

Beyond Nuremberg

Allan Gerson

ON January 21, 1981, the Supreme Court, in one of its most extraordinary opinions, decided the case of *United States of America v. Feodor Federenko*. At issue was whether the defendant, a seventy-four-year-old Ukrainian-American who during World War II had served as an armed guard at the infamous Treblinka extermination camp, should have his American citizenship revoked on the basis of this newly discovered fact about his past.

The majority opinion, delivered by Justice Marshall and joined in by Justices Brennan, Stewart, Powell, and Rehnquist, ruled that Federenko's Nazi past automatically excluded him from entry into the United States and hence from any lawful acquisition of American citizenship thereafter. Justice Burger concurred in the judgment without filing a separate opinion explaining his reluctance to join in the majority. Justice Blackmun also concurred; his reservations over the majority's opinion, he stated, were based on their failure to disavow expressly the Court of Appeals ruling which would permit revocation of citizenship on mere proof that an individual had misrepresented a fact on his petition for immigration or naturalization if disclosure of that fact might have led to denial of the petition. Justice White dissented, maintaining that the case ought to be remanded to the Court of Appeals for clarification of the appropriate legal standard involved. Finally, Justice Stevens, in what was by far the most provocative and disturbing opinion, castigated the majority for deciding the case "on a theory that no litigant argued, that the government expressly disavowed, and that may jeopardize the citizenship of countless survivors of Nazi concentration camps."

What most aroused the ire of Justice Stevens was that the Court, in rejecting as irrelevant Federenko's defense that his behavior had been "involuntary," was destroying the essential distinction between Federenko's conduct and that of kapos and other prisoners at Treblinka who, in one way or another, assisted the Nazis in the processes of extermination. As Stevens viewed it, the statutory

provision at the heart of the case against Federenko—Section 2(a) of the Displaced Persons Act of 1948, which forbade entry by persons who "assisted the enemy in persecuting civil populations" during World War II—had to be construed as barring entry only of persons who *voluntarily* assisted the enemy. Any other construction would have had the effect of excluding Jewish prisoners who had assisted the SS in the operation of the camps, a result clearly contrary to the intent of Congress. In the Federenko case the Court resolved this dilemma by holding that:

The solution to the problem [of jeopardizing the citizenship of Jewish survivors of extermination camps] . . . lies, not in "interpreting" the Act to include a voluntariness requirement that the statute itself does not impose, but in focusing on whether particular conduct can be considered assisting in the *persecution* of civilians. Thus, an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and pistol, who was paid a stipend and regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems but we need decide only this case.

But this solution was hardly acceptable to Stevens, who reasoned:

Thus the Court would give the word "persecution" some not yet defined specially limited reading. In my opinion, the term "persecution" clearly applies to such conduct [as cutting hair, etc.]; indeed it probably encompasses almost every aspect of life or death in a concentration camp.

It is remarkable in itself that a Supreme Court opinion dealing with distinctions in culpability between Nazi death-camp guards and prisoner collaborators should have been rendered in 1981, nearly forty years after the events in question. What is perhaps equally remarkable is that so lit-

ALLAN GERSON, a new contributor, was until recently with the Office of Special Investigations of the Justice Department. He is the author of *Lawyers' Ethics: Contemporary Dilemmas* (Transaction Books, 1980) and *Israel, the West Bank, and International Law* (Cass, 1978).

tle public attention, either in the daily or periodical press, has been focused on this unusual decision which addresses itself to individual responsibility under the most trying of circumstances. Indeed in many ways the decision can be viewed as going beyond the holdings of the Nuremberg and Eichmann proceedings, where what was involved was obedience to "superior orders" or distinguishing between right and wrong in a society said to have gone "morally insane." Here, the issue was whether the law can exact potentially suicidal standards of conduct on the part of those confronted with participation in the processes of destruction of human life.

I

LET US begin with the man at the center of the dispute. Federenko arrived in the United States in late 1949, penniless and without family, carrying the visa issued to him by U.S. consular authorities under the terms of the Displaced Persons Act. He settled in Waterbury, Connecticut, obtained employment there as a furnace operator for the Scovill Metal Works, and led a quiet, uneventful life until his retirement in 1973. At about that time he learned that his wife and son, who he presumed had perished during the war, were still alive and residing within the Soviet Union. This prompted him to take three trips to the Soviet Union: in 1973 for two weeks; in 1974 for three weeks; and in 1975-1976 for fifty-one weeks. During his second trip, his past at Treblinka came to the attention of Soviet authorities and they detained and questioned him at length about his service. (Later, at his trial in the United States, Federenko was to claim that witnesses had exonerated him of any wrongdoing and he invited the court to travel to the Soviet Union for the purpose of hearing such testimony. Nothing came of the proposal.)

In 1976, upon returning from his latest trip abroad, Federenko decided to move from Connecticut to Miami Beach, Florida. He hardly had time to unpack before he was visited by agents of the U.S. Immigration and Naturalization Service. They had learned from information published in a pro-Soviet Ukrainian weekly in New York that Federenko had been a guard at Treblinka. Federenko did not deny the charge. He admitted, moreover, that he had purposely concealed and misrepresented this fact upon his application for a visa to the United States in 1949. That was all the United States Attorney for the Southern District of Florida needed to know; within a few months, denaturalization proceedings were filed against Federenko. The charge: his naturalization had been procured unlawfully and through misrepresentation or concealment of material facts in violation of the Immigration and Nationality Act of 1952.

At the trial, which commenced in the United

States District Court for the Southern District of Florida in the summer of 1977, only the facts about Federenko's pre-war life and the events leading up to his capture as a prisoner of war in June 1941 went uncontested. He had been a truck-driver in a provincial Ukrainian town until mobilized into the Soviet Army immediately upon the German invasion. Within two weeks he was captured and interned at the large German POW camp at Chelm, Poland. Of 80,000 prisoners, half died of starvation during the winter of 1941-42. Federenko claimed he survived on a diet of grass roots.

In March 1942 the German SS undertook a search at the camp for men to be trained as concentration-camp guards or as auxiliary police to be used in the liquidation of the ghettos of Eastern Europe and the quelling of any uprisings. Federenko claimed that he was "selected" for such training, and that he had no choice since refusal would have meant risking a bullet for his impudence, or starvation at Chelm.

The government sought to refute this version of the facts, and to show that Federenko volunteered for training as a guard. But its evidence—the testimony of a U.S. consular official based on third-hand sources—was too weak to meet the high burden of "clear, unequivocal, and convincing" evidence imposed upon the government in denaturalization proceedings.

The government also failed in its next task. Federenko maintained that after undergoing training at the SS's Travinicki camp he did a short stint at the Lublin ghetto, and then was transferred to Treblinka in April 1942. While at Treblinka he did control-tower duty at Camp No. 1 where the working prisoners were housed and only on rare occasions entered Camp No. 2, where the gas chambers, crematoria, and open pits, which consumed the lives of over 500,000 human beings during Federenko's stay at Treblinka, were located. He claimed that while at Treblinka, from April 1942 to August 1943, he never beat, shot, or killed a single Jewish prisoner, with the sole exception of the morning of August 2, 1943 when several hundred bedraggled prisoners staged a revolt and managed to stream through the front gates into the surrounding forests. On that occasion he shot at the prisoners but he could not know whether he had in fact killed anyone.

In attempting to refute this version of Federenko's duties the government introduced the testimony of six survivors of the Treblinka revolt, all currently residents of Israel, who testified that Federenko regularly beat the arriving Jews, helped prod them into the gas chambers, and executed them in front of the large burning pits. He was identified on the basis of his 1949 visa photograph which was placed in a spread of about 20 different photographs. This display the trial court deemed "suggestive" in its placement of the Federenko photograph; it pronounced that the identification

of the defendant, and hence all the testimony concerning him, was less than credible.

The only issue then before the court was whether Federenko's admitted guard service and admitted firing at escaping prisoners was, in itself, sufficient evidence to warrant issuance of an order of denaturalization. To resolve this issue the core question became whether Federenko's entry visa had been fraudulently procured; if so, he would not have established five years of legal residence in the United States—the precondition for lawful acquisition of American citizenship. Federenko claimed that his one misrepresentation—he had put down on his visa application that he had been a farmer at Sarny, Poland when in fact he had been a guard at Treblinka—did not constitute a "material" misrepresentation within the meaning of the United States Code. This, he argued, was because his service at Treblinka had been "involuntary" and hence, if disclosed, would not have resulted in his exclusion from entry into the United States.

The trial court first took notice of the fact that the Displaced Persons Act under which Federenko was admitted drew no distinction between those who had assisted the Nazis voluntarily in the persecution of civilians and those who had done so involuntarily. But this presented a problem, for if "any assistance, whether voluntary or involuntary, in connection with concentration-camp treatment of civilian population would be sufficient to bar that person . . . it would bar every Jewish prisoner who survived Treblinka because each one of them assisted the SS in the operation of the camp." Since it would be "absurd" to deem such conduct "assistance" inasmuch as it was involuntary, and took place under the utmost duress, the court felt compelled to read the word "voluntarily" into the act.

Having laid the groundwork, the trial court then addressed the next issue—whether Federenko's conduct was indeed involuntary, as he claimed. We have already seen that the court found no conclusive evidence to support a finding that Federenko had volunteered for training as a camp guard. It then tried to determine whether the fact that Federenko may have had opportunities to escape from Treblinka rendered his service voluntary in nature. The court took note of the amazing statistic that the entire extermination operation at Treblinka, an average of 2,000 killings daily, was manned by only about 25 German SS, 15-20 ethnic Germans from occupied areas involved largely in administrative tasks, and 200 armed Ukrainian guards. The guards had weekly 4-hour furloughs to the neighboring town and some took advantage of this chance to escape. Of those who tried, several succeeded; among those less lucky some would always be shot as object lessons to the others.

Under these circumstances, the trial judge pronounced, he could not, "seated in a comfortable

chair in an air-conditioned office," rule that Federenko had been under a legal duty to risk his life by attempting escape. Nor, ruled the judge, could Federenko be expected to have refused orders to fire at escaping Jews; had he done so, "there is little doubt from the evidence that his execution would have been swift and sure." To which the judge added the following postscript:

For a prisoner-guard at Treblinka to have denounced publicly the SS and what they were doing there would indeed have been a dramatic act of decency. It also would have been a dramatic act of self-destruction. As a court of equity, this court cannot impose such a duty upon defendant.

On the basis of this chain of reasoning, the trial court dismissed the case against Federenko.

II

As might be expected, the trial court's decision aroused strong feelings. Representative Joshua Eilberg, then chairman of the Judiciary Committee's Subcommittee on Immigration, Citizenship, and International Law, received an angry letter from the chief of the Nazi war-crimes section of the Israeli police who called the decision a "macabre joke." Eilberg himself protested the decision in a letter to the Attorney General. Untouched by the swirling storm of controversy, the attorney at the Solicitor General's office who was reviewing the case for purposes of a possible appeal noted, "The fact is that we do not know today for sure if Federenko is a war criminal or not."

Before the Solicitor General could decide whether or not to proceed with an appeal, further protests were lodged by Martin Mendelsohn, chief of the newly constituted special-litigation unit within the Immigration and Naturalization Service, established for the express purpose of reviewing over 200 files on alleged Nazi collaborators residing in the United States. Mendelsohn wrote: "As an admitted guard at the notorious Treblinka, there can be little question, as the witnesses testified, that [Federenko] was engaged in crimes against humanity. There were no neutrals at a death camp." The decision was made to appeal the trial court's judgment.

On the road to appeal, however, a curious thing happened. The case was transformed from one whose primary emphasis was on crimes against humanity, albeit within the context of a fraud proceeding, to one hanging on the issue of fraud, with the matter of war crimes on the periphery. Two supporting briefs filed on behalf of major Jewish organizations did speak of the need to rectify the failure "to bring to justice those guilty of the enormities of the Holocaust" and "to understand the nature of the crime committed." But the Justice Department's approach was vastly dif-

ferent, as can be seen in the following exchange between the appellate bench and counsel for the government:

The Court: What's the basis of the prosecution of this man? Is it to establish that the things he did were so reprehensible that they must be—that action must be taken today? Or, is it—are we going to make some law that is going to be useful to the United States in further proceedings of denaturalization? . . . Is this [case here] because of the death camp service and because of the relation to the Holocaust, or is it about citizenship?

The Government: It's about citizenship.

To prove the point, the United States fashioned its argument around a 1960 Supreme Court decision, *Chaunt v. United States*, which concerned the definition of material misrepresentation in the context of an application for citizenship. The government contended that under *Chaunt* it was sufficient that truthful disclosure would have triggered an investigation that *might* have changed the outcome. In this argument it became irrelevant whether Federenko's service was "voluntary" or not, or whether indeed it truly constituted the type of assistance to the enemy with which Article 2 of the Displaced Persons Act was concerned. The issue was no longer guilt for collaboration with the Nazis, but guilt for being less than entirely candid, or careful—as the case may be—in filling out one's visa application some three decades ago.

On June 28, 1979, at about the same time that Mendelsohn's special litigation unit was being disbanded to make way for a much larger "anti-Nazi" unit within the criminal division of the Justice Department, the Court of Appeals rendered its verdict. The judgment of the trial court was reversed and Federenko was ordered denaturalized on the grounds that, applying *Chaunt v. United States*, "it is not necessary that the government prove the existence of facts which, in and of themselves, would have justified denial of citizenship." The defendant appealed the decision to the Supreme Court.

III

USUALLY it is the Solicitor General who argues on behalf of the government before the Supreme Court, but either at the Justice Department or at the White House the Federenko case was considered sufficiently important to warrant argument by the Attorney General himself. This was to be Attorney General Benjamin Civiletti's first and sole appearance before the Court.

His argument was strangely empty of any substantive references to Federenko's role, and that of others like him, in the perpetration of the Nazi Final Solution. He made clear at the outset that

his concern was with current and future illegal immigration into the United States—illegal Mexican aliens, not Nazis—and that a stringent standard of fraudulent misrepresentation was necessary to deter abuse of the immigration laws.

The Justices showed immediate concern. Was not the standard Civiletti was urging, as adopted by the Court of Appeals, unduly punitive? The following question seemed to sum up their apprehension:

Supposing for example at the time he applied for a visa they were only issuing visas to college graduates or married persons or something like that, and he concealed his marital status and his educational status, and therefore, got a visa; then came over and lived here for 20 or 30 years, and then filed the same kind of application for naturalization as he did here. Would the government be entitled to denaturalize that person?

Civiletti's answer was unequivocal: "We can reach back and denaturalize him for that fraud."

Fortunately, the Supreme Court did not agree. It refused to endorse the broad definition of material misrepresentation urged upon it by the government. It ruled that it was unnecessary to rely on an interpretation of *Chaunt* because, in the particular circumstances of this case, it was clear that disclosure by Federenko of his Treblinka service would have mandated his exclusion.

While not expressly overruling the broad interpretation of *Chaunt*, the Court's judgment seemed, as Justice Blackmun put it in his concurring opinion, "to reject this approach." In Justice Blackmun's view:

If naturalization can be revoked years or decades after it is conferred, on the mere suspicion that certain undisclosed facts *might* have warranted exclusion, I fear that the valued rights of citizenship are in danger of erosion.

IV

THIS then brings us to the crux of the case, at least as far as the Jewish question is concerned. As indicated earlier, the Supreme Court ruled that the trial court erred in reading the term "voluntarily" into the Displaced Persons Act's exclusion of persons who "assisted the enemy in persecuting civilian populations." What then of the fear expressed by the trial court, and echoed by Justice Stevens in his dissent, that to read the statute as also excluding those who assisted involuntarily would jeopardize the American citizenship of all Jewish survivors of extermination camps? The trial court pointed out:

Every Jewish prisoner who survived Treblinka . . . assisted the SS in the operation of the camp. Each did so involuntarily and under the utmost duress. For example, working prisoners led arriving prisoners to the lazaret to be executed; or

wore armbands as part of the ruse at the lazaret; or cut the hair of the females to be executed; others played in the orchestra at the gate as part of that ruse, etc. Technically, this is assistance.

The Supreme Court attempted to get around the difficulties presented by the word "assistance" by concentrating instead on the word "persecution." If a person had been guilty of persecution, his citizenship would be in jeopardy. What "persecution" meant within the context of the Displaced Persons Act, was left unresolved by the Court. Clearly, the Court ruled, it did not encompass the activities of prisoners who did no more than cut the hair of female inmates before they were executed. Other cases, the Court allowed, "may present more difficult line-drawing problems."

Thus the Supreme Court left open the possibility that, at least in theory, Jewish survivors of extermination camps who did more than simply cut the hair of female inmates before execution (coaxed arrivals into the gas chambers under the pretext that they were showers? beat or selected Jews for execution, in the role of kapos?) could have their citizenship revoked for participation, even though under extreme duress, in the crimes of the Holocaust. In essence, then, the Supreme Court appeared to be implying that just as Federenko's defense of involuntary behavior, in the sense that he had no options which were not potentially or in fact suicidal, could not excuse his participation in the operation of an extermination camp, so it would not excuse assistance on the part of Jewish death-camp survivors.

The point was hardly novel in the annals of jurisprudence, but it had yet to be made in the context of a denaturalization proceeding. And although perhaps academic—it being highly unlikely that the Justice Department would bring proceedings against death-camp survivors—it raised questions about Jewish responsibility during the Holocaust which few had raised before.

The principle that duress, while excusing participation in lesser crimes, does not pardon participation in the destruction of human life is well enshrined in Anglo-American criminal law. Few law students fail to read such cases as *United States v. Holmes* which hold that if passengers or sailors must be thrown into the sea in order to save other members of the group, the terrible choice should be made by casting lots. Similarly, if, in order to save his life, one of two shipwrecked persons swimming in the sea supported by a plank thrusts the other off, he is guilty of murder or manslaughter; and this is true even if the other person was sickly and doomed to die soon anyway. The Talmud draws the same conclusion: it rejects the plea of necessity as an excuse

for taking life. If a man is threatened with death unless he kills another, the Talmud provides (Sanhedrin 74a): "Let him rather kill you, but you may not kill the other man. Who can say that your blood is redder than his?"*

Needless to say, "line-drawing," as the Supreme Court put it, is no easy task when what is at stake is a person's culpability for not making the ultimate sacrifice rather than participate in "persecution." Federenko's case was easy. There can be no doubt that service as an armed guard, whose very function was to insure that massive extermination proceeded smoothly and without hitch, was active collaboration in murder. But what of the Jews? It is painful even to contemplate asking those who survived, in circumstances where all conventions of normal life disappeared, whether survival was worth the price some had to pay. It is disconcerting that this awful question should have been raised in the trial of one who was on the side of the murderers rather than of the murdered.

But there was little recourse for the Supreme Court. To have accepted Justice Stevens's point of view would have meant dismissing the case against Federenko on the ground that the government had failed to demonstrate that his conduct was "voluntary," and this would have meant condoning savagery. Perhaps a distinction could have been drawn between the obligation of a soldier, which Federenko had been, and civilian prisoners. But the Court chose not to do so, perhaps mindful of the lesson of the shipwreck cases that no one may preserve his own life through taking another's.

QUESTIONS about moral, and indeed even legal, responsibility in the face of forces of massive evil continue to plague those concerned with the legacy of the Holocaust. The Supreme Court's decision in *Federenko* provides no answer to these questions. But it does, ironically enough, provide a moral attitude. And it is, as Justice Stevens pointed out, one never considered in the proceedings. Had the trial court's judgment gone unchallenged, as was nearly the case, guard duty at Treblinka would have been condoned as an "involuntary" act. Had the Court of Appeals ruling been allowed to stand, as the government urged, the principle of accountability for the taking of human life would have yielded to selective application of dangerously broad standards of fraud. As it turned out, the Supreme Court fashioned its own dialectic, roughly hewn, painful to swallow, but morally responsive to the difficult challenge posed by this troubling case.

* See I. Rosenbaum, *The Holocaust and Halakha* (1976), pp. 151-155.