or U.S. consular officer, but

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14/ There is reason to believe that the depositions can be videotaped — a procedure that is gaining increasing acceptance in American courts. In re National Airlines, 434 F. Supp. 249, 253 (S.D. Fla.1977); Matter of Daniels, 69 F.R.D. 579, 581-82 (N.D. Ga.1975). That should meet the Immigration Judge's objection to "the absence of . . . demeanor evidence" (Order, page 4) -- an absence which, we note in passing, is in no way cured by the Immigration Judge's order.

Regardless of whether the proceedings are videotaped, a verbatim transcript will be made. During the depositions, appropriate interpreters will be available.

it does not prohibit the taking of depositions before officers of the country involved if that is the only procedure the laws of that country provide for. In fact, § 242.14(e) specifically states that "[t]he Federal Rules of Civil Procedure shall be used as a guide to the extent practicable," and Rule 28(b), Fed. R. Civ. P., specifically provides for the taking of depositions in foreign countries "before a person authorized to administer oaths in the place in which the examination is held . . . by the law thereof." As the Advisory Committee noted in the 1963 amendment allowing depositions before foreign officials:

> "The amendment . . . is designed to facilitate depositions in foreign countries by enlarging the class of persons before whom the depositions may be taken on notice. The class is no longer confined, as at present, to a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States. In a country that regards the taking of testimony by a foreign official in aid of litigation pending in a court of another country as an infringement upon its sovereignty, it will be expedient to notice depositions before officers of the country in which the examination is taken." 31 F.R.D. 640.

The proposed Soviet procedure to be followed in taking these depositions (see footnote 13, supra) therefore complies with the Federal Rules of Civil Procedure.

Courts faced with precisely the question presented in this appeal have time and again rejected the Immigration Judge's conclusion that fair testimony is immpossible in a communist country. For example, in Danisch v. Guardian Life Insurance Co., 19 F.R.D. 235 (S.D.N.Y. 1956), attorneys for plaintiffs, Polish citizens who were claimants against an insurance company, sought to take plaintiffs' depositions by letters rogatory in Poland. The defendant insurance company objected on the ground that such

testimony "would be without value since plaintiffs are residents of a police state which would not permit plaintiffs to testify freely and truthfully." 19 F.R.D. at 237. The district court rejected this argument and granted the motion for the taking of depositions by letters rogatory: "It may well be true that the testimony thereby obtained will be of little or no value because it was taken in a police state. This is something for the trier of the facts to consider; it does not make the testimony inadmissible." 19 F.R.D. at 237.

See also Danisch v. Guardian Life Insurance Co., 18 F.R.D. 77, 79 (S.D.N.Y. 1955) (district court rejected defendant's claim that authorizations expressed by plaintiffs while residing in Poland were invalid because plaintiffs were "'under the jurisdiction, control and absolute domination of an Iron Curtain country'"); Danisch v. Guardian Life Insurance Life Insurance Co., 151 F.Supp. 17 (S.D.N.Y. 1957) (same).

In Bator v. Hungarian Commercial Bank of Pest, 275 A. D. 826, 90 N.Y.S. 2d 35 (1st Dep't 1949), plaintiff sued a bank controlled by the government of Hungary, and the bank moved to take the testimony of two of its officers in Hungary by written interrogatories. The trial court refused to order the taking of testimony by written interrogatories in Hungary on grounds that the judicial process in Hungary was suspect. 15/

15/ The trial court in Bator used the same rationale -- and remarkably similar language -- as the Immigration Judge in this case was to use thirty years later:

> [S]ince the submission of the motion, a vivid light has been cast upon some of the judicial processes now prevailing in Hungary, especially where the immediate interests of its Government are involved. The

[footnote continued]

The Appellate Division reversed, stating:

> "[W]e see no reason why the interests of justice in this case cannot be properly served by an examination of the defendant's officers on written interrogatories in Hungary. The fact that the interrogatories are taken in Hungary will be a matter for consideration by the triers of the facts." 90 N.Y.S. at 37.

See also Ecco High Frequency Corp. v. Amtorg Trading Corp., 196 Misc. 405, 94 N.Y.S. 2d 400 (Sup. Ct. N.Y. County, 1949), aff'd, 276 A.D. 827, 93 N.Y.S. 2d 178 (1st Dep't 1949) (motion for the issuance of letters rogatory for depositions in the Soviet Union granted over plaintiff's objection that Soviet depositions would be tainted); Tomaka v. Pennsylvania R.R. Co., 13 Misc. 2d 272, 273,177 N.Y.S. 2d 858 (Sup. Ct. Erie County, 1958), aff'd, 7 A.D. 2d 831 (4th Dep't 1958) (granting a motion for the issuance of letters rogatory to the U.S.S.R., holding that "any objection to the methods of procedure followed by the foreign court in the execution of letters rogatory as such methods might effect the competency or credibility of the testimony taken may properly be asserted upon their return," and noting that the fact that the interrogatories were to be taken in the U.S.S.R. was a matter for consideration by the trier of facts); Federal Republic of Germany v. Elicofon, 358 F.Supp. 747, 753 (E.D.N.Y. 1970) aff'd, 478 F.2d 231 (2d Cir 1973) (depositions of employees of an East German art museum, apparently taken in East Germany, admitted into

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[footnote continued]

> picture presented by the very recent trial there of Cardinal Mindszenty is at once frightening and sickening. Utterly devoid of elementary standards of fairness and decency, it has shocked lovers of truth and justice everywhere. Even the highest officers of our Government -- mindful as they must have been of the diplomatic amenities between nations at peace -- were moved to denounce those processes publicly as 'infamous,' 'wanton' and 'horrifying'." 194 Misc. 232, 233-34, 87 N.Y.S. 2d 700. See also 196 Misc. 157, 90 N.Y.S. 2d 34.

evidence); Uebersee Finanz-Korporation v. Brownell, 121 F.Supp. 420, 425-26 (D.D.C. 1954) (granting a motion for the issuance of letters rogatory to a Swiss court, holding that the court "should not at this time anticipate difficulties in deposition procedures which may prove to be non-existent.")

It should be noted that the proposed procedure in our case provides substantially greater assurances of fairness than in the cases cited above. In Bator, Ecco, and Tomaka, the examinations were ordered on written interrogatories; thus, attorneys for the parties were not to be present for the examination. In our case, respondent's attorney can attend, can observe the proceedings in their entirety, and can cross examine the witnesses. These safeguards provide respondent the full measure of rights he would have in a domestic deposition; if he has reason to dispute the reliability of these depositions, he will be free to do so before the Immigration Judge.

In short, any improper influence that might be exerted by Soviet or Latvian authorities would affect the weight, not the admissibility, of the proposed testimony, and a motion to take such testimony should not be denied, as it has been here, on the assertion that such influence will in fact arise and will necessarily rob the testimony of all credibility. To have determined, before the fact, that the alleged Soviet influence, per se, will utterly destroy the probative value of any testimony requires a prescience that no man possesses.

We are acutely aware that the underlying charges against respondent are grave ones. At the same time, we believe that the instant depositions will elicit probative and reliable testimony from eyewitnesses that respondent was a murderer and war criminal of the first order. The Immigration Court must ultimately decide whether this testimony is persuasive or not, but that is not the question now. The question now is whether there is good ground to prevent the government from securing this evidence. For the reasons we have shown, there is not.

III. THE PROPOSED DEPOSITONS ARE CONSISTENT WITH THE EXECUTIVE POLICY REGARDING THE LEGAL STATUS OF LATVIA.

In his affidavit of April 28, 1978, attorney for respondent stated that "any discussion of judicial proceedings in Latvia must start with a proper characterization of the legal status of Latvia. The United States has never recognized the occupation and incorporation of Latvia into the Soviet Union." Respondent's objection is apparently that taking depositions in Latvia would somehow be inconsistent with United States policy that does not recognize Soviet dominion over Latvia.

That objection is decisively set to rest by the authoritative statement of the Acting Assistant Secretary of State, which the government requested on this question and transmitted to the Immigration Court:

> "The Department of State does not consider that your proposed trip or the taking of depositions in Riga implies formal United States Government recognition of Soviet annexation of Latvia. For years the American Embassy at Moscow has authenticated documents notarized in the first instance by notaries public in Latvia without conceding that we thereby recognize the Soviet annexation. Also, we routinely forward letters rogatory to the Soviet Union requesting the assistance of its courts in propounding written questions to witnesses residing in Baltic states. Furnishing these administrative services is not considered inconsistent with our policy since we have expressly disclaimed that doing so connotes recognition of Soviet sovereignty over Latvia. The procedure you propose is administrative in character and does not constitute a basis for recognition; consequently, we have no objection to it. I believe our opinion on this question is dispositive."

(Letter from Robert T. Hennemeyer, Acting Assistant Secretary of State for Consular Affairs, to Martin Mendelsohn, Special Litigation Unit, July 16, 1978, attached hereto as Exhibit N.)

The Immigration Court, after concluding that fair depositions could not be taken in the Soviet Union, made vague reference to this question,

stating that its conclusion was "separate and apart from international political questions. However, see: The Signe, 37 F.Supp. 819 (E.D.La., 1941), The Regent, 35 F.Supp. 985 (E.D.N.Y., 1940), The Kotkas, 35 F.Supp. 983 (E.D.N.Y.)."(Order, page 5.)

In each of these cases cited by the Court, letters rogatory were sought, addressed to a court of the U.S.S.R., in order to take testimony of witnesses residing in Estonia or Latvia. In each case, the testimony was sought within a few months of the first annexation of Estonia and Latvia by the Soviet Union, forty years ago. 16/ In each case, the court refused to grant the letters rogatory on the basis that the United States did not recognize the authority of any Soviet court over Estonia or Latvia.

Assuming these cases were correct when they were decided 40 years ago, the Immigration Court's reliance on them now is misplaced because it ignores the State Department's current position on this issue. The Executive Branch, particularly the State Department, is the sole arbiter of the foreign policy of the United States. See e.g., Guaranty Trust Co. v. United States, 304 U.S. 126, 137-138 (1938); United States v. Curtiss Wright, 299 U.S. 304, 320 (1936); United States v. Pink, 315 U.S. 203, 229-231 (1942). See generally 2 M. Whiteman, Digest of International Law, §§ 1-71, esp. §§ 68 and 69. The State Department has stated that the taking of the instant depositions would not be inconsistent with American foreign policy. This is dispositive of the issue.

16/ The USSR occupied the Baltic States in June 1940. The Germans invaded the Baltic States in July 1941 and held them until 1944, when the Soviets reoccupied them. Since 1944, the Soviets have treated Latvia, Lithuania, and Estonia as republics of the Union of Soviet Socialist Republics.

IV. PAYMENT OF RESPONDENT'S EXPENSES FOR TRAVEL TO LATVIA.

The respondent has also objected to the proposed depositions because, he asserts, he is "not a man of means." (Affidavit of April 28, 1978.) In its July 14, 1978 memorandum to the Immigration Court, the government opposed payment of respondent's travel costs for taking depositions in Latvia. Judge Lyons took the following position:

> "If I am not correct in my view of the infirmities of the proposed procedure the alternate suggestion I have made provides a fall back position for the Government. Having invested the extraordinary expenses already spent on this case, it may be in the Government's best interest to cover counsel's expenses in order to attempt to prove the Government's case. That is not providing counsel at the Government's expense. It is using the enforcement appropriation to further enforcement objectives." (Order, page 6.)

The government still contends that it is under no obligation to pay the expenses of respondent's attorney as a condition to taking depositions abroad. 17/ However, the government has no objection to paying the travel expenses of respondent's attorney in this case if respondent establishes that he is unable to afford such expenses.

It should be noted that, in the government's opinion, respondent has not demonstrated his inability to pay for the travel. On July 6, 1978 respondent submitted a cursory affidavit which listed only his alleged

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17/ See the cases cited in the government's Memorandum of Law dated July 14, 1978, pages 11-15, attached hereto as Exhibit H. Responsibility for the prosecution of deportation cases involving alleged Nazi war criminals has been transferred to the Office of Special Investigations, Criminal Division, which has an appropriation separate from that of the Immigration and Naturalization Service. Under this appropriation, the expenditure of funds is within the discretion of the Criminal Division. Consequently, the payment of the expenses of respondent's counsel in this case will not set a precedent for cases involving the INS.

income for 1977 (with no supporting documentation) but failed to disclose what other assets respondent has. (Affidavit attached hereto as Exhibit G.) Nevertheless, even from the limited financial data provided by respondent, it is apparent that his claim of inadequate resources is open to substantial question. For example, respondent's affidavit lists dividend income of nearly $5000 from securities and bank accounts. This suggests assets in the range of at least $100,000 in this category alone. 18/

In any event, we suggest that if respondent wishes the government to bear his attorney's travel and subsistence expenses, the Board order respondent to furnish forthwith a full supplementation of his July 6, 1978 affidavit, listing assets, liabilities and income. If this information demonstrates that the expenses of these depositions would prove a hardship to respondent, we will not oppose his motion, if such is made, for travel expenses. Otherwise, we will oppose such a motion and leave the matter for the Immigration Court to decide.

18/ This assumes a rate of return of 5%.

CONCLUSION

The appeal should be certified, and the order of the Immigration Court denying the government's request for the taking of depositions in Latvia should be reversed. We respectfully request that this matter be argued and decided on an expedited basis.

Respectfully submitted.

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