The Office of Special Investigations:
Striving for Accountability in the Aftermath of the Holocaust

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Preface

> [T]he Holocaust is one of those few issues that the more distant we are from it, the larger it looms. Each decade since the end of the war has seen greater, not lesser, attention, and that is an oddity. There are very few issues which grow in magnitude as they are further away from the event. This is one of them. Perhaps because it is the ultimate evil, because it takes so much time to absorb its lessons, and that those lessons have become universalized in Cambodia, in Rwanda, in ethnic cleansing in the Balkans, the Holocaust has taken on an even greater sense of urgency.[1]

The Office of Special Investigations (OSI) is often referred to as the government's "Nazi-hunting" organization.[2] While that moniker is catchy, in fact the United States does not seek to exclude everyone who had an affiliation with the Nazis, nor even everyone who fought on their behalf. OSI's role is to identify, and to seek removal of, only those who assisted the Nazis and their allies in the persecution of civilians.

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In the 1970s, the public was shocked to learn that some Nazi persecutors had emigrated to the United States. There were calls for their expulsion and legislation was passed to facilitate their deportation. OSI was created in 1979 to handle the caseload.

The obstacles to success were formidable. OSI had to prove events decades old which were committed thousands of miles away, despite the fact that most witnesses had been killed during the war. Many who survived the war nevertheless died before OSI's founding. The witnesses ultimately available for testimony rarely knew the names of their tormentors. Moreover, by the time they were called upon to bear witness, their memories were fallible. Much of the relevant documentary proof had been destroyed – some in the rubble of war, some by Nazis intent on obliterating evidence of their horrific acts, and some by newly liberated camp inmates who, in the first blush of freedom, wanted to burn the records of their persecutors. Much

of what survived was behind the Iron Curtain. Access to this material was extremely limited until the Cold War ended – more than a decade after OSI's founding.

The most frequently asked questions about Nazi persecutors in the United States are: how many came? did OSI find most of them? and was the government complicit in providing these persecutors a safe haven? OSI's work sheds light, although not definitive answers, on all these questions.

One of OSI's early Directors hypothesized in 1984 that approximately 10,000 Nazi persecutors had emigrated to the United States.[3] In retrospect, that estimate seems high. In 1984, the Cold War was at its height; one could only speculate about information in Soviet archives. We now have access to thousands of names not available then. Running those names through computer indices of persons in the United States (a research technique also not available in 1984) has not led to anywhere near 10,000 "hits."[4]

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The 10,000 figure has enduring significance, however, because it has been widely reported.[5] To the extent that people believe it, it unfortunately suggests that the number of cases handled by OSI – approximately 130 – is *de minimus*.[6] However, that number, which includes three cases that reached the Supreme Court, should be placed in context. There is enormous difficulty in marshaling the evidence for these prosecutions, many subjects died before investigation was complete,[7] the cases take years to litigate to completion, and the office is small.[8] As of this writing, more than 25 years after OSI's founding, 83 persecutors have been denaturalized; sixty-two have left the country permanently as a result of OSI's work.[9] Almost 200 have been prevented from entering at all.

The disparity between the number of cases filed and the number of defendants who left

the country is due to a variety of factors. Several cases are still in litigation. More than 20 defendants died while their cases were pending. Some cases were settled – generally because of health issues – with the government agreeing not to pursue deportation even though the facts would have warranted it. The government did not prevail in a few cases, and a handful of defendants who have been ordered deported remain in the United States because no other country is willing to accept them.

"Nazi hunting" so many years after the war is dramatic, tedious and difficult. It calls for the prosecutorial collaboration of litigators and historians. Because the work is so unusual, and the moral content so profound, the Department of Justice determined that the history of the office itself should be documented. This report is the result of that determination.

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In preparing a report of this type, there is inevitably the question of what, and how much, to include. Any reader interested in the full scope of the litigation handled by the office should turn to the Appendix at the conclusion of this report. It lists every case filed, the charges made, and the litigative outcome. The body of the report details only a sampling of the cases. They were chosen as representative of a type of case, or of a particular issue, important to understanding the work of OSI.

Although OSI's litigative losses are few, virtually all are discussed.[10] This was done for two reasons: (1) to avoid any suggestion that the report is designed to aggrandize the office's record; and (2) because the losses are rare, almost all present unique issues worthy of comment.

The history of OSI involves more than its cases, however. Although initially conceived solely as a litigating unit, OSI's mandate has expanded over the years. As a repository of World War II knowledge, the office has been called upon by various parts of the government to prepare

reports and to assist in non-litigative matters concerning the Holocaust. The reports, all of which are detailed herein, involve World War II issues relevant to the nation and to the world community.

While the cases and projects are individually fascinating, this report was not written simply to recount a series of unrelated but interesting undertakings. It is designed to serve as a teaching and research tool for historians, the media, academics, policy makers and the general public. The project will hopefully provoke discussion about some of the legal and moral issues involving prosecution of those involved with the Holocaust. Among the questions: what kind of behavior constitutes assistance in persecution? how do people become involved in genocidal activity? did they have viable alternatives? if not, should that be a factor in determining whether they are allowed to stay in the United States? how should society handle them, 30, 40, 50 years after the fact? does the passage of time affect their ability to refute the charges? And what is society's goal in bringing these cases? should it be to punish? to establish personal accountability? to educate future generations? to present a historical record? Whatever the goals, how can they best be met?

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The issues are legion. While one would hope that the Holocaust was such an aberration that its like would never recur, the world has since learned of new and horrific genocidal undertakings. Bosnia, Cambodia, Croatia, Iraq, Rwanda, Serbia and Sudan are among the all-too-many countries involved. These societies will inevitably have to confront some of the same issues which faced OSI. The United States as well will have to revisit some of the issues as it determines how to treat those new persecutors who have emigrated to this country. It is the Department's hope that this report will help bring some of the matters into focus, both for

historical accuracy as well as to provide some guidance on how to respond to the inevitable repetition of persecution.

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1. S. Eizenstat, *Keynote Address*, 25 Fordham Int'l L.J. 205, 208 (2001).

2. *E.g.*,"Racing Against Time," by Angie Cannon, *The Miami Herald*, Nov. 2, 1996; "Nazi Hunters are Still at War," by Rick Atkinson, *The Washington Post*, Aug. 27, 1995; ABC-TV News, March 25, 1995 (describing OSI as "the most successful government Nazi-hunting organization on earth.")

3. Allan Ryan, *Quiet Neighbors* (Harcourt Brace, 1984), pp. 26-27. Ryan acknowledged that the figure was speculative. His calculation was based on the fact that approximately 400,000 emigrés had been admitted under the Displaced Persons Act. That statute favored persons in the Baltic states and Ukraine, two regions rife with Nazi collaborators. Because the visa screening process was woefully inadequate (*see* pp. 36-37), Ryan postulated that 10% of those admitted had been collaborators. Not wanting to be accused of "being hysterical on this subject," he halved the percentage and then halved it yet again. The figure thus calculated was 10,000. Recorded Ryan interview. Oct. 6, 2000. (Ryan's calculations do not include any admittees under the Refugee Relief Act, under which another 200,000 persons entered the country. Very few of those admittees were from the Baltics or Ukraine.)

4. Of course, not all persons who participated in the Holocaust are listed on rosters and the government does not have all relevant rosters in any event; many are missing or incomplete. Moreover, the number of "hits" does not correlate directly with prosecutable cases. Many subjects died before OSI learned their names. Some hits are cases of mistaken identity; in others there is no evidence or insufficient evidence of persecution. Although we have no reliable way of determining the precise number of Nazi persecutors who entered the United States after World War II, OSI has investigated approximately 1,500 persons since its founding in 1979.

That number overstates the universe of known potentially viable cases, however. Before 1988, a matter was "opened" as an OSI investigation as soon as a match (or sometimes a near-match) was found between a name in INS files and a name on an OSI source list. In many instances, it turned out that the person was dead, the near-match was not an actual match, or there was no reasonable basis to believe the individual was involved in persecution. After 1988, OSI generally "opened" a case only after it was clear that the subject was alive and living in the U.S. (or a U.S. citizen living abroad), the match was proper, and there was a reasonable basis to believe he had been involved in acts of persecution.

5. *E.g.*, "As Suspected Nazi Cases Dwindle, Government to Cast Wider Net," by David Porter, *AP*, Feb. 27, 2005; "Unforgiven, Michael Gruber Can Never Escape his Nazi Past," by Katherine Marsh, *The Los Angeles Times Magazine*, June 17, 2001; "Filed Away, As America's Last Hidden Nazis are Pursued, Silent Witnesses Emerge to Testify from Long-Hidden Soviet Archives," by Joseph Slobodzian, *The Philadelphia Inquirer Magazine*, May 13, 2001; "Probers Race Against Time in Hunt for Fugitive Nazis," by Adam Piore, *The Record* (Bergen Co., NJ), Aug. 10, 1997; "Nazi Hunters Sift Aging Archive," by Angie Cannon, *The Charlotte Observer* (No. Car.), Oct. 13, 1996; "Holocaust's Last Chapter; Hunt for Nazis Continues As Clock Winds Down," *AP*, Apr. 11, 1995; "The Nazis Among Us," by David Friedman, *Newsday* (New York), Feb. 22, 1995; "As Time Runs Out, Hunt for Nazis Speeding Up," by Matt O'Connor, *The*

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Chicago Tribune, Aug. 26, 1994; "Racing Time for the Past's Truth," by Carolyn Pesce, *USA Today*, Feb. 6, 1992; "The Hunt Quickens for Hitler's Butchers," by Daly M, *The Courier-Mail* (Queensland, Australia), Mar. 5, 1986; "Nazi Hunters Revise 'Most Wanted' Lists: Our Purpose is Not Just to Catch a Lot of Old Men," by Leon Daniel, *UPI*, July 7, 1985.

6. Not all these cases involved court proceedings. Some subjects chose to leave before a case was filed, either as part of a settlement or simply to thwart litigation.

7. As of this writing, approximately 600 subjects have died while under investigation. It is impossible to extrapolate from this number how many might have been prosecutable. **Update number**

8. At its zenith, in 1983, the office had a staff of 51, 20 of whom were litigating attorneys. As of this writing, the office has 26 employees, including 5 litigating attorneys. **Update numbers**

9. One defendant, not included in the 62, left the country and then returned surreptitiously. He was ultimately apprehended and spent 40 months in custody. His case is discussed at pp. 440-442.

10. The only omissions are (1) losses handed down before OSI was founded – even though in two instances OSI handled the ultimately unsuccessful appeals (*Detlavs* and *Hazners*); (2) one case filed by INS before OSI's filing and then dismissed by OSI because the office concluded that there was insufficient evidence to proceed (*M. Kowalchuk*); and (3) one case in which OSI did not file a denaturalization case but rather unsuccessfully urged a court to reconsider its very recent grant of citizenship (*Bauzys*). All of these cases are included in the Appendix.

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The Beginning

It was not until the 1970s that the "Nazi war criminal issue" percolated into the public's consciousness. The timing is due to a confluence of factors, including (1) the denaturalization and extradition of Hermine Braunsteiner Ryan, a German-born New York City housewife who had served as a guard supervisor at a Nazi death camp;[1] (2) public denunciation of the INS by the investigator and prosecutor in the Braunsteiner Ryan trial, each of whom left the agency after accusing it of foot-dragging and coverup in other Nazi investigations;[2] (3) publicity attendant the simultaneous filing of three deportation actions against alleged war criminals in 1976;[3] (4) Congressional oversight hearings in 1974, 1977 and 1978 which highlighted deficiencies in the INS procedures for investigating Nazi cases; (5) a GAO study which concluded that the INS investigations of Nazis were "deficient or perfunctory;"[4] (6) publicity surrounding the prosecution of a denaturalization case against the Romanian Orthodox Bishop of America for his alleged involvement in atrocities during World War II;[5] (7) the 1977 bestseller *Wanted! The Search for Nazis in America*;[6] and (8) NBC's 1978 broadcast of a powerful four-part miniseries entitled "Holocaust."

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Until 1973, Nazi cases were handled as any other immigration matter – district by district with no central coordination. In order to increase efficiency, the INS that year designated New York as the Project Control Office to review and coordinate all Nazi cases. A year later, the House Subcommittee on Immigration, Citizenship, and International Law was holding routine oversight hearings on the INS. Newly-elected New York City Congresswoman Elizabeth Holtzman was on the subcommittee. Having been alerted that there were Nazi war criminals in

the country, and that the INS was doing nothing about it,[7] she threw out a skeptical question to INS Commissioner L.F. Chapman, Jr. Once he acknowledged that such Nazis were in the United States, she was riveted by the issue. In the words of her then legislative assistant, she "sunk her teeth in it and would not let it go."[8]

A month after the hearing, Holtzman held a news conference in which she berated the agency for inadequate investigations and proposed creating a War Crimes Strike Force within the INS.[9] Shortly thereafter, she asked the INS for the name of every person under investigation. The INS gave her 73 names and DOJ made public a list of 37 who were under investigation.[10]

Holtzman did not merely hector; she got down in the trenches. She met at her office with INS investigators to review the leading investigations;[11] she visited INS' New York office and spent hours reviewing the files;[12] and she sent the INS detailed critiques and analyses of the agency's work.[13]

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The INS was not the sole focus of Congresswoman Holtzman's concern. She wrote to the Secretary of State complaining about his Department's "continuing failure to cooperate" with the INS in its efforts to investigate alleged Nazi war criminals residing in the United States. Dissatisfied with the response she received, she released the exchange of letters and charged the State Department with "inaction and indifference."[14] Eventually, the State Department acknowledged to Holtzman that it had 68 names from INS about whom it had not yet asked the U.S.S.R. for any pertinent information. The State Department went on to promise that henceforth names would be submitted "as soon as they are received."[15] Holtzman also traveled to Germany to exhort the authorities there to file charges against a resident in her district who, as chief of a police precinct in Latvia, had assisted in the persecution of civilians during the War.[16]

In early 1977, Holtzman and a colleague called on Congressman Joshua Eilberg, Chair of the House Subcommittee, to hold new hearings on Nazi war criminals. The INS used the hearing to announce preemptively that it was overhauling its procedures for investigating Nazis. Henceforth, a Washington task force of four trial attorneys and one lead attorney, under the purview of the INS General Counsel, would review all INS files and material connected with alleged Nazi war criminals. Denaturalization and deportation proceedings would be filed if the evidence so warranted.[17]

INS General Counsel David Crosland chose Martin Mendelsohn, an attorney working on the Hill, to head the new unit. Coming from a Civil Rights background, Crosland thought it especially appropriate that the head of a unit involved in World War II persecution be Jewish. While he was not actively looking to hire a Jewish chief, all things being equal, and they were, he was pleased that he was able to do so.[18] The office was not fully staffed until late summer of 1978. Mendelsohn hired four attorneys, two INS agents, four graduate students fluent in German, and one archivist. The task force was called the Special Litigation Unit (SLU).

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Crosland ordered all closed cases involving alleged Nazi war criminals still alive and in the United States reopened for investigation.[19] In addition, the SLU had to deal immediately with cases already filed by INS and U.S. Attorneys throughout the country.[20] Mendelsohn decided, on a case by case basis, what role the SLU would play. He made these determinations based on the stage of the litigation and his assessment of the local Assistant U.S. Attorneys.[21]

Mendelsohn also tried to establish working relationships with other nations whose cooperation he deemed essential to the SLU. To that end, he traveled to Israel and the Soviet Union, both of which were home to potential witnesses. The U.S.S.R. also was the repository for

many relevant Nazi war records which had been taken by the Russians as they conquered Nazi-held territories. Mendelsohn spoke with the appropriate authorities about access to witnesses and records. Both he and Crosland also endeavored to keep the Jewish community apprised of office plans and accomplishments.[22]

Once he was chosen to lead the SLU, Mendelsohn was a frequent visitor to Congresswoman Holtzman's office – a fact which caused friction between him and General Counsel Crosland, who was neither invited to, nor informed about, the visits. Because the SLU needed immediately to get up to speed on previously filed cases, the unit made little attempt to develop cases on its own. Mendelsohn visited some of the U. S. Attorneys' Offices (USAOs) litigating these cases but felt himself at a disadvantage because they viewed him as an INS attorney rather than a DOJ attorney.[23]

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An additional problem concerned funding. The 1979 Department of Justice Authorization bill earmarked $2,052,000 for the SLU. However, the Appropriation bill made no mention of earmarked funds, and there was some question as to which bill had precedence. Less than half the designated amount was spent on the unit by INS during Fiscal Year 1979.

In January 1979, the Department of Justice's Office of Legal Counsel advised that the full $2,052,000 should be set aside. Whether the SLU needed all this funding was debatable. Crosland and Associate Attorney General (AAG) Michael Egan believed the unit was overfunded; Mendelsohn (backed by Jewish groups and Holtzman) felt otherwise.[24] The solution to both the stature and funding problems, as Holtzman and Mendelsohn saw it, was to have the unit moved to the main building of Department of Justice. This would instantly provide increased visibility and access to the Department's greater support resources; the full

allocation could easily be spent in such an environment.[25]

This was not a change that either the Department of Justice or INS sought.[26] The Associate Attorney General, the INS Commissioner and INS General Counsel met with Holtzman to try to persuade her that such a move was unnecessary. They were unsuccessful; she threatened to legislate the move if the Department did not accede.[27]

The Department of Justice bowed to the pressure. Testifying before Holtzman's Subcommittee, AAG Egan, whose supervisory aegis included INS, was candid about the reasons for the move and his reaction to it.

> I have reluctantly come to agree that the unit must be moved from INS. The immediate director of the unit, Mr. Mendelsohn, has urged this for some time.
>
> * * *
>
> I am sorry to see it pass out of my supervision before its mission is successfully accomplished. However, the unit cannot perform without the support and confidence of this Subcommittee. I trust the transfer will help to achieve that support.[28]

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Mendelsohn gave little thought to where within the Department his section should be placed. Holtzman, however, did. She felt the Criminal Division had the most "heft."[29] In addition, she felt that this would be the most appropriate fit since "the cases involve murder" with an order of proof almost as high as that required in a criminal trial.[30]

The transfer officially took place on September 4, 1979, the date on which Attorney General Benjamin Civiletti signed an order giving the Criminal Division:

> primary responsibility for detecting, investigating, and, where appropriate, taking legal action to deport, denaturalize, or prosecute any individual who was admitted as an alien into or became a naturalized citizen of the United States and who had assisted the Nazis by persecuting any person because of race, religion, national origin, or political opinion.[31]

The new section was the Office of Special Investigations (OSI) and it reported to the AAG for the Criminal Division, then Philip Heymann, through his deputy Mark M Richard (DAAG Richard).[32] The Justice Department sent a memorandum to all U.S. Attorneys advising them of OSI's primacy in the prosecution of Nazi cases.[33]

The AAG wanted a Director with "instant credibility" to give the office an auspicious start.[34] He asked Walter Rockler, a former Nuremberg prosecutor and then a partner in a D.C. law firm, to help in the search.[35] Rockler contacted several people, including Telford Taylor (chief prosecutor at Nuremberg) and Charles La Follete (Nuremberg prosecutor and later a Congressman from Indiana.) No one had any suggestions.

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AAG Heymann then asked Rockler himself to consider the position; Rockler was not interested. He had spent the 35 years since Nuremberg "blotting out the war." [ ] Moreover, at Nuremberg he had investigated and prosecuted bankers; he did not know the "gory stuff" about concentration camps that would be central to OSI prosecutions. And finally, he thought the cases "would be a bunch of garbage. [Nuremberg] had the big-timers." But eventually, as he mulled over the issue, he decided that the cases, though less significant than the ones in Nuremberg, were still worth filing.

There were practical problems, however. [ ] In addition, he was litigating several tax cases against the Department of Justice, and it would present a conflict of interest if he were in litigation against the Department of Justice at the same time he was in their employ. AAG Heymann offered solutions to both obstacles: DOJ would waive any conflict of interest and hire Rockler as a part-time contract employee. He could then be paid by the government on an hourly basis and still work at the firm part-time.[36] The

arrangement would last six to eight months, by which time the office would be established and a new director in place. Rockler's firm too was accommodating, agreeing to provide his full partnership draw, less only what he earned from the government.[37]

The SLU attorneys were invited to transfer *en masse* and all but one made the move. The students and archivist, who had been hired on a temporary part-time basis, were given pink slips and had to reapply for a permanent position. All those who did were chosen. Mendelsohn was named Deputy Director of the unit. Rockler wanted him to oversee litigation while Rockler would assess new cases and deal with the mechanics of establishing the section. As Rockler described his own responsibilities:

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> I had to waste an awful lot of time seeing delegations of groups, the Baltics, the Ukrainians. I had delegations descend on me to plead the case of their countrymen. They were all being potentially persecuted. I didn't know anything about it. I would listen to them and be fairly non-committal. After a while I got fairly impatient with them and I said look, we're not going to pursue anybody because they are Latvian, Lithuanian or Ukrainian. It ain't a nationality designation. If we find they've engaged in anything, why don't you help us instead of criticizing us? Why don't you come forward with stuff so we'll get done with it? And I was short tempered and I didn't understand public relations. I didn't understand the job is a public relations job. Meanwhile the Jewish groups were descending on me and they had a different pitch, which I found extremely irritating too, which was: Where the hell have you been for 30 years? How come you haven't hung anybody? I thought to myself, they're all nuts. I mean people are totally polarized. They don't know what the hell goes on and they were annoying. Some of the particular Jewish groups had particular targets in mind. They wanted us to go after Mr. X, Mr. Y or Mr. Z. So I was wasting an awful lot of time on things like that. I had a couple of public appearances. I didn't want the public relations part of it anyhow, but there was no way to avoid it.[38]

Rockler, as Mendelsohn before him, also traveled to the U.S.S.R. and Israel to speak with his counterparts.

Holtzman, meanwhile, kept her eye on the new section and periodically summoned

Rockler to report on the office.[39] She also assisted in various ways. "[T]here were mechanisms she had to help OSI that DOJ just didn't have. DOJ had to go through the State Department and it took way too long. She could cut right through that."[40]

Thus, when she learned that OSI was having trouble getting documents it needed from Romania in order to prosecute Archbishop Trifa, she testified about the problem before a House subcommittee considering whether to extend Most Favored Nation status to Romania. Romania turned over documents shortly thereafter.[41] And she, along with Representative Hamilton Fish (the ranking Republican on her Immigration subcommittee) was able to gather 120 co-sponsors on a 1979 resolution urging the West German government to extend or abolish its statute of limitations governing the prosecution of Nazi war crimes. (It was abolished.)[42]

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Like virtually everyone involved with OSI at the beginning, Rockler thought the office would complete its work in five or six years. He hoped to file a couple of cases before he left and expected Mendelsohn to succeed him. The relationship between the two soured, however, and Rockler began relying more on Neal Sher, an attorney hired by Mendelsohn, to supervise the litigation. Rockler felt that Mendelsohn was spending too much time on the Hill conferring with Holtzman (something no longer Mendelsohn's responsibility) and not enough time on the cases. Rockler kept both AAG Heymann and DAAG Richard apprised of his concerns. In January 1980, DAAG Richard, acting on directions from AAG Heymann, assigned Mendelsohn to another section. The move infuriated Holtzman and various Jewish groups; emotions ran high on all sides.[43]

Rockler's successor was to be Allan Ryan.[44] Just as Crosland had sought to hire a Jew to lead the section (all things being equal), AAG Heymann and DAAG Richard sought a non-Jew

(all things being equal). They did not want the office to be seen as a Jewish organization.[45]

Ryan welcomed the public relations aspects of the position much more than had Rockler. One of the first tasks he set for himself was the creation of an OSI agenda, to be approved by AAG Heymann and DAAG Richard; among the items listed was the need to keep the public informed of OSI's work.[46]

To that end, he sought to establish ties with both the Jewish and ethnic communities. He got help on both fronts from DOJ. AAG Heymann wrote to, and met with, Jewish leaders to assure them about Ryan and to reiterate the Department's commitment to the success of OSI. AAG Heymann also set a goal for resolving, within one year, all matters inherited from INS; by then suit should be filed or the case closed on the 250 pending INS investigations.[47] The Jewish community responded positively and issued a press release in support of the fledgling section.[48]

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DOJ was not as successful in reassuring the Baltic community. They had two major concerns: (1) they viewed themselves as a group target; and (2) they distrusted evidence which came from any Iron Curtain country, as much of the evidence relied on by OSI did.

Ryan and various Department officials met with ethnic group leaders and asked their help in sorting out the "heroes from the collaborators."[49] Ryan also met with local groups and wrote to ethnic newspapers and activists in an effort to allay their concerns.[50] It was to no avail.[51]

In addition to soliciting support from Jewish and ethnic groups, Ryan also sought to win over Holtzman.

> She had the reputation in OSI . . . of being . . . Ghengis Khan incarnate. You'd think going to see her was like climbing Mt. Everest to see the Dali Lama. She was a supporter of Marty Mendelsohn's and . . . I had to speak with [her] because she was the key person on the Hill. . . . I basically told her what I said to the Jewish groups: Here's who I am; here's what I want to do. I can't do it all at

once but give me some opportunity to do it and I think I will prove to you that I can do it. It was the beginning of a very mutually respectful relationship.[52]

Although Holtzman made peace with Ryan's ascension to the directorship, she remained vigilant about OSI matters, issuing press releases to announce OSI filings and victories, exhorting the State Department to work with OSI to update its Watchlist[53] (they did), demanding that State modify its visa application form to take into account new legislation precluding the entry of Nazi persecutors (also done),[54] and notifying OSI when she learned of a potential subject. The priority she gave OSI matters was evident when she left Congress in December 1980; one of her last speeches on the Floor stressed the issue of Nazi war criminal prosecutions.[55] Ryan remained at OSI until 1983. Leadership then passed to his Deputy, Neal Sher.

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It is hard to overstate the obstacles the office initially had to overcome. As noted earlier, many records had been destroyed. Those which remained (including German military and administrative records, newspapers and magazines published or supported by the German occupation authorities, post-war trials and transcripts) were scattered throughout the world, the bulk of them in Germany and the U.S.S.R. Within each country they were dispersed among many archives. The rules of access varied and research aids were generally limited or non-existent.

In that Cold War era, arguably the most difficult hurdle was getting information from the Soviet Union. Holtzman and Eilberg, Mendelsohn, and later Rockler, DAAG Richard and Ryan, all made trips to the U.S.S.R. to discuss the issue. Attorney General Civiletti raised the matter in a meeting at the Justice Department with the Chief Justice of the Soviet Supreme Court.[56] All were promised that the United States would be allowed to take videotaped depositions of Soviet witnesses and to have increased archival access. Although the Soviets generally made good on

their deposition promise, archival access was much more difficult. The Soviets had inadequate archival indices and were not willing to grant access directly to Western scholars.[57] OSI therefore had to rely on the Soviets to do the research, although the Soviets often gave the task to prosecutors and police investigators, rather than to historians. All this, coupled with the fact that Soviet evidentiary requirements were so different, often left OSI in need of more information.[58]

There were also practical impediments. The Soviet Union and Eastern European countries lacked the resources – both personnel and material – to accommodate many requests. It was not uncommon for a year to pass before there was a response; followups therefore often seemed impractical.[59] Problems were often mundane but serious, including inadequate copying facilities, lack of toner or paper, and deteriorating records due to insufficient preservation. (At times OSI would provide toner and paper or bring a portable copying machine.)

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Even within the United States there were enormous hurdles. Although the National Archives, Library of Congress and many private institutions have valuable resource material, too often pertinent information was destroyed in due course or so poorly kept that its value was limited.[60] Material in private collections sometimes had restricted access. Even government agencies impeded OSI's efforts. OSI attorneys complained that the CIA sometimes censored documents so heavily there was virtually no information provided. The Agency also narrowed research requests so that only information directly related to immigration and naturalization was shared. Moreover, it distinguished between "no identifiable information" and "no record." Thus, if OSI asked for information about John Smith, a record of "Smith, FNU (first name unknown)" would not be considered identifiable, even if Smith FNU was a World War II figure; if the Agency had material from another governmental source, it would neither share it nor advise OSI

that it existed so that OSI could request it from the originating agency.[61]

These problems got resolved, to some degree at least, in a variety of ways. The biggest and most dramatic change resulted from the collapse of Communism. Once the Berlin Wall came down, OSI was allowed access to most archives in the former Eastern bloc countries. Also, with time, many countries improved archival facilities and OSI developed and nurtured relationships with archivists around the world.[62] And to the extent that OSI learned that documents were about to be destroyed in the United States, they intervened to stop the process.[63] DAAG Richard helped smooth the way for greater access from the intelligence agencies.[64]

While the ability to gather evidence has greatly improved over the years, these are not easy cases to establish. Given the advanced age of survivors and questionable value of eyewitness testimony,[65] a case is generally only as good as the archival evidence. What is extant and what is accessible varies. It generally falls on the historians – the backbone of the section – to secure the essential documentation. Their integration into the office makes OSI unique among litigating sections within the Department of Justice.

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1. The INS first learned of the defendant after *The New York Times* ran a story about her past. "Former Nazi Camp Guard is Now a Housewife in Queens," by Joseph Lelyveld, *The New York Times*, July 14, 1964; "U.S. Studies Entry of Ex-Nazi Guard," *The New York Times*, July 15, 1964. (According to Lelyveld, he received a tip about Ryan from Nazi hunter Simon Wiesenthal. "Breaking Away, by Joseph Lelyveld, *The New York Times* (Magazine Section), Mar. 6, 2005.)

Ryan's extradition was front page news."Mrs. Ryan Ordered Extradited for Trial as Nazi War Criminal," by Morris Kaplan, *The New York Times*, May 2, 1973.

Before emigrating to the U.S., Braunsteiner Ryan had been convicted of manslaughter in Austria. She served 3 years in prison before being granted amnesty. The failure to report her conviction on her citizenship application was the basis for the INS denaturalization suit. Mid-trial, Braunsteiner Ryan voluntarily relinquished her citizenship. In response to Germany's request, she was extradited in 1973. After a prolonged trial, she was convicted in 1981 of "complicity in the deaths of more than 1,000 prisoners." She was sentenced to life imprisonment. In 1996 she was released because of ill health; she died in 1999.

There were a significant number of female camp guards and women served in other capacities as well. It is very difficult to determine whether a notable number of women persecutors emigrated, however, since INS could only identify emigrés by the name on their travel documents; if a woman married before emigrating, INS would have no record of her maiden name. OSI believes that few women guards came to the U.S. because guards were generally selected from Austria or Germany. The post-war immigration laws did not favor emigrants from those countries. *See* pp. 36, 38.

INS never filed suit against another woman for her World War II activities. In 2006, OSI filed its first – and to date only – case against a woman. *See* discussion of Elfriede Rinkel in the Appendix.

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2. Attorney Vince Schiano resigned while investigator Tony De Vito retired. Although both men faulted the INS for its handling of Nazi investigations, De Vito accused the agency of a conspiracy to thwart the investigations; Schiano opined that there might be more benign explanations, including inefficiency or personal animus toward him. "Nazis in America," *The MacNeil/Lehrer News Hour*, Feb. 2, 1977.

3. *See e.g.*, "Some Suspected of Nazi War Crimes Are Known As Model Citizens," by Ralph Blumenthal, *The New York Times*, Oct. 18, 1976; "The Mixed Reasons for New U.S. Nazi Hunt," by Ralph Blumenthal, *The New York Times*, Nov. 28, 1976; "Immigrants: Nazis Next Door?" *Newsweek*, Oct. 25, 1976. The three defendants were Boleslavs Maikovskis (discussed at pp. 427, 430-431), Branius Kaminskas and Karlis Detlavs. Only the Maikovskis prosecution was ultimately successful.

4. *Widespread Conspiracy to Obstruct Probes of Alleged Nazi War Criminals Not Supported by Available Evidence – Controversy May Continue* (May 1978).

5. *See* pp. 203-228.

6. Howard Blum (Times Books).

7. Interviewed in 2002, Ms. Holtzman no longer recalled who had alerted her to the issue. It is possible that it was INS investigator De Vito and INS prosecutor Schiano. When interviewed on the PBS television program "Nazis in America," *The MacNeil/Lehrer News Hour*, Feb. 2, 1977, Schiano said that they had "perhaps" spoken to then-Congresswoman Holtzman about the need for an organized task force to investigate alleged Nazi war criminals.

8. Apr. 11, 2001 recorded interview with Jim Schweitzer (hereafter Schweitzer interview). In 1979, when Holtzman became chair of the subcommittee, Schweitzer was made committee counsel.

9. "Holtzman Calls U.S. Lax on Nazi Inquiries," by Ralph Blumental, *The New York Times*, May 20, 1974; May 20, 1974 Holtzman press release.

10. June 5, 1974 letter to Holtzman from INS Commissioner Chapman with attached "Detailed Report in Investigation of Alleged Nazi War Criminals Prepared from the Files of New York District Office, INS;" "37 Under Inquiry in Crimes by Nazis," *The New York Times*, June 6, 1974.

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11. Aug. 20, 1974 memo to Files from Investigator O.H. Colton re "Alleged War Criminals; Meeting with Representative Elizabeth Holtzman."

12. Feb. 14, 1975 memo to INS Regional Commissioner Northeast from District Director, New York, New York.

13. *E.g.*, May 20, 1974 letter to INS Commissioner Leonard Chapman (8 pages single-spaced with a 10 page single-spaced addendum).

14. Aug. 25, 1975 Holtzman press release.

15. Sept. 21, 1977 letter to Holtzman from John DeWitt, Deputy Assistant Secretary for Consular Affairs; Sept. 30 Holtzman press release re "State Department Accedes to Holtzman Demand for Stepped up Action on Nazi War Criminals."

16. Sept. 24, 1975 letter from District Attorney in Landau/Pfalz to Central Office of State Judicial Administrations in Ludwigsburg. The resident was Boleslav Maikovskis. Germany refused Holtzman's request. OSI ultimately filed charges against him and he was ordered deported in 1984. The circumstances of his departure from the United States are discussed at p. 430.

17. "Alleged Nazi War Criminals," Hearings bef. the House Subctee on Imm., Cit., and Internat'l Law, 95th Cong., 1st Sess. (Aug. 3, 1977), testimony of INS Commissioner Leonel J. Castillo, p. 24.

18. Apr. 10, 2001 recorded interview with Crosland (hereafter Crosland interview).

19. June 12, 1978 memorandum to Soobzokov file from Mendelsohn.

20. Among the cases already filed were *Maikovskis*, *Detlavs*, *Hazners*, *Kaminskas* (deportations); *Demjanjuk*, *Trifa*, *Walus, Kowalczuk, Pasakevicus* and *Fedorenko* (denaturalizations).

21. Recorded interview with Martin Mendelsohn, May 23, 2001 (hereafter Mendelsohn interview).

22. *E.g.*, Feb. 27, 1979 letter from Crosland to Richard Krieger, Executive Director of the Jewish Federation of North Jersey.

23. Mendelsohn interview, *supra*, n. 21. Although INS was then part of the Department of Justice, it was a separate component.

24. "Agency Studying Nazis is Upgraded," by A.O. Sulzberger, Jr., *The New York Times*, Mar. 28, 1979; Crosland interview, *supra*, n. 18.

25. "Dispute Over Releasing Funds Mires Federal Investigation of 175 Alleged Nazi War Criminals in U.S.," by A.O. Sulzberger, Jr., *The New York Times*, Mar. 25, 1979. *Accord*, Mendelsohn interview, *supra*, n. 21.

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26. According to Mark Richard, Deputy Assistant Attorney General (DAAG) for the Criminal Division, the Department was opposed to assuming responsibility over an initiative designed to focus on non-criminal remedies. Moreover, the Department was reluctant to carve out jurisdiction from a component (INS). DAAG Richard interview, Apr. 18, 2001. Mendelsohn has an alternative explanation, *i.e.*, that no one expected the government to win these cases and the Department did not want to go to the Hill for appropriations with a reduced win ratio. Mendelsohn interview, *supra*, n. 21.

27. Interview with Liz Holtzman, June 12, 2002 (hereafter Holtzman interview). Congresswoman Holtzman became chair of the Immigration subcommittee after Eilberg, indicted on bribery charges, lost his reelection bid in 1978. He pled guilty and was sentenced to five years probation.

28. Mar. 28, 1979 testimony before the Subcommittee.

29. Schweitzer interview, *supra*, n. 8.

30. Holtzman interview, *supra*, n. 27.

31. Order No. 851-79. While Sept. 1979 is the official creation of OSI, in fact it was in existence before then. By memorandum of Apr. 4, 1979, the DAAG for Administration announced that the SLU would be transferred on Apr. 22, 1979; an Apr. 30 directive from Philip Heymann, AAG for the Criminal Division, announced that the new unit would be established on

May 3.

32. The office was originally to report to DAAG Robert Keuch but due to an illness in his family, the responsibility was transferred to DAAG Richard.

33. Oct. 26, 1979 memo from AAG Heymann to all U.S. Attorneys re "Office of Special Investigations."

34. June 7, 2000 recorded interview with Heymann (hereafter Heymann interview). All references in this chapter to AAG Heymann's actions come from this interview unless otherwise noted.

35. May 10, 2000 recorded interview with Walter Rockler (hereafter Rockler interview). All references to his words and actions come from this interview unless otherwise noted.

36. Rockler recalled his reaction to the waiver: "I thought this was anomalous as hell but it didn't sound bad to me."

37. Rockler originally estimated his time would be fairly evenly divided between OSI and private practice. As it turned out, he spent approximately 80% of his time on OSI matters. He then renegotiated with his firm and took a 25% cut in draw for the duration of his government service.

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38. While this memory of the Jewish groups comports with Mendelsohn's description, both DAAG Richard and AAG Heymann recall the Jewish groups as simply seeking resolution – one way or another. According to DAAG Richard and AAG Heymann, the Jewish leadership just wanted to see some movement in the cases.

39. Rockler and Holtzman did not get along. She perceived him as having the "typical Justice Department attitude," *i.e.*, that the Hill should not be meddling in litigation. Moreover, she felt loyal to Mendelsohn, who she thought should have been chosen as Director. Rockler meanwhile, having worked in the same law firm as she, but 20 years prior, viewed her as "a pup." Schweitzer and Rockler interviews, *supra*, notes 8 and 35.

40. Schweitzer interview, *supra*, n. 8.

41. *See* pp. 210-211.

42. H. Res. 196 (96th Cong., 1st Sess.) gave as one of its supporting reasons that the United States was "moving aggressively" against persons suspected of war crimes and had established a special unit within the Department of Justice to handle these cases. The resolution passed 401 to 0 (with 2 votes of "present.")

The U.S. was not the only country to pressure Germany on this issue. According to an officer of the Czechoslovak political intelligence service who defected to the west, the Soviets too wanted to prevent lapse of the statute of limitations. To that end, they worked with the

Czechs to devise an elaborate ruse. "Operation Neptune" involved taking authentic German military records from Czech and Soviet archives and submerging them at the bottom of Black Lake, some 120 miles from Prague. They were then "inadvertently discovered" by a team of divers working in association with a Czech television crew. The "newly-discovered" documents were then publicized as proof that Czechoslovakia had a great number of original and important Nazi documents at its disposal, and that it would be irresponsible for West Germany to allow the prosecution of previously unidentified Nazi war criminals to become time-barred before the documents could be evaluated. *The Deception Game: Czechoslovak Intelligence in Soviet Political Warfare*, by Ladislav Bittman (Syracuse University Press, 1972).

43. Holtzman accused the Justice Department of exacting retribution on Mendelsohn for his role in moving the unit from the INS. Rockler, equally blunt, claimed that Mendelsohn would not follow instructions, placed too much emphasis on public relations, and had neglected management of the office. AAG Heymann attributed the move to a "personality conflict" between Mendelsohn and Rockler, an explanation which Rockler felt was inadequate. "Justice Dept. to Oust Nazi Hunter," by Robert Pear, *The New York Times*, Jan. 6, 1980, p. A1; "Jewish Leaders Say Justice Department Moving Against Nazis," by James Rubin, *AP*, Jan. 18, 1980.

At the time, Mendelsohn declined to comment in the press. Years later, he opined that part of the problem lay in the fact that he was not a "team player." He also felt there was resentment of his ability to get funding earmarked for the section. Mendelsohn interview, *supra*, n. 21. Earmarked funding continued for several years, often at levels higher than the Department requested. *See e.g.*, H. Rep. 98-759, Department of Justice Appropriation Authorization Act, Fiscal Year 1985 (98th Cong., 2nd Sess.), pp. 5-6.

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44. Ryan came from the Justice Department's Solicitor General's office and had written the appellate brief and argued the seminal OSI case of *United States v. Fedorenko* before the Fifth Circuit. For an account of how Ryan came to be chosen, *see* pp. 53-55.

45. Heymann interview, *supra*, n. 34; DAAG Richard interview of Apr. 25, 2000.

46. Sept. 19, 2005 e-mail from Ryan to Judy Feigin re "Query PS."

47. "Year's Deadline Set in Search for Nazis," by A.O. Sulzberger, Jr., *The New York Times*, Jan. 16, 1980, p. A17. The goal was not met.

48. Jan. 16, 1980 joint press release issued by the Anti-Defamation League, the American Jewish Committee and the American Jewish Congress.

49. *See* p. 547, n. 8.

50. *See e.g.*, Feb. 23, 1981 letters from Ryan to Petro Mirchuk, President Ukrainian Society of Political Prisoners, Inc., and to the Editor of *Vaba Eesti Sona* (an Estonian-American newspaper).

51. *See e.g.*, Jan. 1985 *Latvian News Digest*, "If You Fought Communism You must be Deported Says 1979 US Law;" Sept. 1983 *Darbininkas* (Brooklyn, NY) "How to Defend Oneself from Attacks by OSI." Many Eastern Europeans were concerned since they had falsified their place of birth on their visa applications in order to avoid the possibility of repatriation to a country under Communist domination. Ryan sought in vain to explain that this was not the type of misrepresentation OSI was interested in pursuing. This distrust of OSI had two serious consequences: it cut off evidentiary sources for the government and put innocent people in unwarranted fear. Recorded interview with Allan Ryan, Oct. 6, 2000 (hereafter Ryan interview).

52. Ryan interview, *supra*, n. 51.

53. For a discussion of the Watchlist, *see* pp. 297-309.

54. Oct. 8, 1980 letter from Holtzman to Secretary of State Muskie; Oct. 24 response from Muskie to Holtzman.

55. Cong. Rec., vol. 126, 96th Cong., 2nd Sess., Dec. 3, 1980, H11805.

56. Oct. 26, 1979 letter from Attorney General Civiletti to Lev Nikolaevich Smirnov, Chairman of the Supreme Court of the Union of Soviet Socialist Republics. *See also*, "Soviet Agrees to Aid U.S. on Deportations of Nazis," *UPI*, *The New York Times*, Nov. 8, 1979.

57. The Soviets used a name-linked index that indicated whenever a name was mentioned, but did not cross-reference supporting documentation. Poland was the only Eastern European country that allowed OSI historians direct archival access during the Cold War.

58. Soviet cases only required proof that the defendant was a member of a certain unit, whereas OSI also needed historical context about the unit.

59. July 6, 1984 memo from OSI historian David Marwell to Director Sher re "Soviet Archives." *See also*, Oct. 13, 1980 memo from Marwell to Director Ryan on the same topic.

60. For example, in 1976 all Displaced Person Commission records (other than reject files) were destroyed in due course. May 12, 1978 letter to then-SLU (and later OSI) attorney Robert Boylan from J. Adler, Chief, Reference Service Branch Federal Archives & Records Center. Preliminary worksheets completed by those seeking admission under the RRA were destroyed in 1958. Oct. 7, 1981 memo to OSI historian David Marwell from Alice Harris, Department of State re "Disposal Schedule on Foreign Service Visa Records in 1956 [sic]."

61. *See e.g.*, Nov. 30, 1988 memo to Deputy Director Eli Rosenbaum from OSI attorney Philip Sunshine; May 23, 1989 memo to Rosenbaum from OSI Senior Litigation Counsel Ronnie Edelman.

62. Still, problems exist. Due to deteriorating diplomatic relations with Ukraine during the first years of the 21st century, American researchers have been denied access to some valuable

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archival material concerning Hungarian persecution of the Jews. Mar. 5, 2004 letter to Ukraine Prime Minister Viktor Yanukovych from Congressman Tom Lantos.

Another problem exists in Russia where a treasure trove of documents is housed in the FSB (formerly KGB) Archives in Moscow. While OSI researchers can view documents there (and documents in outlying archives are sometimes sent there for OSI viewing), they cannot make reproductions or even request them on-site. A request in writing is made after the OSI historian returns to the United States. The Archive itself will not respond to requests; everything is done through intermediaries. Thus, the American Citizens Service Section at the American Embassy contacts the Russian procurator (prosecutor) who in turn deals with the FSB Archive. Not surprisingly, given this labyrinthian system, the response time is painfully slow; two-year delays are not uncommon. Compounding these problems, the FSB Archives has made little effort to preserve documents, some of which are merely onion skin carbons. Reproductions, when they finally come, are sometimes unsatisfactory.

While deterioration of documents is a problem in many former Eastern bloc archives, an even more serious problem occurred in Yugoslavia. The ravages of war in the 1990s destroyed entirely many archived documents.

63. Thus, in 1982, when the Archives division in Bayonne NJ was about to destroy DPC rejection records, OSI got custody of the documents. In the ensuing years, the State Department, the CIA and the Army Counter Intelligence Corps (CIC) granted permission to declassify most of the material in their files.

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64. DAAG Richard's contribution to the section extended far beyond liaison with the intelligence community. From its founding (and until 1999), OSI reported to him. He reviewed all cases and was the conduit between OSI and the politically changing top management within the Department. In Ryan's words:

> Mark was the whole show. . . Mark was the guy who made this thing work. . . . He was the guy in the trenches. . . . Mark looked out for us, looked out for me, pointed us in the right direction, told me what was going on. . . . If I had to do it on my own, it would not have been as much fun or nearly as successful.

Heymann expressed similar sentiments. According to him, DAAG Richard "was at the center of a lot of things that I am very proud of taking credit for now, but this one more than any other. . . . I just turned it over to Mark. Mark was the senior point man. I remember his spending a lot of time on this. . . . Allan [Ryan] was reporting in every sense of the word on a very substantial basis to Mark. . . . Mark who always has 2 or 3 or 5 major activities or initiatives. This was almost number one in terms of the time it took, the energy he put into it. . . . [He got] the building space, the agents. . . relations with CIA, getting materials. Both Rockler and Ryan were very strong but they were both beginners in this world and . . . Mark was giving it a lot of time and energy. He wanted it to succeed. He knew I wanted it to succeed. He knew there was all the Congressional support we wanted and no shortage of money for it. . ."

65. *See* discussion of the *Walus* and *Demjanjuk* cases at pp. 71-100, 150-174.

The Historians

In the 1976 movie "Marathon Man," a Nazi dentist who worked in a concentration camp is seen walking in Manhattan's diamond district. A Holocaust victim recognizes him and starts screaming. As the dentist flees from the scene, others join the chase. It is great cinema but it bears little relation to reality.

In only one instance was an OSI case based on a Holocaust survivor recognizing his persecutor in the civic square.[1] In a handful of other cases, the government was alerted to a potential defendant by "Nazi hunters."[2] However, most Nazi persecutors found in the United States are discovered through the unglamourous and dogged review of Nazi-era documents. The work is done by multi-lingual OSI historians in archives around the world.

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That the government needed individuals with combined language skills and historical expertise was not immediately self-evident. Government cases are generally developed by an investigative agent and a prosecuting attorney. When the SLU was established in 1977, the traditional paradigm was modified slightly in recognition of the need for linguists to review Third Reich records at the National Archives. As noted earlier, the SLU was staffed by four attorneys, two INS agents, four graduate students fluent in German, and one German-speaking archivist. Though the students and archivist were called "historians," in fact only one was formally trained as such.[3]

As it turned out, no new cases were filed by the SLU; the unit assisted with, or oversaw, cases previously filed by INS or U.S. Attorney's Offices. Since OSI was established as a result of tremendous publicity and pressure about the need to get "Nazi war criminal" cases moving, there was an urgency to have the office fully staffed as quickly as possible. This was

accomplished, in part, by borrowing investigators from a variety of agencies, including INS, Fish and Wildlife, IRS, Secret Service and the State Department. None had any particular knowledge about the Nazi era and only one or two had any proficiency in German. Two historians were hired during the nine-month tenure of Director Rockler. When they were added to the graduate student pool, the ratio of investigators to historians was approximately 2:1.

Rockler began with two Deputy Directors, Martin Mendelsohn to oversee litigation, and Art Sinai to supervise investigations. Though trained as a lawyer, Sinai was, by all accounts (including his own), an investigator at heart. His role in the office was essentially that of Chief Investigator and he had a traditional investigator's approach: investigators gather the evidence, attorneys present the case in court. The historians at the time felt as if they were second class citizens. The fact that Sinai reported directly to Rockler, but the Chief Historian reported to Sinai, reinforced those feelings.[4]

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By virtue of their differing skills, the investigators and historians approached cases differently. Investigators spent the bulk of their time trying to find the defendant, locate witnesses, and handle liaison with foreign governments and domestic agencies. Case development was defendant-specific. Were there documents detailing what he had done? Eyewitnesses who could testify to his malfeasance? In most instances, the answer was no, since the bulk of OSI investigations involved camp guards or members of auxiliary police units about whom there is rarely information involving personal wrongdoing.[5]

Peter Black was the first formally trained historian hired by OSI. He came to the office in 1980. Following the approach Germans took in their war crimes prosecutions, he began to concentrate on the unit in which a subject served. What were the duties and responsibilities of

that unit? Who else was in it? What could be learned about daily life in the organization? Was this a unit – as many were – whose major purpose was persecution of Jews and other civilian "undesirables?"

He, and other historians as they were hired, spent most of their time in archives. They searched for rosters, identity cards issued to members of auxiliary police forces and camp guards, requests for services or benefits (*e.g.*, pensions) in which the applicant listed his wartime assignments and activities, and pertinent references and statements from the hundreds of post-war trials conducted in Europe. Given their expertise in the matters under investigation, historians could recognize the significance of a document which might otherwise go unnoticed.[6] Eyewitness testimony could corroborate archival information, but the historians did not want to rely on it as a primary method of proof.[7]

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While their academic training led historians to seek archival evidence, there were practical considerations as well. The *Walus* prosecution[8] had made abundantly clear the problems of witness identification. Moreover, even if memories were accurate at the outset – a dubious proposition considering the fact that victims rarely knew their captors' names and had little occasion for direct eye contact – these memories were much less reliable as witnesses and subjects aged.

Despite the differing approaches of investigators and historians, the lines between them were not always demarked. In some instances, historians interviewed witnesses, especially if the historian had greater foreign language skills than the assigned investigator. Where both were qualified, the assignment was generally based on attorney preference.

Inevitably, there was tension between the investigators and historians, much of it related

to status. Who was going to put the case together, the investigator or the historian? Who would decide which investigations to open and which witnesses should be interviewed? Who would accompany the lawyer to the interview?[9]

When Allan Ryan became Director in March 1980, he began to reassess the office paradigm. As he saw it, the proportion of investigators to historians was inverse; historians needed to be the lynchpin in order for judges to understand fully the significance and context of the cases.

> [W]e were not going to win cases by convincing the judge that here's a guy who had cheated on his immigration forms. We'd only win cases if we'd convince the judge that here was a war criminal with blood on his hands. . . . My sense that we needed to do this for the judge reflected my own unfamiliarity with the area. I had always considered myself something of a World War II buff, but I had absolutely no clue of the organization, the detail, the structure, the actions, the sequence of events, particularly on the Eastern front where most of our attention was concentrated.[10]

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There were two aspects to Ryan's approach: (1) hire trained historians to develop the cases; and (2) engage an outside "expert" historian to testify at trial.

One immediate problem in hiring historians was salary. Lawyers entered government service at the GS-11 level and moved quickly to GS-13; historians with PhDs started as GS-9s.[11] Ryan turned to DAAG Richard who arranged for historians to be promoted quickly to GS-11s.

Two early efforts proved particularly fruitful in the search for outside experts. First, OSI reached out for Raul Hilberg, author of *The Destruction of European Jewry*, then, as now, arguably the preeminent text on the issue. Hilberg testified in a series of early cases for OSI, including *U.S. v. Kowalchuk*, the first trial handled by the office. Second, in April 1980, OSI sent two historians (and a third attended at his own expense) to a symposium on Hitler and the

National Socialist Era held at the Citadel in South Carolina. One of the main purposes in attending was to make contact with historians in the field in order to educate them about OSI. They met Charles Sydnor and Christopher Browning, two leading Holocaust historians. Hilberg and Sydnor were the two experts most used by OSI over the years; Browning also testified for the office.

An unexpected byproduct of the South Carolina conference was a handwritten list of suggestions for improving the lot of OSI historians. It was written by the three OSI attendees as they sat overlooking Fort Sumter during a break in the Conference; they dubbed it "The Charleston Manifesto."[12] It makes clear how marginalized the historians felt. They wanted, "like the attorneys and investigators," to be assigned to individual cases on a formal basis. Such assignment should provide "full and ongoing briefing on legal case background, strategy and status" as well as participation in meetings concerning the case. They also sought the authority to develop and maintain contact with historical and archival experts "under the historians own names" and the right to "develop and follow up research leads" both in the United States and abroad. The latter complaint was based on the writers' perception that travel was treated as a perquisite which generally went to investigators and lawyers rather than to historians.[13]

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Though the Manifesto was never formally presented to OSI management, its essence was passed on orally. Over the next few years, the key suggestions were all adopted. In addition, when Art Sinai left in the summer of 1981, the Chief Historian began reporting directly to the Director.

Given the subject matter of OSI cases, the attorneys were generally not well versed in the field. Before meeting with the "outside" historians in preparation for trial, the attorneys needed

reports concerning the relevant historical background. These reports, often over a hundred pages long, were prepared by OSI historians.[14] Most attorneys soon realized that it helped to have the in-house historian along to resolve any ambiguities or questions when they met with the expert.[15]

Other factors too affected the increasing role for historians. Some of the traditional work performed by investigators – finding defendants and witnesses – became routine and simple with the advent of computers and, much later, the internet. For example, it is no longer necessary to do world-wide searches for survivor witnesses. Internet sites and genealogy links give instant information. On-line access to government records also makes searching for a subject simple. Within a matter of minutes, OSI can ascertain whether someone in the United States is alive and, if so, where he is living. This effort used to take months of investigators' time.

There was thus less for the investigators to do while the work for historians was increasing. Since most of the investigators were on loan from other agencies, they were simply replaced by newly-hired historians once their loan period (generally one or two years) expired.

By the late 80s, the position of the historians seemed secure. They had largely supplanted investigators and by now they were being paid as GS-14s, a salary much higher than most would have earned in academia, their most likely alternative employment. Moreover, in 1986, Peter Black assumed many of the responsibilities of the Chief Historian.[16] Unlike his predecessor, he was formally trained in the field and was seen by his colleagues as willing to fight for their rightful place in the office.

Two things, however, served to shake the historians' security. The first was OMB Circular A-76, first issued in 1955, and designed to privatize various government functions when the government can save at least 10% by doing so. Different administrations have attached more

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or less significance to the Circular. In the late 80s, during the administration of George H.W. Bush, it received renewed emphasis. Within the Department of Justice, one of the few groups targeted for privatization was the OSI historians.

Under the A-76 plan, a private company would interview applicants and then submit a report and resumés to OSI. OSI could choose from among the names submitted, but would have no opportunity to itself interview the applicants. The contract employees would be lower paid than OSI historians and would receive no benefits. DAAG Richard and the OSI leadership were strongly opposed to the concept, fearing that it would dilute the quality of historians and therefore, ultimately, of OSI. Congressmen, alerted by OSI to the problem, intervened to prevent its application to OSI.

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The second employment scare came in 1993, when OSI itself began hiring on a contract basis. Newly-hired historians and attorneys were engaged for two year terms, though at the same salary (and with the same benefits) as if they were permanent hires. The contracts were renewable for one more two year period, and then, for a final one year period. The rationale for this change of protocol was that the office was not expected to continue significantly longer and therefore there was no need for long-term hires.[17] However, the office did not disband and in August 2004, all the contract historian positions were converted into full-time government positions.[18]

That the office was still in existence in 2004 is due largely to the development of a research and development program which was a natural outgrowth of the archival approach adopted by the historians. INS and the SLU had been reactive – responding to information presented to them by outside sources (often the media). Once historians uncovered rosters and

other archival material, the office became proactive. It submitted lists of names to INS to determine whether any of the men had entered the United States. Without such an R & D program, the office might well have closed within the five years everyone assumed at the outset to be its life expectancy.

In addition to transforming the way OSI learns about subjects and investigates cases, the historians have increased enormously the body of Holocaust knowledge. They have done so in various ways. As part of OSI's research and case development, the historians have amassed the largest concentration of documents in the world concerning Trawniki – a German-run training camp in Poland for concentration camp guards.[19] Analysis of this data – often as part of the historical reports prepared for OSI litigation – has helped explain how the Nazis trained men, many of whom were prisoners of war, to brutally persecute civilians. The Trawniki story has been accepted by courts and made public in a series of OSI decisions.[20] OSI historians have also unearthed and sorted out the role indigenous police forces played in assisting the Nazis in Estonia and Lithuania.[21] Until the Cold War ended, and OSI historians gained access to archives previously behind the Iron Curtain, there was widespread belief that the mass murder of Jews in those two countries was done by the Germans.[22] The much more complex story of indigenous participation is now part of the record in many OSI cases.[23] Moreover, with some assistance from the attorneys, OSI historians have written exhaustive reports on controversial Holocaust subjects including Mengele, Barbie, Waldheim, Verbelen and some Watchlist candidates. They also contributed significantly to a State Department report on Nazi gold.[24]

As of this writing, OSI has seven historians and one investigator. **Update number** Historians are very much involved in decision-making, both on the macro and micro level. The

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Chief Historian is a Deputy Director of the section and consults with the Director and Principal Deputy on almost all major decisions. Staff historians work and strategize with attorneys on individual cases.

Despite the near parity, however, there is a difference in perspective. Some historians speak privately about "historical truth" versus "judicial truth," and express some frustration about the difference. As explained by one:

> You are going to, in the course of a proceeding that is like a criminal prosecution, overemphasize simply through focus, if not through rhetoric, but sometimes through rhetoric as well. You're going to overemphasize the role of this individual because that's what the trial is about. [I]n the larger context of things, you wouldn't have sympathy for [him], though you might, but his role is much less sinister than it would appear in a trial directed about his person.

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1 1. Jacob Tannenbaum, discussed at pp. 106-116.

2. *E.g.*, Canadian "Nazi hunter" Steven Rambam alerted OSI that Johann Leprich, a former OSI defendant, had returned to the U.S., although Rambam could not pinpoint his location. *See* p. 441. Simon Wiesenthal notified *The New York Times* about Hermine Braunsteiner Ryan. *See* p. 14, n. 1. The Simon Wiesenthal Center brought Harry Männil to OSI's attention. Männil is discussed at pp. 300-301, 456-457. In some instances, however, Nazi hunters have publicly identified people as persecutors who turned out not to be so.

3. Some SLU documents reference four historians rather than five. However one of the students was working out of New York and therefore may have inadvertently been omitted.

The students had an advantage to INS beyond their language skills. They were much cheaper to hire than INS agents who, because they were authorized to carry weapons, were entitled to mandatory overtime payments. INS "historians" were thus seen, in part, as a way to get investigators more cheaply. Apr. 11, 2001 telephone call with former INS General Counsel David Crosland.

4. Oct. 11, 2000 recorded interview with former OSI historian (and later Chief Historian) Peter Black (hereafter Black interview); Apr. 2, 2001 recorded interview with former OSI historian David Marwell (hereafter Marwell interview); Apr. 25, 2002 discussion with OSI historian Steven B. Rogers. The Chief Historian had been hired by Rockler. He had been a translator at Nuremberg and had thereafter worked at the Center of Military History.

5. One major exception concerns guards at the Mauthausen concentration camp in Austria who were responsible for the deaths of persons in the camp. An OSI historian, doing research at the National Archives, found a book entitled "Unnatural Death Book," in which the Nazis recorded all instances of Mauthausen guards killing internees. Incident reports and diagrams were kept. (Natural deaths included death from starvation, overwork, and disease. Shooting of an alleged potential escapee was considered "unnatural.")

6. A dramatic example of this involved preparation of the Waldheim Report (discussed at pp. 310-329). OSI historians recognized that "O3" was Waldheim's rank in the military, and that documents hand initialed "W" from the O3 officer in his unit on certain dates had to have been from him. Oct. 20, 1986 memo to Sher from OSI historian Patrick Treanor re "Propaganda documents initialed by Waldheim."

7. Recorded interview with Black, May 3, 2002; unrecorded discussion with Black, Nov. 5, 2002.

8. *See* pp. 71-100.

9. Black interview, *supra*, n. 4.

10. Oct. 6, 2000 recorded interview with Allan Ryan. All Ryan references are to this interview unless otherwise noted. All the historians of that era who were interviewed agreed that it was

Ryan who focused on, and changed, the role of historians in the office.

11. "GS" stands for Government Service. Salaries within most of the federal government are based on one's GS level; the higher the level, the greater the salary.

12. Information about the Charleston Manifesto comes from the Black and Marwell interviews, *supra*, n. 4, as well as informal discussions with OSI historian Steve Rogers.

13. Black and Marwell interviews, *supra*, n. 4.

14. Under the rules of evidence then in effect, the report was not shown to the outside expert or defense counsel. In 1993, a modification of the Federal Rules of Evidence required the testifying expert to provide a written report to the defense before trial. As a practical matter, this did not alter the role of the OSI historian. In most cases, the report is drafted by an OSI historian and then modified, as warranted, by the testifying witness.

There is a downside for the OSI historians with this change in procedure. To the extent that their research becomes a report issued under the name of another historian, it impedes their ability to present the material as original work of their own. In a field where publications matter for academic appointments (which some OSI historians still see as a future employment option), this can diminish their ability to enhance their *curriculum vitae*.

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15. In a 1982 television appearance, Allan Ryan, then OSI Director, described OSI historians as "people who know the city of Riga in 1941 better than they know the city of Baltimore in 1981." "After Hours," Jan. 7, 1982. This depth of knowledge was essential. " If a defendant were to say he had turned a corner and seen X, OSI needed to know if X was there or not." Remarks by Ryan at Oct. 24, 2004 luncheon commemorating OSI's 25th anniversary.

16. He was formally named to that post in 1989 when the Section's first Chief Historian left.

17. While this change in policy impacted both historians and attorneys, it is the historians who felt most concerned. They reasoned that the Department would always find a place for an attorney of proven worth; they felt less sanguine that there would be options for them.

18. In fact, the precariousness of being a contract employee did not lead to a diminishment in the quality of applicants or hires. This may be due in part to the fact that academia, an obvious alternative for well-credentialed PhDs, stopped hiring with the abandon of a generation ago.

19. In addition to serving as a training camp, Trawniki also was the site of a forced labor camp. On November 3, 1943 more than 6,000 men, women and children incarcerated there were shot to death. It was one of the largest single massacres of the Holocaust.

Trawniki men assisted in Aktion Reinhard ("Operation Reinhard"), the Nazi project whose ultimate goal was the annihilation of Polish Jewry. Under the aegis of Operation Reinhard, an estimated 1,700,000 Polish Jews were murdered, the labor of able-bodied survivors was exploited in slave labor camps under armed guard, and the personal belongings of the murdered Jews were stolen and distributed to benefit the German economy.

In 1990, shortly after Czechoslovakia's "Velvet Revolution," OSI historians were granted access to Czech and Slovak archives. They found a collection of rosters from the SS Battalion Streibel, a unit formed in the summer of 1944 during the evacuation of Trawniki. The rosters list hundreds of Trawniki men by name, rank and identity number. The information from this material eventually led OSI's historians to the Central Archive in Moscow where they found a treasure trove of Trawniki material, including personnel files, deployment orders, and additional rosters.

As of this writing, the Trawniki documents have been used in at least 15 OSI cases.

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20. *See e.g., U.S. v. Hajda, supra*, 936 F. Supp. 1452; *U.S. v. Kairys*, 600 F. Supp. 1254 (N.D. Ill. 1984), *aff'd*, 782 F.2d 1374 (7th Cir. 1986); *U.S. v. Schiffer*, 831 F. Supp. 1166, 1177 (E.D. Pa. 1993), *aff'd*, 31 F.3d 1175 (3rd Cir. 1994); *U.S. v. Wasylyk*, 162 F. Supp. 86 (N.D.N.Y. 2001).

21. Their role in Latvia first began to emerge as a result of German criminal investigations in the 1960s.

22. For example, there was apparently nothing mentioned during the Nuremberg investigations and trials about the Saugumas' (Lithuanian security police) role in annihilation of Lithuania's Jews.

23. For Lithuania, *see e.g., U.S. v. Lileikis*, 929 F. Supp. 31 (D. Mass. 1996); *U.S. v. Balsys*, 918 F. Supp. 588 (E.D.N.Y. 1996), *vacated &* remanded, 119 F.3d 122 (2nd Cir. 1997), *rev'd and remanded*, 524 U.S. 666 (1998); U.S. *v. Dailide*, 227 F.3d 385 (6th Cir. 2000). For Estonia, *see U.S. v. Linnas*, 527 F. Supp. 426, 430 (E.D.N.Y. 1981), *aff'd*, 685 F.2d 427 (2nd Cir.).

24. *See* pp. 300-302, 310-329, 371-423.

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Chapter Two: The Limits of the Law

Introduction

Those who OSI investigates have allegedly been involved in persecution of civilians based on their race, religion, national origin or political beliefs. No matter how egregious the persecutory activity, the United States cannot file criminal charges because the alleged crimes -- committed on foreign soil against non-U.S. citizens – violated no U.S. law of the time.[1] Any legislation to criminalize such activity retroactively would be constitutionally barred by the Ex Post Facto Clause.

Unable to prosecute and incarcerate Nazi persecutors for their crimes, the government's goal is to remove them from the country. Their spouse and children, whether or not born in the United States, are not part of the litigation.

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The most oft-used method of removal is deportation. However, the government cannot deport U.S. citizens. Therefore, if the subject became a naturalized U.S. citizen after emigrating, the government must first file suit to have his citizenship revoked. If that is accomplished, a deportation case can be filed.

Both denaturalization and deportation are civil matters. There is no statute of limitations controlling the filing of either of these proceedings. Given that OSI was not founded until 34 years after World War II ended, and continued investigating Nazi persecutors for over a quarter

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[1] By contrast, in the modern era, the United States is a party to various conventions which call for prosecution or extradition of persons found in the U.S. who committed crimes on foreign soil. Implementing legislation grants the U.S. jurisdiction to prosecute. *E.g.* The Hague Convention concerning seizure of aircraft and 49 U.S.C. § 46502; The Terrorist Financing Convention and 18 U.S.C. § 2339C; The Terrorist Bombing Convention and 18 U.S.C. § 2332f; The Violence at Airports Protocol and 18 U.S. C. § 37; The Nuclear Materials Convention and 18 U.S.C. § 831; and The Hostage Taking Convention and 18 U.S.C. § 1203.

of a century thereafter, the defendants are invariably elderly. Since each phase of the two-step litigative process – denaturalization and deportation – takes years to complete, a significant number of OSI defendants die before litigation is finalized.

An understanding of the statutory bases for OSI's filings – including the limitations of the statutes under which it operates – is essential to assessing what OSI has been able to accomplish.

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Statutes and Procedures

The basis for OSI's cases, and sometimes even the decision to bring a case at all, depends in part on when the person entered the United States. Changing immigration laws established differing criteria for admission.

The exclusion of aliens deemed dangerous to the United States dates back to the Alien Act of 1798. However, it was not until passage of the Quota Act in 1921 that the U.S. imposed restrictive limitations based on nationality. The number of aliens to be admitted in any given year was capped at 3% of the number of persons of that nationality then in the U.S. Given the emigration patterns at the time, these restrictions favored western Europeans. The 1924 Immigration Act perpetuated this disparity.

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Following World War II, millions of displaced persons sought to emigrate to the United States. Many were Jews hoping to start a new life after the decimation of the Holocaust. An even greater number, however, were non-Jews fleeing Communist rule in the Soviet Union, Eastern Europe and the Baltics. The situation was chaotic. Refugees were living in camps, often in countries other than their own, and without sufficient documentation to establish their identity or their history. In 1947, the U.N. created an International Refugee Organization (IRO) to help with issues of repatriation and resettlement. The IRO's mandate did not include anyone who had "assisted the enemy in persecuting civil populations," or who "voluntarily assisted the enemy forces."[1]

In 1948, the United States enacted the Displaced Persons Act which provided for the issuance of 205,000 visas over a two year period without regard to statutory quota limitations.[2] The Act defined displaced persons in the same manner as had the IRO but added the additional

requirement that applicants have been in a displaced persons camp by December 22, 1945.

Congress' overriding concern at the time was in helping refugees escape Communist rule. Forty percent of the admittees had to be from the Baltic nations (newly incorporated into the Soviet Union) and 30 percent had to be farmers (as were many from the U.S.S.R.). A Baltic emigré who was a farmer thus had a double preference. Very few Jews were farmers or Balts. Moreover, many otherwise-qualified Jews did not meet the camp cutoff date.[3]

While the Act focused mostly on those seeking to escape Communist oppression, it recognized the possibility that some unwelcome former enemies might seek to settle in the U.S. It therefore precluded issuing visas to anyone who had assisted the enemy in persecuting civilian populations or had been "a member of, or participated in, any movement . . . hostile to the United States."[4] Applicants who "wilfully misrepresented" or concealed "material facts" were also ineligible for admission under the DPA.

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Congress created a Displaced Persons Commission (DPC) to carry out the Act's mandates and to determine the eligibility of applicants. Eligibility depended on a variety of factors, including personal interviews, medical examinations, sponsorship by a U.S. citizen or organization and investigative reports prepared by the Army's Counter Intelligence Corps (CIC). This multi-tiered process was designed to provide reliable and detailed scrutiny of all applicants. In practice, however, the process was difficult to implement. Many relevant records had been destroyed during the war. Of those that survived, a significant percentage were in the Soviet Union, which had swept up huge caches of German material as the Nazis retreated westward. The Soviets did not give the U.S. access to the material. Even when records were available in the west, they often could not be accessed easily. They were dispersed in various countries and had

not yet been organized.

Despite these problems, there was enormous pressure to process the applicants quickly. This pressure came from a variety of groups, including non-governmental organizations in the U.S. which were sponsoring applicants for admission as well as Congressmen intervening on behalf of constituents. U.S. ships bringing the refugees to the United States could not wait endlessly. As a result, even when records were available in the West, they often could not be accessed in time. Many applicants were allowed to board ships with the proviso that they might be sent back if negative information were later found.[5]

In 1949, the State Department issued a regulation precluding issuance of a visa to any person:

> who has advocated or acquiesced in activities or conduct contrary to civilization and human decency on behalf of the Axis countries during . . . [World War II].[6]

Anyone entering after 1949 (no matter under what law), also had to meet the standards set forth in this regulation.

In 1950, the DPA was extended two more years (and the immigration quota raised). In addition to the restrictions in the 1948 Act, Congress added a provision denying admission to anyone who had "advocated or assisted in the persecution of any person because of race, religion, or national origin." It also extended the camp eligibility date to 1947, thereby allowing more Jews to qualify.

Congress passed the Immigration and Nationality Act (INA) in 1952. It established criteria for issuing entry visas and set quotas for emigration based on country of origin. Although there were no restrictions directly based on World War II activity, the Act denied visas

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to anyone who either misrepresented or concealed pertinent information on his visa application.

Approximately 400,000 refugees entered the U.S. under the DPA. Of these, about 68,000 were Jews.[7] More than 70% of the 400,000 were from countries occupied or dominated by the U.S.S.R.[8] Hundreds of thousands more Eastern bloc refugees fled to western Europe. The pressure of this influx on countries trying to rebuild after the war was enormous. In order to alleviate some of the burden, Congress passed the Refugee Relief Act in 1953. It authorized the admission of additional non-quota refugees, *i.e.*, refugees in addition to those admissible under the INA.[9]

The RRA was similar to the DPA but differed in three respects pertinent to this report. First, it eliminated the "movement hostile" provision. Second, without any explanatory legislative history, it modified slightly the provision barring admission to those who "assisted in the persecution of any person because of race, religion, or national origin." Under the RRA, admission was barred to those who *personally* assisted in such acts. Finally, the statute mandated that every country sending someone to the United States issue each emigrant a certificate of readmission guaranteeing reentry if the U.S. later determined that the emigrant had procured a U.S. visa by fraud. Refugees could not enter under the RRA if their country of embarkation did not accept this condition.

Screening under the RRA was not significantly better than it had been under the DPA since most of the same pressures remained. Approximately 200,000 people were admitted under the RRA before it expired at the end of 1956. Almost all were refugees and escapees from Communist persecution, natural calamity and military operations, or close relatives of citizens or permanent resident aliens of the U.S.[10]

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In order to revoke the citizenship of someone who became a naturalized U.S. citizen, the government files a case in federal district court. There is no applicable statute of limitations nor is there a right to a trial by jury; the matter is heard by a judge alone. The government must prove its case by "clear, unequivocal and convincing" evidence, a standard which the Supreme Court has equated to proof beyond a reasonable doubt.[11] The suit can be predicated on the ground that the naturalization process itself was flawed or that the applicant's admission into the country – without which naturalization would not have been possible – was faulty. Most commonly in OSI cases, the government alleges that the applicant's assistance in persecution made him ineligible to enter under the DPA or RRA and/or that he misrepresented or concealed material information in the process of applying for a visa or acquiring citizenship. The government may also assert that the applicant lacked the "good moral character" necessary for citizenship. Assisting in persecution, or misrepresenting and concealing the fact that one has done so, are bases for establishing lack of good moral character.[12]

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If the court revokes citizenship, the defendant can appeal to a federal court of appeals and, thereafter, seek review from the Supreme Court. The entire process takes years. Only after it is completed (and assuming that the revocation of citizenship is upheld), can the government begin deportation proceedings. For emigrés who never became naturalized U.S. citizens, however, deportation is the first court proceeding.

In deportation cases, the government must prove its case by "clear and convincing evidence."[13] The matter is handled by an immigration judge. Again, there is no statute of limitations and no jury. However, unlike denaturalizations, hearsay is admissible. The court's ruling may be appealed to the Board of Immigration Appeals (BIA), from there to a federal

appellate court, and then to the Supreme Court. This, too, can take years.

Misrepresentation or concealment of material facts can provide the basis for deportation as well as denaturalization. However, anyone ordered deported on these grounds – even if the misrepresentation or concealment relates to persecution or war crimes – can ask the Attorney General to exercise his or her discretion in order to prevent deportation. One basis for such discretionary relief is that deportation would subject the defendant to persecution abroad. Another is that deportation would cause personal or family hardship.

Most OSI defendants could ask for a waiver on one or both of these grounds. Many had joined with the Nazis in opposing Communism. During the Cold War years, they feared retaliation if they were deported to an Eastern bloc country. Moreover, because of their advanced age, many have medical problems or spouses with medical needs. Their children are generally U.S. citizens. All these factors present potential equitable bases for the Attorney General to grant discretionary relief from an order of deportation. If the Attorney General does exercise such discretion, the government's court victory – generally achieved after years of investigation and litigation – is pyrrhic.

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To eliminate this problem, Congress in 1978 passed the eponymously named Holtzman Amendment, sponsored by Representative Elizabeth Holtzman. It makes participation in Nazi persecution on the basis of race, religion, national origin or political opinion an independent basis for deportation. The law applies retroactively and covers anyone in the United States, regardless of which law provided their admittance into the country. Most importantly, if an immigration judge orders deportation based on participation in persecution on behalf of the Nazis (even if other grounds for deportation are cited as well), the Attorney General is statutorily precluded

from providing discretionary relief.

The Holtzman Amendment was passed shortly before the creation of OSI in 1979. It has been key to OSI's efforts to deport those who persecuted on behalf of the Nazis.

Once a court determines that a defendant should be deported, the question of where he should be sent looms large. That issue is discussed in various parts of this report.[14] There is a statutory scheme to determine the appropriate destination.[15] However, in the end, it depends upon the designated country being willing to accept the deportee.

The fate of a defendant in the receiving country varies. Most deported OSI defendants spend the remainder of their lives in freedom and peace. In some cases, however, the recipient country has jurisdiction to try him criminally for his World War II activities. It may or may not choose to do so.

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Countries that are anxious to prosecute OSI defendants can expedite their removal from the U.S. by asking the U.S. to extradite them. Extradition is the process whereby a foreign government asks the United States to send someone to the requesting country to stand trial on criminal charges. The United States and the requesting country must have a treaty providing for extradition and specifying which crimes may constitute the basis for an extradition request. Once extradition papers are filed, the defendant is arrested and is generally not eligible for release on bond.

Evidence from the requesting country is usually presented in court by the U.S. government. The court must determine whether criminal charges are pending in the requesting state, whether the defendant is the person named in those charges, whether probable cause exists to believe that he committed the crimes alleged, and if so, whether, under the treaty between the

two countries, these crimes are extraditable offenses. If the answer to all these questions is yes, the defendant is extraditable. Whether he in fact should be extradited is then determined by the Secretary of State; (s)he alone has the power to issue a warrant of extraditability.

In making their determinations, neither the judge nor the Secretary of State decides ultimate innocence or guilt. If the defendant is extradited, his culpability is decided at trial in the requesting country.

While extradition is a much speedier process than denaturalization and deportation, with their multiple levels of appeal, it is rarely used in OSI cases.[16] Its use depends on an unlikely confluence of factors – an extradition treaty between the U.S. and a country with jurisdiction to prosecute criminally, sufficient admissible evidence in the foreign jurisdiction to satisfy the burden of proof in a criminal trial, and the political will and commitment by the foreign country to prosecute these cases decades after the crimes occurred.

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Since these factors rarely converge, denaturalization and/or deportation are the traditional means for expelling from the United States someone who was involved in persecution on behalf of the Nazis during World War II. These are the cases which OSI was created to handle.

1 1. Annex I of the Constitution of the International Refugee Organ, 62 Sat. 3037, 3051 (1946). *See also*, IRO Manual for Eligibility Officers, p. 33.

2. Immigrants admitted under the DPA were to be counted against the nationality quota in future years.

3. Many displaced Jews fled Poland in 1946 following a brutal post-war pogrom. "Polish Jews' Exit is Put at 20,000 Since Pogrom," *AP*, *The New York Times*, Aug. 15, 1946; "100,000 More Jews Seen Fleeing Poland," *The New York Times*, Aug. 4, 1946.

President Truman, who had urged Congress to pass liberalizing immigration legislation, signed the DPA bill with much hesitation. He felt that some of its categorizations were "wholly inconsistent with the American sense of justice." "New DP Measure Called Unworthy," *The New York Times*, June 28, 1948.

4. Whether a movement qualified as "hostile" was determined by reference to a list of "inimical organizations" prepared by the Displaced Persons Commission. The list was periodically revised although some organizations were permanently listed. Among them were indigenous police groups who worked with Nazi mobile killing units and the SS Totenkopf battalion, whose members served as camp guards.

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5. "Alleged Nazi War Criminals," Hearings bef. the Subctee. on Imm., Cit., and Internat'l Law, 95th Cong., 2nd Sess. p. 151 (July 19-21, 1978).

6. 10 Fed. Reg. 8995, 8997, 9000 (1945); 8 C.F.R. §§ 175.52(a), 175.53(j) (1947S); 22 C.F.R. § 58 (1947S).

7. *America and the Survivors of the Holocaust* by Leonard Dinnerstein (Columbia Univ. Press). An additional 40,000 Jews had entered between 1945 and June 30, 1948 (when the DPA was enacted). The 40,000 were admitted under a Dec. 1945 directive by President Truman which gave priority to displaced persons within existing American quota laws. Review by Leonard Dinnerstein of "Post-Holocaust Politics: Britain, the United States, and Jewish Refugees, 1945 - 1948," by Arieh Kochavi. The review is posted at www.politicalreviewnet.com/polrev/reviews/diph/R_1045_2096_046.asp (last visited Nov. 2005)

8. The DP Story, The Final Report of the United States Displaced Person Commission, 1952, p. 243.

9. Final Report of the Administrator of the Refugee Relief Act of 1953, Nov. 15, 1957, p. 8 (hereafter RRA Report). Persons entering between expiration of the DPA and enactment of the RRA came in solely under the standard INA quotas. Unlike the DPA, the RRA did not require that entrants be charged to future nationality quotas.

10. "Alleged Nazi War Criminals," Hearings bef. the House Subctee on Imm., Cit., and Internat'l Law, 95th Cong., 1st Sess. (Aug. 3, 1977), p. 46; RRA Report, *supra*, n. 9 at p. xiii.

11. *Klapprott v. U.S.*, 335 U.S. 601, 612 (1949).

12. As of 2004, lack of good moral character can be proven more directly. Section 5504 of The Intelligence Reform and Terrorism Prevention Act of 2004 amended the INA to specifically make assistance in Nazi persecution a bar to good moral character for aliens. *See* 8 U.S.C.A. § 1101(f)(9).

13. The Supreme Court had originally set the standard as "clear, unequivocal and convincing." *Woodby v INS*, 385 U.S. 276, 285-86 (1966). In 1996, Congress legislated the lesser standard of "clear and convincing." INA § 240(c)(3)©, 8 U.S.C. 1229a(c)(3). *See also*, 8 C.F.R. 1240.8.

14. *See e.g.*, pp. 271-295, 426-453.

15. Immigration law provides a three-step process for determining a country of deportation. First, the defendant himself may designate a country. If that country is unwilling to accept him, or the U.S. contends his deportation there would be prejudicial to the United States, he can be deported to any country of which he is a subject, national or citizen, so long as that country is willing to accept him. Barring that, there are a series of options which take into account the shifting boundaries and sovereignties following World War II:

(1) the country from which he last entered the United States;

(2) the country which contains the foreign port from which he embarked for the United States;

(3) the country in which he was born;

(4) the country in which the place of his birth is situated at the time he is ordered deported;

(5) any country in which he resided prior to entering the country from which he embarked for the United States;

(6) any country that had sovereignty over his birthplace at the time of his birth.

There is no order of priority among these choices. If none of them is feasible, the alien may be sent to any country willing to accept him.

16. Only three OSI defendants have been extradited: Bruno Blach, John Demjanjuk and Andrij Artukovic. The *Demjanjuk* and *Artukovic* cases are discussed at pp. 150-174 and 239-258, respectively.

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Chapter Three: Case Studies of Various Persecutors and How the Law Handled Them

Introduction

The Holocaust did not occur in a vacuum or through the operation of some social imperative set in motion by the actions of a few fanatical individuals. Its horrific scope – in terms of duration, geographical range and organizational efficiency – required the participation and acquiescence of untold numbers of people.

Those who "only" acquiesced – by standing on the sidelines while their countrymen committed atrocities in their name – are not within OSI's purview. The focus of OSI's endeavors is the participants – those who in some way assisted the Axis powers in their persecution of civilians. These participants came from all walks of life, social strata and ethnic backgrounds. OSI's roster of defendants reflects that diversity.

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High-ranking Nazi officials were generally German or Austrian. The DPA and RRA greatly favored those fleeing Eastern Europe and the Soviet Union. Thus, even if they could have hidden their wartime past, relatively few Nazi leaders were eligible to enter the United States under these expansive statutes. They could have sought admission under the country quotas set forth in the INA, but the number admissible from Germany and Austria at that time was quite limited.

In such circumstances, it is not surprising that very few OSI defendants were leaders in the Nazi cause. Most were camp guards. A few held "white collar" positions. The cases detailed in this chapter give a sampling of the OSI prosecutorial spectrum; the Appendix provides a synopsis of all cases.

The statutes on which OSI prosecutions are based do not distinguish among levels of

culpability. Whether one "assisted in persecution" is the core issue. Whether one lied about that assistance is also often a factor. Yet the meaning of "assistance in persecution" is not self-evident. Does it – should it – encompass unwilling assistance? What about assistance willingly rendered, but only because the alternative might be death? And what should be actionable in misrepresenting information on a visa or citizenship application? Does every false statement, no matter how tangential, carry legal consequences? And if not, where should the line be drawn? The cases filed by OSI helped clarify the law in all these areas.

While the courts gave legal answers, detailed in the cases reported herein, the issues remain haunting when considered in the context of actual OSI cases. Is a police official who was "merely" following orders when he rounded up Jews and confiscated their property different in any meaningful way from a camp guard? Are there distinctions to be drawn among the camp guards themselves? Were those who chose such duty (and received pay) more responsible than those who were drawn from the ranks of German POWs? In making that determination, should one consider the barbaric conditions of POW camps and the fact that POWs faced a Hobson's choice? They knew they would likely perish if they remained in German captivity for an extended period of time. Does a POW who "volunteers" in such circumstances differ from a Jewish kapo who, also fearing imminent death, wants only to better his chances for survival?

And what about propagandists? Although the Nuremberg trials made clear that propagandists were culpable because they made genocide palatable to the public, how does the prosecution of propagandists comport with our concept of free speech and freedom of the press?[1] Although the First Amendment does not apply to writings by foreign nationals overseas, should we consider the spirit of the Amendment before filing a case against a propagandist?

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How too should society view the scientists, industrialists, politicians and mid-level bureaucrats who contributed to the horrors of the Holocaust through direct and indirect efforts to keep the killing machines going? Are they more or less guilty than the camp guards, police officers and others who came in direct contact with their victims?

Should age be considered in these matters? Does the fact that one was 17 or 18 during the war make him less responsible than those who were older? And what about age now? Should the government prosecute people who have spent decades as law abiding citizens in the United States and are now nearing the end of their lives? Whether or not age is relevant, can a persecutor expurgate his guilt by postwar activities that benefitted the United States and possibly others as well? These are among the many issues which come to mind when examining the role of OSI subjects in the Nazi genocidal program.

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1. In 1966, the world community view on propagandists was codified in the International Covenant on Civil and Political Rights. 999 U.N.T.S. 171, 6 I.L.M. 368. Article 20 provides that:

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

The covenant was signed by President Carter in 1978 and ratified by the Senate in 1992, subject to a reservation proposed by the George H.W. Bush administration: that it "does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States." The United States also attached a declaration stating that the provision was not self-executing.

Hands On Persecutors

Feodor Fedorenko – "Assistance in Persecution" Under the DPA

Fedorenko v. United States is OSI's seminal case. It gave the Supreme Court's imprimatur to OSI's mission and made possible numerous prosecutions that would otherwise have been foreclosed.

Feodor Fedorenko, a Ukrainian draftee in the Soviet Army, was captured by the Germans in 1941. POW camp conditions were brutal, with many dying of overwork, disease and/or starvation.[1] After being held prisoner in various German camps, he, along with several hundred other POWs, was sent to Trawniki, Poland, a training area for men who were to assist the Nazis in implementing Operation Reinhard – a program to dispossess, exploit and murder the Polish Jews.[2] Once his training was complete, Fedorenko served as a guard in various locations, including a Jewish ghetto and the Treblinka death camp, where approximately 800,000 Jews were murdered.

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Believing his wife and children had died during the war, he emigrated to the United States in 1949. His visa application falsely stated that he had been born in Poland and spent the war years there, first as a farmer and later as a factory worker.

Fedorenko remarried in the United States and became a naturalized citizen in 1970. He later learned that his first family had survived and was still in the Soviet Union. He returned to visit them in 1972, 1973 and again in 1975-76. During the second trip he was interrogated by Soviet authorities about his role during World War II. The Soviets concluded that he was "not criminally liable" for his activities, and they informed him as much.[3]

The INS opened an investigation in November 1975 after an article in *The Ukrainian*

News reported that Fedorenko had participated in atrocities during World War II. At INS' behest, the Israelis interviewed various Treblinka survivors. Most picked him from a photospread and recalled beatings and brutalities he had administered. When interviewed by the INS, Fedorenko admitted having been a guard at Treblinka, though he contended he had gone under duress and had not personally been involved in any persecution. Although some POWs volunteered for camp guard duty in order to improve their lot, the government had no evidence that Fedorenko had done so.

The U.S. Attorney's Office for the Southern District of Florida filed a seven-count denaturalization complaint in August 1977. Four of the counts turned on Fedorenko's having committed war crimes. The remainder involved his failure to disclose pertinent information (his birthplace and war service) and his lack of the good moral character necessary for citizenship. Coincidently, the very month the complaint was filed, the SLU was established. An SLU trial attorney was sent to assist in the *Fedorenko* prosecution. His main contribution was to find and prepare a witness to testify about State Department procedures.

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Trial lasted two weeks. As described by an evidently angry district court:

> If ever a case supported the Judicial Conference ruling barring cameras from the courtroom, this case does. From the beginning it was like a Hollywood spectacular and polarized the residents of South Florida.
>
> As an example of some of the emotional intensity surrounding the trial, the Jewish Defense League ran ads in newspapers offering chartered buses from Miami Beach to Fort Lauderdale on opening day. A demonstration outside the courtroom ensued with a chant: "Who do we want? Fedorenko. How do we want him? Dead." After the court was interrupted twice and the first three warnings were ignored by the demonstrators, a leader who was using an amplified bullhorn was arrested.[4]

Six Treblinka survivors testified that Fedorenko had beaten or shot Jewish prisoners at

the camp. In addition, a Vice Consul (the OSI-prepared witness) who had reviewed displaced persons applications after the war, told the court that an armed guard would have been ineligible for a visa – even in the unlikely circumstance that he had been importuned to serve. The denial of a visa would have been based on the ground that he had assisted in persecuting civilians.

Fedorenko testified in his own behalf. He explained that as a POW he had been surviving on grass and roots; he would have died had he not been sent to Trawniki. Even so, he had not volunteered. He admitted knowing that Jews were murdered at the camp but insisted that, having served as a perimeter guard, he had no hand in their death. Although he admitted shooting in the direction of the prisoners during the 1943 Treblinka uprising, he said he had not aimed to kill. He explained that he had falsely listed Poland as his place of birth in order to avoid repatriation to the Soviet Union.

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The trial judge found Fedorenko a very sympathetic character.

> Defendant has retired on a social security pension and a pension from his 20 years labor . . . . He doesn't own a car; he doesn't own a house; he owns no real estate except a cemetery lot, and he has a burial insurance policy. He has accumulated a life savings of $5,000 but owes his attorney an unknown fee . . . . He has never been arrested in 29 years not even for a traffic offense. His one failure as a resident and citizen in 29 years: he received one parking ticket. Feodor Fedorenko has been a hard-working and responsible American citizen.

The court's benign view of Fedorenko contrasted sharply with its sense of the prosecution. The court questioned whether the action should have been brought at all, suggesting that doing so violated DOJ protocol. The court relied on a 1909 DOJ Circular Letter which stated that denaturalization actions should be brought only rarely, and then only as a means of promoting "betterment of the citizenry." The court was at a loss to understand how the country would be bettered by the prosecution of someone who had been an upstanding citizen.

Moreover, the court excoriated the government for squandering taxpayer funds on daily transcripts and two Russian interpreters.

The court was not any kinder to the government on the merits of the case. It concluded that the Israeli photospread was impermissibly suggestive and that it tainted the subsequent in-court identification of each of the survivors asked to identify Fedorenko in the courtroom. The court also feared that the witnesses had been discussing the trial among themselves, or, even worse, may have been coached on the identification.[5] The court rejected the in-court identifications "in toto."

The court then turned to a statutory analysis. Only "displaced persons" were eligible for a visa under the DPA. The Act specifically *excluded* persons who could be shown:

> (a) to have assisted the enemy in persecuting civil populations of countries. . . or
>
> (b) to have voluntarily assisted the enemy forces . . . in their operations against the United States.

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Although the word "voluntarily" was not used in subsection (a), the court concluded that it should be read into that section. Failure to do so would lead to the "absurd" result that anyone who assisted the enemy – even those who did so under duress, such as kapos and working prisoners – would be excludable. The crux of the case therefore was whether Fedorenko's service was voluntary. The court concluded that it was not. In so ruling, he credited Fedorenko's testimony that he had been assigned to Trawniki rather than the Vice Consul's testimony that guard duty was a voluntary assignment. Though Fedorenko might have escaped (testimony was that some had done so) the judge refused to impose retroactively an obligation that a prisoner of war risk his life in such an attempt.

Under this reasoning, Fedorenko was not automatically barred from applying for a visa. The court then considered whether anything about his visa application itself warranted revocation of citizenship. There was no dispute that Fedorenko had lied about his place of birth and wartime assignment. But under Supreme Court precedent, such misrepresentations had to be "material" if they were to be the basis for revoking citizenship. The Supreme Court had set up two tests to determine materiality: (1) were facts suppressed which, if known, would have warranted denial of citizenship; or (2) might disclosure of the facts have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship.[6]

The government did not contend that guard service at Treblinka would, in and of itself, have warranted denial of citizenship (though ultimately the case came to stand for that very proposition.) The government argued only that if it had known of his work at Treblinka, it would have investigated, and that investigation would have shown he committed atrocities that would have precluded his becoming a U.S. citizen. The court disagreed on the ground that there was no evidence that Fedorenko had participated in atrocities. Even his shooting at prisoners during the uprising did not qualify because the court doubted he did anything other than "shoot over their heads."

The court was no more bothered by Fedorenko's failure to report that he had served with the German army. The court held that Fedorenko reasonably viewed himself a prisoner of war rather than a soldier. As for good moral character, the court focused on his 29 exemplary years in the United States; his conduct in the war was too fraught with "conflict and uncertainty" to be determinative. In sum, the court found no statutory basis for revoking citizenship and the government lost the case on the merits. The district court then went one step further and ruled

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that even if the law did not warrant denial of the government's claim, it would have ruled for the defense on equitable grounds. To reach this conclusion, the court focused on Fedorenko's exemplary behavior in the United States rather than his conduct during the war.

The Solicitor General of the United States determines whether to appeal a government loss. He does so after reviewing recommendations from various DOJ components and the relevant agency or agencies involved, plus an overview from one of the lawyers in his office. In this case, the U.S. Attorney from the Southern District of Florida, the Criminal Division and INS all recommended appeal. Martin Mendelsohn, head of the SLU, wrote that: "There were no neutrals at a death camp; the choice was killer or victim;"[7] he put Fedorenko squarely in the first category. The Israelis, not normally participants in this decision-making process, weighed in with Congress. They feared that the wholesale rejection of eyewitness testimony would make survivors reluctant to testify in future cases. They were also horrified that the district court would even suggest that kapos had aided persecution.[8]

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The case was assigned to Allan Ryan, then working in the Solicitor General's office. [redacted] As for the misrepresentations (concerning his birthplace, wartime whereabouts and German army service), Ryan feared that [redacted]

[redacted]

For some reason, the case haunted Ryan.[10] [redacted]

[redacted]

The war crimes and voluntariness issues could be decided without reaching the murkier question of what constituted a "material" misrepresentation. Yet if the court wanted to reach that issue, Ryan felt the government had strong arguments to present. He had originally believed that a misrepresentation would be material under the Supreme Court's test only if the government could actually prove war crimes. On further reflection, he believed that the government need establish only that an investigation would have been opened and that it *might have* led to the discovery of some disqualifying information. If the latter standard was applied, the Vice Consul's testimony would make the case, since he testified that if it had been known that Fedorenko were a guard, he would have been denied admission. The Solicitor General

authorized appeal.

Attorneys in the Solicitor General's office argue cases before the Supreme Court. It is extremely rare for them to handle cases in the lower courts. However, the INS asked if Ryan could do so. By this point, he was well immersed in the issues and happy to take on the case. With the Solicitor General's approval, he wrote the brief and argued the case before the Fifth Circuit.

The government made three arguments: (1) that Fedorenko's deception about his wartime service when he applied for a visa was material and justified revocation of his citizenship; (2) that the district court used the wrong standards in judging the credibility of the survivor witnesses; and (3) that the court erred in holding that equitable considerations (Fedorenko's conduct in the U.S.) may serve as an alternative ground for its judgment. The government did not challenge the district court's reading of a voluntariness requirement into the statute. On the contrary, the government expressly endorsed that position.

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The government won the appeal, with the Circuit adopting the government's position on the misrepresentation and equitable relief issues; it did not rule on the question of eyewitness testimony.[14] The decision came down in June 1979, when OSI was in its infancy. Ryan sent the decision and appellate brief to AAG Heymann, telling him that if there was anything he could do to help the new section get launched, he would be happy to do so. At the time, he thought he might be able to help with some briefs even while he remained in the Solicitor General's Office. Instead, Heymann convinced him to join OSI with the intention of taking over in a few months when Director Walter Rockler returned to private practice. Ryan went to OSI in January 1980. A month later the Supreme Court granted certiorari in *Fedorenko.*

Attorneys General usually argue at least once before the Supreme Court during their term in office. The case is of their choosing. Attorney General Benjamin Civiletti selected *Fedorenko.* It was the only argument he presented as Attorney General and he had several reasons for the choice: (1) the record was fairly small and so could be mastered despite the daily demands of his office; (2) he felt an affinity for OSI both because the section had been established during his tenure and because he had met with the Soviet Chief Justice and secured through him greater access to the Soviet archives containing Nazi records; and (3) he had long been "revolted" by the Holocaust.[15]

Civiletti was aware of legend within the Department that one of his predecessors, preparing for his only argument, had sent a note advising the Court that he was making a ceremonial appearance and would appreciate not being asked questions. While that story may be apocryphal, Civiletti did not want to take any chances. He sent a note to the Chief Justice saying he would welcome questions during his presentation.

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There were two issues before the Court: the meaning of "materiality" and whether the district court could rule on equitable grounds. Both sides were peppered with questions on materiality.[16] Yet in the end, the Court's ruling did not turn on this at all.[17] Instead, it reexamined the language of the DPA and the testimony of the Vice Consul to reach conclusions entirely different from those of the district court judge. Whereas the district court read the word "voluntary" into Section (a) of the statute, the Supreme Court declined to do so. Given that the word was in one section but not the next, the Court assumed the omission was intentional. Thus, those who had assisted in persecution were ineligible for a visa – whether or not they acted voluntarily.[18]

The question then became whether Fedorenko had assisted in persecution. In answering affirmatively, the Court relied on the testimony of the Vice Consul who said that camp guards were routinely denied admission on the ground that they had assisted in persecution. Given that, Fedorenko had been unlawfully admitted. Everything flowing therefrom was tainted, including his citizenship. It had been "illegally procured" and must be revoked.[19]

Unlike the district court, the Supreme Court was not concerned that such an analysis could apply to kapos.

> The solution . . . 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 a pistol, who was paid a stipend and was 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.[20]

(emphasis in original).

The Court also ruled that the trial judge had no discretion to deny denaturalization on equitable grounds once the statutory requirements for denaturalization had been satisfied. Fedorenko's citizenship was therefore revoked.

Justices White and Stevens dissented. Stevens' dissent was passionate. He believed that voluntariness should be the key. Without it, the Court's effort to distinguish kapos from guards did not hold up.

> [T]he kapos were commanded by the SS to administer beatings to the prisoners, and they did so with just enough force to make the beating appear realistic yet avoid injury to the prisoner. . . . I believe their conduct would have to be

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> characterized as assisting in the persecution of other prisoners. In my view, the reason that such conduct should not make the kapos ineligible for citizenship is that it surely was not voluntary.

Stevens accused his colleagues of reacting to the horrors of Treblinka rather than following the logic of the law: "The gruesome facts recited in this record create what Justice Holmes described as a sort of 'hydraulic pressure' that tends to distort our judgment."

With the denaturalization complete, OSI filed a deportation action. Fedorenko was ordered deported in 1983 and he chose the U.S.S.R. as his destination.[21] It probably appeared a wise choice at the time, given that the Soviet Union had earlier assured him he faced no criminal liability.

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While Fedorenko was in the midst of appealing the deportation order, the U.S. Embassy in Moscow informed OSI of a recent trial and execution in the Soviet Union of a naturalized Belgian citizen accused of war crimes. His war history was similar to Fedorenko's. He had been a prisoner of war "convinced to join" the German ranks; he emigrated to Belgium after the war but had been arrested by the Soviets during a 1968 visit to his homeland. He was detained in the Soviet Union until his trial in 1983.

The Embassy recommended that Fedorenko be told of the case and the possible risks he faced if deported to the U.S.S.R. The Criminal Division argued otherwise. It pointed out that Fedorenko had been back to the U.S.S.R. in years after the Belgian had been detained, yet he had not been arrested; it was thus not clear he would be arrested if deported now. Moreover, since the Belgian case had been well covered by the U.S. media, Fedorenko and his attorney could learn about it and make an independent assessment of his circumstances.[22]

Fedorenko was deported to the Soviet Union in December 1984. Shortly before his

departure, a Soviet Embassy official opined that Fedorenko would be treated leniently in light of his age.[23] And indeed, the following June the American Embassy in Moscow passed on a tip that Fedorenko was living in the Crimea and seeking private pension benefits.[24] The telegram concluded: "This . . . would seem to indicate that Fedorenko is alive and well and that he expects to be in a position to enjoy his pension for the foreseeable future."

It was not to be. Just one year later, the Soviets tried him for desertion, taking punitive actions against civilians, and participation in mass executions.[25] According to reports in the Soviet press, several witnesses testified that Fedorenko had beaten Jews as they walked naked toward a gas chamber.[26] He was found guilty and sentenced to death. The execution was carried out in 1987.

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The case has reverberated for OSI. The vast bulk of OSI prosecutions have been of camp guards. By focusing on conduct rather than intent, *Fedorenko* made it possible to prosecute these cases without showing that service was voluntary – a showing that in most cases could not easily be made. Under the Supreme Court ruling, if a visa was improperly procured, denaturalization is mandatory. Just as importantly, the Court eliminated the possibility of asserting equitable defenses in these cases. Had the holding been otherwise, a variety of equitable arguments (*e.g.*, the difficulty of defending against claims arising from activity so long in the past, the government's opportunity to have learned of the events sooner, the defendant's upstanding U.S. citizenship) might have resulted in the dismissal of OSI cases. Without *Fedorenko*, OSI would have had a very short docket.

Its significance extends beyond that however. In the words of DAAG Richard:

It served to refute the notion that the mere passage of time and the leading of a

quiet life in the U.S. somehow made amends for the past. It established the correctness of OSI's effort and gave it a legitimacy that . . . others could never give . . . . It said that the issue wasn't merely one for the Jews, but what kind of a nation we want to be – a refuge for the repressed or a safe haven for the oppressor.

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1 1. Conditions in some POW camps were so dire that there were instances of cannibalism. *See, e.g.,* Doc. 63: Transit Camp 140 to the 285th Security Division, Jan. 20, 1942, in NARA microfilm collection T-501 (Records of German Field Commands), reel 8, frame 1114. Of the roughly 3.5 million Soviet POWs who fell into German hands in 1941 – the year of Fedorenko's capture – over two million were dead by Feb. 1, 1942. Christian Streit, *Keine Kameraden: Die Wehrmacht und die sowjetischen Kriegsgefangenen 1941 - 1945*, 4th ed. (Bonn: J.H.W. Dietz Nachf., 1997), p. 136.

2. *See* p. 31, n. 19.

3. Fedorenko testified about this during his deportation hearing. The U.S. government learned of the Soviet decision after it filed its denaturalization case. Aug. 11, 1978 cable from the Ministry of Foreign Affairs of the U.S.S.R. to the American Embassy in Moscow.

4. *United States v. Fedorenko*, 455 F. Supp. 893, 899 (S.D. Fl. 1978), *rev'd*, 597 F.2d 946 (5th Cir. 1979), *aff'd*, 449 U.S. 490 (1981).

5. According to the OSI attorney (interviewed on Jan. 16, 2002), and the Israeli liaison on the case (who spoke with SLU attorney Thirolf after trial), there was no basis for this conclusion. The witnesses, who had never before been in a U.S. courtroom, were not individually prepped nor even told how the courtroom was organized. Having testified at war crimes trials in Germany, some thought that the defendant must be seated in the audience.

6. *Chaunt v. United States*, 364 U.S. 350, 355 (1960).

7. Sept. 15, 1978 memo from Mendelsohn to the Solicitor General.

8. Aug. 24, 1978 letter to Joshua Eilberg, Chairman of the House Judiciary Committee's Subcommittee on Immigration, Citizenship and International Law from Menachem Russek, Chief Superintendent for the Israeli Police Section for the Investigation of Nazi War Crimes.

9. Sept. 12, 1978 memorandum from Allan Ryan to the Solicitor General. All references hereafter to Ryan's first memo are to this document.

10. Recorded Ryan interview, Feb. 7, 2002. All references hereafter to Ryan's actions and motivations come from this interview unless otherwise specified.

11. Ryan could point to no external factor which led him to read the transcript. It should be noted however, that INS' appeal recommendations (they actually wrote two, one of which had Mendelsohn's dramatic view of Treblinka) both arrived shortly after Ryan wrote his first memo.

12. Patty Hearst was an heiress kidnaped by a radical group in the 1970s. She was convicted for participating in a bank robbery with her captors. (Years later, and long after Ryan's memo, she was granted a pardon by President Clinton.)

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13. Sept. 27, 1978 memorandum from Ryan to the Solicitor General. All references hereafter to Ryan's second memo are to this document.

14. *United States v. Fedorenko*, 597 F.2d 946, 953 (5th Cir. 1979).

15. His feelings on the issue were so strong that in 2001 he still had never visited Germany. Recorded interview with Civiletti, March 30, 2001. All references to Civiletti's actions come from this interview unless otherwise noted.

16. Supreme Court arguments are recorded and the tapes are kept on file in the Motion Picture Sound and Reference Room at the National Archives. The *Fedorenko* argument is 267.326, No. 79-5602.

17. *Fedorenko v. United States*, 449 U.S. 490 (1981). How to determine materiality in these cases was resolved years later in *United States v. Kungys*, 485 U.S. 759 (1988), discussed at pp. 127-133.

18. In fact, however, it was not Congress which crafted the language in sections 2(a) and (b); the language was adopted from the IRO. Nothing in the legislative history of the Act indicates that Congress focused on these subtleties in the IRO. Therefore, it arguably presumes too much to say that Congress made a conscious distinction; it was simply taking definitional terms from another document.

19. The Court's opinion did not clearly distinguish between citizenship that is "illegally procured" or citizenship procured through "misrepresentation" or "concealment of a material fact." The Supreme Court seemed to be saying that Fedorenko had both procured his citizenship illegally and through misrepresentation.

20. The factors enumerated by the Court were those which applied to Fedorenko. An argument could be made however that two of the factors – the stipend and leave – have nothing to do with persecution.

21. *Matter of Fedorenko*, A07 333 468 (Imm. Ct., Hartford, Conn. 1983), *aff'd*, 19 I. & N. Dec. 57 (BIA 1984).

22. Nov. 8, 1984 memo to AAG Trott from Director Sher re "Deportation of Feodor Fedorenko to the U.S.S.R."

23. Nov. 26, 1984 memo to Attorney General Smith from AAG Trott re "Deportation of Feodor Fedorenko."

24. Telegram No. 071833Z, June 7, 1985 from AmEmb., Moscow to the Secretary of State. According to subsequent news accounts, he had indeed been living in the Crimea with his wife. "Soviet Reports it Executed Nazi Guard U.S. Extradited," by Felicity Barringer, *The New York Times*, July 2, 1987.

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25. It is unknown why the Soviets changed their view on his wartime culpability.

26. "War Criminal Sentenced to Death," by Alison Smale, *AP*, June 19, 1986.

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Georg Lindert and Adam Friedrich – "Assistance in Persecution" Under the RRA

> The stone quarry at the Mauthausen concentration camp was infamous for its brutality.
>
> The prisoners were forced to extract large quantities of granite from the quarry without significant safety measures and without regard to the health of the prisoners. The quarry included a set of one hundred and eighty-six stone stairs from the floor to the top of the quarry. Some guards forced prisoners to march up and down the stairs carrying heavy stone as a form of punishment.[1]

Georg Lindert served as a guard at the quarry.[2]

Lindert first applied to enter the United States in 1951, under the DPA. Rather than listing his guard duty on the visa application, Lindert claimed to have served in a combat division of the Waffen SS. At the time he applied for entry, administrative regulations made membership in the Waffen SS an automatic disqualifying factor. Accordingly, his visa request was denied.

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Three years later, the DPA had been supplanted by the RRA. In addition, the administrative rules had been modified so that the Waffen SS was no longer a *per se* visa disqualifier. Lindert reapplied for a visa, again making no mention of his guard service. In response to a question asking for a list of his residences, Lindert wrote "1942-1945 with the German Army." The visa was issued, and he came to the United States in 1954.

Several years later, when applying for U.S. citizenship, Lindert completed a form which asked for a listing of all organizations of which he had been a member. He did not list the military.

The RRA's use of the word "personally" when describing assistance in persecution was a cause of concern to OSI. The addition of this word – absent from the DPA under which most OSI cases are brought – could arguably require the government to establish *individual* culpability. In DPA cases, it is sufficient to show that the defendant was one of a group all

responsible for activities which amounted to assistance in persecution. OSI was concerned that it could not meet the potentially "heavy burden of proof" necessary to establish Lindert's "personal" assistance in persecution, especially since some camp guards had obtained visas under the RRA even after disclosing their camp service.[3] Therefore, when it filed suit against Lindert in 1992, the government did not base its claim on his having assisted in persecution. He was charged only with illegal procurement of citizenship.

The complaint set forth three bases for its claim: (1) service as a camp guard showed that Lindert lacked the good moral character required for naturalization; (2) he misrepresented and concealed a material fact on his citizenship application when he failed to list the military as an organization to which he belonged; and (3) he lacked good moral character because he had been untruthful both in failing to list Mauthausen as a place of residence and in not referencing the military as an organization to which he had belonged.

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Lindert was the first case in which OSI charged "lack of good moral character" based on guard service for someone who had entered under the RRA. Following a three week trial with over 300 government exhibits, the district court rejected all the government's theories. The court acknowledged that Lindert had served as a guard in a brutal camp. However, absent "evidence that Lindert ever fired his gun or took any other action hostile to any prisoner," the court was unwilling to conclude that his moral character "was irreparably soiled by his actions or inactions while he was a guard."

The court excused Lindert's misstatements on the ground that the forms he completed were ambiguous. No question had specifically asked about military service. Not everyone asked to list organizations of which they were a member would think that called for a reference to the

military. Nor, in the court's view, was it self evident that a listing of residences would mandate a specific reference to a concentration camp, when in fact the defendant had responded that he was in the military during the relevant period. Because of the ambiguity, the court found no evidence that Lindert had intended to mislead. Without such intent, there was neither a "wilful" misrepresentation nor evidence of bad moral character. He was allowed to retain his citizenship.

In ruling against the government on the question of whether service as a camp guard *per se* established lack of good moral character, the court relied in large part on its assessment of witness credibility. The court believed the defendant's testimony that he had served "only" as a perimeter guard, and that, as such, he had no role in persecution. It discounted the testimony of OSI's expert, an historian who testified that guards rotated responsibilities.[4] It also rejected OSI's argument that perimeter duty alone would establish lack of good moral character in any event, because perimeter guards kept persecuted civilians from escaping.

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The *Lindert* ruling came in spite of the fact that the Supreme Court had held in *Fedorenko* that service as a perimeter guard amounted to "assistance in persecution" under the DPA.

Although *Fedorenko* did not have a "good moral character" count, the *Lindert* court found *Fedorenko* instructive. Since *Fedorenko*, unlike Lindert, had admitted shooting at escaping inmates, the *Lindert* court concluded that it took that type of direct abusive action to establish lack of good moral character.[5]

The *Lindert* court was not the first to rule against the government on issues concerning misrepresentation about place of residence or organizations joined.[6] However, none of the other cases involved a defendant who had entered under the RRA. Moreover, the other courts had accepted alternative theories offered by the government for revoking citizenship. The *Lindert*

court did not and the case was therefore an outright loss.

Despite its frustration with the court's ruling, OSI recommended against appeal. The office assessed the chance of reversal as slim because (1) appellate courts are reluctant to overturn a district court's credibility finding; and (2) the appeal would be to the Sixth Circuit, where OSI had already lost two cases.[7] OSI determined it would rather distinguish a loss in the district court than run the serious risk of another adverse appellate ruling.[8] The Criminal Division and Solicitor General agreed and no appeal was filed.[9]

Although *Lindert* was only a district court opinion, its impact on OSI was significant. Even before *Lindert* was filed, the office was reluctant to file a case based on "personal assistance" in persecution. After *Lindert*, it became wary of charging a guard who had entered under the RRA with "lack of good moral character." Although there were several RRA cases under investigation at the time of the *Lindert* loss, they were put aside.

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Years later, an attorney who joined the office after *Lindert* was decided urged OSI to reexamine the matter. Based on new research, the office proposed filing a test case to litigate the "personally advocated or assisted in persecution" issue directly, as it had not been done in *Lindert*. The Criminal Division authorized the filing, and in 2002, seven years after *Lindert,* a case was filed against Adam Friedrich.

Friedrich had entered the country under the RRA after serving as a guard at two camps. His duties twice included guarding prisoners on forced marches during camp evacuations. Neither his visa application nor his 1962 citizenship papers mentioned his guard service. The government filed a denaturalization case and argued that the word "personally" was inserted into the RRA only to ensure that individuals were excluded based upon conduct, rather than mere

membership in an organization.[10] Since the defendant had been a camp guard, the government contended that this alone established impermissible conduct.

The district court, citing *Fedorenko* and its DPA progeny, agreed. It never even cited *Lindert*. The Circuit court, also ignoring *Lindert*, affirmed and issued an even broader ruling. It held that the word "personally" modifies "advocated" or "assisted;" it does not concern whether one "engaged in direct persecution." "[B]y impeding prisoners' escape," Friedrich was "actively and personally involved in persecution" even if he "never saw a prisoner escape, never harmed a prisoner, never discharged his weapon while guarding prisoners, and never saw any prisoners die during the forced evacuation marches."[11]

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The *Friedrich* prosecution ended the pall cast by *Lindert* and opened the way for a series of cases that OSI had been holding in abeyance for years.[12]

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1. *United States v. Lindert*, 907 F. Supp. 1114 (N.D. Ohio. 1995).

2. He also stood guard at a Mauthausen subcamp where inmates were forced to build a tunnel through a mountain pass.

3. May 20, 1996 memorandum from Director Rosenbaum to DAAG Richard re "Defendant's Allegation of 'Bad Faith' in Seeking Attorney's Fees in United States v. Lindert, Case No. 4:92CV1365 (N.D.Ohio)."

4. The historian, Charles Sydnor, has worked on approximately two dozen cases for OSI. He believes that all camp guards performed a variety of duties including night patrol, escorting inmates to and from work details, guarding them at work, serving in the watchtower, and patrolling the perimeter of the camp. The primary documentary evidence in support of this view is the German Wrong/Right picture book and its narrative companion, "Instruction on Tasks and Duties of the Guard," as well as the 1933 service regulations for the Dachau concentration camp.

5. Interestingly, the *Lindert* court made no mention of *U.S. v. Schiffer*, 831 F. Supp. 1166 (E.D. Pa. 1993), *aff'd*, 31 F.3d 1175 (3rd Cir. 1994), decided just a year earlier. In that (non-RRA) case the court concluded that lack "good moral character" depended on a showing that the person *voluntarily* engaged in "some morally reprehensible conduct."

> For instance, a person who was forced into service under a constant threat of death might not lack good moral character simply because of his service. Similarly, it is not entirely impossible that a member of the SS had responsibilities, such as minuscule clerical duties, so insignificant and unrelated to the Nazi program that his contribution is negligible.

831 F. Supp. at 1198.
(The court concluded that Schiffer, whose service was voluntary and significant, did lack good moral character.)

6. *U.S. v. Kairys*, 600 F. Supp. 1254 (ND Ill. 1984), *aff'd*, 782 F.2d 1374 (7th Cir.) (wartime service need not be listed in response to the question about membership in organizations); *U.S. v. Osidach*, 513 F. Supp. 51, 104 (E.D. Pa. 1981) (defendant not required to list his police service in response to that question). Both *Kairys* and *U.S. v. Schellong*, 717 F.2d 329 (7th Cir. 1983), held that the residence question did not call for a listing of concentration camp postings.

7. *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993), *cert. denied sub nom. Rison v. Demjanjuk*, 513 U.S. 914 (1995) and *U.S. v. Petkiewytsch*, 945 F.2d 871 (6th Cir. 1991). These cases are discussed at pp. 134-140 and 150-174.

8. Sept. 22, 1995 memorandum from Director Rosenbaum to DAAG Richard re "Loss in United States v. Lindert."

9. Nov. 8, 1995 memorandum from Acting AAG John C. Keeney to the Solicitor General re "United States v. George Lindert."

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10. Unlike the DPA, the RRA did not preclude issuance of visas to persons who were members of a "movement hostile" to the U.S. The government contended that the word "personally" reinforced the new statutory emphasis – focusing on persecution committed by an individual rather than by a group. As such, it had nothing to do with one's subjective intent to persecute others.

11. *U.S. v. Friedrich*, 305 F. Supp. 2d 1101 (E.D. Mo. 2004), *aff'd*, 402 F.3d 842 (8th Cir. 2005).

12. As of this writing, three RRA cases are in litigation. The defendants are John Hansl, Josias Kumpf and Anton Geiser. Both Hansl and Kumpf had their citizenship revoked, and in each case the court relied heavily on *Friedrich*. *U.S. v. Hansl*, 364 F. Supp.2d 966 (S.D. Iowa 2005), *aff'd*, 439 F.2d 850 (8th Cir. 2006); *U.S. v. Kumpf*, 2005 WL 1198893 (E.D. Wis. 2005), *aff'd*, 438 F.3d 785 (7th Cir. 2006). *Geiser* is still pending. **Update if necessary**

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Frank Walus – Lessons Learned by OSI

I. The Prosecution

Early critics of OSI often cited the *Walus* case as an example of the office overreaching.[1] Their criticism was misdirected. In fact, the prosecution and appeal were handled by the Chicago U.S. Attorney's Office before OSI's founding. The Circuit ruling – excoriating the prosecution and remanding the case for retrial – was issued shortly after OSI was established, making *Walus* one of the first cases with which the office had to contend. OSI's role was palliative.

Frank Walus was born to Polish parents residing in Germany. His father died when he was a youngster and the family returned to Poland. Where he spent the war years became a matter of intense dispute, as discussed below. After the war, he lived in Poland, spending seven years in the town of Kielce. He entered the United States in 1959 under the INA. Several months later he returned to Poland, but then came back to the United States in 1963. He settled in Chicago, where he was naturalized in 1970.

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A letter from Simon Wiesenthal brought Walus to the attention of the INS in 1974. Wiesenthal reported that Walus had delivered Jews to the Gestapo in the Polish towns of Czestochowa and Kielce.[2]

INS contacted representatives of various Jewish survivor organizations to determine if they had any information about Walus. None did.[3] The agency also spoke with eleven of his neighbors, eight former boarders in his home, and Walus himself. Nothing supporting the allegations came from these interviews.[4] Walus told INS that he had spent World War II in Germany as a forced laborer.[5]

In response to an INS request, Israel placed advertisements in Israeli newspapers asking

anyone with information to come forward. The ads mentioned Walus by name and explained that they were seeking witnesses for an investigation of war criminals in the Polish towns of Czestochowa and Kielce. Those who came forward were shown one of two photospreads. In each, the picture of Walus showed him at age 36 although he had been a teenager during the war.

Israel gathered six survivor affidavits, with five of the affiants claiming to be eyewitnesses to atrocities committed by Walus. The sixth stated that he delivered mail to Gestapo headquarters in Kielce, and some of the letters were addressed to a Frank Walus.

The eyewitness accounts were dramatic.[6] Several recalled seeing Walus in uniform or at Gestapo headquarters, although they were divided as to whether he had been in Kielce or Czestochowa. (The towns are 60 miles apart.) One claimed Walus had shot a woman in the neck after forcing her and two young girls to disrobe. Although the witness turned away after the first shot was fired, he heard two additional shots. When he looked back, the three bodies lay motionless. On a different occasion, he saw Walus shoot a Pole who had been trying to escape.

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Another witness claimed that Walus dragged a neighbor from his apartment to a waiting automobile. He saw Walus strike the neighbor and later learned that the neighbor had died. A third saw Walus beat an elderly Jew to death with an iron bar. The fourth reported seeing Walus separate children from adults. She later heard that the children had been killed. The fifth had witnessed Walus beating Poles and Jews. All but one witness picked Walus from the photospread.

INS attorneys went to Israel to interview the witnesses themselves. The information they developed was generally corroborative, though in some cases more detailed than had previously

been known. For example, the witness who originally reported the delivery of mail to a Frank Walus at Gestapo headquarters now recalled personally handing some of those letters to Walus. Moreover, he recalled seeing Walus shoot an elderly and sick woman as well as several crippled and undernourished ghetto residents. He told one INS lawyer that he did not give the Israelis full information because he believed the Israeli interviewer was inexperienced and not seeking an in-depth account of events. He told another that he had been reticent with the Israelis because he knew that Walus was living in the U.S. and therefore assumed the Israelis would be unable to do anything about him. And while he earlier had been unable to pick out Walus' photograph, he could now do so, explaining that he had not been wearing his glasses during the prior interview. The witness who recalled Walus beating a Jew now said that he witnessed Walus beat five other Jews as well.

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The INS attorneys compared the statements they had taken with those given to the Israelis. They generally found reasons to accept the later and more detailed accounts given to them, in part because they believed the INS questioning was "more specific and detailed" than had been the Israelis'. They expressed concern over only one witness because she "was very emotional and it was very difficult to obtain direct answers." They suggested she not be called to testify.[7]

Additional investigation by INS turned up several witnesses in the United States. One said he was within 50 feet of Walus in the Czestochowa ghetto in 1941. He heard shots ring out and then saw Walus with a pistol in hand standing over the dead bodies of a mother and daughter who had been walking down the street. Another recalled Walus breaking into her room and pointing a pistol at her husband. She pled with Walus to spare her husband's life. He did so but

then ran into another apartment and shot the inhabitant therein.

Despite the discovery of these eyewitnesses to persecution, there was no ready basis for deportation since the Holtzman amendment had not yet been enacted. However, Walus could still be denaturalized, although the ready ground for denaturalization – assistance in persecution – was unavailable since Walus had not emigrated under the DPA or RRA. In January 1977, Walus was charged with procuring his citizenship illegally, both because he concealed material facts (wartime atrocities and his membership in the "Gestapo, SS or other similar organization") and because he lacked the good moral character required (as evidenced by his having committed war crimes and having concealed his membership in the Gestapo).

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Before the case went to trial, the SLU was established. SLU chief Mendelsohn had confidence in the Assistant U.S. Attorneys (AUSAs) assigned to the Walus prosecution and allowed them to continue without supervision from the SLU.[8]

Trial began in March 1978 before Senior Judge Julius Hoffman. Hoffman had received much notoriety and negative publicity nine years earlier when he presided over the trial of "The Chicago Seven," a group of protestors at the 1968 Democratic convention. The judge's outbursts and inability to control the courtroom were the basis for overturning those convictions on appeal.[9]

At the time of the *Walus* trial, Judge Hoffman was 82 years old. By unfortunate happenstance, the role of the Nazis during World War II was then a headline story in Chicago as well as the rest of the nation because of a planned march of Nazi sympathizers through Skokie, Illinois.

Skokie, a Chicago suburb which was home to many Holocaust survivors, had enacted

three ordinances designed to restrict demonstrations.[10] A month before the *Walus* trial, a court ruled the ordinances unconstitutional.[11] The appeal of that ruling was argued during the *Walus* trial.

Courthouse security during the trial was unusually tight for the times; it included a metal detector at the courtroom door and an armed guard at the elevator. The government presented twelve eyewitnesses, eight from Israel and four from the United States. Each testified to having seen Walus in Poland (either in Czestochowa or Kielce) between 1941 and 1943.

By and large, the survivors testified consistently with their pre-trial interviews and depositions, though in some instances testimony was expanded on the witness stand. The witness who told the INS he had turned away after seeing Walus murder a woman, only to hear two more shots ring out, now claimed to have actually witnessed the murder of all three victims. Another told of Walus killing an old woman and shooting two of his best friends, though he had not mentioned the murder of his friends when he first spoke with Israeli interrogators. The witness who one INS attorney had deemed too emotional to testify was, nonetheless, called by the government. Her testimony did not hold up well on cross examination.

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Beyond these individual problems, there were overarching issues which affected the credibility of the eyewitness identifications. Not only had the perpetrator gone from a youth to a middle-aged man in the 35 intervening years, but the very circumstances of ghetto life made it questionable whether the survivors could rely on their visual memories. Testimony included the following:

> I wouldn't look at him. I tried not to see him. I tried to avoid him as much as one avoids a dog.

> I never looked in his eyes. I was afraid to look in his eyes. I thanked God every time I left the Gestapo.
>
> At that time there wasn't even 5 percent of hope in me that I will survive this time. Therefore, I didn't really make any special mental remarks.

Nor did the mental image survivors recalled match well with the defendant in the courtroom. Despite Walus' diminutive stature (he stood approximately 5'4"), the witnesses generally described the assailant as average height or taller.

The government also presented several witnesses who first met Walus in the United States. They testified about statements of his which were inconsistent with his claim of having been a farm laborer in Germany during the war. Two said that Walus spoke of being in a labor camp and inadvertently gassing prisoners. He told them that the Germans had tricked him into turning on the shower without telling him that the system was designed for executions.

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A key witness presented by the government was Michael Alper, a former boarder in the Walus home and one of the two men whose report to Wiesenthal had triggered the government's investigation.[12] In his pre-trial deposition, Alper conceded that Walus told a different story every day; Walus' wife had admitted to Alper that even she did not know what to believe.[13] Alper, however, showed no such doubts during his trial testimony. He described Walus boasting about helping the Gestapo liquidate ghettos and arresting Poles who assisted Jews. According to Alper, Walus told of having thrown Jewish babies against a wall. Alper's wife had similar stories, involving tales of killing Jewish children and pregnant women and rounding up Poles who hid Jews.

The defense suggested that both Alpers were biased because of the strong animus between them and Walus: Walus had accused Alper of cheating both him and another tenant out

of money, maligned Alper to a social service agency, reported him to the INS, told Alper's new neighbors that Alper was a murderer, and written derogatorily about Alper to the president of a Polish organization in Vienna when Alper went to Austria.

Judge Hoffman thought pursuit of the bias angle "inappropriate." He cut off fruitful areas of cross-examination with other witnesses too, including probes about the height and voice timbre of the person whom the survivors were recalling. At times the court was so antagonistic to defense counsel that the government joined with the defense in an effort to salvage the record.[14]

The defense began with Walus' testimony. He recounted being taken from Poland to Germany and being forced to work on various farms. He named the farmers, recalled local friends, and described the area and surrounding terrain with great particularity. He even introduced pictures of himself on some of the farms during the war years. The pictures had stamped on their back the date and place of development. German farmers, their relatives and neighbors verified that Walus had indeed been at these locations. A Polish priest testified that Walus had attended church fairly regularly until 1940 and then was not seen again until 1947. The priest also confirmed that the pictures of Walus submitted by the defense accurately depicted the way Walus looked at the time.

Walus also presented abundant documentary corroboration, most of which his attorneys had turned over to the government before trial. There were records from the German Health Insurance Office (an organization analogous to Blue Cross) showing that payments were made for a farmhand named Walus who worked during the relevant periods on the farms about which Walus testified. And Red Cross records, created in 1949, listed Walus as a foreigner in the

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appropriate farm towns of Germany during the war.

The absence of certain records was also telling. The Germans had no record of Walus having served in the military and the Polish war crimes commissions in Kielce and Czestochowa had no record of him either.

The trial lasted 17 days. During the six weeks that the case was under submission, the Holocaust was much in the news. The governor of Illinois proclaimed Holocaust Remembrance Week, NBC aired a powerful four-part miniseries on the Holocaust and the Seventh Circuit ruled the Skokie ordinances unconstitutional.[15] In addition, Simon Wiesenthal gave an interview to *The Chicago Sun-Times* in which he acknowledged informing the INS about Walus and boasted that he never had a case of mistaken identity.[16]

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Judge Hoffman revoked Walus' citizenship.[17] He found the survivor witnesses "powerful and convincing," noting "a high degree" of consistency among them. The court was also persuaded by the defendant's statements of wartime escapades – especially his statements to the Alpers. Although the court acknowledged "strong illwill" between Walus and the Alpers, the Alpers' testimonial demeanor persuaded Judge Hoffman that they were credible.

By contrast, he found the defense witnesses unconvincing. The very fact that Walus' former employers were supportive bespoke their disingenuousness as far as the judge was concerned. He found it "curious" that a forced laborer would have formed friendships and kept contact with those for whom he worked. And the fact that some of the witnesses (or their relatives) had been members of the Nazi party tarnished their credibility in Judge Hoffman's eyes.

The documentary evidence did nothing to bolster the defense case in the court's view. He

found the date and place stamps on the photographs irrelevant because they established only where the film had been developed, not where the photographs were taken. The medical insurance records were disregarded because they were incomplete (some having been destroyed during or after the war).

Walus filed a series of motions to vacate the judgment based on newly discovered documents and witnesses. The documents included residence permits recently found in a German archive. The permits, which included a photograph of the defendant, had been issued in 1940 and placed Walus on two of the farms about which he testified.

New eyewitness testimony came from a French prisoner of war shipped to Germany as a forced laborer. He had come in contact with Walus during that time and was coming forward "in order to rectify a miscarriage of justice" after reading about the trial.

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Two other witnesses, who had been known to the defense but had refused to come to the United States to testify, were now willing to do so in light of the verdict against Walus. One was a Pole who had been forced to work in Germany. His affidavit was accompanied by four photographs of Walus with other Polish farm workers in Germany between 1941 and 1945. The second was a German priest who had been too ill to travel to the trial. His affidavit stated that Walus had attended services in his parish during the war years. Walus also offered a statement from the University of Munich stating that he could not have been in the SS or the Gestapo both because he was Polish and because he was too short to meet the entrance criteria.[18]

Judge Hoffman was not persuaded. Since some of the witnesses had been known to the defense before trial, their statements did not qualify as "newly discovered." Other evidence was rejected on the ground that it was merely cumulative of material presented during the trial.[19] As

for the nationality and height restrictions, Hoffman noted that they were not absolute.[20]

Several months later, Walus sought assistance from the court in securing the testimony of yet more newly discovered overseas witnesses. Walus' Polish father-in-law had been contacted after the verdict by several Poles who had been forced laborers with Walus. The defense lacked resources to travel to Poland and interview these new witnesses and had twice asked the Polish War Crimes Commission to conduct the interviews. The Commission had not responded and Walus wanted the court to issue an order stating that they should do so.

Judge Hoffman denied the request without opinion. Two days later, defense counsel received a letter from the Polish War Crimes Commission stating that it would provide information if so ordered by a court. The defense urged the court to reconsider its ruling in light of the Polish offer. Judge Hoffman refused.

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Walus appealed the original district ruling both on its merits and for alleged bias by the judge. He appealed also the denials of his post-trial motions. The cases were consolidated and argued one week before OSI was established. The Seventh Circuit issued its opinion ten months later.[21] Although the Court noted "instances of attitude we find somewhat disturbing on the part of this experienced trial judge," it declined to reverse on the ground of bias. The Circuit was more equivocal about the merits of the case itself, characterizing as "persuasively presented" the argument that there was insufficient evidence to support the verdict. In the end, however, the court opted for a remand. It did so on the ground that the government's case "was sufficiently weak, particularly as to impeachment of the defendant's documentary evidence, that the newly-discovered evidence would almost certainly compel a different result in the event of a new trial."

The Circuit was particularly concerned about the reliability of the government's

witnesses, upon whom the district court so heavily relied. Especially disturbing was the way the witnesses had first learned of the investigation and the procedures used during the photograph displays. Not only were the photospread pictures taken almost 20 years after the events in question,[22] but the picture shown to eight of the twelve eyewitnesses was of particularly poor quality. The court was dismayed also by Judge Hoffman's heavy reliance on the Alpers despite the fact that the "evidence of hatred" between them and the defendant was "extremely strong."

Although the government had argued that the defense documents were forged or altered in order to create an alibi, the Circuit would have none of it. In light of the newly-discovered evidence, the court found the government's theory "impossible to believe" and concluded that affirming Judge Hoffman's decision would be "an intolerable injustice." The case was remanded for trial before a different judge.

Since OSI had not been in existence at the time of the Circuit argument, review of the opinion was its first input on the case. Allan Ryan, then Deputy Director, urged against seeking rehearing or Supreme Court review. His concerns were both pragmatic and legal.

> I have the distinct impression, from reading the opinion, that it was originally drafted as an outright reversal, and that the portions relating to a remand for a new trial on the newly discovered evidence question were added at the last minute. The Assistant United States Attorneys who handled the appeal have the impression that the two Seventh Circuit Judges, Pell and Wood, were originally a majority to reverse, but that Judge Moore of the Second Circuit prevailed on them to remand on the new evidence question, in an opinion which all three judges could join.
>
> * * *
>
> Assuming that it is so, we would have much to lose if we sought rehearing en banc in this case. There are nine judges on the Seventh Circuit, and thus we would have to win over five of the remaining seven. If we fail in that, we could well face not merely an affirmation of the panel's decision but an outright

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> reversal, ending the case against Walus once and for all. I don't like those odds. I think we are much better off with what we have – which is the opportunity to try Walus again.
>
> * * *
>
> I have directed that this Office reopen its investigation of Walus as a matter of the highest priority . . . . If we were to seek rehearing or certiorari now, I could not ignore the possibility that we might be proceeding against the wrong man. Finally, the evidence we turn up in our present investigation may well place us in a stronger position at trial than we were originally – or than we are now in seeking further review.[23]

The Criminal Division and the Solicitor General agreed with Ryan's analysis. In the end, it was Walus who petitioned for rehearing, arguing that a retrial would pose a devastating financial burden. He also asked the court to consider an outright reversal without remand. The Circuit rejected both arguments, though it noted that reversal was "an exceedingly close question." The panel made even more clear than it had originally its disdain for the case as tried.

> [W]e are hesitant to believe that the Department of Justice will decide to relitigate this case without first determining that it has a stronger case than it did in the first trial. In that respect, it is of interest that with the resources at its command, the Government has apparently been unable to demonstrate more persuasively than it has heretofore that Walus was indeed in Poland during the crucial years. . . . It is somewhat incredible that if Walus spent his boyhood in the area in Poland where he allegedly committed his Nazi activities in his late teens that not one witness has been brought forward who remembered the boy growing into manhood and who, on that basis of personal knowledge, identified him as the perpetrator of the atrocities attributed to him.[24]

The ball was now squarely in OSI's lap.[25] Ryan sent two investigators to Europe to examine the case "down to its floor nails."[26] They interviewed current and former residents from the area of Germany where Walus claimed to have spent the war years. Some of the witnesses had testified at trial; others were newly found. All supported the defense theory of the case. So too did employees at the German Health Insurance office. To the extent that OSI was allowed to

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examine their records,[27] that too was corroborative of Walus' claims.

Over the course of this trip and another, OSI compiled a list of 25 Germans who would have been in a position to know Walus if he had worked for the German police in Czestochowa or Kielce. Of the 25, they located six. Two refused to answer any questions; the other four were shown a photospread. They could not identify Walus by picture or name.

The canvassing and research was exhaustive and took approximately seven months to complete. It included the following: asking the Polish War Crimes Commission to interview Walus' first wife and his European employers as well as to review all investigations of Nazi operations in the areas of Poland where Walus had allegedly been stationed during the war; having the Israelis review all defense documents for authenticity;[28] reviewing records at the National Archives and the YIVO Institute in New York City for documents relating to the vicinity in Poland where Walus had allegedly been posted; reading reports from survivors of the Kielce and Czestochowa ghettos to see if there was any mention of Walus; contacting the Polish Archives, the Berlin Document Center (repository of membership records of the Nazi party and the SS), the German equivalents of the CIA[29] and FBI,[30] the Hoover Institute,[31] the Bavarian State Archives, and various agencies in the area in which Walus claimed to have been a farm worker;[32] subjecting the records Walus had submitted to forensic examination; having the Polish government interview the Poles who filed post-trial affidavits on Walus' behalf; and interviewing Jews from Czestochowa and Kielce now living in the United States.

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Aside from one survivor in the United States who claimed to recognize Walus, everything supported Walus' defense or led to a dead end. There was even new reason to doubt the Alpers' testimony: Walus had filed a lawsuit against Michael Alper in October 1974.[33]

Two OSI attorneys reviewed the case. Jerry Scanlan did so before all the additional investigation was complete, Robin Boylan at the end of the process. After personally interviewing the four American witnesses (including the Alpers) and reading all the trial testimony, Scanlan recommended eliminating seven of the twelve eyewitnesses, in some instances because their current memory contradicted their trial testimony.[34] Scanlan suggested some additional investigative steps be taken before a decision was made.

After Boylan reviewed the case, he concluded that the government could not in good faith stand by *any* of its witnesses.[35] He stressed the bitterness between the Alpers and Walus and drew a profile of Walus based on the more than 150 people and institutions the authorities had contacted over the years. These included twenty-two witnesses who had lived or worked with Walus. They had differing memories of Walus' wartime accounts, which included claims that he had escaped from a German concentration camp and served with the Polish underground. His neighbors described him as acrimonious. In Boylan's view:

> a picture emerges of an uneducated youth from Poland who spent the war as a farmhand in a backwater of Germany and who built himself up afterwards by recounting a series of completely imaginary escapades involving the underground, the Polish army and daring escapes from concentration camps. His craving for recognition is as apparent in these stories as in his tempestuous relations with his neighbors and in his attempts to play "godfather" to the Polish immigrants who stayed in his house.

Boylan found the evidence overwhelmingly supportive of Walus' defense. His former farm employers, fellow forced laborers, and two priests all swore to facts in Walus' favor. In addition, there was documentary evidence which OSI's own experts had authenticated. And beyond this direct proof, there was compelling circumstantial evidence, including the "complete absence of any [contrary] documentary evidence" despite thorough searches. Moreover, Walus

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had returned to Poland after the war. Boylan knew that, as a general proposition, "the culpable ones headed west, away from the scene of their crimes."

Boylan compared the government's case to that presented by the defense.

> We are faced with two mutually exclusive versions of five years in Walus' life. If we believe one, we must necessarily disbelieve the other. The choice is this: either the twenty people, the documents and the photographs have been bribed, forged and faked to show that Walus was in Germany, or the government's twelve eyewitnesses (seven of whom we are ready to abandon in a retrial) are mistaken. Because I find it absurd to believe that Walus' defense is the product of a massive conspiracy, I am compelled to conclude that the government was wrong, and that Walus did spend the war in Germany.
>
> Clearly, there is no question of retrying the case. The only issue we face is how to back away from it. Many options are available, each of which is characterized by one of three underlying attitudes: (a) "We were right about Walus but we can't prove it"; (b) "We were wrong"; or (c) "We don't know."

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He analyzed the options. The first was appealing since "it is more comfortable to be right than wrong. It also avoids sticky questions about the reliability of eyewitnesses' identifications which occur forty years after the crime." But there were drawbacks too, the most notable being that there was no plausible reason for doubting the defense witnesses, documents and photos. Yet to admit error also presented risks.

> It would leave us open in future cases to serious attacks on the validity of identifications by eyewitnesses. It would also have adverse short term effects of bad publicity and lack of credibility. It could cause hard feelings on the part of the Israeli police and Simon Wiesenthal. The feelings might spread throughout the Jewish community in the United States and lead to political repercussions.

Only the "know nothing" option avoided all these pitfalls, yet Boylan recommended against it. He believed Walus was innocent, and that "no reasonable person who has examined the file could conclude otherwise." A failure to admit the government's error would therefore create the false impression that Walus was a war criminal. This would be particularly egregious

since the government had the evidence in hand, before trial, to realize that the case against Walus could not stand.

> Had we done an adequate job, Walus would not be saddled with the heavy financial burden under which he now labors. The least we can do at this point is to avoid saddling him with the suspicion that he got away with murder.

Ryan agreed and discussed details for the dismissal with the U.S. Attorney's Office.[36] Both offices determined that a statement should be issued. Ryan insisted, however, that the government stand by its eyewitnesses in order to preserve our relationship with the Israelis and to "protect our flank."

On November 26, 1980, the U.S. Attorney, with the approval of the Criminal Division, moved to dismiss the case. He read a statement prepared by himself and Ryan. It included a review of the exhaustive investigation conducted by OSI in the wake of the Circuit opinion and noted that the government had "no doubt that the witnesses who testified on behalf of the government – the survivors of the Nazi persecutions of Czestochowa and Kielce – testified sincerely and honestly." The government noted too that the defendant had told various acquaintances and coworkers that he had been a Nazi agent and that he had committed acts of violence on innocent and defenseless Jews. "Although he later denied such admissions, the law has traditionally and properly accorded such admissions significant weight and, indeed, the District Court found these statements critical to its decision." Nonetheless, the "striking absence" of corroborating evidence, and the plethora of evidence supporting Walus' claims, "compels the conclusion that we could not responsibly go forward with a retrial." The government, mindful of its obligation "to take special care that the processes of the law not be brought to bear against those who are not guilty" expressed its "regret" to Walus.

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The court granted the motion to dismiss and acknowledged the enormous emotional toll on all the participants.

> This case demonstrates the human fallibility of the trial process, and the continuing need for a careful and vigilant system of review of trial court decisions. But for the painstaking review given this case by the Court of Appeals, the defendant would have been stripped of his United States citizenship.
>
> In addition, the case is a manifestation of a worthy and courageous government and its servants who are able and willing to investigate evidence favorable to an accused, and to reexamine and withdraw charges made against an accused which are unsupported by the evidence.
>
> In granting the Government's motion, we do not forget the abominable atrocities inflicted at the hands of the Nazis on those and the families of those who testified against the defendant. But those outrages cannot be undone and certainly not by an unjust conviction of the defendant. Indeed, we are confident that those who survived the atrocities and seek vindication in memory of those who did not would not want their honor stained by a conviction which could not withstand careful, dispassionate scrutiny.[37]

Reaction came from all quarters. Walter Rockler, back in private practice, wrote to Ryan expressing some concern about the government's statement to the court.

> I think it is a good statement and agree that the Office had no real choice except to abandon the prosecution. . . . [I]t is likely that the case involves mistaken identification but it is not certain.
>
> I would not, however, under any circumstances, have expressed regret to Walus. In good part, he brought the case on himself by telling cronies that he had actively participated in persecuting Jews and in making other anti-Semitic remarks. In my view, the circumstances call for no apology from the Government.[38]

Ryan explained the "story behind" the statement.

> Tom Sullivan, the United States Attorney, felt very strongly that we should make an outright apology to Walus. I flatly refused, and Mark Richard backed me up. Sullivan said that if the Department of Justice did not tender an apology, that he would issue his own statement of apology. Such a statement obviously would have boomeranged against us and put us in the position of answering

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> embarrassing questions from the press highlighting our refusal to make an apology. Sullivan and I compromised on a statement of "regret", the idea being that it is always a regrettable experience to have a trial based on mistaken identity or insufficient evidence. In formulating the statement, I took pains to point out Walus' own bragging to cronies and anti-Semitic remarks lest the public be under the mistaken impression that this fellow was entirely blameless for his predicament.[39]
>
> Articles appeared in the press castigating the government for the original prosecution.[40]

The Israelis, on the other hand, castigated the government for not reprosecuting Walus. Israel's Chief Superintendent for the Investigation of Nazi War Crimes wrote Ryan about the impact of the dismissal on the Israelis who testified. After having "revealed to the world their wounds, which will never be healed" they felt as if they had "been deceived in that the trial in Chicago was no more than a well-directed show, with their participation." He described the witnesses as "spiritually broken" by Ryan's decision, "tears in their eyes, as though blood was still running from their wounds, not believing their own ears that a decision had been taken not to renew the Walus case." An Israeli Justice Ministry official expressed similar concerns to U.S. Attorney Sullivan. The Israelis shared these concerns with the media.[41]

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After the case was dismissed, Walus sued Simon Wiesenthal for having made false allegations. Walus accused Wiesenthal of forging documents and Wiesenthal countersued for libel. Wiesenthal was represented in the litigation by Martin Mendelsohn, chief of the SLU when the *Walus* case was tried. The Walus/Wiesenthal suit was settled for an undisclosed amount, with damages awarded to Wiesenthal and not to Walus.[42]

Walus had one final interaction with OSI. In 1984, he went to Poland with counsel for Ivan Demjanjuk. Demjanjuk had lost his citizenship after a district judge concluded that, as alleged by OSI, he was Ivan the Terrible, a particularly brutal guard at the Treblinka death camp.

As detailed elsewhere in this report,[43] the Demjanjuk prosecution, like Walus', involved a case of mistaken identity, to the extent that Demjanjuk was charged with having been Ivan the Terrible. (He was later denaturalized on the basis of having been a guard at the Flossenbürg and Majdanek concentration camps as well as at the Sobibor death camp.) Walus went to Poland seeking witnesses to clear Demjanjuk's name and testified on Demjanjuk's behalf at his 1983 deportation proceedings. Walus died in 1994.

II. The Fallout

The *Walus* trial showcased a variety of issues relevant to OSI litigation, including the appropriate way to contact survivors, the proper use of photospreads, and the potential unreliability of eyewitness testimony.

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A. Eyewitness Testimony

Conventional wisdom in the late 1970s was that eyewitness testimony was the key to identifying "Nazi war criminals."[44] The prosecution went forward in *Walus* believing that everything depended on their eyewitnesses and confident that these witnesses would be sufficient to overcome whatever documentary evidence Walus might submit.[45] That confidence was based not only on their assessment of the witnesses, but also on a belief that the more horrific the memory, the more likely it would be etched indelibly.[46] This view was shared by Jewish groups[47] and even had some support in the scientific community.[48]

In the context of the times – the Cold War at its height and therefore limited access to documents behind the Iron Curtain – the exaggerated reliance on eyewitness testimony is perhaps understandable. But even then, not everyone shared this view. The West Germans, conducting a series of war crime trials, were beginning to doubt the reliability of survivor memories. In

March 1979 – after the Walus trial but before the appellate ruling – German prosecutors moved to dismiss, mid-trial, a case against four former Nazi SS guards accused of participating in the murder of 250,000 Jews. The prosecutor said the age of the witnesses and their emotional reaction to the trial rendered many of them ineffective.[49] The motion to dismiss was granted, with the Chief Judge commenting that faded memories, misidentification and the general effects of the passage of 30 years precluded the conclusive proof needed.[50]

OSI attorney Robin Boylan, in his memo to Director Ryan about the *Walus* case, attached excerpts from a German war crimes tribunal which heard testimony on the vagaries of memory. As summarized by Boylan:

> The theory advanced by the expert and accepted by the court is really a matter of common sense and every day experience: the details of an incident are not remembered as readily as the central facts. Consequently, the description of a remembered event changes as the witness thinks more about it and recalls more details. Sometimes, though, the details are not actually recalled, but are filled in by the witness on the basis of his experience or perhaps with information the witness thinks the interrogator wishes to hear.[51]

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Other psychological factors may also come into play, subconsciously but nevertheless profoundly. As one court noted in another OSI case:

> A witness who is aware that the commandant or deputy commandant . . . worked hand-in-glove with the Nazis in persecuting Jews, and who learns years later that the defendant has been charged with having served as the commandant or deputy commandant, might readily achieve a firm present recollection that indeed it was the defendant who participated in particular incidents.[52]

The infusion of historians into OSI advanced reliance on documentary evidence over eyewitness testimony. Moreover, the case law developed in such a way that it is not necessary to identify a defendant as having personally committed atrocities or acts of persecution. It is enough to show that he served in a unit whose main purpose was persecutory (*e.g.*, camp guards)

or that he was in a particular unit at a time when it is known to have committed persecutory acts.[53]

That is not to say that OSI in the historian era *never* filed a case based primarily on eyewitnesses. There were at least three such filings.[54] However, as a general proposition, survivors now testify for strategic purposes rather than historical ones. Director Rosenbaum believes that survivor testimony "balances the old man in the defendant's chair" because "if you can't win the judge's heart, you are not going to win."[55] It serves another purpose as well. To the extent that OSI cases receive media coverage, it is often the survivor testimony that is carried on the local news. Publicity about the cases sends a message, to the nation as well as to other subjects, that the U.S. will not knowingly allow persecutors to remain in the country.

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B. The Search for Witnesses

One of the criticisms leveled by the Seventh Circuit against the Walus investigators was their manner of contacting and interviewing potential witnesses. As the court noted, witnesses were alerted at the outset that a specifically named person was being sought in connection with war crimes allegations in a specified town.

Ryan opined on the impact such notification might have on survivors.

> You pick that paper up, you see the Justice Department has caught a guy and he may go free unless witnesses come forward. . . . It places it seems to me an intolerable burden on someone to look at that picture. "Could he have been the guy? What if he goes free and there was an SS guy and maybe it's him."[56]

The more neutral tone adopted by the office is set forth in an early memorandum from OSI to the Department of State asking that newspapers in Stockholm run an advertisement with the following text:

> The United States Department of Justice seeks information regarding the imprisonment or execution during World War II of Estonian citizens in Tartu, Estonia by the German occupying forces or persons cooperating with them. Persons having information on this subject are requested to contact the United States Embassy (address and telephone) or the Office of Special Investigations, Department of Justice (address).[57]

This type of notification remains the OSI standard.

C. Photospreads

Hand in hand with the more neutral search for witnesses was a revised presentation of photospreads. The Seventh Circuit had been concerned both by the poor quality of one of the Walus photos and by the fact that the pictures shown were taken some 20 years after the events the witnesses were asked to recall. Moreover, the fact that some of the witnesses were told that they had identified the proper person, and one witness had been directed to the proper photograph after he was unable to recognize Walus, all tainted the in-court identifications. As an OSI attorney noted in a memorandum to Director Ryan, "although some of the Israeli witnesses claim to have remembered Walus' name from their alleged contact with him in Poland during the war, it is probably impossible at this point to determine whether any of them remembered it prior to hearing it from the investigators or seeing it in the paper."[58]

The Israelis alone are not to blame for improper photospread procedures. OSI has made its own errors in this area.[59] So too have other foreign governments.[60]

Ryan sought to make the photospread non-suggestive in accordance with the standards applied in criminal cases. Even before the Walus prosecution was dropped, he had an OSI attorney prepare a memorandum on the issue of pretrial photo identification procedures. The memo discussed the relevant case law, emphasizing the need to avoid suggestiveness, and

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contained a form to be completed by the investigator and signed by the interviewee. The form lists (and is to be signed by) all persons present. If a photograph is chosen, it is to be signed by the witness; all other photographs viewed are to be initialed.[61]

That form became the standard protocol until 2001 when Director Rosenbaum, reacting to a magazine article, made some changes. The article reported that sequential lineups – where a witness views one person at a time and is asked to decide if (s)he is the culprit before the next person is brought in – are significantly more reliable than the traditional simultaneous viewing.[62] Rosenbaum was persuaded by the data in the article and determined that it would be just as relevant to photospreads. He asked that all photospreads thereafter involve such a sequential showing of pictures.[63] In fact, however, OSI has so decreased reliance on eyewitness testimony that use of photospreads is virtually obsolete.

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D. OSI's Image

Most unquantifiable of the *Walus* ramifications is its impact on OSI – both internally and externally. The courage it took to dismiss the case should not be underestimated. Only four months before, the office had dismissed the prosecution of Tscherim Soobzokov, discussed elsewhere in this report.[64] And now a case which had been won below was being abandoned, with regrets (sounding very close to an apology) being given. OSI did not yet have a cushion of victories from which to draw comfort.

The Jewish community was not pleased with the dismissal[65] and Ryan, in whose name the decision was being made, was still a newcomer to them. He had barely had time to establish his *bona fides*. He proceeded in the belief that his track record over time would leave no doubt about his commitment to prosecuting those against whom the government had sufficient

evidence. That Ryan ultimately won the respect and admiration of the Jewish community is clear. In 1991, he was appointed to the Executive Committee of the New England Region of the Anti-Defamation League – the first non-Jew ever to be so honored.

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1. *See e.g.*, Patrick Buchanan on the MacNeil/Lehrer News Hour, Apr. 21, 1987; "The Persecution of Frank Walus: To Catch a Nazi," *The Reader* (Chicago), Jan. 23, 1981; "The Persecution of Frank Walus," [a separate piece despite the similar title], *Student Lawyer,* May 1981.

2. Dec. 12, 1974 letter from Simon Wiesenthal to INS in Wien, Germany.

3. May 12, 1975 Report of Investigation (ROI) by INS Investigator Robert Rellinger.

4. Walus ran a boarding house for recent emigrés. Reports of the early INS interviews are no longer in the OSI file. Information about them comes from OSI attorney Robin Boylan's Nov. 6, 1980 draft memorandum to Director Ryan re U.S. v. Walus (hereafter Boylan memo). According to Boylan, only one of the neighbors had any war information about Walus. (She claimed he had been in the Polish underground.) The others recounted disputes and clashes with Walus, suggesting that he was difficult to get along with. One of the boarders recalled Walus saying he had spent the war years with the Communist underground. Another said he had seen a picture of Walus with Goering or Geobbels.

5. Feb. 10, 1976 memo to Eastern Regional Commissioner from N.Y. District Director re "Frank Walus."

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6. The statements of five of the witnesses are set forth in a July 6, 1976 memorandum to District Director (Chicago) from Regional Commissioner, Eastern Region. The sixth is in an Oct. 28, 1976 Summary Report of Investigation by Ralph C. Johnson.

7. Undated memorandum entitled "Summary Evaluation and Recommendation in the Case of Possible Revocation Proceedings being Instituted against Frank Walus A11 738 778," prepared by Lloyd Sherman and William Strasser.

8. Recorded interview with Martin Mendelsohn, May 23, 2001 (hereafter Mendelsohn interview).

9. *See United States v. Dellinger*, 472 F.2d 340, 386-88 (7th Cir. 1972).

10. The first established a permit system for parades and public assemblies and required applicants to post public liability and property damage insurance. The second prohibited the dissemination of material that incited racial or religious hatred with intent so to incite, and the third prohibited public demonstrations by members of political parties in military style uniforms.

11. *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill. 1978).

12. Poland would not allow Wiesenthal's other source to travel to the United States to testify. According to the Poles, he could add little to what was already known because he had been only fourteen when the war ended and had no personal knowledge of Walus' wartime activities. Cable 1008227, Jan. 10, 1978 from Amer. Emb. Warsaw to Secretary of State re "Judicial

Assistance: United States versus Frank Walus."

13. Alper deposition, Sept. 25, 1977, pp. 43, 44.

14. Recorded interview with Walus prosecutor Bill Conlon, Nov. 28, 2000 (hereafter Conlon interview).

15. *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978). Ultimately, the neo-Nazis abandoned their effort to assemble in Skokie and gathered instead in Chicago's Marquette Park.

16. "'Nazi Hunter' Can't Stop," *The Chicago Sun-Times*, Apr. 19, 1978, p. 63.

17. *United States v. Walus*, 453 F. Supp. 699 (N.D. Ill. 1978).

18. Letter of Sept. 21, 1978 from Gotz Pollzien to defense counsel Charles Nixon, attached to Supplement to Motion to Remand to Trial Court to Consider Motion Re: Newly Discovered Evidence.

19. Jan. 23, 1979 Memorandum and Order.

20. Judge Hoffman was at least partially correct about this. In a Feb. 27, 1980 memorandum to Director Ryan, OSI historian Peter Black reported that height requirements existed only for the SS, not for the Gestapo. Although the SS standards were stringent until 1939, they relaxed as the war progressed.

21. *United States v. Walus*, 616 F.2d 283 (7th Cir. 1980).

22. The district court had considered the time span but found it unimportant. Judge Hoffman reviewed pictures of himself from twenty years earlier and found it "remarkable how much I look today as I did then, even though the curl is now out of my hair."

23. March 12, 1980 memorandum from Ryan to AAG Heymann.

24. Apr. 1, 1980 order in *U.S. v. Walus*, Nos. 78-1732, 79-1140, 79-1587, 79-1629 (unpub'd).

25. Unless otherwise noted, information on OSI's investigative efforts comes from a Sept. 23, 1980 memo by OSI attorney Jerry Scanlan to Ryan as well as a June 12, 1980 Report of Investigation (ROI) by OSI investigator Ed Gaffney.

26. Recorded interview with Ryan, Oct. 6, 2000. Unless otherwise noted, all statements about Ryan's actions and motivations come from this interview.

27. German privacy laws placed some limits on access.

28. Israel was anxious to have the case proceed and had offered to assist in any way it could.

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29. Bundesnachrichtendienst.

30. Bundesamt fuer Verfassungsschutz, equivalent to the counterintelligence branch of the FBI; and Bundeskriminalamt, analogous to the Criminal Division of the FBI.

31. The Hoover Institute at Stanford University is one of the largest private archives in the country and contains a large Eastern European collection.

32. Most of Neu Ulm was destroyed during the War. Some surviving records were later destroyed as a matter of course. (The Neu Ulm police destroy records after 25 years.)

33. Oct. 6, 1980 Request for Investigation to OSI Deputy Director Charles Gittens from Robin Boylan.

34. The witnesses Scanlan would retain all placed Walus in Czestochowa, thus avoiding the awkward problem in the first trial of having him working in two towns sixty miles apart.

35. Boylan memo, *supra*, n. 4.

36. Boylan was also on the call and made handwritten notes of the conversation.

37. The statement was included in the court's unreported memorandum order of Nov. 26, 1980. The court later granted Walus $31,000 in court costs. "Frank Walus – Nazi Exterminator or Victim of Mistake?" *Chicago Daily Law Bulletin*, Mar. 18, 1981, p.1. He had sought $83,466.81, which included $35,209.31 in out-of-pocket expenses, and $48,257.50 in attorneys fees. Motion for Assessment of Costs by Defendant. Since the law barred recovery of attorney's fees, he was, in fact, reimbursed almost to the full extent possible.

38. Dec. 12, 1980 letter from Rockler to Ryan. Others, however, faulted the statement for not apologizing enough. *See e.g.*, *The Reader*, n. 1, *supra*, which deemed the government's statement "ignoble" because it "left the impression, duly conveyed by reporters, that Walus may yet be guilty."

39. Dec. 15, 1980 letter from Ryan to Rockler.

40. *See* n. 1, *supra*.

41. "Israeli Assails Justice Dept. Decision on Accused Nazi," *The New York Times*, Jan. 26, 1981; "Data Against Walus Ignored – 2 Israelis," *The Chicago Sun-Times*, Jan. 25, 1981.

42. Mendelsohn interview, *supra*, n. 8.

43. *See* pp. 150-174.

44. *See e.g.*, the opening remarks of Chairman Joshua Eilberg, "Alleged Nazi War Criminals," Hearing before the Subcomm. on Imm., Cit., and Internat'l Law of the House Judiciary

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Committee, 95th Cong., 1st Sess., Aug. 3, 1977, p. 1; D. Nesselson & S. Lubet, *Eyewitness Identification in War Crimes Trials,* 2 Cardozo L. Rev. 71, 74, n. 16 (1980).

45. Conlon interview, *supra*, n. 14; Aug. 8, 1977 memorandum from AUSA John Gubbins to the Department of Justice.

46. Oct. 28, 1976 memo on Walus investigation by INS Investigator Ralph Johnson. *Accord*, recollections of Walus prosecutor Bill Conlon in Conlon interview, *supra*, n. 14.

47. "Analysis of the Seventh Circuit Opinion in *U.S. v. Frank Walus*," by the Anti-Defamation League and the American Jewish Congress, forwarded to OSI by the U.S. Attorney's Office for the Northern District of Illinois, on Mar. 6, 1980.

48. *See e.g.*, Letter to the Editor, *The New York Times*, Mar. 25, 1979 from Dr. William G. Niederland, clinical professor emeritus of psychiatry, discussing "hypermnesia" – "the overly sharp, acute and distinct memory of a victim of brutality."

49. "Bonn Said to Plan Release of Accused War Criminals," by John Vinocur, *The New York Times*, Mar. 15, 1979.

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50. "Acquittal of Four Ex-Nazis Stirs Angry Protest in Court," *The New York Times*, Apr. 20, 1979.

51. Boylan memo, *supra*, n. 4. There is no indication of which German trial is referenced. As he recalled the events years later, Boylan attributed his skepticism to more than just the *Walus* decision. He remembered one witness found by the Israeli police who gave the same statement, regardless of the case. Interview with Robin Boylan, Sept. 27, 2000.

52. *U.S. v. Kowalchuk*, 571 F. Supp. 72, 78 (E.D. Pa., 1983), *aff'd en banc*, 773 F.2d 488 (3rd Cir. 1985).

53. *See e.g.*, *Fedorenko v. U.S.*, 449 U.S. 490 (1981); *U.S. v. Friedrich*, 305 F. Supp.2d 1101 (E.D. Mo. 2004), *aff'd*, 402 F.3d 842 (8th Cir. 2005). *Fedorenko* is discussed at pp. 48-63 of this report; *Friedrich* is discussed at pp. 67-68.

54. In *U.S. v. Kowalchuk*, *supra*, n. 52, the court was struck by the fact that there was "not one scrap of documentary evidence relating to the pertinent facts." 571 F. Supp. at 75. However, relying primarily on the testimony from the *defendant* and *his* witnesses, the court concluded that Kowalchuk's activities during the war warranted revocation of citizenship. In the case of Jacob Tannenbaum, there was no doubt he had been a kapo; he admitted it. The only question was what he had done in that capacity. For that OSI intended to rely entirely on the statements of fellow prisoners. Their credibility was not tested in the end as the case ultimately settled (*see* pp. 106-116). Finally, in 2002, the office filed a denaturalization action against John Bernes. The government intended to rely on eyewitnesses and Bernes' own admissions to establish the personal role Bernes had played in sending approximately 1,300 Jews and other civilians in

Lithuania to their death. However, Bernes left the United States several days before the complaint was filed. A default judgment was later entered stripping him of his citizenship.

55. Not all judges, however, want their heartstrings pulled. *E.g.*, in *United States v. Szehinskyj*, the judge ruled that all evidence was to be submitted through affidavits; only cross examination would be in court. Since the defense indicated pre-trial that they would not cross examine the survivors, the affidavits alone told their story. They were powerful nonetheless. The court quoted dramatically and extensively from them in its opinion stripping Szehinskyj of citizenship. *United States v. Szehinskyj*, 104 F. Supp.2d 480, 486 (E.D. Pa. 2000), *aff'd*, 277 F.3d 331 (3rd Cir. 2002).

In *United States v. Bucmys*, the judge issued a pre-trial order precluding the introduction of survivor testimony in the government's case-in-chief. The court ruled that the testimony might be admissible in rebuttal, depending on the defense presented. The case settled before trial.

56. Ryan interview, *supra*, n. 26.

57. July 31, 1980 memorandum from OSI Deputy Director Sinai to Charles Wyman, CA/OSC/CCS/EUR, Department of State.

58. Oct. 3, 1980 memorandum from Jerry Scanlan re "Frank Walus," p. 21. The Israelis were also chastised for sloppy photospread procedures in *United States v. Fedorenko*, 455 F. Supp. 893, 906 (S.D. Fl. 1978) and *U.S. v. Kowalchuk*, 571 F.Supp. 72, 78 (E.D. Pa. 1983), aff'd *en banc*, 773 F.2d 488 (3rd Cir. 1985). Although the district court ruling in *Fedorenko* was ultimately reversed, it was on grounds independent of the photospread issue. 597 F.2d 946 (5th Cir. 1979), *aff'd*, 449 U.S. 490 (1981). *Fedorenko* is discussed at pp. 48-63.

59. *See* discussion of photo identification in the *Demjanjuk* case at pp. 154 and 156.

60. In 1987, a questionable photospread procedure was used by the Soviet authorities on behalf of OSI. It contained 8 pictures, *two* of which were of the subject. It is unknown whether the photospread was prepared by OSI or by the Soviets. In any event, the court did not find the procedure disqualifying. *In re Kalejs*, A11 655 361 (BIA 1992), p. 31.

61. May 23, 1980 memorandum from Rod Smith to Ryan re "Pre-Trial Photographic Identification Procedures." Martin Mendelsohn had tried to institute similar, though not quite as rigorous procedures. In an Apr. 2, 1979 letter to Israel's Chief Superintendent for the Investigation of War Crimes, he forwarded several sets of photospreads, asked that the witness sign the picture chosen, and that once a photo was signed it not be shown to any other witness.

62. "Under Suspicion," by Atul Gawande, *The New Yorker*, Jan. 8, 2000, p. 50.

63. Jan. 8, 2001 e-mail from Rosenbaum to all OSI re "Photospread Procedures: Important Update."

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64. *See* pp. 342-355.

65. On the contrary, many urged the government to press forward with a retrial. The Chair of the Public Affairs Committee of the Jewish United Fund of Metropolitan Chicago wrote to the United States Attorney arguing that anything less "would be a signal to defendants, witnesses and prosecutors that the Government is willing to 'forgive and forget' wartime atrocities." Mar. 4, 1980 letter from Joel Sprayregen to U.S. District Attorney [sic] Thomas P. Sullivan. The American Jewish Congress and the Anti-Defamation League believed the evidence supported Judge Hoffman's verdict. "Analysis of the Seventh Circuit Opinion in *U.S. v. Frank Walus*," forwarded by the United States Attorney's Office to OSI by letter of Mar. 6, 1980.

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Elmars Sprogis – When Are Law Enforcement Officers Persecutors?

Elmars Sprogis was an assistant police chief in Latvia during the early war years. He listed this on his visa application and signed a form stating that he had never advocated or assisted in persecution based on race, religion or national origin. He entered the United States in 1950 under the DPA and became a citizen twelve years later.

Based on statements from several former police colleagues and two internees, OSI believed Sprogis had participated in three incidents of persecution. The first involved the arrest, transportation and confiscation of property from nine Jews; the second concerned transporting 100 - 150 Jews to the site of their execution and guarding them until they were murdered; the last involved appropriating furniture from the homes of arrested Jews.

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In 1982, the government charged Sprogis with illegal procurement of citizenship, both because he had assisted in persecution (as set forth in the above three incidents) and because he had falsely denied such assistance.[1] It claimed also that his assistance in persecution showed a lack of the good moral character necessary for citizenship.

By the time of trial, only two witnesses were available concerning the last two allegations of persecution. One had been a prisoner and the other a colleague. Their testimony was videotaped in Latvia, then a Soviet Republic. Based on the witnesses' demeanor, the court feared that the environment had been coercive. Moreover, the court found the statements inconsistent (either with earlier statements the witnesses had made or with statements from Sprogis), conflicting with one another, and uncorroborated by external evidence. Accordingly, it gave them no credence.

The one remaining allegation of persecution pertained to Sprogis' role in the fate of the

nine Jews. To establish that, the government relied on Sprogis' admissions as well as contemporaneous documentary evidence. Sprogis conceded knowing that the Jews had been arrested simply because they were Jewish; he also knew that they would likely be killed after they were taken from the police station. As the highest ranking official on duty during the hours of their detention, he had signed a document naming the Jews and listing the amount of money confiscated from each. Another document signed by him showed that he gave some of that money to the men who had brought the Jews to the police station; he turned the rest over to the city administration. He gave property confiscated from the Jews to the town's mayor.

The district court characterized all these activities as "ministerial" and, as such, concluded they did not amount to assistance in persecution.[2] The government appealed this holding.[3] The Second Circuit acknowledged that it was "a difficult and troubling issue" but concluded that the district court assessment was correct. As the Circuit saw it:

> Rather than personally carrying out Nazi-ordered oppression . . . Sprogis seems only to have passively accommodated the Nazis, while performing occasional ministerial tasks which his office demanded, but which by themselves cannot be considered oppressive. There is no clear evidence that he made any decision to single out any person for arrest and persecution or that he committed any hostile act against any persecuted civilian. Sprogis' passive accommodation of the Nazis, like that of so many other civil servants similarly faced with the Nazis' conquest of their homelands and the horrors of World War II, does not, in our view, exclude him from citizenship under the DPA. To hold otherwise would require the condemnation as persecutors of all those who, with virtually no alternative, performed routine law enforcement functions during Nazi occupation.[4]

The case seemed to set a high bar for finding "assistance in persecution" since Sprogis' activities had clearly aided the Nazis' persecutory scheme by helping them dispose of the Jews and their property. Indeed, on facts arguably similar to those in the *Sprogis* case, two other courts previously had found sufficient evidence of assistance in persecution.[5]

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OSI feared that after *Sprogis* courts would require "active participation" in persecution in order to establish illegal procurement of citizenship. The evidence against most OSI subjects would not meet that standard. Some had passively followed orders which enabled the Nazis to pursue their genocidal policies.

OSI wanted the government to seek review in the Supreme Court. However, the Criminal Division did not support this request because it doubted:

> whether the court's distinction between active and passive assistance is all that meaningful. Judges are going to decide these cases based on their "feeling" that the statute should or should not apply to the particular conduct before them, and not based on whether the conduct fits into a cubbyhole labeled "active" or "passive."[6]

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The Solicitor General declined to authorize further review and the Criminal Division's analysis proved correct. *Sprogis* in fact has had very little precedential value. Other Circuits were dismissive of the decision;[7] ultimately even the Second Circuit seemed to reject its reasoning.[8] Jurisprudentially, the case is a footnote in OSI history.

1 1. Since Sprogis had truthfully listed his service as a Latvian policeman, there was no allegation of misrepresentation. In this respect, the case differed from most brought by OSI in its early years.

2. *U. S. v. Sprogis*, No. CV-82-1804 (E.D.N.Y. 1984) (unpub'd).

It is, of course, impossible to determine what ultimately persuaded the judge. However, Jeffrey Mausner, trial attorney in the case, posited a theory. According to Mausner, in an off-the-record discussion with the attorneys, the trial judge asked whether the government intended to deport Sprogis to the Soviet Union. Mausner told the judge that no decision had yet been made. Nonetheless, he sensed that the judge was troubled by the possibility that the Soviet Union would be the ultimate destination since this increased substantially the likelihood that Sprogis might be executed for his World War II activities. (At the time of the *Sprogis* trial (Oct. 1983), no OSI defendant had yet been sent to the Soviet Union, but the concern was not frivolous. The U.S.S.R. had years earlier sentenced two other OSI defendants – Boleslavs Maikovskis and Karl Linnas – to death *in absentia* for their wartime activities.) *See* pp. 271 and 430.

3. The government did not appeal the judge's determination as to the other two alleged instances of persecution. The judge's ruling concerning those incidents turned on his assessment of witness credibility, a matter in which the judge had enormous discretion. The government felt that an appeal of that discretionary determination would not be successful.

4. *U.S. v. Sprogis*, 763 F.2d 115, 122 (2nd Cir. 1985). Although all three appellate justices agreed that the district court opinion should be affirmed, one judge wrote separately to express some concern.

> I do not share the majority's view that Sprogis' conduct amounted to mere "passive accommodation of the Nazis."
>
> This is not the case of a minor employee performing some insignificant or subordinate ministerial tasks without knowledge of Nazi oppression. It is the story of a person who *volunteered* to become a policeman and Assistant Precinct Chief . . . after his country had been overrun by the Nazis. We can almost take judicial notice that at that time Nazi pogroms and persecution of the Jews was generally known, particularly to persons engaged in law enforcement and possessed of Sprogis' education and background. Under these circumstances a volunteer must have reasonably anticipated that as a police official he would probably be relied upon by the Nazis for assistance in the performance of their unsavory tasks. . . . [H]e performed so satisfactorily that within two months he became Assistant Chief of Police in a larger city. . .

Id. at 124. (emphasis in original)

5. In *U.S. v. Kowalchuk*, 571 F. Supp. 72 (E.D. Pa. 1983), *aff'd en banc*, 773 F.2d 488 (3rd Cir. 1985), the defendant, a Ukrainian policeman during the war, typed the daily reports of police

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activity. While the police were involved in various acts of persecution against the Jews, including beatings and confiscation of valuables, there was no evidence that Kowalchuk himself participated in any of these activities or that he knew that Jews were to be liquidated. *See also*, *U.S. v. Osidach*, 513 F. Supp. 51 (E.D. Pa. 1981), where the defendant served as an armed, uniformed street policeman and interpreter for the Ukrainian and German police.

6. July 1, 1985 memorandum to the Acting Solicitor General from AAG Trott.

7. *See e.g.*, *U.S. v. Koreh*, 59 F.3d 431, 441-42 (3rd Cir. 1995); *Schellong v. INS*, 805 F.2d 655, 661 (7th Cir. 1986); *Hammer v. INS*, 195 F.3d 836, 843 (6th Cir. 1999).

8. In *Ofosu v. McElroy*, 98 F.3d 694 (1996), an asylum case, the court was interpreting a statute which denied asylum to anyone who "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of. . . political opinion." The defendant had worked as a senior officer in a quasi-police force in Ghana. Without citing *Sprogis*, the court held that "personal involvement in killing or torture is not necessary to impose responsibility for assisting or participating in persecution."

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Jacob Tannenbaum – The Kapo Dilemma

> It is not an easy thing to pass judgment and determine a sentence for those poor souls whom the Nazis dehumanized and whose human feelings were destroyed. It is difficult for us, the judges of Israel, to free ourselves of the feeling that, when we punish such a human worm, we are reducing, even by the least bit, the abysmal guilt of the Nazis themselves.[1]

Kapos were inmates (some Jewish and others not) who collaborated with their Nazi persecutors by serving as overseers at the camps. In return, they received limited privileges – generally better food, clothing and/or bunk space – within the camp hierarchy. Jewish reaction to kapos varied, ranging from "street justice" to "courts" in survivor camps and other areas where displaced Jews were concentrated.[2]

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In the 1950s, the INS filed deportation cases against three Jewish kapos – Heinrich Friedman, Jakob Tencer and Jonas Lewy. None of the prosecutions was ultimately successful. In both *Friedman* and *Tencer*, the courts concluded that the dilemma faced by the kapo mitigated his actions.[3] The *Lewy* court held otherwise. Lewey was ordered deported for having participated in activities contrary to civilization and human decency on behalf of the Axis. However, after the decision was affirmed, it was learned that the government had not turned over certain witness statements. A new trial was ordered, but by then two of the government's key witnesses were unavailable. The government chose not to reprosecute and Lewy remained in the United States until his death in 1980.

When OSI was established in 1979, the office inherited several kapo investigations from INS. One involved Jacob Tannenbaum, an observant Polish Jew who, before the war, had been active in Zionist activities. His wife, six-month old daughter, parents and five siblings perished during the Holocaust. Tannenbaum served as a forced laborer from 1941 to 1944 at a series of

concentration camps. In Goerlitz,[4] the last camp at which he was incarcerated, Tannenbaum was made head kapo.

He entered the United States under the DPA in 1950. He told the investigating authorities that he had been a forced laborer in Goerlitz from September 1944 until May of 1945, never mentioning his time as a kapo. He became a United States citizen in 1955, settling in Brooklyn, New York, where he became an active member in an Orthodox synagogue. His yearly charitable contributions included donations to the Simon Wiesenthal Center, a Nazi-hunting organization.[5]

In 1976, a Holocaust survivor recognized Tannenbaum and reported him to the INS. INS opened an investigation and interviewed dozens of Goerlitz survivors. Almost all described Tannenbaum as particularly sadistic. Twelve had themselves been beaten by Tannenbaum and all but one had witnessed his beating others. Six reported inmate deaths as a result of Tannenbaum's actions. Survivors recalled, among other things, that Tannenbaum had brutally beaten inmates even when no Germans were present, that the Germans shot two inmates after Tannenbaum reported their rifling through a pigsty in search of food, and that the SS executed inmates who Tannenbaum reported for trying to avoid an evacuation march. Many said Tannenbaum was more brutal than the camp's SS leader.[6]

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When interviewed, Tannenbaum acknowledged that he had been a head kapo, opining that he was chosen because he was "tall and presentable and spoke a little German."[7] Admitting that he had beaten prisoners as part of his duties, he claimed to have done so only when German authorities were present -- and then only to "protect" the prisoners from being shot by the Germans for whatever infraction had allegedly occurred.

By the time INS transferred its caseload to OSI, 38 witnesses had been interviewed. OSI reviewed all the witness statements and spoke with ten of the survivors. The OSI attorney on the investigation felt confident of only one. His emotions were under control, his memory precise, and his recollections were based on personal observations rather than hearsay. Problems with the others ranged from excessive aggressiveness to excessive passivity. Some expressed such hatred for Tannenbaum that the attorney feared emotional tirades; others had a "turn the other cheek attitude" and showed no emotion; one saw himself as a "man of God" and preferred not to testify against anyone. However, since names of new witnesses were still surfacing, the attorney believed the case had potential.

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Director Rockler disagreed. As a matter of policy, he viewed kapos as victims rather than persecutors.

> I thought [it] was absolutely insane. . . .You could bring charges against them for other reasons but not on the ground that they were Nazi persecutors. They were concentration camp inmates, generally Jews who were assigned supervisory responsibility with respect to other Jews. Were they lovable? No. They stayed alive. But they were themselves inmates and were in many cases exterminated. Kapos were the last target group I had in mind.[8]

That Tannenbaum was Jewish was irrelevant. Rockler had earlier closed an investigation of a Catholic kapo incarcerated for her work with the underground.

It was not until 1984, when Director Sher expressed interest in the case, that the investigation again became active. He knew, of course, that the matter would be controversial. Therefore, although various attorneys worked on the case, Sher was the public face. "I felt if there was any grief to be had, it should come on my head. . . . I interrogated the bum; I deposed the bum."[9]

The interrogation (interview) was in October 1984. Tannenbaum readily conceded, as he had to the INS, that he had been the chief Jewish kapo, and acknowledged that benefits had been bestowed on him as a result of his position. These included having his own room, wearing a civilian jacket, and leaving the camp unguarded to get supplies in town.[10] He offered explanations or denials for the brutality which inmates had reported.

OSI continued to reinterview survivors. Sher recalled comments along the line of: "He's still alive? Give me his address and you won't have to worry about him." People claimed to have current nightmares about him. Sher had many "sleepless nights" as he agonized over the case. OSI consulted with rabbis and various segments of the Jewish community during the course of the investigation for their reaction to the prosecution of a kapo.

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Every available survivor who knew Tannenbaum favored prosecution. Simon Wiesenthal and the Israelis had no objection in principle. Indeed, the Israelis themselves had prosecuted several kapos. The message OSI took from the Israelis was that it would be immoral *not* to proceed with the case.[11] Ultimately, Sher recommended prosecution.

> At first I felt I had to discount the fierceness of [witness] attitudes because by viewing him as a traitor they might have unintentionally exaggerated what he had done. Because he was a Jew, they might consider it more egregious than it was. But the evidence increased so dramatically and was so strong. What made me cross the line is that he was involved in the use of deadly force with his own hands outside the presence of Germans. We knew from reading and talking with survivors and experts that there were kapos who were basically benevolent. They took the job to save their lives. Did what they had to do in front of Germans but never more. This guy was cruel beyond belief. This was very hurtful for me because I knew he had lost his first family. I felt no matter where you drew the line, no matter how much leeway and benefit of doubt you gave him, he crossed the line.

The Criminal Division agreed. Before the complaint was filed, however, the

investigation was leaked to *The New York Law Journal*.[12] Other papers picked up the story.[13]

Former Director Rockler read the articles and wrote to Sher.

> I regard such a suit as more than a little dubious as a matter of law, and as improper, if not outrageous, as a matter of policy.
>
> * * *
>
> Over the years, it seems to me, the thrust of OSI activities, and publicity attendant thereon, seems to have been to suggest that German Nazi programs were really programs of East Europeans – Ukrainians, white Russians, Baltics and Poles. As we know, some of these people may have been willing accomplices and collaborators, but they were not directors or principals. To suggest that Jews were willing participants in the program of extermination of Jews carries this misdirection one step further toward absolute nonsense – to say nothing of lending aid and comfort to the enemy.[14]

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Rockler wrote again several days later, advising Sher that he wanted to represent Tannenbaum, without compensation, if the complaint were filed. He sought an opinion from the Department of Justice as to whether such representation presented a conflict of interest because of his prior leadership of OSI. He was told that it would.

Rockler was not the only one reacting to the pre-filing publicity. Someone smashed the windows in Tannenbaum's home and his second wife, from whom he had been separated since the late 1960s, was abruptly fired from her job.[15]

The complaint was filed on May 12, 1987. The government charged that Tannenbaum was ineligible to enter under the DPA because he had assisted in persecuting civilians and, as a kapo, had been a member or participant in a movement hostile to the United States. The complaint also alleged that his entry was barred by the State Department regulation excluding persons who advocated, acquiesced or engaged in activities or conduct contrary to civilization and human decency on behalf of the Axis, and that he lacked the good moral character required

for U.S. citizenship.

By and large the Jewish community did not criticize the filing. The director of the World Jewish Congress (WJC) told the press that "No one should be able to cloak themselves in some collective ethnic garb to escape justice."[16] The president of the American Gathering of Jewish Holocaust Survivors stated that despite the dire conditions of camp life, "our human background says you must remain a human being even under the worst of circumstances."[17]

Tannenbaum denied all the charges, admitting only that he had been a kapo, a position which had been forced on him. He raised four defenses: (1) that the United States had a "duty and obligation to conduct a complete and thorough investigation" before issuing a visa; (2) his actions were done "to prevent his being killed;" (3) the government delayed bringing suit so long that he could no longer participate in his own defense; and (4) his actions helped preserve the lives of fellow inmates.

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He was deposed by Director Sher over three days in August 1987. It was a tense confrontation. Less than an hour into the third day, Tannenbaum fell ill. He was taken by ambulance to the hospital where he remained for almost three weeks with heart problems.

Citing health reasons, his attorneys proposed settling the case.[18] A doctor chosen by the government conducted an independent examination. He concluded that Tannenbaum suffered from diabetes, as well as an organic mental syndrome which left him somewhat confused, and possible underlying coronary disease. A stressful situation could aggravate his condition and place him at "high risk;" it might even be life threatening.

DAAG Richard knew that an agreement in the Tannenbaum case might be viewed skeptically. Among other things, the medical evidence was "less than overwhelming." More

importantly:

> inasmuch as Tannenbaum is Jewish, this settlement may be erroneously viewed by some as a "sell out". The facts, however, speak for themselves – If we wanted to "sell out" we could have declined to bring the case in the first instance.[19]

The settlement called for Tannenbaum to agree to denaturalization based on his having participated in persecution "by brutalizing and physically abusing prisoners outside the presence of German SS personnel."[20] The government agreed not to institute deportation proceedings unless Tannenbaum's health – which the government was to monitor – improved.

The parties appeared before Judge I. Leo Glasser on February 4, 1988. It was apparent that the judge himself was torn.

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> THE COURT: I dreaded the day when this case was to come to trial. . . . I was one of the very early soldiers into Dachau in World War II, but I have often wondered how much moral and physical courage we have a right to demand or expect of somebody in the position of Mr. Tannenbaum. . . . I sometimes wonder whether I might have passed that test.[21]

Tannenbaum was not the first to have what amounted to a medical deferment, although OSI used the procedure sparingly. As DAAG Richard saw it, the government "should not use [its] prosecutorial discretion to undercut the Congressional decision to deny [Nazi persecutors] waivers on deportability."[22]

Public response to Tannenbaum's plea was mixed. Many Goerlitz survivors were disappointed. "Tannenbaum deserves not less than any regular Nazi deserves." "I would have hanged him with my own hands. I am only partially satisfied." "Is this all he is getting, for all he did?" "Why did they not call me for the trial? . . . Had he wanted to, he could have saved the entire camp."[23] *The Baltimore Jewish Times* opined that "the government skirted its legal and moral duties" by issuing a medical deferment to Tannenbaum when it had not done so for Karl

Linnas.[24]

Some Jewish organizations interpreted the plea as a humane compromise based on the moral dimensions of the case, rather than a result brought about by health concerns. The WJC opined that "the Justice Department handled a very sensitive matter in a most fair and equitable way, insuring that justice was applied in a firm but proper manner"[25] while the Simon Wiesenthal Center (SWC) called the plea "an appropriate action from both a moral and legal point of view."[26]

Sher's memory of Tannenbaum is nuanced:

> We were right to investigate it; we were right to bring it; and we were right to settle it. Of all the defendants and subjects that I came into contact with, he was the only one to have exhibited any morsel of remorse. He was so conflicted. He was a tragic figure. He was also a murderer.

Tannenbaum died of a heart attack in June 1989. Although OSI investigated several other kapos, they felt the evidence was sufficient in only one other case. Because the subject was bedridden and terminally ill, however, the government forewent prosecution. Tannenbaum therefore remains the only kapo prosecution brought by OSI.

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1. *Beisky v. Israel* (Crim. Appeal No. 149/59, 1959) (Beisky was sentenced to three years).

2. Trunk, Isaiah *Judenrat, The Jewish Councils in Eastern Europe Under Nazi Occupation* (Stein and Day, 1972, pp. 548-554.) *See also*, "Giving Hitler Hell," by Matthew Brzezinski, *The Washington Post Magazine*, July 24, 2005. The article profiles a former U.S. military officer who admitted sending lower level Nazi persecutors to the DP camps for street justice. According to the officer, who served with the Army CIC, "We had seen what the DPs did to the kapos, and we realized they could do us a favor."

3. In *Tencer*, the immigration judge dismissed the case. In *Friedman*, the court ordered his deportation but it was reversed on appeal. The Friedman case was more nuanced than Tencer's. More survivors testified on Friedman's behalf than for the government. While government witnesses recalled Friedman beating Jews and stealing their footwear, defense witnesses recounted his protecting the sick and injured, destroying a list of inmates scheduled to be shot, and allowing prayers to be said despite SS orders forbidding Jewish worship.

4. Goerlitz was a subcamp of the Gross Rosen concentration camp in Poland. The camp held approximately 1,000 male prisoners separated by a wire fence from a smaller women's section. Internees were forced to work for a German firm manufacturing mobile field kitchens, tanks and rockets.

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5. "Haunting Issues Surround Jewish Nazi Camp Overseer," by Samuel Freedman, *The New York Times*, May 26, 1987.

6. Not all these allegations were sustainable once OSI began its investigation.

7. May 12, 1977 Tannenbaum interview, p. 4.

8. Recorded Rockler interview, May 10, 2000.

9. Sher recorded interview, Apr. 30, 2001. All references in this chapter to Sher's views come from this interview unless otherwise specified.

10. Tannenbaum interview, Oct. 1, 1984, pp. 26, 27, 31, 69.

11. Recorded Einhorn interview, Oct. 2, 2001. All references in this chapter to Einhorn's views come from this interview unless otherwise specified.

12. "U.S. Plans Move Against Jew Said to Aid Nazis Guard Camp," by Alan Kohn, *The New York Law Journal*, Apr. 29, 1987, p. 1. It is unclear how the *Law Journal* learned of the pending filing. An unnamed source speculated that the leak had been designed to sow dissension between OSI and the Jewish community. "OSI Said Ready to Prosecute U.S. Jew as Nazi Collaborator," by Walter Ruby, *Washington Jewish Week*, May 7, 1987. It is equally plausible that the source was someone opposed to having the case filed.

13. *See e.g.*, "Brooklyn Man Probed As Nazi Collaborator," by Kevin Flynn, *Newsday*, Apr. 30, 1987; "Brooklyn Man in Inquiry on War Crimes," *The New York Times*, May 1, 1987; "OSI Said Ready to Prosecute U.S. Jew as Nazi Collaborator," by Walter Ruby, *Washington Jewish Week*, May 7, 1987.

14. May 8, 1987 letter from Rockler to Sher (with footnote omitted).

15. Tannenbaum deposition, Aug. 26, 1987, p. 10. Attacks on OSI defendants or their property were not uncommon in the 1980s. *See* pp. 349-350, 527-528.

16. *Long Island Newsday*, "Nazi Hater or Holocaust Henchman?" by Kevin Flynn, May 22, 1987. Eli Rosenbaum was General Counsel for the WJC at the time.

17. *Id.*

18. Nov. 30, 1987 letter from defense counsel Elihu Massel to OSI attorney Phil Sunshine.

19. Jan. 19, 1988 memorandum from DAAG Richard to AAG William Weld.

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20. The admission of brutality was essential to Director Sher. He insisted that without it, he would not have recommended the settlement. In this respect, the agreement was different from others entered into by OSI. In the typical agreement, defendants were required to admit only that they had served in some capacity which, had they advised U.S. authorities, would have precluded their entry into the United States.

21. Plea transcript, pp. 14-15.

22. DAAG Richard interview, Oct. 26, 2000.

As of this writing, at least 20 cases have been resolved through written settlement agreements allowing the defendant to remain in the U.S.: Artishenko, Baumann, Berezowskyj, Bernotas, Bucmys, Didrichsons, Ensin, Gudauskas, Habich, Kaminskas, Kirstens, Klimavicius, Koreh, Kungys, Lehmann, Quintus, Schuk, Tannenbaum, Virkutis, and von Bolschwing.

Twelve of these were based on medical condition (Baumann, Berezowskyj, Bernotas, Didrichsons, Ensin, Habich, Kirstens, Koreh, Lehmann, Quintas, Tannenbaum and von Bolschwing.) The others were litigative concerns.

There were also cases dismissed for medical concerns without written settlements to that effect *e.g.*, Paskevicius (aka Pasker). **Update numbers if necessary**

23. The survivors were contacted by OSI. Their responses are contained in a Feb. 9, 1988 letter to OSI attorney Sunshine from Ruth Winter, an OSI staffer.

24. "Awaiting Justice for Nazi Crimes," *Baltimore Jewish Times*, Feb. 12, 1988. For a discussion of the *Linnas* case, *see* pp. 271-295.

25. "U.S. Denaturalizes Jewish Kapo; Won't Deport Him," *Washington Jewish Week*, Feb. 11, 1988.

26. *Id.*

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Edgars Laipenieks – When There are No Good Choices

Edgars Laipenieks was a track and field star who competed in the 1936 Olympics on behalf of his native Latvia. His prosecution by OSI is notable for several reasons: (1) it led to the CIA's public acknowledgment that Laipenieks had worked with the agency; (2) it is a case involving political more than religious persecution; and (3) it highlights some of the nuanced and difficult choices faced by persons in the Baltic states during World War II.

Latvian history is tortuous. Long under Russian domination, Latvia gained independence after World War I. Its independence was short lived, however. Germany invaded in 1938 and then, in accordance with provisions in the Molotov-Ribbentrop pact, the Soviets annexed the country in 1940, declaring it a Soviet Socialist Republic. Thousands of Latvians were deported to Siberia; many were murdered. The following year, Germany invaded and drove the Russians out. Germany remained an occupying force until the end of World War II, after which the Soviet Union again annexed the country.

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Laipenieks worked as an investigator and interrogator for the Latvian Political Police (LPP), a group which coordinated with, and reported to, the Germans. The LPP pursued a German agenda, hunting Jews and Communists as enemies of the German state. The search for Jews was largely complete by autumn of 1941. At that point, those Jews not yet killed were confined to ghettos; most were murdered by early December. After rounding up the Jews, the LPP focused its attention on Latvians suspected of having denounced fellow citizens during the Soviet occupation.[1]

Laipenieks was a member of the LPP from July 1941 until some time in 1943. He admitted occasionally roughing up prisoners as part of the interrogation process. As he

described his wartime activity, he captured about 200 Communist spies who were later shot by persons other than himself.[2]

After the war, Laipenieks was convicted by a tribunal of the French Military Government of Austria on charges of possessing arms. He emigrated to Chile in 1947 where he became a citizen and coached Chilean athletes for the 1952 and 1956 Olympics. In 1960, the University of Denver sought his services as head track coach. His U.S. visa application made no mention of his service with the LPP or his Austrian conviction. Laipenieks entered the United States under the INA; he never applied for U.S. citizenship.

Laipenieks moved to Mexico in 1964 to train their Olympic hopefuls, but returned to the United States five years later. In 1974, he was one of the 37 people who the Department of Justice acknowledged were being investigated by the INS for their wartime activities.[3] Simon Wiesenthal claimed that Laipenieks had personally murdered Jews, and the Israelis identified him as a "war criminal."[4] Although nothing in OSI's investigation substantiated such a claim, Laipenieks' local newspaper linked him to the deaths of 60,000 Latvian Jews.[5]

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Between 1958 and 1967, Laipenieks had occasionally acted as a "spotter" for the CIA, helping the Agency to assess and develop "targets of interest" in Communist bloc countries. His work involved approaching touring athletes and Latvian emigrés about defecting or providing information to the United States.[6] Although the Agency had played no part in his emigration to the United States, Laipenieks contacted the organization when he learned he was being investigated. He then released their written response to the press. It stated in relevant part:

> [W]e have been corresponding with the Immigration and Naturalization Service about your status. We have now been told that you are "not amenable to deportation under existing laws". It is our understanding that INS has advised

their San Diego office to cease any action against you.

If such does not prove the case, please let us know immediately. Thank you once again for your patience in this instance, and your past assistance to the Agency.[7]

In addition to this written confirmation of his assistance, then CIA Director George H.W. Bush, in response to a reporter's questioning, publicly acknowledged Laipenieks' work with the agency, although he characterized Laipenieks' service as "minor."[8] William Colby, a former CIA Director, made reference to Laipenieks' assistance during a television show about Nazis in America.[9]

Laipenieks opined on the reason for the INS investigation. As he saw it, "[a]ll the top Communists in Latvia were Jews," one of whom might have escaped and started rumors about him. He thought that Americans were prone to believe such stories because both the Secretary of State (Henry Kissinger) and the Attorney General (Edward Levi) were Jewish. According to Laipenieks, "[t]hey are smooth together."[10]

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Despite all the publicity, the INS never filed charges, apparently frustrated in part by the fact that there was no statutory basis for deporting those who entered under the INA because of their World War II acts of persecution.[11] By the time OSI was established, however, the newly-enacted Holtzman Amendment had closed this loophole. In 1981, after discussing the issue with the CIA, OSI filed suit.

The complaint alleged that Laipenieks' visa had been obtained by fraud and wilful misrepresentation of material facts, in that it omitted any reference to his work with the LPP and his later conviction in Austria. The government also contended that service with the LPP constituted persecution of civilians based on race, religion, national origin or political opinion.

The immigration court gave short shrift to the misrepresentation counts. In part the court was moved by the fact that the visa application was printed in English, a language which Laipenieks neither spoke nor read at the time. (Laipenieks had given his responses orally in Spanish, and they had been translated into English by consular officials.) Moreover, evidence at trial showed that Laipenieks had told the CIA in 1962 about his service with the LPP. The court therefore thought it unlikely that he had "wilfully" concealed the same information from the American Consul when he applied for his visa; the court surmised that the concealment was due either to imprecision in the questioning or to the language barrier. The court did acknowledge that Laipenieks might have acted wilfully in concealing his conviction. However, it deemed this immaterial on the ground that full disclosure would not have barred his admission under then-existing law.

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Most of the opinion was devoted to the persecution charges. Testimony on these counts had been presented largely through videotaped depositions from witnesses in Latvia, then a Soviet Socialist Republic. The deponents claimed to have been victims personally beaten by Laipenieks, to have seen others who were beaten or to have been told of such events by people at the scene. The immigration court largely rejected the deposition testimony, finding that the atmosphere in which it was given was "intimidating," in part because the presiding Soviet official referenced the "Nazi war criminal Laipenieks" and restricted cross-examination. The court also doubted the credibility of the witnesses. Many could not identify a photograph of the defendant; others remembered details which seemed implausible; and many relied on hearsay to establish the defendant's role. Although hearsay is admissible in deportation hearings, the court viewed it with particular skepticism since it involved conversations and memories from 40 years

earlier.

The court was no more impressed with the few eyewitnesses who, having settled in the United States and Israel, testified in court. In each case, their courtroom testimony was contradicted in some respects by statements they had made earlier. The court worried too that witnesses might be confusing the defendant with his brother; both worked at the same location as interrogators for the LPP.

Most importantly, however, even if the witnesses were to be believed, the immigration judge was not persuaded that Laipenieks' actions were based on persecution due to race, religion, national origin or political opinion. He thought it more likely reprisal for betraying Latvia during the period of Soviet occupation, since each of the victims had been a pro-Soviet Latvian activist. There was only one Jewish victim and he was the father of persons who allegedly persecuted the Latvians during the Russian era; the court therefore saw his religion as an incidental fact unrelated to Laipenieks' actions. In such circumstances, the court declined to order Laipenieks' deportation.

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The government appealed, and the ruling was reversed. The BIA noted that many of the Latvian victims had been punished for their involvement in killings and deportations of Latvians following Soviet occupation of the country. While punishment for such crimes did not violate the Holtzman Amendment prohibition against persecution based on political opinion, Laipenieks had admitted in court that he gathered information against "all kinds of communists." This included persons who had done nothing more than show sympathy to the Communist cause. As such, the Board concluded that he had engaged in political persecution of the type covered by the Holtzman Amendment. He was ordered deported to Chile, the country he had designated should

the court rule against him.

The BIA decision was a total vindication for OSI. However, Laipenieks appealed to the Ninth Circuit, and once again the decision was reversed.[12] Rather than focusing on whether the LPP (of which Laipenieks was indisputably a member) persecuted individuals because of their political beliefs, the court focused on Laipenieks himself. Had *he* persecuted people because of their political opinion or committed acts which led to the persecution of individuals because of their political beliefs?

In concluding that the answer was no, the Circuit shared the immigration judge's skepticism of government witnesses who claimed that their incarceration had been for political belief rather than criminal activity. Even if the witnesses were to be believed, however, the Circuit was left wondering what it meant to be a Communist sympathizer. The court tried to place the defendant's activities in context.

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> During Laipenieks' service with the LPP, Latvia was a war-torn nation. Only months before, the country had suffered terrible atrocities at the hands of Soviet rule. Latvia was at war with Russia and had reason to fear spies, saboteurs and pro-Soviet conspirators working to undermine the government in power. Thus, Laipenieks and the LPP certainly had reason to concern itself with the behavior of Soviet "activists" and "sympathizers."
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>
> When individuals are singled out and victimized on the basis of religion, race or national origin there is no legitimate reason for doing so. For instance, there was no rational basis for the persecution perpetrated against the Jews during the Holocaust. There can be only one explanation for the persecutorial acts; the Jews were persecuted because they were Jews. In contrast, the present case is much more troublesome. Laipenieks and the LPP had a legitimate basis for investigating Communists. The Communists remaining in Latvia were sympathetic to a hostile nation who was presently at war with the Latvians and who only a few months earlier had exterminated thousands of Latvian citizens.

One judge vigorously dissented. He felt that the Circuit had not given sufficient deference to the decision by the BIA. Moreover, he believed that the court had virtually disregarded the testimony of the government's expert historian as to the role played by the LPP and had improperly focused on Laipenieks' personal motivation – a factor the dissenter thought irrelevant.

OSI and the Criminal Division urged the Solicitor General to seek rehearing. The thrust of their argument was a technical one: that the Ninth Circuit had improperly given due deference to the findings of the immigration judge rather than to the Board of Immigration Appeals. OSI also feared that the Circuit was imposing a standard of personal involvement in persecution that was not warranted by the statute and that the court had been too dismissive of the deposition testimony. The Solicitor General agreed and a petition for rehearing by the full court was filed. However, the Ninth Circuit declined to reconsider the case.

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Although some of the language in the opinion was potentially very troubling to OSI,[13] in retrospect it appears that the impact of the case was limited. The role of saboteurs in a political climate as charged as Latvia's is difficult to determine. Very few OSI cases present the question. To the extent that it suggests there must be a *personal* role in persecution (as opposed to membership in a group that can be shown to have persecuted), other courts have simply rejected it.[14] The Second Circuit alone used it as precedent. That was in *Sprogis*, a case which, as noted earlier, is confined generally to its facts.[15]

Perhaps *Laipenieks* stands for nothing as much as recognition that the world during World War II was not as black and white as it is often portrayed. For those in countries like Latvia, where the dilemma was fighting Communism or fascism, it was not always easy to see

where one should turn. The difficulty the courts had in deciding *Laipenieks* (with the ultimate decision in the Court of Appeals decided by a 2 to 1 vote) may simply be testimony to that fact.

Laipenieks died in the United States in March 1998.

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1. *In re Edgars Laipenieks*, 18 I & N Dec. 433 (BIA 1983), pp. 8-9, 1983 WL 183255.

2. "Area Man Accused by Top Nazi-Hunter," by Martin Gerchen, *The San Diego Evening Tribune*, Oct. 15, 1976.

3. "37 Under Inquiry in Crimes by Nazis," *The New York Times*, June 6, 1974.

4. "Area Man Accused by Top Nazi Hunter," *supra*, n. 2.

5. "Former Track Coach in La Jolla Accused of Being War Criminal," by Bob Dorn and Martin Gerchen, *The San Diego Evening Tribune*, Oct. 14, 1976.

6. Laipenieks Prosecution Memo to AAG Jensen from OSI Director Ryan, Apr. 24, 1981, p. 8.

7. The July 20, 1976 letter was printed in various news organs, including *The New York Times*, "Nazi War Crimes Suspect Asserts C.I.A. Used Him as Anti-Soviet Spy," by Ralph Blumenthal, Oct. 15, 1976; *The San Diego Evening Tribune*, "Former Track Coach in La Jolla Accused of Being War Criminal," *supra*, n. 5; and the Oct. 1980 issue of *Keeping Posted*, the Union of American Hebrew Congregations magazine.

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8. "CIA Denies Giving Aid to War Crimes Suspect," by Bob Dorn, *The San Diego Evening Tribune*, Nov. 30, 1976.

9. ABC News Closeup, "Escape from Justice, Nazi War Criminals in America," Jan. 13, 1980.

10. "Former Track Coach in La Jolla Accused of Being War Criminal," *supra*, n. 5.

11. "U.S. Unlikely to Oust War-Crime Suspect," by Bob Dorn, *The San Diego Evening Tribune*, Oct. 16, 1976.

12. *Laipenieks v. INS*, 750 F.2d 1427 (9th Cir. 1985).

13. At one point, the court indicated that the government had to prove that an individual was persecuted *solely* because of his political views. Elsewhere in the opinion, indeed twice on the very same page, the court omitted the word "solely." 750 F.2d at 1437.

14. *Hammer v. INS*, 195 F.3d 836, 843 (6th Cir. 1999); *Schellong v. INS*, 805 F.2d 655, 661 (7th Cir. 1986). Indeed, another panel of the Ninth Circuit seemed to reject the reasoning in *Laipenieks*, when it refused to grant asylum to an Egyptian police officer who had rounded up fundamentalist Moslems and turned them over to others who he knew would torture and abuse them. *Riad v. INS*, 161 F.3d 14 (9th Cir. 1998) (unpub'd). The asylum statute is almost identical to the language in the Holtzman amendment, yet the *Riad* panel held that one can assist in persecution even if he "has not physically taken part in the offense." The *Riad* decision is unpublished, however, and therefore of no precedential value within the Ninth Circuit. It establishes only that some members of the court disagree with the *Laipenieks* reasoning; it does

not overrule *Laipenieks*.

15. *See* p. 103.

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Juozas Kungys – When is Misrepresentation Actionable?

On the macro level, *Kungys* was a significant win for OSI; on the micro level, it was a loss.

Juozas Kungys emigrated to the United States in 1948. He entered under the INA and became a citizen in 1954. In 1975, the *Morning Freiheit*, a New York daily Yiddish newspaper, reported that Kungys was implicated in the murder of approximately 2,000 Lithuanian Jews during World War II. INS opened an investigation which ultimately passed on to OSI. Based on statements supplied by the Soviets from witnesses in Lithuania, OSI concluded that Kungys had rounded up and transported thousands of Jews to an execution site, distributed firearms and ammunition to an execution squad, forced the victims into a mass grave, shot some of them, and exhorted the execution squad to do the same.

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In 1981, OSI filed suit to revoke Kungys' citizenship. The government charged that his admission to the country should have been barred by the State Department regulation excluding anyone who had been guilty of, or who had advocated or acquiesced in, activities or conduct "contrary to civilization and human decency" on behalf of Axis countries during World War II.[1] In addition, the complaint asserted that false statements on Kungys' visa and naturalization forms (concerning date and place of birth, as well as residence and occupation during the war) rendered his admission and subsequent naturalization unlawful. Finally, the government charged that Kungys' conduct during the war, as well as his false statements, showed that he lacked the good moral character required of persons seeking to become naturalized citizens.

The crux of the complaint was Kungys' role during World War II. To establish that at trial, the government introduced videotaped depositions taken in Lithuania in which the

witnesses detailed Kungys' involvement in the massacre of Jews. Lithuania was then a Soviet republic, and the depositions were presided over by a Soviet official with questioning by OSI attorneys and defense counsel. After viewing the videotape, the district court discounted entirely the witnesses' statements.[2]

The court's reasoning was multi-faceted. It concluded that: (1) because the Soviets treated war crimes as "political cases," there was often pressure to tailor evidence; (2) the Soviet Union had an interest in the United States finding that Kungys participated in the killings because this would diminish the influence of Lithuanian emigrés (such as Kungys), and thereby help suppress Lithuanian nationalism; (3) the manner in which the depositions were conducted was suspect; (4) the content of the depositions suggested that inculpatory statements were fabricated as a result of undue pressure by the Soviet authorities; and (5) the Soviets' failure to release statements the same witnesses had given in the 1940s cast doubt on the accuracy of the more recent testimony.

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The court's criticism was leveled not only at the Soviets but at OSI itself, for showing "extreme deference" to the overbearing and intimidating Soviet procurator, posing "blatantly" leading questions, and interposing "silly" objections to the defense cross-examinations. The sum of all this led the court to accuse OSI of "collaborating" with a totalitarian state and to conclude that the use of the deposition testimony against Kungys "would violate fundamental considerations of fairness."

Without evidence of Kungys' role in persecution, the only remaining issue was whether his misrepresentations and concealments warranted revocation of citizenship. The court concluded that they did not, because neither singly nor in the aggregate were they material

(relevant) to his having been allowed to enter the United States or to become a naturalized citizen. The same reasoning motivated the court's conclusion that the false information did not establish lack of good moral character: the falsehoods were not deemed material.

The government appealed on a variety of grounds – arguing that *any* false statement was evidence of bad moral character, regardless of whether it was material; that the defendant's false statements had in fact been material; and that the court should have considered the deposition testimony taken in the Soviet Union. The latter issue was of particular importance to OSI. Not only was the testimony crucial to a determination about Kungys' wartime activity, but the Criminal Division feared that the court's ruling:

> and inflammatory language could cripple OSI's enforcement effort. Many of OSI's subjects and defendants committed their war crimes in Eastern Bloc countries and the Soviet Union. Successful prosecution depends upon courts receiving into evidence the testimony of witnesses and documents found behind the Iron Curtain.[3]

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Although that may have been the most important issue to OSI, the appeals court did not issue a ruling on the point. Instead, the court focused on whether Kungys' misrepresentations had been material. Concluding that they had, the court found sufficient basis to revoke his citizenship on that ground alone; the court did not need to determine whether he in fact had played a role in the murder of 2,000 Jews.[4]

Kungys appealed to the Supreme Court which agreed to hear the case. The Court was interested in two issues, neither of which involved the deposition testimony crucial to a determination of Kungys' role in World War II. Rather, the Court was concerned with how to determine whether facts concealed in a citizenship application are material, and whether false statements alone establish lack of good moral character for citizenship or whether those false

statements too have to be material.

On the first issue, both the government and Kungys agreed that the standard for materiality should be determined from a prior Supreme Court ruling;[5] the two sides disagreed only on what that ruling established. As to good moral character, the government took a middle ground:

> We're not saying that any lie, regardless of its significance, is enough to show that you lack good moral character. What we're saying is that here in the context of lies that could have proven the basis for perjury. . . where somebody has repeatedly committed perjury, that he has demonstrated lack of good moral character.[6]

After the argument, in an unusual move, the Supreme Court notified the parties that it wanted the case reargued. It also asked the parties to submit another set of briefs, focusing on a series of questions including whether the materiality standard in the prior Supreme Court ruling ought simply to be abandoned, and if so, what should take its place.

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The opinion ultimately issued showed a very divided Court.[7] A majority did agree, however, to abandon the earlier test of materiality and to establish a less stringent one than even the government had originally urged. Under the new test, a misrepresentation or concealment is material to a citizenship application if it would have a "natural tendency to produce the conclusion that the applicant was qualified."[8] The Court also held that *any* false statement made under oath in order to obtain an immigration benefit can establish lack of good moral character; there is no requirement that the statement be material.

This was a major victory for the government. Henceforth, it would be much simpler to establish both materiality in denaturalization proceedings and lack of good moral character in cases in which the defendant was charged with misrepresentation. From that perspective – and

that is the big picture – the government was vindicated.

The impact on Kungys himself, however, was less clear. The Court did not determine whether he had made material misstatements nor whether he lacked good moral character. Nor did the Court discuss whether the depositions, essential to establishing his role in persecution, should have been admitted. It sent the case back to the lower courts to resolve the materiality and good moral character issues.

Neither the government nor defense counsel was interested in prolonging the litigation. From OSI's perspective, the chance that the lower courts would reconsider the deposition issue was minimal. Nothing in the Supreme Court ruling required such reconsideration, and even if the lower court were willing to reopen the issue, OSI was not confident that the original decision would be reversed. Without that, the government could never establish Kungys' role in persecution. The best the government would obtain was a denaturalization and deportation based on his misrepresentations. While this would ostensibly still be a victory, there was a big loophole. Unless he was deported under the Holtzman amendment (for reasons involving his role in persecution), the law allowed him to apply for discretionary relief from the deportation order. Given his age and the fact that his wife was a U.S. citizen with serious health problems, OSI believed his request would likely be granted. Therefore, the most the government would achieve would be to strip Kungys of his citizenship without being able to remove him from the United States.

Defense counsel was the first to propose settlement: Kungys would consent to denaturalization – conceding that he had misrepresented facts which were material to his citizenship application – if the government would agree not to seek his deportation.[9] OSI and

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DAAG Richard believed that nothing more could be achieved through litigation.[10]

In November 1988, the district court entered an order along the terms proposed. As of this writing, Kungys remains in the United States.

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1 1. This was the first case in which OSI based a denaturalization count on the State Department regulation. He could not be charged with assistance in persecution since he had not entered under the DPA or the RRA.

2. *United States v. Kungys*, 571 F. Supp. 1104 (D.N.J. 1983).

3. Dec. 5, 1988 memorandum from AAG Trott to the Solicitor General.

4. *U.S. v. Kungys*, 793 F.2d 516 (3rd Cir. 1986). On a separate issue, the Circuit agreed with the lower court that a misrepresentation must be material to show a lack of good moral character.

5. *Chaunt v. U.S.*, 365 U.S. 350 (1960).

6. *Kungys* Supreme Court argument, Case 86-228, Apr. 1987, Tape 267.606, National Archives of the United States.

7. *Kungys v. United States*, 485 U.S. 759 (1988). There were five opinions issued in the case.

8. If the government proves that the misrepresentation had this tendency, a presumption of ineligibility is raised. The naturalized citizen can then rebut the presumption. The government had originally contended, both in its brief and first oral argument, that materiality is established when the government can prove that if the truth had been revealed, there *would* have been an investigation that *might* have uncovered disqualifying facts leading to loss of citizenship.

9. Aug. 11, 1988 memo to OSI Director Neal Sher from Bruce Einhorn, Deputy Director for Litigation.

10. Sept. 6, 1988 memorandum from Sher to DAAG Richard, recommending that the case be settled; Sept. 8, 1988 cover memo from DAAG Richard to AAG Ed Dennis, urging approval on the ground that "denaturalization is probably all we can achieve;"and approval granted by AAG Dennis on Sept. 9, 1988.

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Leonid Petkiewytsch – An Aberrational Loss

Leonid Petkiewytsch was born in Poland where his father served as mayor of their town during the German occupation. In 1944, the family fled to Austria to avoid the advancing Russian Army. The Austrians routed the family to Germany where the 21-year-old Petkiewytsch was assigned to serve as a civilian guard in a labor education camp. These camps, run by the Gestapo, were originally intended to accustom indolent or unproductive foreign workers to "proper work" during eight weeks of incarceration and indoctrination.[1] The camp to which Petkiewytsch was sent also housed political prisoners and Jews who were segregated from the rest of the population. Their incarceration was longer and they were subjected to especially harsh forced labor, beatings and torture. Some were executed.

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Although Petkiewytsch was a civilian employee, he was issued a German military uniform and carried a loaded rifle. During his seven months at the camp, he guarded the inmates and escorted them to factories and farms where they served as forced laborers. At war's end, Petkiewytsch was arrested by the British. He remained in custody for three years, though no charges were ever filed.

Shortly after his release, Petkiewytsch applied for a visa under the DPA. His application was rejected because of his guard service. In 1955, after both the DPA and RRA had expired, Petkiewytsch was admitted under the INA. He answered "no" to a question on his visa application asking whether he had ever been arrested.

Petkiewytsch did not apply for U.S. citizenship until 1982. In response to questioning at that time, he stated that he had served as a guard in a labor camp and had been arrested by the British. INS contacted OSI which, unaware of Petkiewytsch until then, opened an investigation.[2]

INS meanwhile placed his citizenship application on hold.

While investigating Petkiewytsch's wartime activities, OSI learned that the British failure to file charges did not necessarily mean that they believed a person was not guilty. Often they were unable to locate key witnesses or realized that the subject had already spent more time in custody than he would receive if tried and convicted.[3]

OSI filed deportation charges in 1985. The filing alleged that Petkiewytsch was deportable because he had assisted in persecution and concealed material information (that he had been arrested by the British) in his visa application.

In an unusually brief opinion (3 pages), the immigration judge rejected the government's claims outright. He concluded that Petkiewytsch was "a victim of the times he lived in" and that his wrongful conduct was "at most. . . his acceptance under duress of his duties as a civilian labor education camp guard."[4] The court determined that Petkiewytsch's service had been involuntary and that he had never abused any inmates. Based on these findings, it ruled that he had not assisted in persecution.[5]

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The ruling was reversed on appeal.[6] The BIA accepted the premises upon which the immigration judge had relied, *i.e.*, that Petkiewytsch had been "a rather reluctant guard who performed his duties as ordered in order to escape imprisonment or death," and that he never physically harmed the prisoners or fired a shot. However, it found these emotionally powerful arguments irrelevant to legal disposition of the case. Relying on the Supreme Court ruling in *Fedorenko*, the Board focused solely on the "objective effect" of Petkiewytsch's conduct. From that perspective, his work had assisted the Nazis in their persecution of Jews. The Board was unfazed by Britain's failure to file charges after the war since the British did not focus on

whether Petkiewytsch violated U.S. statutes. The decision was a complete victory for OSI.

The victory was short-lived. Petkiewytsch appealed to the Sixth Circuit which reversed the decision yet again.[7] The Circuit acknowledged that the labor camp was "a place of persecution" and that the Holtzman Amendment, the statute under which OSI had filed suit, was aimed at those who "assisted in persecution." However, after examining the legislative history of the amendment, the court concluded that it was intended to prevent true "war criminals" from entering the country. Petkiewytsch, who had "never struck a prisoner and never personally inflicted any form of abuse upon prisoners beyond impeding their escape through his presence as a civilian guard," did not qualify.

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The ruling was very troubling for OSI. Most of its cases involve camp guards, and it is difficult to establish that such individuals had "hands on" interaction with inmates. If there was an altercation, the victim is likely dead and it is rare that there is a written record to which OSI can turn.[8] The bulk of OSI cases rely on the proposition that prison guards performed a variety of duties, generally along the lines acknowledged by Petkiewytsch, *i.e.*, they were an armed presence to preclude inmates from escaping and to escort them to and from work stations. A series of courts had already ruled that this was sufficient to establish assistance in prosecution.[9] Moreover, the Supreme Court, in *Fedorenko*, had held that a prisoner of war who involuntarily served as a camp guard could be stripped of his citizenship. In an effort to distinguish Petkiewytsch's situation from Fedorenko's, the Sixth Circuit relied heavily on the fact that Fedorenko had admitted shooting his gun at escaping inmates; Petkiewytsch, by contrast, had never fired a shot.[10]

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The Solicitor General authorized the government to seek rehearing. The Circuit, however, declined to reconsider the case. On the theory that bad facts – at least as the Sixth Circuit had articulated the facts – make bad law, OSI and the Criminal Division did not ask the Solicitor General to file a petition for certiorari.[12] The Sixth Circuit ruling was therefore the final word.

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In 1992, with litigation complete, INS asked OSI to return Petkiewytsch's immigration file. The agency was set to remove its hold on his naturalization application and to grant him citizenship. OSI advised INS that if it did so, the government would bring a denaturalization action. The INS retained the hold and Petkiewytsch remained a resident alien in the United States until his death in January 2000.

The holding in *Petkiewytsch* had tangible as well as intangible consequences for OSI. Intangibly, it made the office for years more reticent to file a case which could ultimately be appealed to the Sixth Circuit. Tangibly, another case was lost when the court followed the *Petkiewytsch* weapon analysis.[13] OSI feared that a "shoot the gun" test was developing: if a

guard had not used a weapon offensively, the court would conclude he had not assisted in persecution.

In fact, however, no other appellate courts were willing to follow suit; indeed, they were openly dismissive of the ruling.[14] One went so far as to describe it as not merely wrong, but "doubly wrong."[15] Only eight years after the Sixth Circuit decided *Petkiewytsch*, another panel of the same court interpreted it to apply only to those required to serve involuntarily as civilian guards in labor education camps.[16] The chance that these three factors will coalesce in another case is remote, as the court inevitably realized. By giving *Petkiewytsch* such a narrow interpretation, the Circuit essentially neutered it as precedent.[17]

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1 1. Decree of Himmler, "Establishment of Labor Education Camps," May 28, 1941.

2. Aug. 16, 1982 memo to Charlie Gittens, OSI Deputy Director from Peter Black, Historian. It is unusual for OSI to learn of a subject in this manner. For one similar occurrence, *see* pp. 303-304.

3. Mar. 13, 1986 memorandum from OSI attorney Alan Held to File re interview with British prosecutor Francis W.I. Barnes.

4. *Matter of Petkiewytsch*, A08 857 812 (Imm. Ct., Cincinnati, Ohio 1987).

5. The court bolstered this conclusion by noting that Petkiewytsch had been released by the British. As for not acknowledging his time in custody, the court concluded that this misrepresentation was immaterial to the issuance of the visa.

6. *In re Leonid Petkiewytsch*, A8 857 812 (BIA 1990).

7. *Petkiewytsch v. I.N.S.*, 945 F.2d 871 (6th Cir. 1991).

8. It can happen, however. *See* p. 30, n. 5 re Nazi records of killings at Mauthausen.

9. *See e.g.*, *Kulle v. INS*, 825 F.2d 188, 1192 (7th Cir. 1987); *Schellong v. INS*, 805 F.2d 655, 660-61 (7th Cir. 1986); *Maikovskis v. INS*, 773 F.2d 435, 445-46 (2nd Cir. 1985).

10. The Sixth Circuit did not decide whether involuntariness was a factor to be considered in *deportation* proceedings. (In *Fedorenko*, the Supreme Court said that someone who entered the United States under the DPA could be *denaturalized* if he served as a camp guard, even if that service was involuntary.) The Holtzman amendment, under which the *Petkiewytsch* deportation action was filed, has wording very similar to the DPA.

11. OSI was concerned not only with the shooter analysis, but also by the Circuit's conclusion that Petkiewytsch's misrepresentation about his arrest was not material. In so ruling, the Circuit ignored the definition of materiality established by the Supreme Court in *U.S. v. Kungys*, 485 U.S. 759 (1988), discussed at pp. 127-133.

12. Oct. 27, 2002 discussion with Susan Siegal, Principal Deputy Director of OSI and lead counsel in the Petkiewytsch prosecution.

13. *U.S. v. Lindert*, 907 F. Supp. 1114 (N.D. Ohio 1995), discussed at pp. 64-70.

14. *Tittjung v. Reno*, 199 F.3d 383, 398 (7th Cir. 1999); *Kairys v. INS*, 981 F.2d 937 (7th Cir. 1992); *Szehinskyj v. Attorney General*, 432 F.3d 253 (3rd Cir. 2005).

15. *Szehinskyj v. Attorney General*, *supra*, n. 14, 432 F.3d at 260, n. 8.

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16. *Hammer v. INS*, 195 F.3d 836 (6th Cir. 1999). The *Hammer* panel could not overrule *Petkiewytsch* since that can only be done by a full complement of the Sixth Circuit judges or by the Supreme Court. In fact, *Hammer's* narrow reading of *Petkiewytsch* is questionable since it wrongly suggests that involuntariness was key to the *Petkiewytsch* ruling.

17. *See, Negele v. Ashcroft*, 368 F.2d 981, 984 (8th Cir.), *cert. denied*, 125 S.Ct. 815 (2004), in which the court notes that "the mitigating factors in *Petkiewytsch* are not present in this case."

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Aloyzas Balsys and Vytautas Gecas – Self-Incrimination in OSI Cases

The decision in *United States v. Balsys* was arguably the most far-reaching of the three OSI cases to reach the Supreme Court. It will likely impact terrorism and international drug prosecutions even more than it does OSI matters.

The ruling concerns the scope of the Fifth Amendment privilege against self-incrimination. That privilege guarantees that "[n]o person. . . shall be compelled in any criminal case to be a witness against himself." The Supreme Court had long held that the privilege precludes the government from requiring a person to answer questions if the answers could be used against him in a state or federal criminal prosecution. This was so even if the answer would provide only "a link in the chain of evidence" needed to prosecute him in the United States. The Court had not resolved, however, whether someone could be required to answer if he feared prosecution *abroad* rather than in the United States.

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In the course of pursuing its denaturalization and deportation cases, OSI seeks to question and depose defendants and witnesses.[1] They cannot invoke the Fifth Amendment on the ground that they fear their statements will be used against them in OSI proceedings because OSI cases are *civil* matters. However, some have declined to answer on the ground that their answers might subject them to criminal prosecution overseas. Courts have handled this in a variety of ways. Some ruled that the Fifth Amendment can never be invoked based on fear of prosecution abroad;[2] others suggested it applies in limited circumstances;[3] and some skirted the issue based on the facts in the particular case.[4]

The issue was resolved in *U.S. v. Balsys*.[5] Aloyzas Balsys, a Lithuanian who emigrated to the United States in 1961, never applied for U.S. citizenship. OSI opened a deportation

investigation based on wartime documents found in Lithuania. Those documents showed that someone with the name Aloyzas Balsys had served in a Lithuanian secret police organization that had liquidated a Jewish ghetto. However, OSI was not certain that the subject of their investigation was the same person who had served in the police unit.

In September 1993, an OSI attorney and an OSI investigator went to Balsys' home to question him. Balsys denied that he had served in any military or police organizations during the German occupation of Lithuania. When pressed further, he terminated the interview. Ten days later, OSI served him with a subpoena, ordering him to answer questions and bring various documents concerning his wartime activities and his emigration to the United States. He appeared at the appointed time and place, accompanied by a lawyer. He refused to answer any questions, other than his name and address, on the ground that the answers might incriminate him abroad (in Lithuania, Germany or Israel). He also declined to turn over any documents covered by the subpoena other than his alien registration card.

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OSI filed suit in district court to enforce the subpoena. After reviewing the criminal statutes in all the countries where Balsys feared criminal liability, the court concluded that he did indeed face a "real and substantial" danger of prosecution. However, the court ruled that the Fifth Amendment did not extend to fear of prosecution overseas. It reasoned that the amendment was designed to protect individuals from "governmental overreaching," a consequence not possible if the feared prosecution was by a foreign power.[6]

The ruling was reversed on appeal.[7] The Second Circuit court concluded that "individual dignity and privacy values"– which it saw as some of the core purposes of the Amendment – were best protected if an individual could avoid the "cruel trilemma of self-accusation, perjury,

or contempt." The Circuit acknowledged that "governmental overreaching" was also a core value inherent in the Amendment. Unlike the district court, however, it posited that such overreaching was possible with an overseas prosecution because we now live in an era of "cooperative internationalism." To illustrate its point, the court noted that the Justice Department was interested in having OSI defendants prosecuted abroad and was willing to share its evidence with foreign governments.

The ruling was of substantial import to the United States for reasons well beyond OSI cases. When the government seeks testimony from an individual who has a "substantial and legitimate" fear of prosecution by federal or local authorities, the government can grant the witness immunity from all domestic prosecution. He can then be compelled to testify because nothing he says can be used against him in any criminal proceeding; the Fifth Amendment interest against self-incrimination is thus preserved. However, the United States has no ability to grant immunity from *foreign* prosecution. Therefore, any statements made in the United States might be used in a criminal proceeding abroad if the United States makes the statements available. Many witnesses in cases involving international organized crime, drug trafficking, terrorism, antitrust conspiracies and securities frauds might legitimately have such a fear. If they can invoke the Fifth Amendment, investigation of these crimes would be severely hampered.

Because of these concerns, as well as the fact that the Circuit's decision conflicted with rulings in other Circuits, the government asked the Supreme Court to review the case. In its brief to the Court, the government stressed the impact on domestic prosecutions of crimes with international reach, but noted too the direct impact of the lower court ruling on OSI's investigations. The government acknowledged that there were "many" cases where OSI did not

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have sufficient evidence without the requested testimony. Were the Circuit ruling to stand, the United States might have "to tolerate . . . within its borders . . . participants in persecution or genocide."[8]

After reviewing the history and purpose of the Fifth Amendment, the Supreme Court concluded that the privilege was intended to apply only to domestic prosecutions. The Court acknowledged that the United States had an interest in having foreign governments prosecute OSI matters.[9] However, there was no evidence that such foreign prosecutions were being brought on *behalf* of the United States. If they were, the Fifth Amendment would apply. But the "mere support of one nation for the prosecutorial efforts of another does not transform the prosecution of the one into the prosecution of the other."

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The Court's ruling meant that Balsys would now have to answer questions posed by OSI or face incarceration for contempt of court. Shortly after the ruling, Balsys' attorney advised OSI that his client would rather abandon his permanent resident status and leave the country than answer questions about his wartime activities. His voluntary departure allowed OSI to achieve its potential ultimate goal – removing Balsys – without further investigation or litigation. Balsys left the country in May 1999.

The Supreme Court ruling had repercussions on other OSI subjects as well. Most immediately, it affected Vytautas Gecas, an OSI subject who had, almost simultaneously with Balsys, litigated his right to assert the Fifth Amendment based on fear of foreign prosecution.

OSI historians had found several documents referencing a Vytautas Gecas who served in Lithuania's Second Battalion, a unit so notorious for persecution that courts have ruled service in the Battalion is sufficient in and of itself to constitute assistance in persecution.[10] However,

none of the government's Gecas documents had identifying information, such as date or place of birth. Just as with Balsys, the government could not be certain that it had the right person.

In 1991, Gecas answered some questions from OSI investigators. He claimed to have spent the war years in a vocational school in Kaunas, Lithuania. The government later issued a subpoena to compel Gecas to answer more questions and bring pertinent documents. Gecas, newly represented by counsel, refused to comply. OSI filed suit to enforce the subpoena and, after much litigation, won a ruling that the Fifth Amendment could not be invoked based on fear of prosecution overseas.[11] On the day after the Supreme Court issued its ruling in *Balsys*, it declined to review Gecas' case.

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Despite the definitive court rulings against his position, Gecas maintained his silence. At the government's request, the district court held him in contempt for refusing to comply with a court ruling. The court ordered him imprisoned for eighteen months – the maximum period allowed by law – or until he agreed to answer questions. He remained consistent in his refusal to respond and therefore spent the full eighteen months behind bars.

He was released in November 2000, having spent more time in U.S. custody than any other OSI defendant up to that point.[12] Still, the government was no closer to being able to file its case. In an effort to obtain more information, an OSI attorney and an investigator interviewed inmates and employees at the two institutions where Gecas had served his sentence. OSI thought he might have discussed his situation with one of them, and, perhaps inadvertently, made statements that would be helpful to the government's investigation. He had not.

Inmates in federal custody are advised that their phone conversations (other than those with defense counsel) may be recorded. OSI retrieved audiotapes of 78 telephone conversations

Gecas had had with family members. Nothing in any of those conversations was useful to the government.

In November 2002, an OSI historian searched all vocational school records in Kaunas, Lithuania to determine if Gecas' alibi was credible. There had been seven vocational high schools in Kaunas during the war. The records of only three survived, and those only partially. Miraculously for OSI, the historian found pertinent material. In addition to Gecas' graduation certificate (June 1941) there was a letter from his father in a folder containing material about Gecas' brother. The father had written to request a stipend for his younger son because elder brother Vytautas was not providing any family support. He "voluntarily joined the Second Battalion and has gone away. . ."

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This was the last piece of evidence the government needed. OSI filed a deportation action against Gecas shortly after finding the new material. Rather than face trial, Gecas agreed to admit that he had served in the Second Battalion, to relinquish his green card, and to leave the United States permanently. He flew to Lithuania in August 2003.

There is no way to estimate the number of domestic criminal prosecutions impacted by *Balsys*. That would involve answering a counterfactual question: how many people would have asserted a Fifth Amendment privilege based on fear of foreign prosecution had the Supreme Court not ruled as it did. However, it is safe to assume that the impact of the case is substantial. The privilege had been asserted with some frequency in OSI investigations[13] and there are many more wide-reaching criminal investigations than OSI matters. Indeed, at the time the Supreme Court briefs were filed in *Balsys*, more than twenty grand juries in the United States were investigating international cartel activities that involved businesses and individuals located in

twenty countries on four continents.[14] The number of investigations has undoubtedly increased in the post 9/11 era, given the proliferation of international terrorist activity.

There is a new twist to *Balsys* on the horizon. At this writing, the Justice Department is entering an era of international task forces. The line between U.S. and foreign prosecutions will inevitably be blurred. Whether the Fifth Amendment will apply to prosecutions abroad emanating from such task forces is an open question. The only certainty is that resolution of the matter must begin with an analysis of *Balsys*.

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1 1. Before a case is filed, a citizen is under no obligation to respond to questioning. Non-citizens, however – and many OSI defendants never became citizens – must do so if the government issues an administrative subpoena pursuant to 8 U.S.C. 1225 (d)(4).

Over the years, the format and purpose of the interview has evolved. It was originally intended as an opportunity for the defendant to persuade the government it was mistaken before a case was filed (recorded interview with DAAG Richard, Apr. 25, 2001). The early interviews were scheduled in advance, the subject had the option of appearing with an attorney, he was placed under oath and a court reporter was present.

In the mid-1980s, the office began doing more drop-in unannounced interviews in the hope of catching the subject unawares. The subjects are told that they need not answer any questions, that they can consult with an attorney, and that if they do choose to answer, they can stop at any time. Although some refuse to talk, many submit to the questioning. As one OSI historian posited, "They are of a place and time where you respond to authorities." The interview has thus gone from a last chance for exoneration to an interrogation designed to develop evidence. DAAG Richard voiced concern about this evolution. He feared that, rightly or wrongly, a process designed to be "fairness driven" had come to be seen as a "pressure tactic," a "knock on the door" – ironically one of the very things feared by those persecuted in Nazi Germany. Interview, Apr. 21, 2001.

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2. *U.S. v. Gecas*, 120 F.3d 1419 (11th Cir. 1997) (*en banc*); *U.S. v. Ragauskas*, No. 94 C 2325, 1995 WL 86640 (N.D. Ill. 1995); *U.S. v. Kirsteins*, No. 87-CV-964 (N.D.N.Y. 1987) (unpub'd). *See also*, *U.S. v. (Under Seal)*, 794 F.2d 920 (4th Cir. 1986) (a non-OSI case).

3. *U.S. v. Inde*, No. 3-88-50 (D. Minn., Aug. 22, 1989 as amended Dec. 6, 1989); *U.S. v. Trucis*, 89 F.R.D. 671 (E.D. Pa. 1981); and *U.S. v. Palciauskas*, 559 F. Supp. 1294 (M.D. Fl. 1983) (the defendant could decline to answer some questions but not others); *Juodis v. Mikutaitis*, 800 F.2d 159 (7th Cir. 1986) and *U.S. v. Bartesch*, 643 F. Supp. 427 (N.D. Ill. 1986) (an order sealing testimony was sufficient protection against the likelihood of prosecution overseas; therefore all questions must be answered); *U.S. v. Lileikis*, 899 F. Supp. 802 (D. Mass. 1995) (if there is a "real and substantial" likelihood of prosecution abroad, the United States must establish that a "governmental interest" is involved in securing the testimony and that there is a "legitimate need" for the testimony in order to "further[] that interest.")

4. *U.S. v. Linnas*, No. 79 C 2966 (E.D.N.Y. 1980) (where the defendant had been convicted *in absentia* by the U.S.S.R., the earlier conviction meant that there was no longer reason to fear prosecution); *U.S. v. Stelmokas*, No. 92-CV-3440, 1995 WL 464264 (E.D. Pa. 1995), *aff'd on other grnds*, 100 F.3d 302 (3rd Cir. 1996) and *U.S. v. Klimavicius*, 671 F. Supp. 814 (D. Me. 1985) (after analyzing facts, it appeared there was no "real and substantial" likelihood of prosecution abroad).

5. 524 U.S. 666 (1998). It was a significant enough matter to have come before the Court twice prior to *Balsys*. However, in neither case did the Court reach the merits. *Zicarelli v. New Jersey Comm'n of Investigation*, 406 U.S. 472 (1972) (no "real and substantial" risk of foreign prosecution); *Parker v. U.S.*, 397 U.S. 96 (1970) (per curiam) (remanded for dismissal because of

mootness).

6. *U.S. v. Balsys*, 918 F. Supp. 588 (E.D.N.Y. 1996).

7. *U.S. v. Balsys*, 119 F.3d 122 (2d Cir. 1997).

8. Reply Brief for the United States in *Balsys*, p. 13, n. 4.

9. The Court cited both OSI's mandate – which includes maintaining liaison with foreign prosecution, investigation and intelligence offices – and treaty agreements such as one which requires the United States to cooperate with Lithuania in developing evidence for the prosecution of war criminals. 524 U.S. at 699.

10. *U.S. v. Ciurinskas*, 148 F.3d 729, 734 (7th Cir. 1998). *See also*, *Naujilis v. INS*, 240 F.3d 642, 647 (7th Cir. 2001).

11. *U.S. v. Gecas*, 830 F. Supp. 1403 (N.D. Fl. 1993), *aff'd in part, rev'd in part*, 50 F.3d 1549 (11th Cir. 1995), *vacated and dis. ct. opinion aff'd*, 120 F.3d 1419 (*en banc* 1997), *cert. denied*, 524 U.S. 951 (1998).

12. Several defendants were prosecuted abroad and incarcerated as a result of those prosecutions.

Within the United States, John Demjanjuk, Andrija Artukovic and Bruno Blach were imprisoned pending their extradition. (Demjanjuk also spent 10 days in custody after failing to appear at a deportation hearing.) Konrads Kalejs was in custody briefly after he was caught fleeing the jurisdiction in the midst of his deportation proceeding. Karl Linnas spent a year in custody while he fought his deportation order. Several other defendants were detained for short periods prior to their deportation hearings.

Johann Leprich was arrested in July 2003 when he was found in the U.S. after having told the court he would leave the country once his citizenship was revoked. He remained in custody until Oct. 2006. The court ordered his release when it became clear that no country was willing to accept him. Leprich now holds the record for the longest incarceration in the United States of an OSI defendant.

Unbeknownst to OSI, in Sept. 2004 DHS (successor to INS), arrested OSI defendant Mykola Wasylyk. DHS cited 8 U.S.C. 1231(a), which allows for the detention of an alien who has been ordered deported if he fails to pursue in good faith all means necessary to assure his departure. He was released in Aug. 2005 because the law does not justify unlimited detention.

13. *See* notes 2-4, *supra*.

14. Supreme Court Brief for the United States in *Balsys*, p. 34.

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John Demjanjuk – An Appropriate Prosecution Initially Brought, in Part, Under the Wrong Factual Predicate

1. Litigation

Unfortunately for OSI, the greatest media attention the office ever received involved the greatest mistake it ever made: prosecuting John Demjanjuk as "Ivan the Terrible," a sadistic guard who operated the Treblinka gas chamber and took particular delight in mutilating and taunting inmates as they marched from a railroad siding to the gas chambers. Although Demjanjuk was not Ivan the Terrible, he in fact had served as a guard at various camps, including the death camp at Sobibor.

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Demjanjuk entered the United States from Germany under the DPA in 1952. He became a naturalized citizen in 1958 and changed his given name from Ivan to John. In 1975, the New York editor of a Soviet weekly notified the INS that Demjanjuk had trained for guard service in Trawniki, Poland and then served as a guard at the Sobibor death camp, also in Poland.[1] A 1977 article in the Soviet weekly showed a Trawniki identification card with Demjanjuk's picture and a notation of his Sobibor posting. This article quoted Ignat Danilchenko, a fellow guard, who claimed to have served with Demjanjuk at Sobibor as well as at Flossenbürg, a concentration camp in Germany.[2]

While investigating Demjanjuk, INS was also looking into Feodor Fedorenko. INS sent photographs of Demjanjuk, Fedorenko and 15 other Ukrainians suspected of war crimes to Israel. The Israelis prepared an album of pictures; by happenstance, Fedorenko and Demjanjuk were on the same page. (Demjanjuk's picture was from his visa application.) Several Treblinka survivors, interviewed as part of the Fedorenko investigation, picked out the picture of

Demjanjuk and identified him as Ivan the Terrible. So too did eyewitnesses in Germany and the United States.

Based on these eyewitness identifications, the USAO in Cleveland, Ohio filed a denaturalization action in 1977. The complaint charged Demjanjuk with having unlawfully gained admittance and citizenship by concealing his Treblinka service. It did not reference the sobriquet "Ivan the Terrible," but accused Demjanjuk of "cruel, inhumane and bestial treatment of Jewish prisoners and laborers" at Treblinka. And while there was no allegation that he had served at Trawniki, Sobibor or Flossenbürg, the complaint charged him with falsely listing Sobibor on his visa application as a place of residence during the war.

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Coincidentally, at almost the same time that the case was filed, the Justice Department established the SLU. The SLU and the USAO agreed to prosecute the case jointly. There was, however, inevitable tension between the offices. Martin Mendelsohn lobbied for control. He gave several reasons, one of them particularly prescient:

> The Special Litigation Unit, regardless of the degree of its involvement, has been, is, and will be blamed for any shortcomings in the presentation of the evidence and the result in this case.[3]

The Justice Department designated the SLU lead counsel.

During the course of the *Fedorenko* litigation, which came to trial before *Demjanjuk*, the government learned that the Soviets had interviewed several Treblinka witnesses. The SLU sought to get reports of the interviews from the Soviets.[4] The reports, called "protocols," arrived after the *Fedorenko* trial was completed. They came to be known as "the Fedorenko protocols."

By the time anyone read them, the SLU had been replaced by OSI. Since the protocols involved Treblinka, they were reviewed by the attorneys assigned to handle the Demjanjuk

investigation. The protocols included a statement made by Fedorenko while visiting the Soviet Union. He recalled two gas chamber operators, Nikolai and Ivan. Another guard remembered the two as Nikolai and Marchenko; a third recalled only one name, Nikolai Marchenko. No one mentioned the name Demjanjuk.

OSI asked the Soviet Union for additional material, including new statements from Danilchenko, the guard quoted in the Soviet magazine, as well as from the two Treblinka guards still in the Soviet Union. (Fedorenko was by then in the United States.)

The Soviets reinterviewed Danilchenko and one of the guards, the other having been executed for war crimes. Danilchenko reiterated that he knew Demjanjuk from guard service at Sobibor. He identified three photographs of Demjanjuk and claimed that he and Demjanjuk were transferred from Sobibor to Flossenbürg. The Treblinka guard could not identify Demjanjuk's picture. However, he said an Ivan Demedyuk or Demjanjuk had worked as a *cook* at Treblinka. After leaving Treblinka, the guard was told that Demedyuk (or Demjanjuk) had become the gas chamber operator.[5] From his own time there, however, the guard remembered the gas chamber operator as Nikolai Marchenko. These new Soviet interviews came to be known as the "Danilchenko Protocols."

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OSI also sought information from Poland. The Poles had nothing on Demjanjuk, but sent an article which included a partial list of guards who had served at Treblinka. Among them was an Ivan Marchenko; there was no listing for anyone named Demjanjuk.

OSI personnel conducted many interviews. A Treblinka medical aide named Otto Horn and eighteen Treblinka survivors identified Demjanjuk as Ivan the Terrible.

Based on the fact that Demjanjuk had given his mother's maiden name as Marchenko on

his visa application, one of the two original OSI attorneys assigned to the case hypothesized that Marchenko and Demjanjuk were one and the same. The other attorney (George Parker) had a different thought: Demjanjuk seemed ubiquitous. The evidence had him at Sobibor and Treblinka during overlapping periods, even as various witnesses said Ivan rarely left Treblinka. Parker placed little faith in the eyewitness identifications because of the passage of time since the events in question.

In February 1980, Parker wrote a memorandum to the OSI director and his deputy.[6] The memo reviewed the evidence, suggesting that it was so contradictory and inconclusive that proceeding with the case raised ethical concerns.

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The government did not drop the case, but did strive for more precision in the charges. The complaint was amended to add Sobibor and Trawniki to the Treblinka allegations.[7]

The case went to trial in 1981. Neither the Fedorenko protocols, contemporaneous reports of the Otto Horn interview, the list of names from Poland, nor the Danilchenko protocols were given to the defense. The OSI trial attorneys explained that they did not believe there was any significant or exculpatory material in the Fedorenko and Danilchenko protocols nor in the material from Poland. They claimed never to have seen contemporaneous reports of the Horn interview.

The government obtained Demjanjuk's Trawniki card from the Soviets and introduced it into evidence. This was the first Trawniki card ever seen by scholars and it differed from many other known German identity documents in that it did not have a date and place of issuance. Moreover, Demjanjuk's picture, glued to the card, was not properly aligned.

The government's case rested on the testimony from Horn and the survivor witnesses,

which placed Demjanjuk at Treblinka, as well as on the Trawniki card, which established that Demjanjuk was a guard at Sobibor; the card did not mention Treblinka. Horn testified that he had been shown two stacks of pictures, each containing one photograph of Demjanjuk; he had recognized Demjanjuk's picture in each set. A handwriting expert testified that the German signatures on the Trawniki card matched signatures on other documents signed by the same personnel.[8] The alignment of markings on the card and photograph showed that the picture had originally been attached properly.

Demjanjuk's defense was that he had been a prisoner of war when he was compelled to join a German-sponsored anti-Soviet army;[9] the Trawniki card was a forgery; and the witness testimony was based on mistaken identity. He admitted lying on his immigration documents about where he had spent the war years; he said he feared that if he acknowledged the truth, he would be repatriated to the U.S.S.R. and executed for having fought against the Russian army.

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The court ruled for the government and revoked Demjanjuk's citizenship, concluding that he had trained at Trawniki and then, as Ivan the Terrible, operated the gas chamber at Treblinka.[10] The court made no determination as to whether he had also served at Sobibor.

At some point after the denaturalization trial was completed, DAAG Richard went to Israel to discuss potential extradition of OSI defendants. As he recalled it, there was much internal debate over the issue. Some Israelis feared that any extradition would dilute the impact of the Adolf Eichmann trial, which, two decades earlier, had galvanized world attention. Others believed another significant war crimes trial was needed to educate the current generation about the horrors of the Holocaust. The latter view prevailed, and the Israelis chose to make "Ivan the Terrible" their first war crimes extraditee from the United States.

The Department of Justice filed its deportation case before the Israelis formally requested extradition. The thrust of the deportation suit was that Demjanjuk's wartime activity, as proven in the denaturalization trial, showed that he had persecuted civilians on behalf of the Nazis. As such, he was deportable under the Holtzman Amendment.

After the deportation hearing was completed, but before the court ruled, the extradition process was begun. The two cases thereafter were on parallel tracks. The extradition papers alleged that Demjanjuk, as Ivan the Terrible, murdered thousands of Jews and non-Jews while operating the gas chambers at Treblinka. The extradition was before the same district court judge who had issued the denaturalization ruling.

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The deportation decision came down first. Demjanjuk was found deportable and the U.S.S.R. was designated as the country of deportation.[11] While that ruling was on appeal, the district court ordered him extradited to Israel to face murder charges.[12] Demjanjuk spent nine months in custody while he appealed the extradition order. His appeal was unsuccessful and he was flown to Israel in February 1986. There he was charged with crimes against the Jewish people, crimes against humanity, war crimes and crimes against persecuted people. The thrust of the charges concerned Demjanjuk's role as Ivan the Terrible, operator of the gas chambers in the Treblinka death camp. There was mention as well of his having trained at Trawniki and having served briefly at the Sobibor death camp.

The Israeli trial lasted 14 months. Testifying, Demjanjuk denied that he had ever been at Treblinka or Sobibor, despite the fact that he had listed Sobibor on his visa application as a place of residence during the war. He now maintained that after being captured by the Nazis in 1942, he spent 18 months in a prisoner of war camp in Poland. Following that, he had been sent to

Austria to serve in Shandruk's Army, a unit of Ukrainians organized by the Nazis to fight the Soviets; the Nazis then sent him to Germany to join Vlasov's Army, a unit composed primarily of Russians organized for the same purpose. The Israelis countered this with evidence that Shandruk's Army had not yet been organized at the time Demjanjuk claimed he was first a member.

Much of the Israeli evidence of criminality was the same as that presented by the Department of Justice at the naturalization, deportation and extradition hearings.[13] The Israelis also had newly prepared affidavits from two former OSI employees, one an historian and one an investigator, who had interviewed Otto Horn. Each affiant claimed that Horn pointed directly to the picture of Demjanjuk and confidently said "That is him."

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Unbeknownst to OSI or the Israeli prosecutors, the defense also had new material – documents taken from OSI trashbins. The material had been gathered by emigrés opposed to OSI and distributed by them to the Demjanjuk defense team.[14] It included contemporaneous notes taken by the historian and the investigator. Nothing in those notes suggested that Horn said "That is him." On the contrary, he had trouble identifying the defendant. He did so only after he was shown a second stack of photos which also had a picture of Demjanjuk (though there was no repeat of anyone else from the first set.) According to one of the accounts, Demjanjuk's picture, and his alone from the first set, was kept face up in Horn's sight while he viewed the second set. Only after comparing both pictures did Horn choose Demjanjuk's.[15]

Based on this new material, the defense accused OSI of both concealing and falsifying evidence in the U.S. litigation.[16] In 1988, the Israeli court found Demjanjuk, as Ivan the Terrible, guilty of war crimes, crimes against humanity and crimes against the Jewish people.[17]

He was sentenced to death and spent the next five years in isolation on death row while his conviction was on appeal.[18]

By the time the appeal was heard, however, the Soviet Union had collapsed. This opened a treasure trove of new archival material. None of it supported the charge that Demjanjuk was Ivan the Terrible. On the contrary, there was much to indicate that he was not. Most significant was a statement from one Nikolai Shalaev, who said that he and Ivan Marchenko were the two gas chamber operators at Treblinka. Other Treblinka guards reported the same, and they, along with several female inmates, picked Marchenko's picture from a photospread.[19]

Although none of the new evidence linked Demjanjuk to Treblinka, it did tie him to Trawniki, Sobibor, and Flossenbürg, as well as to Majdanek, another Polish camp. The Israelis uncovered in the former Soviet archives German orders posting Demjanjuk to both Sobibor and Flossenbürg; they also found three pertinent Flossenbürg records in West Germany. An OSI historian found in Lithuania a disciplinary report for Demjanjuk from Majdanek. OSI gave the document to the Israelis. Demjanjuk walked a fine line with the new evidence – relying on it to establish that he had *not* been at Treblinka, but questioning its reliability to the extent that it showed service elsewhere in the Nazi camp system.

Even before the Israeli Supreme Court ruled, the defense moved to overturn the U.S. denaturalization and extradition. The defense cited the new evidence as well as alleged improprieties in OSI's handling of the earlier proceedings. Publicity about the new evidence and OSI's alleged misconduct was extensive,[20] and the Justice Department announced that it was reviewing the case.[21] The Sixth Circuit (which had earlier affirmed both Demjanjuk's denaturalization and extradition orders) twice wrote to Assistant Attorney General Robert

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Mueller, seeking the results of the inquiry. Receiving no response to either letter, the Circuit reopened the case, appointing a district court judge to serve as a Special Master.[22] The Circuit wanted his view on whether the courts had granted the extradition request only because the government had misled them in ways that amounted to prosecutorial misconduct or fraud on the court. Although the Justice Department sought to limit the inquiry to its handling of the extradition proceeding, the Special Master ruled that the government's handling of all lawsuits emanating from this case should be considered.[23]

Over a six-month period, the Special Master considered more than 300 exhibits, heard testimony from six attorneys who had worked on the case, and reviewed depositions from nine other participants. He issued a 210-page unpublished report with his findings and conclusions. Although he found that the government had failed to turn over some material that would have been helpful to the defense, he excused this on circumstances, including the attorneys' plausible understanding that the law did not require them to turn over the material and such a lack of continuity in the prosecution team that a given attorney was often not aware of material his colleagues or predecessors had handled. All this was compounded by government attorneys who, despite having committed before the court to be cooperative, instead "played hardball" by narrowly interpreting defense requests for documents, and a defendant whose alibi was so preposterous as to raise the government's suspicion "that he lied about everything."

As the Special Master saw the case, it was:

> [u]ltimately . . . about questions that were never asked, and questions asked that went unanswered. . . .
>
> Government attorneys failed to challenge the evidence they possessed, and this led them to abandon leads which contradicted their interpretation of the

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evidence.

Nonetheless, the Special Master concluded that the prosecution team had acted in good faith.

> They did not intend to violate the Rules or their ethical obligations. They were not reckless; they did not misstate facts or the law as they understood them. . . . Although they were blinded to what we may now perceive to be the truth, they were not wilfully blind.
>
> Moreover, each of the attorneys involved. . . [has] cooperated fully in this investigation. I believe that they testified truthfully, and that they are now, and were then, principled, albeit fallible.

He found no prosecutorial misconduct.

While the Special Master believed that the new evidence from the Soviet Union cleared Demjanjuk of being Ivan the Terrible, there was nothing to refute the U.S. court's original finding that Demjanjuk had served at Trawniki. Since the Trawniki allegations formed an independent basis for Demjanjuk's denaturalization and deportation, the Special Master concluded that those rulings should stand.

The report was issued in June 1993. One month later, the Israeli Supreme Court acquitted Demjanjuk of the charge that he was Ivan the Terrible.[24] The Israelis had no doubt that Demjanjuk had been at Trawniki, Flossenbürg and Sobibor. He had been extradited principally to stand trial for murder as Ivan the Terrible, however, and of this the court was not convinced.

> [D]oubt began to gnaw away at our judicial conscience. . . . By virtue of this gnawing -- whose nature we knew, but not the meaning -- we restrained ourselves from convicting the appellant of the horrors of Treblinka.
>
> . . . . This was the proper course for judges who cannot examine the heart and the mind, but have only what their eyes see and read. The matter is closed -- but not complete. The complete truth is not the prerogative of the human judge.

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The law of extradition is circumscribed. One can only be tried for the charges which formed the basis for the extradition. In Demjanjuk's case, Trawniki, Flossenbürg and Sobibor were part of the extradition case – but only in passing. The thrust of the case had clearly been the charge that he was Treblinka's Ivan the Terrible. While he could be convicted for his activity at other camps, the Israeli court declined to pursue this option. To change the thrust of the extradition at such a late date would necessitate giving Demjanjuk another opportunity to defend himself. Since he had already spent seven years in Israeli custody, the court felt that prolonging the proceedings any further would be unreasonable.

The Israelis were prepared to release Demjanjuk, but it was uncertain where he would go. Having lost his U.S. citizenship, Demjanjuk was stateless and did not have authorization to return to the United States. Indeed, the Department of Justice maintained that he was barred from reentry by the Holtzman Amendment, since he had – at Trawniki, Sobibor, Flossenbürg and Majdanek – assisted in persecution of civilians on behalf of the Nazis.

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Ukraine was willing to have him return to his country of birth, but he wanted to be in the U.S. with his family.[25] He asked the Sixth Circuit to order the Attorney General not to bar his reentry. The court obliged, giving several reasons, including (1) Demjanjuk's need to assist his new counsel with the pending prosecutorial misconduct litigation; and (2) "basic humanitarian considerations embodied in our Constitution" which required the court responsible for sending him to Israel to ensure that he "is not injured or rendered permanently homeless."[26] He returned to the United States amidst much fanfare, accompanied by Congressman James Traficant.[27]

Shortly after he arrived, a three-judge panel from the Sixth Circuit ruled on the prosecutorial misconduct issue. It skeptically accepted the Special Master's finding that no OSI

attorney deliberately withheld from Demjanjuk or the court information he believed he had a duty to disclose, but nevertheless found the government's conduct unacceptable.

> The attitude of the OSI attorneys toward disclosing information to Demjanjuk's counsel was not consistent with the government's obligation to work for justice rather than for a result that favors its attorneys' preconceived ideas of what the outcome of legal proceedings should be.[28]

The Court held that the government should have given the defense the Fedorenko Protocols, the list of Treblinka guards from the Polish government and the information about the Horn photospread. Because the government had "recklessly disregarded" its duty to do so, the court concluded that OSI had perpetrated a fraud on the court, without which Demjanjuk would not have been denaturalized, deported or extradited.

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Given the government's conduct, the Circuit rescinded the extradition order. The court made no determination about any of the other charges against Demjanjuk, including whether he had served at Trawniki, Sobibor or any other camp.

The Circuit also vastly broadened the government's obligation to share exculpatory information with the defense. Although the government had long been required to provide the defense with all potentially exculpatory material in *criminal* cases, that rule had never been extended to civil lawsuits. In *Demjanjuk*, the Sixth Circuit applied the rule to denaturalization and extradition proceedings if those proceedings are predicated on the defendant's involvement in criminal activity. Demjanjuk, having been charged as a mass murderer, fit within that category.[29] The Supreme Court denied the government's request that it review the case.[30]

Following the Circuit's ruling, the Justice Department asked the district court to reopen the denaturalization case. Given the "extraordinary public scrutiny" attached to the case, the

government believed that giving Demjanjuk "a final opportunity in an American court to refute the evidence of his Nazi involvement will bolster confidence in the denaturalization proceedings."[31] The judge who had ruled in the denaturalization (and extradition) matters had died, and the case was assigned to a new judge.

Rather than reopening the matter, the district court vacated the earlier denaturalization order, based on a new determination that OSI had acted with "reckless disregard" for its duty. The court cited OSI's failure to disclose the memorandum of an interview with a Trawniki clerk who said he had "no useful information" about Demjanjuk. (This memorandum was independent of those discussed earlier.) According to the court, the clerk might have had information useful to the defense about the authenticity of the Trawniki card. The court restored Demjanjuk's U.S. citizenship, but left open the possibility that a new denaturalization case could be filed.

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By this time, the matter had been in litigation for over two decades. The parties spent several months in settlement negotiations, ultimately to no avail. In April 1999, the United States filed a new complaint seeking denaturalization based on Demjanjuk's having assisted in persecution by having served as a Trawniki-trained guard at Sobibor, Majdanek and Flossenbürg, his having been a member of, or participant in, a movement hostile to the United States, and his having wilfully misrepresented material facts about his wartime activities.[32]

The second denaturalization trial differed markedly from the first. The earlier case had relied almost entirely on eyewitness testimony; the only document offered into evidence by the government was Demjanjuk's Trawniki pass. This time, the government presented no eyewitness testimony but relied extensively on wartime documents which had become available since the first trial. This included over 40 Trawniki cards which, like Demjanjuk's, had no date

or place of issuance. Their similarity to Demjanjuk's card was used to establish the authenticity of the Demanjuk document.

Rather than claiming that the documents relating to him were forgeries, Demjanjuk argued that they either referenced a cousin of his, who, coincidently, had the same name, or else that they must have been used by someone in a case of identity theft. The court rejected these defenses and, once again, stripped Demjanjuk of his U.S. citizenship.[33] The ruling was affirmed on appeal and the Supreme Court denied review.[34] OSI filed a deportation action in December 2004. Six months later, the court found him deportable under the Holtzman Amendment because his wartime service – at Trawniki, Majdanek, Flossenbürg and Sobibor – involved assistance in persecution based on race, religion or national origin.

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The government requested that Demjanjuk be sent to Ukraine or, if that country refused to accept him, to Poland or Germany. Demjanjuk sought to preempt a decision to remove him to Ukraine by filing an application with the immigration judge for relief under the Convention Against Torture (CAT). He contended that if sent to Ukraine, he would be likely be prosecuted as Ivan the Terrible and tortured. To support his claim, he submitted reports issued by the State department and Amnesty International asserting that torture is common in Ukrainian prisons. The immigration court rejected Demjanjuk's argument and ordered him deported to Germany, Poland or Ukraine in December 2005.[35] That ruling was affirmed by the Bureau of Immigration Appeals in December 2006 and by the Sixth Circuit in January 2008.[36] In June 2008, Equipo Kizkor, a Brussels-based human rights group asked a Spanish court to indict Demjanjuk and seek his extradition to Sprain for crimes against humanity in the persecution of Spanish nationals at Flossenbürg.[37]

2. Impact

It is hard to overstate the impact the Demjanjuk litigation has had on OSI. The case is still in litigation as of this writing even though it was filed before the office was founded. It has had enormous consequences for many of the persons involved, it resulted in a series of ethics investigations, and it changed OSI's operating procedures in a variety of ways.

(a) Procedural

(1) At the time Demjanjuk was tried, there was no one historian assigned overall responsibility for a given case; various historians worked on pieces of the litigation. The debacle reinforced for OSI the value of the holistic approach to cases that had begun in the 80s.[38]

(2) Although protocol even before the garbage raids called for shredding or burning sensitive material, much more care was placed on this thereafter.

(3) Before *Demjanjuk*, OSI generally turned over to the defense only those documents which had been requested as part of the discovery process.[39] The law in civil cases and extradition matters called for no more. OSI began to provide potentially exculpatory material, whether or not there had been a request, in August 1992.[40] Determining if something is potentially exculpatory is sometimes difficult to determine, however. Therefore, this policy soon evolved into one in which all material arguably *relevant* is provided.

The amount of material is staggering. In the typical case involving a Trawniki-trained defendant, OSI produces 11 CD roms with generic historical material, plus hard copies of documents relevant to the particular case. This gives the defense between 100,000 and 150,000 pages of documents.

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The new policy has had unintended consequences. The enormous resource drain involved in assembling this material (by lawyers, historians and paralegals) cuts into the office's ability to investigate new cases. It also prolongs litigation. The defense, understandably, needs a significant amount of time to go through the material. (In the second Demjanjuk trial, the court at first granted a year. Due to issues that arose over the material, this was extended some months beyond.) Given the age of OSI defendants, this is a matter of much moment.

(4) The ruling ended reliance on victim eyewitnesses for identification. The *Walus* prosecution had first taught that lesson.[41] Perhaps because that case had not been prosecuted by OSI, the lesson was not fully absorbed. Other cases presented witness problems, but until *Demjanjuk*, none had caused OSI to lose in court.[42] Survivors are now used to corroborate documentary evidence, to make vivid the conditions in the camps, and to serve as a counterweight to the grandfatherly figure in the defendant's seat. They are asked to establish identity only in the rare case where the identifier knows the defendant from pre-war days (*e.g.*, the town policeman who later rounded up Jews).

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(5) There has never been another extradition of an OSI defendant from the United States.[43] Whether there would have been, even without *Demjanjuk*, is unclear. Israel had suggested to DAAG Richard that Demjanjuk would be the first and others might follow. However, there has not been another OSI defendant since with the degree of culpability that Ivan the Terrible possessed. The typical OSI defendant is a camp guard or member of an auxiliary police unit. Israel has never been interested in extradition of persons at that level of responsibility.

(b) Ethical Investigations

The local Bar reviewed the conduct of both Allan Ryan and Norman Moscowitz. Ryan had been Director of OSI; Moskowitz was an attorney assigned to the case. Each was cleared of any wrongdoing. There were also five internal DOJ investigations of matters emanating from the Demjanjuk litigation.

(1) In 1987, at OSI's request, the Office of Professional Responsibility (OPR) opened an investigation into how the defense and media came into possession of OSI material. OSI's suspicions were first aroused when a Chicago magazine ran a story on the case containing some classified and sensitive documents. In addition, FOIA requests by the defense referenced internal OSI documents which had not been provided to defense counsel.

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OPR determined that between June 1985 and May 1987, two members of the Latvian emigré community arranged for OSI's trash on the street to be delivered to them each weekday. They then sorted through it and directed it to persons opposed to OSI, including people being investigated and prosecuted and their attorneys. The Department concluded that this was a "wholly legal 'trash cover'" and that OSI personnel had "negligently discarded" sensitive and classified documents. Material retrieved from the garbage impacted not only the *Demjanjuk* litigation; other subjects learned that OSI was investigating them.

Apart from information retrieved from the trash, there was apparently an entirely separate source of information uncovered by OPR. A former OSI employee admitted that he had identified to persons outside OSI the names of five subjects under investigation; he also admitting releasing some documents from OSI files. OPR was unable to corroborate this information, however, since the subjects notified were unable or unwilling to cooperate. The former OSI employee, working for another government agency by the time of the OPR

investigation, left government service rather than have the government administratively pursue the matter.

(2) An investigation into alleged misconduct by OSI was undertaken at the request of individuals associated with the defense team. They claimed that OSI attorneys and investigators had knowingly submitted false affidavits and testimony relating to Horn in both the U.S. and Israeli proceedings. In addition, they alleged that OSI had concealed the names of guards and survivors who might have exculpatory evidence and concealed notes and reports of interviews. In July 1991, OPR concluded that the allegations were unsubstantiated.

(3) Reacting to media reports suggesting misconduct by the government, AAG Robert Mueller asked OPR to investigate whether OSI improperly failed to produce the Fedorenko protocols to the defense. Based largely on the Special Master's report, as well as some additional inquiry of its own, OPR concluded in the summer of 1993 (before the Sixth Circuit issued its ruling), that there had been no prosecutorial misconduct.

(4) Chief Judge Gilbert Merritt of the Sixth Circuit asked the government to investigate former OSI Director Ryan. This request was based on information which came to light after the Sixth Circuit ruling.

While the Supreme Court was considering the government's request that it review the Sixth Circuit's order, a member of the Solicitor General's office recalled having a conversation with Ryan shortly after Ryan joined OSI. According to this colleague, Ryan had mentioned a case in which the government knew that a defendant had been a Nazi guard but might have conflicting evidence as to where he had been stationed. The colleague recalled Ryan saying that he did not believe he had an obligation to bring this conflict to the attention of the defense

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because the Supreme Court ruling requiring disclosure of potentially exculpatory information in criminal proceedings would not apply to this civil proceeding. This recollection differed markedly from Ryan's testimony before the Special Master (that he applied a full disclosure doctrine in OSI cases.) The government advised defense counsel of the discrepancy, telling him also that Ryan denied ever saying or implying that he would withhold such material information. At the request of defense counsel, the government also notified the Supreme Court of the new information.[44] It was the government's position that whatever, if anything, had transpired in conversation between these two colleagues, had no bearing on the current status of the case – which concerned only the standard to be applied in determining fraud on the court.

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Judge Merritt, who had been a member of the panel which issued the Circuit ruling, though not the author of the opinion, wrote to the Attorney General about this latest development. He suggested that the allegations, if true, indicated that Ryan "as Director of the Office of Special Investigations" intentionally committed outrageous prosecutorial misconduct. Moreover, he urged the Department to consider whether Ryan had committed perjury in his testimony before the Special Master. Judge Merritt went on to say that it appeared that outside pressure on the Department from "Jewish special interest groups" had "obviously influenced Ryan and the OSI."[45] The judge's allegations were referred to OPR (though Ryan was no longer with the Department of Justice.) OPR found no merit to the charges.

(5) OPR considered the district court's finding of fraud on the court based on OSI's not turning over the interview report from a Trawniki clerk. After preliminarily determining that the court's conclusion was not supported by the facts, OPR declined to do any further investigation. OPR noted that the attorneys who had handled the case were no longer

with the Department. (While this was also true of Ryan, the allegations against him were in a well publicized published order, prompting the Department to respond. This allegation was unpublished and had received no publicity; the Department therefore felt no need to pursue the matter.)

(c) Intangible

It was the second loss for OSI in the Sixth Circuit.[46] This increased the Department's hesitancy to seek review from that Circuit in cases where the district court ruled against OSI.[47] Much more importantly, however, it cast a pall on the office. It was a loss with international repercussions. Based partly on evidence unavailable to OSI, the Israelis had concluded he was not Ivan the Terrible. That ruling received worldwide publicity. That the Israelis also concluded he had served at Trawniki, Sobibor and Flossenbürg did not get as much attention. The impression therefore remained that OSI had erred badly. The subsequent Sixth Circuit ruling, finding that the office had committed a fraud on the court, reinforced that message. And although Demjanjuk was again denaturalized and ordered deported, this did not receive the same media attention as had the earlier rulings. As a result, many members of the public still know of OSI only as the mistaken prosecutor of Ivan the Terrible.[48]

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2 1. Several months later, the editor published the allegations. "At Different Poles," by Michael Hanusiak, *News from Ukraine*, Mar. 26, 1976.

2. "Punishment Will Come," by O. Matviychuk, *News from Ukraine*, Sept. 1977.

3. Oct. 25, 1978 memorandum from Mendelsohn to INS General Counsel Crosland.

4. *Demjanjuk v. Petrovsky*, Report of the Special Master, June 29, 1993. Unless otherwise indicated, the chronology of events in this chapter comes from the Special Master's unpublished report.

5. The Soviets provided a translation of the statement which said that Demjanjuk had become the driver of a gas chamber van. However, when OSI reviewed the original document, they realized that the translation was inaccurate.

6. The memo is reprinted in *Demjanjuk v. Petrovsky*, 10 F.3d 338, 369-71 (6th Cir. 1993).

7. Whether the amendment was the result of the memorandum is unclear. Neither the Director nor his Deputy recalled seeing the memorandum and no copy was found in OSI's files. Shortly after the memorandum was written, however, there had been a meeting to discuss the case.

8. The expert could not establish with certainty that the signature on the card was that of the defendant, although he testified that there were strong indications that this was the case. He noted that the spacing, height ratios and baseline habits matched with a current exemplar from the defendant. However, since approximately 35 years had passed since a poorly educated person had signed his name using a different alphabet than he was now accustomed to using, a positive identification was difficult to establish.

9. The government acknowledged that Demjanjuk had been a German prisoner. However, the government's evidence established that many Soviet POWs captured on the Eastern front were sent to Trawniki to be trained for guard service in Nazi extermination and concentration camps.

10. *U.S. v. Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio 1981), *aff'd per curiam*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982).

11. *Matter of Demjanjuk*, A08 237 417 (Imm. Ct., Cleveland, Ohio 1984), *aff'd, In re Demjanjuk*, (BIA 1985), *aff'd per curiam*, 767 F.2d 922 (6th Cir.) (unpub'd), *cert. denied*, 474 U.S. 1034 (1985).

12. *In the Matter of the Extradition of John Demjanjuk*, 612 F. Supp. 544 (N.D. Ohio 1985).

13. The issue of obtaining evidence from the Soviet Union presented problems for Israel since the two countries did not have diplomatic relations. OSI had already returned the Trawniki card,

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so essential to the case, to the U.S.S.R. The fact that evidence had already been credited by United States courts was not sufficient to establish its authenticity and credibility under Israeli criminal law. Nov. 18, 1986 memo to DAAG Richard from Sher re "Linnas – Summary and Evidence of Wartime Activities."

The problem was solved by using Armand Hammer, a Jewish businessman and philanthropist in the U.S., as an intermediary. Hammer had worked with the Soviets since the Russian revolution and he arranged for them to loan the Trawniki card to Israel.

14. *See* discussion at pp. 165-166 on OPR's investigation of the matter.

15. *Demjanjuk v. State of Israel* (Crim. App. 347/88, 1993), pp. 298-302.

The investigator and historian affidavits were not the only ones prepared for the Israeli trial about which the defense raised doubts based on contradictory information found in the garbage. Another OSI investigator prepared an affidavit saying he had presented a photospread seven years earlier to a Treblinka survivor. Discarded drafts of the affidavit suggested that the investigator may not have been the person displaying the photos. Testimony that the witness could not speak English cast further doubt on whether the OSI investigator could have conducted the interview. *Id.* at 284, 292.

There were problems with the defense case as well. The court suggested that someone (apparently, though not provably, with the defense team) had tricked Otto Horn into signing a new affidavit contradicting some of his earlier statements. *Id.* at 298, 305-06. The court also questioned whether the defense had tried to influence the testimony of a Treblinka survivor. *Id.* at 306, 433.

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16. "Lawyer Claims New Evidence Found in Demjanjuk Case," by Allyn Fisher, *AP*, Sept. 5, 1989.

17. *State of Israel v. Demjanjuk*, Crim. Case 373/86 (D. Ct. Jerusalem 1988).

18. Demjanjuk had also spent the two years preceding trial in Israeli custody. His appeal was postponed several times. The first postponement dramatized how emotionally charged the case was for all concerned. A week before the appellate argument, one of Demjanjuk's counsel committed suicide. At his funeral, a 70-year old Holocaust survivor threw acid in the face of another Demjanjuk attorney. The acid thrower was sentenced to three years' custody.

19. The defense had other evidence as well. This included statements from a Polish farmer and his wife who claimed that the Treblinka gas chamber operator caroused in their town; they knew him as Ivan Marchenko. Their story was featured on the CBS Newsmagazine *60 Minutes*, Feb. 25, 1990.

20. *See e.g.*, "How Terrible is Ivan?" by F. Dannen, *Vanity Fair*, June 1992; "U.S.-Israel Plot Charged in 'Ivan' Holocaust Case," by Daniel Williams, *The Los Angeles Times*, Dec. 24, 1991; "Demjanjuk's Lawyer Cites U.S., Israel," by Jackson Diehl, *The Washington Post*, Dec. 24, 1991; "Israel to Review Demjanjuk Verdict," by Ethan Bronner, *The Boston Globe*, Dec. 20,

1991; "War Crimes Trial Awaits New Data," by Clyde Haberman, *The New York Times*, Dec. 18, 1991; "Ivan the Terrible: A Case of Mistaken Identity," A&E television, Apr. 7, 1991.

21. "War Crimes Trial Awaits New Data," *supra*, n. 20.

22. The letters were dated Jan. 7, 1992 and May 4, 1992 and were released to the press by the court. "Justice Dept. Probing U.S. Nazi Hunters," by Ronald Ostrow, *The Los Angeles Times*, June 12, 1992. AAG Mueller received conflicting advice on how to respond to the letters from his two deputies, Robert Bucknam and Mark Richard. DAAG Bucknam urged that the government confess error because so many mistakes had been made. DAAG Richard argued that the government should persevere since there was no doubt that Demjanjuk had served at other camps, including Sobibor, even if not at Treblinka. Discussion with DAAG Richard, Sept. 30, 2002.

23. In addition to the denaturalization, deportation and extradition litigation, there had been two post-denaturalization actions alleging fraud on the court based on the withholding of evidence. The district court had found neither of the claims convincing. 518 F. Supp. at 1384 *et seq.* There was also a series of Freedom of Information Act (FOIA) requests from Demjanjuk's family and defense team, and at least two FOIA requests from Rep. James Traficant (D. Ohio). The family succeeded in getting the Danilchenko protocols; Rep. Traficant's request yielded, among other things, the Fedorenko protocols.

24. *Demjanjuk v. State of Israel*, Crim. App. 347/88 (Sup. Ct. 1993).

25. Ukraine issued a visa and reportedly indicated he would be granted asylum. "U.S. or Ukraine? Demjanjuk Family Knocks on 2 Doors," by Michele Lesie, *The Cleveland Plain Dealer*, July 31, 1993.

26. The Justice Department sought, unsuccessfully, to have the Circuit reconsider this unpublished ruling. Not only did the Criminal Division believe that reentry violated the Holtzman Amendment, but the Department's Office for International Affairs was concerned that the ruling might lead to other extradited defendants returning if they were acquitted after trial overseas.

27. Traficant was not Demjanjuk's elected representative. Nevertheless, he took a special interest in the case. For additional discussion of Congressman Traficant and OSI, *see* pp. 336, 340, n. 19, 543.

28. *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993). The Circuit particularly chastised former OSI Deputy Director, and then Director, Allan Ryan, at one point taking some of his testimony "with a grain of salt," at another point referring to his "professed" policy of turning over exculpatory information. Indeed, the court went so far as to suggest that Ryan had been coopted by Jewish interests because the ADL had sponsored a lecture trip by him to Israel. (In fact, Ryan had left government service three years before the trip. Although Ryan and the ADL later requested that the court remove this scurrilous accusation, it declined to do so.) The court

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was equally skeptical that trial attorney Norman Moscowitz had not read the contemporaneous accounts of the Horn photo identification, which would have alerted him to the fact that Horn's trial testimony conflicted with those reports.

29. In making that ruling, the Circuit noted that former OSI Director Ryan testified before the Special Master that OSI policy was to turn over exculpatory information even if it was not requested in discovery. 10 F.3d at 349. Ryan acknowledged to the Special Master, however, that he was not certain if, when or how he communicated that policy to the office. All other office members who appeared before the Special Master denied knowing of any such policy. Special Master Report, p. 180.

In 1980, just four months after Ryan joined the office, an OSI attorney recommended turning over an arguably exculpatory document in the *Trifa* case. The attorney noted that the office had already concluded that it did not have to turn the document over pursuant to a request for exculpatory material; he was urging reconsideration of that decision. This suggests that exculpatory material was not routinely turned over at that time or at least that the definition of exculpatory was not expansive. Apr. 25, 1980 memo from Eugene Thirolf to Director Ryan and Deputy Directors Neal Sher and Arthur Sinai re "Oct. 9, 1979 report entitled 'Viorel Trifa, a/k/a Bishop Trifa, Valerian, Foreign Counter-Intelligence - Romania.'" OSI Director Rosenbaum lends credence to that view. He describes the early OSI era as one in which the office "tended to construe requests very narrowly." "Nazi Hunter Battles Time to Ferret Out Hitler's Foot Soldiers," by Stephen Koff, *Newhouse News*, Nov. 13, 2002.

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30. One of the reasons the Solicitor General decided to seek Supreme Court review was to vindicate the OSI attorneys who he felt had been "unfairly harm[ed]." May 20, 1994 Memorandum to the Attorney General from the Solicitor General re "Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993)."

31. Government's Brief in Support of Motion to Reopen Judgment.

32. Demjanjuk filed a $5 million counterclaim, alleging that he had been a victim of torture for which the U.S. was responsible. In support of this claim he contended, among other things, that the government had falsely claimed he was a mass murderer, mocked his refusal to confess, and caused him to be tried abroad in a "circus atmosphere" where he had been placed in solitary confinement and sentenced to death. The district court dismissed the counterclaim on jurisdictional grounds.

33. *U.S. v. Demjanjuk*, 2002 WL 544622 (N.D. Ohio 2002) and *U.S. v. Demjanjuk*, 2002 WL 544623 (N.D. Ohio 2002) (supplemental opinion).

34. *U.S. v. Demjanjuk*, 367 F.3d 623 (6th Cir.), *cert. denied*, 125 S.Ct. 429 (2004).

35. *Matter of Demjanjuk*, A08 237 417 (Imm. Ct., Cleveland, Ohio 2005).

36. **GET CITES**

37. "Alleged Nazis Face Charges in Spanish Court," by Daniel Woolls, *AP*, June 24, 2008.

38. *See* pp. 22-23.

39. *See* n. 29 *supra* re Ryan's testimony to the contrary.

40. Aug. 3, 1992 memorandum from OSI Director Neal Sher to OSI attorneys.

41. *See* pp. 89-91.

42. In *Maikovskis*, the Israeli witnesses had the defendant in various places at the same time. The district court was so hostile to this portion of the case that the government dropped several counts and focused only on those for which it had documentary proof. In *Trifa*, victims held the defendant accountable for numerous beatings and killings in Romania. OSI ultimately pursued it as a propaganda case which was not based on this testimony.

43. Latvia had just begun the process of seeking extradition of Konrad Kalejs in 2001 when Kalejs died. Although Kalejs had been an OSI defendant, the extradition would have been from Australia, the country to which OSI had him deported. *See* pp. 466-475.

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44. *Rison v. Demjanjuk*, No. 93-1875, Supplemental Brief for the Petitioners, Oct. Term, 1994. *See also*, "Demjanjuk Case has a New Twist," by Joan Biskupic, *The Washington Post*, Sept. 27, 1994.

45. Oct. 20, 1994 letter to Attorney General Reno re "Conduct of Allan A. Ryan in connection with the various cases brought by him to denaturalize, deport and extradite John Demjanjuk."

46. The other was *U.S. v. Petkiewytch*, 945 F.2d 871 (6th Cir. 1981), discussed at pp. 134-140.

47. *See* discussion of *U.S. v. Lindert*, 907 F. Supp. 1114 (N.D. Ohio 1995) at pp. 64-70.

48. As noted on pp. 543-544, Patrick Buchanan was arguably the most influential of OSI's critics. He wrote more pieces about the Demjanjuk prosecution than any other OSI case. *See e.g.*, "Nazi hunting – with guidance from the KGB," *The Washington Times*, Dec. 1, 1983; "Response to an OSI Nazi Hunter," *The Washington Times*, Feb. 22, 1984; "Nazi Butcher or Mistaken Identity?" *The Washington Post*, Sept. 28, 1986; "Acquit Demjanjuk: The Case is Weak," *The New York Times*, Mar. 31, 1987; "Deadly, Dubious I.D. Card," *Washington Times*, Mar. 19, 1990.

Johann Breyer – An American Persecutor

Several factors distinguish the prosecution of Johann Breyer from other OSI cases: (1) it raised unusual equal protection and gender discrimination issues; (2) it involved expatriation (renunciation of citizenship) as well as denaturalization; and (3) the defendant sued the media over its coverage of the case. The convergence of these factors made for arguably the most arcane and convoluted litigation in OSI's history.

Breyer's mother was born in the United States, emigrated to Czechoslovakia as a teenager, and married a Czech national. She never returned to the U.S. Both her children were born in Czechoslovakia.

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Under the law at the time of Breyer's birth, foreign-born offspring of U.S. citizen fathers were U.S. citizens at birth; foreign-born offspring of U.S. citizen mothers were not.[1] The law was amended in 1934 to be gender neutral: any child born abroad to a U.S. citizen father *or* mother obtained U.S. citizenship at birth.[2] The amendment was not retroactive, however. It therefore did not confer citizenship on Breyer, who had been born in 1925.

In 1939, the area in which Breyer lived became the separate state of Slovakia. The country allied with Nazi Germany during the war. At age 17, Breyer joined the SS and was assigned to the Totenkopf (Death's Head) battalion, an organization whose members served as guards at Nazi concentration and death camps. Breyer served at Buchenwald and then Auschwitz.[3] Although he knew that prisoners at these camps were killed, tortured and used for gruesome experiments, he denied any personal role in the brutality. He acknowledged only that he had served as an armed guard and escorted prisoners to and from their work sites.[4]

Breyer emigrated to the United States in 1952, entering under the DPA. His application

form stated that he had been with the German military, but made no mention of his membership in the SS or his service as a camp guard. In 1957, Breyer became a naturalized U.S. citizen.

OSI learned of Breyer through routine case research and development; he was listed on a document as an Auschwitz guard and a cross-check with INS showed that he had emigrated to the United States. In 1992, the government filed a denaturalization action. The complaint alleged that Breyer had been ineligible to enter under the DPA because he had assisted in persecution and, as a member of the Death's Head battalion, been part of a movement hostile to the U.S.[5]

Breyer did not contest these points. Instead, he challenged the government's right to denaturalize him, asserting that in retrospect he should be deemed to have entered the country lawfully as a U.S. citizen since his mother had been born in the United States. He argued that the statute granting derivative citizenship only patrilineally was unconstitutional because it denied to women a right granted to men (*i.e.*, the right to pass U.S. citizenship to one's child). If the statute had been applied in a gender-neutral manner, Breyer would have been a U.S. citizen at birth and free to enter the country at any time. His eligibility to enter under the DPA was therefore irrelevant. So too was the validity of his 1957 naturalization since he was already a U.S. citizen.

There is an administrative procedure for establishing derivative citizenship. One must file an application with INS for a certificate of citizenship and, if it is denied, file suit in district court. Before the court ruled in his denaturalization case, Breyer began this administrative quest for citizenship. As a result, the case for years preceded on parallel tracks: OSI's lawsuits (denaturalization and deportation) on one track, and Breyer's effort to get a declaration of citizenship on the other.

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In the denaturalization lawsuit, the district court found merit in both OSI's arguments and Breyer's defense. The court agreed that Breyer had been ineligible to enter under the DPA and therefore that the citizenship he obtained in 1957 was invalid. However, it also ruled that the statute denying Breyer citizenship at birth was unconstitutional. The court concluded that if his mother had indeed been born in the United States – a contention which OSI disputed – then Breyer's citizenship should have been conferred at birth. The court ordered a hearing to resolve the issue of Katrina Breyer's birthplace.[6]

There was no contemporaneous record of the birth. After reviewing conflicting secondary evidence, the court concluded that Breyer's mother had been born in Pennsylvania. That did not resolve the question of Breyer's citizenship, however. His mother's citizenship could only pass to Breyer if his mother was a U.S. citizen when Breyer was born. Had she, perhaps, done anything to renounce her citizenship? And even if not, had Breyer done anything to expatriate himself before he came to the United States? (U.S. law lists a series of acts which, if done voluntarily with the specific intent of relinquishing citizenship, will have the desired effect.)

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Rather than resolving these questions, the court opted to defer to the INS, which still had before it Breyer's request for a certificate of citizenship. The district court therefore abstained from deciding the ultimate issue – whether Breyer was a U.S. citizen by birth – until the administrative process was complete.[7]

Breyer appealed the district court rulings. The Third Circuit affirmed the denaturalization but also held that the district court should not have considered the derivative citizenship claim at all. As the Circuit saw it, derivative citizenship had nothing to do with the denaturalization

litigation. The denaturalization concerned only the validity of the citizenship granted to Breyer in 1957. The sole way for Breyer to establish derivative citizenship, according to the appellate court, was through the INS (where his application for a certificate of citizenship was still pending). If the INS granted his application, his 1957 certificate of naturalization would be extraneous and the court's revocation of it would have no effect on his standing as a U.S. citizen. If the INS denied his request for a certificate, Breyer could ask the district court to consider the matter of derivative citizenship.[8]

Three weeks before this ruling (but not referred to in it), Congress again amended the derivative citizenship law by making its earlier gender-neutral provision retroactive.[9] Under the amendment, anyone born overseas to a U.S. citizen mother acquired U.S. citizenship at birth, even if the child was born before 1934. At the behest of the Department of Justice, however, Congress placed a singular exception into the statute.[10] The exception denied retroactive application of the law to anyone who would not have been eligible to enter the United States under the DPA or the RRA.[11] The amendment was designed, in part, to avoid jeopardizing pending Nazi expatriation cases.[12] Since the district court had already determined that Breyer should not have been admitted under the DPA (because he had assisted in persecution and been a member of a "movement hostile") he came squarely within the exemption. As such, he still did not qualify for derivative citizenship.

The INS cited the new statute in finally denying Breyer's request for a certificate of citizenship.[13] Shortly thereafter, OSI filed its deportation case. Before the deportation was resolved, Breyer appealed the INS ruling. As procedurally required, he did so by filing a lawsuit in district court seeking a determination that he was entitled to citizenship.

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This new case was handled by the Justice Department's Office of Immigration Litigation (OIL) rather than by OSI since it was not directly part of OSI's denaturalization or deportation cases. However, OIL consulted OSI throughout.

Breyer's suit challenged the retroactivity amendment on several grounds. His key contention was that it preserved some gender discrimination and therefore violated the equal protection clause of the Constitution.[14] Gender discrimination remained because a group of people (those inadmissible under the DPA or RRA) were denied derivative citizenship only if the citizenship came from their mothers; the same was not true if the citizenship passed through their fathers. Breyer also argued that the new law was a bill of attainder – legislation written to punish him alone – and that it was unconstitutional on that ground as well. Moreover, he maintained that it had been improper for DOJ to lobby for passage of the legislation. And finally, Breyer accused the Attorney General, the Department of Justice, and various unnamed officials within the Department of conspiring to have INS delay acting on his administrative request for a certificate of citizenship until the new statute – with its exemption targeting him – had passed.[15]

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The court rejected all his arguments. While it acknowledged that the statute retained some disparate treatment, it concluded that remedial legislation need not "strike at all evils at the same time or in the same way."[16] And since the prohibition on bills of attainder applies only to laws that target individuals for "punishment," the court found no constitutional impediment. Case law has traditionally held that neither the loss of naturalized citizenship nor deportation constitutes punishment.[17] The court also found nothing improper with the Department's role in lobbying for the legislation.

> I find no provision of law that prevents DOJ or its employees from advancing the agenda of the executive branch by seeking a change in proposed legislation, even if they intend such a change to adversely affect people already engaged in litigation or the administrative process. Even if such conduct would be egregiously abusive if it were directed toward a citizen – and I do not so conclude – nevertheless, governmental conduct that may be considered "shocking" when it serves to deprive the life, liberty or property of a citizen may not be unconstitutional when directed at an alien.[18]

Without determining whether INS had delayed acting on Breyer's claim, the court noted that the only remedy available for undue delay would be to vacate INS' earlier decision and to have the agency reconsider the matter. Given that the law had changed to Breyer's detriment in the interim, he would be unable to advance his cause in any event. Accordingly, the court denied Breyer's claim of derivative citizenship.[19]

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In addition to losing his derivative citizenship claim, Breyer also lost the deportation case. An immigration court found Breyer deportable and ordered him sent to Slovakia or, if that country were unwilling to accept him, to Germany.[20]

He appealed both losses. The Third Circuit adopted at least part of Breyer's argument concerning derivative citizenship. It agreed that the retroactivity amendment did not fully eradicate the discriminatory effects of the prior immigration law and that the disparity was "arbitrary and irrational."

> The foreign-born children of American fathers will acquire citizenship at birth and lose it only by intentionally committed expatriating acts. The foreign-born children of American citizen mothers will be prevented from obtaining American citizenship if they, with or without intent, have committed similar expatriating acts. The subjection of American women to this additional burden for the transmission of citizenship to their foreign-born offspring is in fundamental tension with the principle of equal protection.[21]

To remedy the problem, the court held that Breyer *was* entitled to American citizenship

relating back to the time of his birth. Once again, however, outstanding issues remained. The Circuit noted that Breyer's wartime acts might have amounted to a *voluntary* renunciation of that citizenship. This was so notwithstanding the fact that Breyer was not a citizen during World War II and could not have believed he was such because the law then denied him that right. The Circuit reasoned that a voluntary oath of allegiance to a nation at war with the U.S., and to the Death's Head battalion, was fundamentally incompatible with the principles of American democracy; indeed, it would amount to an "unequivocal renunciation of American citizenship whether or not the putative citizen is then aware that he has a right to American citizenship." The court sent the case back to the district court, yet again, for a determination of the circumstances surrounding Breyer's membership in the Death's Head battalion.[22]

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The Justice Department considered seeking further review. Technically, the government had lost. The Third Circuit ruling meant that Breyer was not statutorily barred from remaining in the United States. His fate would depend on whether his death camp duties had been involuntary, a factual determination as to which the outcome was as yet uncertain. Moreover, the government believed that the Circuit had applied the wrong standard of review when considering the constitutionality of the statute.

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In the end, the Solicitor General did not authorize additional review. Many factors were considered. Among them, that: (1) the arcane statutes in this case did not provide the best opportunity to argue the legal principles involved; (2) the retroactivity statute had been poorly worded in any event and therefore would be hard to

defend;[23] and (3) the court's holding had no foreseeable impact on anyone other than Breyer, and as to him, the government might still succeed once the district court heard all the evidence.[24]

OSI handled the expatriation matter in district court. There were legal as well as factual issues to resolve in making a determination as to whether Breyer's service with the Death's Head battalion had been voluntary. Under U.S. law at the time Breyer entered the SS, loyalty oaths and military service to a foreign power were not expatriating if the individual was a minor. However, by the time Breyer emigrated, the law had changed such that voluntary actions by a minor *could* be expatriating. The question of which statute applied was therefore crucial. After hearing the circumstances of Breyer's joining the SS, the court determined that as a matter of *fact*, Breyer had acted on his own volition. However, it agreed with Breyer that the law at the time he joined the SS should control. Under that law, everything he did before his 18th birthday was, as a matter of *law*, not expatriating.

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What happened after he turned 18 was another matter. Breyer's military service ended at the age of nineteen. Had he done anything *after* his eighteenth birthday which would amount to a voluntary act of expatriation? The burden lay with Breyer to prove that his actions after age 18 were involuntary.[25]

Before a hearing was held on that issue, the government notified Breyer that it intended to argue that his mother had expatriated herself before Breyer was born.[26] If the government prevailed in this argument, Breyer's citizenship arguments would be precluded. As a non-citizen, Breyer's mother would not have been able to convey citizenship to her child. However, the court refused to allow the government to raise the issue at this late date in the litigation.[27]

The stage was finally set for a determination of what was now the ultimate issue: had

Breyer done anything after his eighteenth birthday to renounce the U.S. citizenship that had been retroactively granted to him? The court had already concluded that as a factual matter Breyer's joining the SS had been voluntary. While the law precluded a finding that his actions as a minor were expatriating, OSI argued that his motivations should be presumed constant absent evidence to the contrary. Unless Breyer could establish that service past his 18th birthday was performed under *duress*, OSI contended that he had remained in the SS voluntarily and thereby expatriated himself.

Breyer testified that he had done everything possible to be excused from service and to convey his opposition to the policies of the Death's Head battalion. Among other things, he had asked the town mayor to help him avoid service; he had refused to renounce his religion even though there were economic incentives for SS men who did so; he had also refused to be tattooed in a manner that would mark him as a member of the SS. Although he carried a weapon, he did not always load it and told his superiors that he would not shoot an inmate; and he had ultimately deserted in August 1944, returning months later only because he feared that he might be killed if he failed to do so.[28]

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There were only three documents available concerning the circumstances of Breyer's service after his 18th birthday. All involved requests – by him or on his behalf – to be excused from continued service. As such they supported his assertion that he was not serving voluntarily.[29]

Given the paucity of documentary evidence, Breyer's testimony was largely irrefutable. OSI's expert historian did testify, however, that some of Breyer's claims *e.g.*, that he was given less onerous responsibilities because he was opposed to shooting inmates, were not historically

plausible. The government also pointed out that Breyer's service at Auschwitz began after his 18th birthday and that he had taken an oath of loyalty to Hitler at that time. Moreover, there was no evidence that Breyer had ever tried to transfer from the Death Head's battalion to a fighting unit. OSI relied on the Third Circuit's characterization of membership in the SS as tantamount to a moral commitment to Nazi ideology. With that as a starting point, OSI contended that transfer to a traditional fighting unit would have shown that Breyer was less at odds with American principles. Not seeking a transfer was, the government argued, evidence that Breyer's service after age 18 was an expatriating act.

The district court found that such a transfer would have been "technically possible" but "exceedingly difficult" to obtain. Moreover, it found that Breyer had "no conceivable chance" of leaving the SS entirely and that the loyalty oath was an involuntary action necessitated by his circumstances.[30] Based on these findings, the court concluded that Breyer's service after his 18th birthday was involuntary and therefore not expatriating. Accordingly, Breyer retained the U. S. citizenship that should have been his from birth.

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The decision was affirmed on appeal. The Third Circuit concluded that "deserting his unit under what he believed to be penalty of execution suggests that Breyer's service was not voluntary."[31] The Court rejected the notion that Breyer had to establish duress. Rather, the panel placed the burden on the government to show voluntariness and then concluded that that burden had not been met.

The government did not seek further review. The court's ruling was largely driven by its factual findings. Although OSI believed some of those factual determinations were wrong, the government recognized that as a legal matter it is almost impossible to overturn factual

determinations.

The precedential value of the ruling for OSI is minimal. It is highly unlikely that a similar factual pattern will recur – an individual born abroad to a U.S. citizen mother and non-U.S. citizen father and who assisted the Nazis in acts of persecution.

The ruling could, however, have ramifications in non-OSI cases. The Circuit's determination that membership in the SS was so antithetical to American values that it warranted expatriation even if that was not the defendant's intent might be cited in support of an expatriation argument involving someone who joined another group whose core values are inimical to U.S. interests. It could also apply to someone who committed intentionally destructive acts to the U.S. body politic.[32]

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Breyer, however, need not worry; he may remain in the United States for the duration of his life. While he can take satisfaction in his victory, he did make one serious miscalculation in a related proceeding.

In 1994, Breyer sued two networks over their coverage of his denaturalization case.[33] He was particularly distressed over their equating him with Ivan the Terrible.[34] Two weeks before trial, CBS offered to settle the case for $20,000. When Breyer did not respond in a timely manner, CBS withdrew the offer. Breyer failed to show up for trial, but on the morning it was due to start, he notified CBS that he wanted to accept their offer. By that time, the network was no longer willing to settle and the judge dismissed the lawsuit because Breyer was not present. He therefore lost both the payment and the opportunity to litigate his claim.[35]

The *Breyer* litigation is so convoluted that it is difficult to categorize. In retrospect, it appears that the original anomaly in the law – granting citizenship to the children of U.S. citizen

fathers but not U.S. mothers – was fatal to the government's case.[36] There was simply no way to level the playing field despite heroic efforts by both Congress and the courts to do so.

The gender-neutral amendment in 1934 left uncovered the children born to U.S. citizen mothers before 1934. Had the 1994 amendment simply established retroactivity, it would have overcompensated for this inequity by giving *more* protection to the children of U.S. citizen mothers than to the children of U.S. citizen fathers. Since anything such children did before knowing they were citizens could not have been done with the intent to relinquish that citizenship, military service on behalf of the Axis would not be expatriating. Yet the very same service could be expatriating if performed by someone whose citizenship was derived patrilineally.

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One possible solution was to include a statutory exemption for persons inadmissible under the DPA or RRA. But this created yet another inequity. Some children born abroad to U.S. citizen mothers (*i.e.*, those ineligible for entry under the DPA or RRA) were now categorically denied the possibility of derivative citizenship. They had no opportunity to show that their service was *not* intended to be expatriating. Children of U.S. citizen fathers might be expatriated, but they would at least have an opportunity to litigate the issue. Children of U.S. citizen mothers who served the Axis could not.

In an effort to resolve *this* problem, the Third Circuit fashioned a remedy allowing for the possibility that someone could voluntarily expatriate himself absent knowledge that he was a U.S. citizen. This tortured traditional notions of expatriation and created an intellectual impossibility. How could someone commit a sentient act of expatriation if he had no idea that he was a citizen? By ruling that Breyer's continued service in the SS was *involuntary*, the district

court avoided the problem.[37]

In sum, the legislature and courts faced an insoluble dilemma. There was simply no way to remove all inequities in the law. Breyer benefitted from a statutory anomaly.

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1 1. Rev. Stat. of 1874, § 1993. The law was a bit more complicated in that citizenship could pass only if the father had at some point resided in the U.S. However, this factor is irrelevant to the handling and outcome of the Breyer litigation.

2. 48 Stat. 797 (1934).

3. Whether he had served at the Auschwitz death camp (Auschwitz II) or the Auschwitz labor camp (Auschwitz I) was itself an issue during part of the case. The court ultimately concluded that he had served at Auschwitz I. However, resolution of that issue is not essential to the legal issues or outcome of this case.

4. Breyer made these admissions in depositions given during the OSI litigation as well in a deposition in the case of *Breyer v. Capital Cities/ABC, Inc., and CBS, Inc.*, Civ. No. 94-5872 (E.D. Pa.), discussed on p. 185. *See also*, *Breyer v. Meissner*, 2002 WL 31086985, Finding of Fact 101 (2002).

5. The government also charged misrepresentation and concealment of material facts, but these counts were not ultimately relevant to disposition of the case.

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6. *U.S. v. Breyer*, 829 F. Supp 773 (E.D. Pa. 1993).

7. *U.S. v. Breyer*, 841 F. Supp. 679 (E.D. Pa. 1994).

8. *U.S. v. Breyer*, 41 F.3d 884 (3rd Cir. 1994).

9. The impetus for this amendment was a Ninth Circuit ruling, in a non-OSI case, which held that the statute was unconstitutional to the extent that it did not retroactively confer citizenship on offspring of U.S. citizen mothers. *Wauchope v. Dep't of State*, 985 F.2d 1407 (9th Cir. 1993).

10. Comments by Sen. Kennedy, Cong. Record, S16863, Nov. 20, 1993.

11. The Immigration and Nationality Technical Corrections Act of 1994 (INCTA), Pub. L. No. 103-416, § 101 (a) and (c)(2).

12. 132 Cong. Rec. H9280 (daily ed. Sept. 20, 1994) (statement of Rep. Schumer). In fact, the only pending case affected by the bill was Breyer's.

13. *In re Breyer*, A08-305-096 (Office of Administrative Appeals 1996).

14. The government questioned whether Breyer could even raise the issue. Theoretically, the discrimination was against his mother rather than against him (in that she could not pass on her citizenship whereas a U.S. citizen father could have). However, since Breyer's mother had long since died, there was no way to resolve the potential inequity unless Breyer could himself raise the issue. The court ruled that he could.

15. INS was at the time part of the Justice Department.

16. *Breyer v. Meissner*, 23 F. Supp.2d 521, 535 (E.D. Pa. 1998).

17. This principle has been important in many OSI cases. *See e.g., Linnas v. INS*, 790 F.2d 1024,1030 (2nd Cir. 1986); *Artukovic v. INS*, 693 F.2d 894, 897 (9th Cir. 1982).

18. *Breyer v. Meissner*, 23 F. Supp. at 545 (internal citations omitted).

19. *Breyer v. Meissner*, 23 F. Supp.2d 521 (E.D.Pa. 1998) and *Breyer v. Meissner*, 23 F. Supp.2d 540 (E.D. Pa. 1998).

20. *In the Matter of Johann Breyer*, A 08 305 906 (Imm. Ct., Phila., Pa. 1997).

21. *Breyer v. Meissner*, 214 F.3d 416, 427 (3rd Cir. 2000).

22. This ruling is at odds with the traditional expatriation law. *See e.g., Rogers v. Patokowki*, 271 F.2d 858, 861 (9th Cir. 1961). *Rogers* was cited in *dicta* in another OSI case which was reviewed (in an unpublished and therefore not precedent binding decision) by the same appellate court which handled *Breyer*. In *U.S. v. Schiffer*, 831 F. Supp. 1166, 1189 (E.D. Pa. 1993), *aff'd*, 31 F.3d 1175 (3rd Cir. 1994) (Table), the district court stated that "[a] United States citizen could not form the intent to relinquish his citizenship if, at the time he committed the expatriating act, he did not know he was a citizen." (Schiffer had been born in the U.S. but later moved to Romania and served as a camp guard during World War II. Unlike the Breyer case however, the court found that Schiffer knew during the relevant period that he was a U.S. citizen and his camp guard service therefore constituted an intent to expatriate.)

23. [redacted] 65

see,

Aug. 20, 2000 memorandum to the Solicitor General from Malcolm Stewart, Assistant to the Solicitor General.

24. August, 2000 memo to the Solicitor General from David Ogden, Acting AAG, Civil Division, re *Breyer v. Meissner*.

25. *Breyer v. Meissner*, 2001 WL 1450625 (E.D. Pa. 2001).

26. Breyer's mother was living in Czechoslovakia when it became a state in 1918. Under the law of the new republic, she automatically became a Czech citizen, unless she indicated that she wanted to retain her U.S. citizenship. OSI wanted to argue that her failure to take affirmative action to retain the citizenship amounted to a renunciation of it.

27. *Breyer v. Meissner*, 2002 WL 922160 (E.D. Pa. 2002). The issue had been lurking for years. As noted at p. 177, the 1994 district court ruling mentioned this possibility. The court at that time noted that "the parties did not present evidence or argument" on the point. *U.S. v. Breyer*, 841 F. Supp. at 685. Two years later the INS, denying Breyer's claim to derivative citizenship, made the same point, stating that it was "aware of no evidence that she expatriated before the applicant's birth in 1925." *In re Breyer*, A08-305-096 (Office of Administrative Appeals, Oct. 15, 1996), p.3.

28. When deposed by OSI, Breyer claimed he had deserted (by failing to return from leave) in January 1945. The court, however, believed his court testimony that he had left in August 1944. The variance is significant. By January 1945, it was clear that the Germans were fighting a losing cause. Moreover, the advancing Russians would likely have cut off Breyer's means of access to his unit. Failure to return to his unit in January 1945 was therefore less likely due to "desertion" than if he failed to return in August 1944.

29. The government found some useful information even in these documents. According to one, "the inductee" appeared before the German Party in January 1945 to plead his case. OSI argued that the inductee was an obvious reference to Breyer himself and that if he had been a deserter since the prior August, he would hardly appear before the authorities to seek their assistance. However, because of several factual inaccuracies in the document referring to the January event, the court concluded that it was not authentic and discounted it entirely. *Breyer v. Meissner*, 2002 WL 31086985, n. 13 (2002). This significantly weakened the government's case.

(OSI believed that most of the inaccuracies had plausible explanations. This could not have been a case of "Soviet fabrication" – an argument which even Breyer did not make – since the documents were helpful to him.)

30. *Breyer v. Meissner*, 2002 WL 31086985 (E.D. Pa. 2002), Findings of Fact 103 and 118, Conclusion of Law 3.

31. *Breyer v. Ashcroft*, 350 F.3d 327, 335 (3rd Cir. 2003). The Circuit agreed with the lower court that Breyer's return to his unit was borne of necessity, rather than choice. "There is no evidence of any other place Breyer safely could have gone. . . . [Therefore] his return was not voluntary in the sense that it might represent an intentional relinquishment of United States citizenship." *Id.* at 338.

32. Indeed, Breyer's attorney argued that the Circuit's language was so broad that it would encompass terrorist acts such as the 1995 bombing of the federal building in Oklahoma City. Yet despite the horrific nature of that act, intended by its perpetrators as an act of defiance against the federal government, no one argued that the defendants should be expatriated. The perpetrators were tried and convicted. One was executed; the other was sentenced to life in prison.

33. *Breyer v. Capital Cities/ABC, Inc., and CBS, Inc.*, Civ. No. 94-5872 (E.D. Pa.).

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34. *See* p. 150. On Sept. 7, 1993, a television announcement of upcoming news asked: "Could Philadelphia have its own Ivan the Terrible?"

35. *Breyer v. Captial Cities/ABC, Inc., and CBS, Inc.*, 1995 WL 733384 (E.D. Pa. 1995).

36. If the government had been able to establish – in a timely manner – that Breyer's mother had in fact expatriated herself before Breyer was born, the outcome of the case would have been different.

37. Whether the court would have ruled in the same way in the absence of this intellectual impossibility is unclear, although the opinion does suggest that the district court judge felt constricted in some measure by the Circuit's ruling. *See Breyer v. Meissner*, 2002 WL 31086985, n. 26 (2002).

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Propagandists

The International Military Tribunal at Nuremburg sentenced Julius Streicher, publisher and editor of a German anti-Semitic weekly newspaper, to death.

> In his speeches and articles, week after week, month after month, he infected the German mind with the virus of anti-Semitism and incited the German people to active persecution.
>
> ***
>
> Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with War Crimes. . . and constitutes a Crime against Humanity.[1]

The DPA excluded propagandists because they were seen as members of a "movement hostile" to the United States as well as abettors in persecution.[2]

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Vladmir Sokolov – A Persecutor Who Found a Home in Academia

Vladmir Sokolov was a Ukrainian-born writer and editor of *Rech*, a Russian-language newspaper published by the Germans after they invaded the U.S.S.R. Before being hired at *Rech*, Sokolov underwent a background check by German military intelligence to assure, among other things, that he was opposed to "Jewish Bolshevism."[3]

His work included writing articles and giving propaganda speeches and lectures to the civilian population. The position provided him with a salary and privileges, including better food and living quarters than would otherwise have been available.[4] Sokolov, who wrote under the penname Samarin, received two medals from the Germans for his work. His writing often harped on the theme that Jewry and Communism were synonymous.

> The same mug with the hooked nose peers from behind the hundreds of millions of bodies that were tortured, executed and shot in the back of the neck over the Katyn graves, in distant Siberia and in the far North.[5]

> The current war was prepared and provoked by Jewry, which already had brought so much suffering to mankind through the centuries. . . .
>
> In this war, the peoples of Europe and Asia are fighting against kike-plutocracy and Kike-bolshevism, against two outwardly different but inwardly common systems . . .[6]

Sokolov claimed that "kikes" ran the government, and listed Jews in his hometown who occupied executive posts in various organizations and institutions. Although the list was "far from complete," he exhorted his readers to "Thrash them!"[7]

Sokolov emigrated to the United States in July 1951. He advised the authorities that he had been working at *Rech* as a "corrector."[8] His visa application included an oath stating that he had not been part of any "movement hostile" to the United States nor had he advocated or assisted in the persecution of any person because of race, religion or national origin.

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In 1954, the FBI received information that Sokolov had been associated with *Rech*, and that he had collaborated with the Gestapo. INS learned of these accusations when processing his application for citizenship in 1956 and called him in for an interview. He told them that he had served as the literary editor and later Deputy Editor of *Rech* but denied having any involvement with the editorial policies of the newspaper. According to Sokolov, *Rech* was neither pro-Fascist nor anti-Semitic. He contended that, to the extent that such views appeared in the newspaper, it was at the behest of the German occupation forces.

> [W]e were forced to assume certain political lines. We Russians fought this the best way we could, but under the ever-present danger of being shot to death on the spot, we had to put in remarks Fascist and anti-Semitic to please the Germans, but we fought against the Fascist line. . . . Personally, I confined myself to Anti-Communist articles. I have not written one single Fascist or Pro-Fascist line, and as to Anti-Semitic remarks, there may have been some to which I was forced.[9]

He went on to deny collaborating with the Gestapo. The INS found "[n]o evidence on which to

base Service proceedings." Approximately one month after his INS interview, Sokolov became a U.S. citizen.

In 1959, Sokolov was hired as a language instructor at Yale University. His application listed his work as an assistant editor of *Rech*. However, University officials did not do a thorough background verification for this non-tenured position.[10] As they later explained: "If he'd gotten into the United States, the assumption was that he had been closely checked by the government."[11]

At Yale, Sokolov became active in pro-Zionist affairs and wrote several articles for a Zionist Russian-language newspaper.[12] One of his colleagues described him as the "best language teacher" in the department.[13]

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In March 1974, *Voice of the Homeland*, a Russian-language newspaper published overseas, listed several former Nazi war criminals living in the United States. "Samarin" was among them. Two years later, *Komsomol'skaya Pravda*, the official journal of Soviet Communist youth, carried a brief article asserting that a current Yale University teacher had worked for the Nazis during occupation of the U.S.S.R.

Neither article attracted much attention. Then in April 1976, *Sovetish Heimland*, a Yiddish language monthly in Moscow, quoted from several articles written by Sokolov. A Yale librarian who did translations for *Morning Freiheit* discovered the piece.[14] On May 23, 1976, *Morning Freiheit* carried a story under the headline "Moscow Yiddish Magazine Charges: Russian Fascist Has Teaching Position at Yale University."

Yale first learned about the writings a couple of weeks earlier when then Slavic Department Chair Robert Jackson received the text of one of the Soviet articles.[15] He arranged a

meeting with Sokolov. According to two attendees, Sokolov acknowledged writing the *Rech* articles. He contended, however, that stylistic changes had been made, including substitution of the word "kike" for "Jew."

Sokolov's past activity was not ground for academic dismissal and the University recommended his reappointment for another two-year term.[16] Support for Sokolov within his own department, however, was thin. Four of the six professors wrote him on June 29, 1976.

> Some recent publications which carry photocopies of your articles in Rech, as well as extensive reproductions of the same newspaper which have come into our possession recently, reveal to us beyond any reasonable doubt that you were engaged not only in anti-Communist but also in pro-Nazi and anti-Semitic activities under the German occupation. As individual members of the department, and as people engaged in a humanistic endeavor, we feel obliged to express to you our profound feeling of disgust and outrage at these documented revelations of your past activities. We should like to make it clear that under no circumstances can you count on the undersigned for any support whatsoever.

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The next day Chairman Jackson advised Sokolov that while he had the right to remain on the faculty, the department "in no way condoned" his activity.[17]

The following month, Sokolov resigned.[18] He attributed this decision to the "character of the campaign in [his] own department" and claimed he "did not want to create difficulties for the University administration." He also cited medical problems.[19] Under the terms of his resignation, he continued to receive his salary for a full year and remained eligible to collect a pension from a national teachers organization.

The story did not resonate nationally until students returned to the Yale campus and the *Yale Daily News* published its first piece on the affair.[20] Professor Alexander Schenker, Sokolov's strongest ally in the Department (and himself a refugee from Nazi Germany), tried to put Sokolov's activities in historical context. "The German occupation, paradoxical as it may

seem, was the only real chance to escape. A guy sitting in his apartment in New York can't understand what it was like growing up in a Gulag Archipelago world."[21]

The *Yale Daily News* also defended Sokolov.

> The hasty action of the four members of the Slavic Languages and Literature Department had the predictable effect of coercing Mr. Samarin into resignation. Acting upon insufficient information, they displayed a contempt not only for Nazism, but for due process as well. Those four instructors did, however, spare the Yale Corporation from a hard decision: should Mr. Samarin have remained at Yale? We are sure the answer to that question ought to have been yes.
>
> Mr. Samarin was and is a dedicated foe of the Soviet government. We find his unspeakable attack on the Jewish people unjustifiable, whatever its ultimate purpose. Not all opponents of Bolshevism found it necessary to lace their essays with anti-Semitism. If there is any argument against Mr. Samarin's dismissal from Yale, it does not lie in his chilling rationalization of Nazi collaboration.
>
> Since his arrival here 17 years ago, Mr. Samarin has become an effective and sympathetic teacher. Had his story not filtered out of Soviet Russia this summer, he would have been remembered as a gentle friend to many Yale undergraduates. In fact, his opposition to the Soviet regime has led him to espouse Zionist interests. Although we are somewhat alarmed by the vast ideological distance one man can travel in 30 years, we must believe Mr. Samarin when he says that he is no longer anti-Semitic and that he "loves his students."
>
> * * *
>
> . . . His conduct here is in part a testament to the wisdom of running a university free from the political forces and ideological tyranny that he was too weak to transcend in the 1940's. The lesson is simple: all men grow when the[y] leave the house of intellectual bondage.[22]

The New York Times and several other newspapers around the country picked up the story.[23] The following month INS ordered a review of the file in order to determine whether a "full scale and comprehensive investigation" should take place. They concluded that, given the "full investigation" conducted in 1957, there was no basis for a reinvestigation.

The newly-formed OSI, reviewing all INS Nazi files, took the matter up in 1979.

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However, they had no access to the offending articles. Although Yale had copies in Sokolov's personnel file, the university would not release the material absent a subpoena or Sokolov's consent. During an interview with OSI attorneys, Sokolov agreed to authorize release of the articles.[24]

OSI filed suit in 1982, alleging that Sokolov's citizenship was illegally procured. As set forth in the complaint, Sokolov had been ineligible for citizenship because he had assisted in persecution, been a member of a movement hostile to the United States, voluntarily assisted enemy forces, and made misrepresentations in his visa and citizenship applications (by denying membership in a movement hostile to the United States). The complaint also cited his lack of good moral character (as evidenced by his misrepresentations).

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The case generated much publicity and various people, to no avail, urged the government to reconsider its position. Among them were author and commentator William F. Buckley, Jr. and Mstislav Rostropovich, Russian emigré and renowned cellist and conductor of the Washington National Symphony. Buckley wrote a note to President Reagan, thanking him for the time they had recently spent together and relaying his "outrage[]" at the filing.[25] Maestro Rostropovich came to OSI to speak with Director Sher directly. As Sher recalled it, Rostropovich described Sokolov as "a shit [whose] life [was] worth shit." Nonetheless, he begged Sher not to "throw him to the Russians."[26]

Trial opened in November 1985 before Senior Judge Tom Murphy, himself an historic figure. Murphy was a former New York City police commissioner and the lead prosecutor in the Alger Hiss trials. The government's expert historian explained how the Nazis used propaganda to condition the Russians to accept, and assist the Nazis in executing, the policy of Jewish

extermination. He also explained the hidden role played by the Germans in controlling the content of *Rech*. OSI submitted 17 *Rech* articles published under Samarin's byline as well as an oath of fealty signed by Sokolov to obtain membership in an anti-Bolshevik group.

> In joining the ranks of associates of the Union for Struggle Against Bolshevism, I give my solemn pledge of loyalty to Adolph HITLER, the Liberator of the Peoples of Russia, and the Unifier of New Europe.
>
> I declare myself an irreconcilable and undaunted enemy of Judeo-Bolshevism in all its manifestations.
>
> I oblige myself to place the interests of the people and of the common struggle against Jew-Bolshevism and its allies above my own. . . .

The thrust of Sokolov's defense was that he had viewed the Germans as liberators from Communism and that his articles had been heavily edited – so much so that he hardly recognized his own work. He claimed he had remained at the newspaper because he feared that if he left he would have been sent to a camp or killed.

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In February 1986, while the case was under submission, it was featured on *CBS Sunday Morning*. Director Sher explained to the viewing television audience the rationale for pursuing propagandists.

> It was not just a few crazed men in Berlin who had the notion of destroying Jews and others. It took hundreds of thousands of people, if not more. People to operate at every aspect of German society -- in Germany proper and in the occupied territories to implement them. Propagandists, they were one cog in that wheel as were the people who pulled the triggers.

Later that year, the district court issued its ruling withdrawing Sokolov's citizenship.[27] He appealed to the Second Circuit Although there were very few appellate decisions in OSI cases at that time, the government had recently lost a case in that circuit which it believed it should have won.[28] This naturally caused OSI concern about the current case.

The concern was unnecessary. The Circuit accepted all the government's arguments and

affirmed the ruling below.[29] It concluded that Sokolov's articles "assisted the enemy," that they advocated or assisted in persecution, and amounted to participation in a "movement hostile" to the United States – all of which made him ineligible for a visa under the DPA. Significantly, in finding that Sokolov had advocated or assisted in persecution, the Court held that no evidence of *actual* persecution resulting from the articles need be shown. The mere fact that Sokolov's articles worked to "condition[] the Russian people into accepting and carrying out the National Socialist Policy in regards to the Jews" was sufficient.

Once the Supreme Court denied review, OSI commenced deportation proceedings. Before the first scheduled hearing, OSI learned from media accounts that Sokolov had left the country. After subpoenaing the family telephone records, OSI surmised that Sokolov was in Montreal, Canada.

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DAAG Richard worried about the Canadian reaction to this turn of events. Years earlier, when refusing to accept an OSI deportee, they had made clear their distaste for these defendants: "[I]t is extremely unlikely that Canada would be willing to accept any individual, as a deportee, whose removal from the United States is being effected for reasons similar to those pertaining to [the defendant]."[30]

Although Sokolov had not been deported to Canada, DAAG Richard opined that the Canadians were "very sensitive about US wilfully 'dumping' our Nazis into their country." He feared they would believe (mistakenly) that the United States had a role in Sokolov's choosing their country.[31]

Sokolov had found refuge in a Russian Orthodox church in Montreal. This information, conveyed to OSI by the Royal Canadian Mounted Police War Crimes Investigations Section, was

confirmed by an OSI historian. Conversant in Ukrainian, he called the monastery and identified himself as an anti-OSI crusader. Sokolov spoke with him and asked for a number where he could return the call. The historian happened to have open on his desk a Ukrainian newspaper; he passed along the phone number of a tombstone company advertised therein.

Although Sokolov had already left the country and was on the government's Watchlist to preclude his reentry, OSI proceeded with the deportation hearing *in absentia*. Director Sher, asked about it years later, surmised that he had been concerned that the U.S./Canadian border was too porous for the Watchlist to be fully effective. Deputy Director Bruce Einhorn recalled feeling that living in Canada was no punishment. If Sokolov reentered the United States, the government wanted to be able to put him on a plane to the U.S.S.R. without an additional hearing.[32]

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Sokolov did not appear at the deportation hearing nor was he represented by counsel. The government presented the record from the denaturalization hearing and the court ordered Sokolov deported to the U.S.S.R. The order was never carried out because (to the best of OSI's knowledge) Sokolov never returned to the United States. He died in Canada in 1992.[33]

1 1. *The Nuremberg Trial*, 6 F.R.D. 69, 162-163 (I.M.T. 1946).

2. There is no First Amendment issue in these cases as the protections from that Amendment do not apply to actions by foreign nationals overseas.

3. Jan. 24, 1984 deposition of Artur Bay, pp. 11-12. Corporal Bay was with Panzer Propaganda Co. 693 and issued assignments to the Russians working for *Rech.* The assignments were based on directions from the German Propaganda Ministry.

4. Sokolov deposition, July 10, 1984, pp. 24, 165.

5. *Rech*, July 11, 1943, No. 79 (262), p. 1 "Criminals."

6. *Rech*, May 14, 1943, No. 54 (237), p. 1 "Liberation Struggle."

7. *Rech*, May 30, 1943, No. 61 (244), p. 2, "The Former Masters of Orel."

8. A corrector took care that type setting corresponded to the copy.

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9. April 19, 1957 sworn statement taken by INS Investigator Herbert Fichlander, p. 4.

10. "Samarin Cited 'Rech' Ties in Original 1959 Resume," by John Harris and Jonathan Kaufman, *Yale Daily News*, Sept. 22, 1976.

11. Statement by Yale's Director of Public Information, speaking on behalf of University President Kingman Brewster, Jr. *Id.*

12. As Sokolov explained it, he adopted a new approach after the war when the U.S.S.R. began its anti-Jewish campaign. "From now on the Jews have become my allies in the struggle against our common enemy – Communism. The enemy of my enemy is my friend." Letter to the Editor, *Yale Daily News*, Oct. 8, 1976.

13. Statement by Prof. Alexander M. Schenker, Chair of Yale's Department of Slavic Languages and Literature at the time of the Sokolov denaturalization trial, quoted in "Ex-Yale Teacher Tried As a Nazi Collaborator," *The New York Times*, Nov. 8, 1985.

14. *JTA* [Jewish Telegraphic Agency] *Daily News Bulletin*, Jan. 20, 1989.

15. "Samarin Cited 'Rech' Ties in Original 1959 Resume," *supra*, n. 10.

16. *Id.*

17. *Id.*

18. According to the *Yale Daily News*, the Soviets cited the resignation as an example of "progressive public opinion" which is powerful even at traditionally "imperialist and reactionary"

universities like Yale. "Soviets Condemn 'Fascist' Samarin" by John Harris, *Yale Daily News*, Feb. 21, 1977, quoting "Kicked Out", a Jan. 30, 1977 article in *Komsomolskaya Pravda.*

19. Letter to the Editor, *Yale Daily News*, *supra*, n. 12.

20. "Nazi Ties Revealed; Samarin Quits Faculty," by John Harris, *Yale Daily News*, Sept. 20, 1976.

21. *Id.*

22. *Yale Daily News*, "Samarin," Sept. 29, 1976.

23. "Yale Teacher Quits Over Pro-Nazi Role," *The New York Times*, Sept. 21, 1976.

24. Thereafter OSI, aided by the State Department, obtained certified copies of the articles from the U.S.S.R. for submission to court.

25. Letter from William F. Buckley to Ronald Reagan, April 19, 1982. By happenstance, the letter became a matter of public notice in 2005 when the National Archives released documents relating to then Supreme Court nominee John Roberts' tenure at the Justice Department. The Buckley letter had apparently crossed Roberts' desk. The notation in Roberts' handwriting said "keep RR [President Reagan], AG [Attorney General William French Smith] out." "The Case of the Nazi Propagandist," by Josh Gerstein, *The New York Sun*, Aug. 4, 2005.

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26. Sher recorded interview, Apr. 27, 2001. (All references to Sher's actions hereafter in this chapter stem from this interview unless otherwise noted.) Sher viewed the Buckley letter as "the old Yale boy connection rallying around." (Buckley was a Yale alumnus.)

27. *United States v. Sokolov*, No. N-82-56-TFM (D. Conn. 1986).

28. *United States v. Sprogis*, 763 F.2d 115 (2nd Cir. 1985). *Sprogis* is discussed at pp. 101-105.

29. *United States v. Sokolov*, 814 F.2d 864 (2nd Cir. 1987).

30. Feb. 28, 1985 letter to Director Sher from William Lundy, Counsellor and Consul, Canadian Embassy re Karl Linnas. The *Linnas* case is discussed at pp. 271-295.

31. Routing and transmittal slip of July 7, 1988 from DAAG Richard to AAG Dennis.

32. Once stripped of his citizenship, Sokolov reverted to the status of a legal permanent resident. As such, he would have been able to return to the United States at any time within 180 days of his departure.

33. The Canadians, who had opened their own investigation, never filed charges nor did they act on the request for asylum Sokolov filed shortly after entering their country.

Valerian Trifa – A Persecutor Who Found Refuge in His Church

The prosecution of Valerian Trifa was particularly convoluted since he could say – in truth – that he had spent much of the war in Nazi concentration camps and had fought against a government allied with Nazi Germany. The challenge for OSI was to show that those were only half truths.

In 1940, the Romanian government was sympathetic to Nazi Germany.[1] The Iron Guard, a fascist organization within Romania, was part of a governmental coalition whose most dominant group was the Army. The Iron Guard was the most extreme member of the coalition, both in its anti-Semitism and its fascism.

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In the fall of 1940, theology student Viorel Trifa[2] became leader of the Iron Guard's student movement and editor of *Libertatae*, an anti-Semitic weekly newspaper linked to the Iron Guard cause. As a student leader, he addressed various rallies. A mid-December speech discussed anti-Semitism.

> The Romanian student has been anti-Semitic not because he read in some book that he must oppose the Yids, but because he felt that he could no longer make a living in his own country. If our students have been anti-Semitic from 1922 on, this is due to this Romanian tragedy, that after leaving the villages where they were being plundered by the Yids, they found themselves in cities once again plundered by the Yids. And then they had to rise up and say: This can no longer go on!![3]

Trifa's newspaper writings in *Libertatae* expressed similar sentiments.[4]

Throughout the fall and into January, Iron Guardists terrorized the local citizenry, extorting money, expropriating property, looting and killing wantonly.[5] Most victims were Jewish, though some were non-Jewish political adversaries. In mid-January, General Ion Antonescu, head of the coalition government, reacted. He dismissed hundreds of Iron Guardists

from government posts, forbad the wearing of the Iron Guard uniform other than at ceremonial events, and fired the pro-Guard Minister of the Interior.[6]

On January 20, a widely-publicized Iron Guard manifesto, issued in Trifa's name, called for the "replacement of all Masonic and Judaized persons in the government."[7] The "Trifa Manifesto" was read over Bucharest radio, and that evening Trifa gave the keynote speech at a student demonstration. He extolled the virtues of:

> a housepainter with his healthy soul [who] rose to confront the interest of Judaism and of London Free Masonry. . . . The struggle thus initiated led to the un-masking and the removal of the Jewish-Masonic domination in Central Europe, an achievement that is to the credit of Chancellor Hitler.[8]

On January 21, the Trifa Manifesto was distributed in the provinces. Local Iron Guardists were urged to demonstrate on the basis of its text for the reinstatement of the fired Interior Minister and establishment of an Iron Guard government. For three days, January 21 - 23, bands of Iron Guardists drove through Jewish neighborhoods, plundering, burning and murdering. The riots extended into the countryside, but were most intense in Bucharest, where dozens were killed, many at an animal slaughterhouse. The American legation chief reported that there were "60 Jewish corpses on the hooks used for carcasses . . . all skinned. The quantity of blood about [seemed to indicate]. . . that they had been skinned alive."[9] Dozens, and perhaps many more, were killed before the rioting was quelled.[10]

Germany was ambivalent about the uprising. While sympathetic to the ideological purity of the Iron Guardists, Hitler was concerned that the rioting would destabilize the country and endanger vital supply lines. Although Germany did not assist the insurrection, it granted nine of the top Iron Guard leaders, Trifa among them, sanctuary in the German embassy once the

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rebellion was crushed. From there, three months later, the leaders (along with several hundred Iron Guard loyalists) escaped to Germany. The Romanian president was sufficiently outraged by this that Otto von Bolschwing, the German responsible for providing shelter within the embassy, was recalled.[11] Romania tried Trifa *in absentia* and sentenced him to life at hard labor.[12]

With the Iron Guard leaders in Germany, the Nazis faced a dilemma. Hitler had given sanctuary to Antonescu's adversaries, but still needed the Antonescu regime to remain a stalwart ally. Hitler's solution was to appear to punish the Iron Guardists without actually doing so. They were kept in minimal detention, similar to house arrest, although Trifa was spared even this. Due to medical problems, he was allowed to travel throughout the country, visiting spas.

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In December 1942, shortly after one of the Iron Guard leaders tried to flee Germany, new restrictions were imposed on the detainees. All, Trifa included, were sent to concentration camps. However, they were segregated from the other prisoners and given special privileges – better living quarters, decent food, and no work assignments. At Dachau, for example, the men had individual cells and a common room with a radio.

Trifa remained in Germany throughout the war. His four years there included three months at Buchenwald and 17 months at Dachau. After the war, he emigrated to Italy and from there, in 1950, to the United States. At that time, those who had been members of the Iron Guard were ineligible to receive a visa.[13] Trifa's visa application made no mention of his Iron Guard membership; it stated that he had been a forced laborer at Buchenwald and Dachau from 1941 to 1945. He settled in Michigan, and shortly thereafter was ordained as a bishop in the Romanian Orthodox church.

At that time, the church's traditional headquarters in Romania was part of the Soviet bloc.

Some Romanian Orthodox in America, therefore, vehemently opposed control from abroad. Trifa was in this group. In 1952, when his faction selected him to serve as Archbishop, the pro-Soviet faction obtained a court order blocking the ordination. The ceremony took place nonetheless and Trifa was then cited for contempt of court for violating the order.[14] The order was later vacated and Trifa retained his new position.

Even before Trifa had emigrated, the CIC knew that he had been a member of the Iron Guard.[15] For reasons not clear from the files, he was nonetheless granted a visa. Shortly after his arrival, however, the State Department realized that he "may have misrepresented the facts of his career in obtaining his visa."[16] Around the same time, the FBI, alerted about Trifa's background by a confidential informant, notified INS.[17] In a May 1951 INS interview, Trifa denied having been a member of the Iron Guard. When asked if he had given any anti-Semitic speeches, he replied "I don't believe so."[18]

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In September 1951, Walter Winchell, then one of the most influential broadcasters in America, denounced Trifa in a radio broadcast as a Nazi "murderer." Trifa was reinterviewed by the INS shortly thereafter. This time, he admitted organizing and leading a demonstration on January 20, 1941 as the president of a Romanian student group. He insisted, however, that after his speech he had told the demonstrators to disperse. He denied participating in any of the post-demonstration atrocities or killings.[19] INS closed its investigation in 1953, concluding (incorrectly) that membership in the Iron Guard would not have barred Trifa from entering the country under the DPA.[20]

As head of the Romanian Episcopate in the United States, Trifa was a powerful and influential religious figure. In May 1955, he presented the opening invocation in the United

States Senate. This sparked renewed controversy as Drew Pearson, another nationally syndicated journalist, questioned the propriety of a "Nazi terrorist" leading the Senate in prayer.[21]

In December 1955, the FBI spent three days interviewing Trifa. He again acknowledged speaking to assembled students in January 1941, though he claimed not to remember the content of his statements. To the extent that there was any anti-Semitism, he insisted that the speech, as the manifesto, was written by others; he had simply read the prepared script. He denied any involvement in, or responsibility for, the rioting that followed his speech.

Both the INS and FBI were skeptical of the charges against Trifa, the INS because they believed the source of the allegations to be a rival church faction,[22] and the FBI because they suspected the source to be the Communist government in Romania.[23]

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In 1956, Trifa applied to become a U.S. citizen. The naturalization examiner had a very clear recollection of the matter as "it was an unusual and different type of case."

> I asked him specifically if he had ever been a member of the Romanian Iron Guard, the Nazi Party, the Fascist Party or the Communist party. He categorically denied membership in any of these organizations. . . I asked him if the student organization he had belonged to in Romania was a branch of the Iron Guard and he stated that it was not.

Trifa claimed that he had been arrested by the Germans because of his opposition to the Romanian government. He said he had been taken to Germany against his will.

> I asked Mr. Trifa if he had ever been an anti-Semite and he stated that he had not. I asked him if he had ever taken any part in the killing of Jews, or whether he had ever directed any persecutions of Jews and he stated that he had not. . . . He told me that he had not signed the manifesto, but that his name had been placed thereon . . . and that he had been ordered to and did appear at [the January 20, 1941] demonstration. He denied having taken part in the later killing of Jews and other atrocities that allegedly occurred.[24]

He became a U.S. citizen in 1957.

Since 1952, one private citizen had been exhorting the government to deport Trifa. Dr. Charles Kremer, a Jew, had lost dozens of Romanian relatives in the Holocaust. During a letter writing campaign that spanned more than 20 years, he repeatedly contacted INS and urged the White House, the Secretary of State, the Attorney General, Congressmen, news media and members of the public to do the same.[25] He was consistently rebuffed. In retrospect, this may be due to the fact that Trifa, unlike most OSI subjects or defendants:

> had been of note in his homeland. . . . He had a constituency in this country. He was a churchman. He was an outspoken anti-Communist. He had a ready-made story about how these accusations were out to scandalize him as part of the Communist disinformation machine. When you play that tune to INS and Congress, which is willing to hear it, it doesn't take all that much to succeed. No one was looking for these guys then.[26]

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As the years passed without any legal action against him, Trifa – an increasingly public figure, both as a church dignitary and as an anti-Communist activist – seemed emboldened. In 1972, he admitted to a reporter that he had been the top leader of a Fascist Youth movement sympathetic to Hitler's Germany. He went on to acknowledge that there had been anti-Semitism at the time, but he attributed it to the perception that Jews "monopolized the economy," rather than to any Nazi ideology. He opined that "[p]eople should not be over-sensitive over some incidents."[27]

Following Trifa's admission of leadership, Dr. Kremer met with an INS investigator and presented dozens of exhibits, including letters, books and newspaper articles. He had assembled the material with the help of various Jewish groups, including the Anti-Defamation League (ADL), the Simon Wiesenthal Center (SWC), and *The United Israel Bulletin.* While much of the information had already been sent to INS by Congressional members at Kremer's behest,[28]

there was some new material, including statements from eyewitnesses who had been present when Trifa delivered his January 1941 speech. INS forwarded the material to the local U.S. Attorney, who concluded that Trifa's entry and naturalization should now "be investigated fully."[29]

In 1973, *The New York Times* reported the renewed investigation on the front page. The reporter spoke with Trifa, who acknowledged that he had worn an Iron Guard uniform and made anti-Semitic speeches. Trifa also admitted that his claim of having been arrested by the Germans was not accurate. Rather, he had received protection from the Germans. Trifa was "not ashamed" of his past "at all."

> For those circumstances in that time I think that I didn't have any other alternative but to do what I thought to be right for the interests of the Rumanian people.[30]

A few months later, the INS Commissioner testified at a routine oversight hearing before the House Immigration Subcommittee. Representative Holtzman pressed him about the Trifa investigation;[31] she also followed up thereafter.[32] Reacting to this pressure, INS met with Dr. Kremer and interviewed witnesses whose names he had earlier forwarded.[33] Based on this new eyewitness testimony – some of which had Trifa exhorting and/or joining marauding mobs – INS recommended that a denaturalization petition be filed.[34]

The Detroit U.S. Attorney's Office filed a complaint in May 1975. It alleged that Trifa had misrepresented and concealed material facts both in his visa application and in his quest for citizenship. Among the facts allegedly concealed were his membership in the Iron Guard, and his advocacy of, and participation in, the slaughter of Jews.

As noted earlier, the SLU was established in July 1977, shortly after *Wanted, the Search*

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for Nazis in America became a *New York Times* bestseller. Kremer provided much of the book's material on Trifa. As recounted in the book, Trifa had led an execution squad into a cell filled with Jews. The case was thus notorious by the time the SLU took over primary responsibility for its prosecution. SLU Chief Martin Mendolsohn assigned the prosecution to attorney Gene Thirolf.

> I called Gene in and told him this is the biggest dog ever – an absolute loser and totally screwed up. The only thing I can promise you is that I will sign every pleading and go down with you. [Gene] turned it around.[35]

Although Dr. Kremer had served a vital function in keeping the issue alive, the material he provided was not particularly helpful. Much of it was irrelevant to the legal issues at hand.[36] Thirolf concluded that only one witness proposed by Dr. Kremer and the INS was viable;[37] he realized that the government needed documentary evidence. Thirolf began by searching through Romanian newspapers at the Library of Congress. A reference to Trifa's work on a newspaper led to the discovery that he had edited *Libertatae*, a fact that had not been known when the case was first filed in 1975. DOJ requested copies of the newspaper from Romania.

Getting material from Romania proved exceedingly difficult, however. In four years, Romania had provided only one pertinent document.[38] The Romanians told Thirolf that he could neither interview witnesses nor get archival material because the country had no judicial assistance treaty with the United States.[39] At Mendelsohn's suggestion, Thirolf spoke about the problem to a *New York Times* reporter who then wrote an article about Romania's intransigence.[40]

Under the law at the time, eastern bloc countries enjoyed preferential trade status with the United States only if their governments allowed free emigration. This most favored nation

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status (MFN) needed to be renewed by the president each year and approved by both houses of Congress. Politicians sympathetic to OSI's mission realized that the renewal process might give them leverage with the Romanians. Two days after *The Times* article appeared, the Chair of the House subcommittee in charge of MFN hearings asked the Romanian Ambassador to meet with Representative Holtzman. Days after that meeting, the Romanians delivered a packet of material to the American Embassy in Bucharest. A week later, Representative Holtzman testified before the subcommittee in the hope of pressuring Romania into allowing OSI personnel to interview witnesses and examine archival material. She did not urge Congress to deny MFN status, but suggested that the subcommittee postpone its decision "until the Romanian government has fully cooperated in the prosecution of the Trifa case."[41] A senator interested in the matter sent a similar message through an aide, advising that "anything Romania does to please Congress would be to its advantage."[42]

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The Congressional pressure had immediate effect. As Representative Holtzman recalled it:

> After I testified . . . the Ambassador came slithering across the floor in my office and I knew the minute that he picked up my hand to kiss it that I was getting good news. He didn't have to say a word.[43]

Shortly thereafter, Thirolf and an historian were granted access to material and personnel. In acknowledgment of this, Representative Holtzman supported extension of MFN status.[44]

OSI, as is routine, also checked with U.S. intelligence agencies for information about Trifa. The FBI had information from a confidential source that the Romanian government was out to get Trifa because of his unwillingness to collaborate with the Romanian home church and government. According to this source, the Romanian government provided information to

American Jewish groups in the hope that they would use it to attack Trifa.[45] While the source claimed that most of the information provided was legitimate, (s)he advised that some documents were altered to make Trifa's actions appear worse; a certain number were fabricated altogether. The alterations and fabrications were designed to show that Trifa was personally responsible for the decision to murder civilians and/or for the actual murders themselves. According to the FBI:

> the Romanian plan against Trifa was . . . to put Trifa in a sufficiently difficult position with U.S. Government authorities that he would be disgraced in his church position and lose it. The use of American-Jewish organizations was a means to this end as was the tactical use of exaggeration and falsifying documents to fill holes in the Trifa story.[46]

An OSI historian also expressed concern. He noted the possibility of tampering not only by the Communists, but also by preceding Romanian governments. Official reports prepared by the Romanian government shortly after the uprising may have been designed to portray the Iron Guard and its leaders in the worst light possible.[47] OSI already had in its possession at least one document the authenticity of which it doubted. A photograph of Trifa looked as if his face had been superimposed. The government did not plan to introduce it into evidence.[48]

To allay concerns, the government sought multiple levels of corroboration. In addition to examining Romanian documents, including newspapers, trial transcripts and government reports, the government wanted evidence of non-Romanian origin. They searched foreign ministry documents from Germany, England and the United States which detailed the situation in Romania at the time Trifa was active. German SS records yielded a contemporaneous report of the January 1941 rally from a German exchange student studying in Romania. Enclosed with his account was a copy of the Trifa manifesto. OSI also traced Trifa's life in Germany to establish that he had been given special status because of his Iron Guard activities. Finally, they turned to

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Trifa's own statements in the U.S. press. OSI planned to present testimony from *The New York Times* reporter who had interviewed Trifa in 1973.[49]

While the case was pending, but before a trial date had been set, Trifa was invited to participate in a broadcast prepared by Radio Free Europe (RFE) for transmission to Romania.[50] The occasion for the broadcast was the fiftieth anniversary of the establishment of the Romanian Orthodox Epsicopate in North America. The use of an alleged Nazi war criminal in a government-sponsored broadcast created a furor.[51] Martin Mendelsohn, first as SLU chief and thereafter as Deputy Director of OSI, protested to RFE.[52] Representative Holtzman too took up the cause.[53] Shortly after the uproar died down, Trifa received another torrent of negative publicity. He was featured on a nationally broadcast television show entitled "Escape from Justice – Nazi War Criminals in America."[54]

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Trifa's trial was set for October 1980. Government attorneys traveled to Romania and Israel during the summer interviewing witnesses. Suddenly, seven weeks before trial, and without any forewarning, Trifa's attorney told the U.S. Attorney in Michigan that he had a "bombshell." Trifa would turn in his certificate of naturalization; there was no need for a trial. According to his attorney, Trifa "wasn't up to" a trial because of his health.[55]

Trifa issued a public statement in which he ceded no ground to the government.

> The relinquishment of my citizenship is in no way to be considered an admission of the government allegations. . .
>
> The litigation against me has actually been enlarged into something far more comprehensive – a trial of the ideological and political milieu of Romanian history in the pre-war years, nearly 50 years ago. To that obvious purpose and direction, I have been made a hostage of my own naturalization, forced to act as a vehicle in the condemnation of my country of origin; and particularly of the Legionary Movement [Iron Guard] of those years, and of the many fine men and

> women who gave so much in their dedication to what was then felt as the best solution to Romania's many and complex difficulties. This I cannot and I will not permit to continue.
>
> However much I believe in the American judicial process – and I do – it is with an equally firm conviction I feel I have been denied due process in this protracted litigation. Even if I were accorded a fair trial as such in a procedural sense, it would appear to be irrelevant when such would still render impossible any attempt to bring across the truth of the matters taking place in Romania during the critical years between the great wars.
>
> The tremendous cost, the enormous amount of time, the heavy burdens of many years of litigation and harassment have rendered me unable to effectively defend myself and give full measure to the parishioners of my far-flung Episcopate.
>
> * * *
>
> Thus, in order to preserve the integrity of my own convictions, and in the best interests of my Church and its faithful, the struggle must end!

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The struggle did not end, however. Two months later, the government filed a deportation action. The denaturalization complaint, which had been filed by the USAO, alleged that Trifa had personally participated in acts of murder. By contrast, the OSI-filed deportation action focused on Trifa as a propagandist. OSI's exhaustive research into Trifa's background left it unconvinced that Trifa himself had partaken in the mayhem; it did believe, however, that his writings and speeches had helped create an atmosphere in which such wanton murder and destruction was deemed acceptable.[56]

The government alleged that Trifa had concealed all information about his Iron Guard activities, and that he had advocated violence and the persecution of Jews. According to the government, "hundreds of innocent civilians were killed" as a result of the Trifa Manifesto.[57]

As always, Dr. Kremer followed the litigation closely. He wrote to the immigration judge

urging that the trial be expedited.

> We ask for an immediate and speedy trial of this pogromist. The pogrom that was ordered by Mr. Trifa is considered by contemporary historians the most ghastly ever, even more cruel than Hitler's gasing [sic] and incinerating men, women and children. In this pogrom Mr. Trifa and his cohorts perpetrated the most vicious acts ever devised by distorted human minds: Jews and Christians had their ears, tongues, sexual organs cut off before being put to death by slashing their throats "in the ritual manner", their heads cut off and the carcasses hung on hooks and marked "KOSHER" – on their bellies (KARNE KOSHER in Rumanian).[58]

The letter did not have the desired effect. The judge, assuming that Dr. Kremer was "an informant and potential witness for the Government," recused himself from the case.

> Although ordinarily I would discount ex parte remarks and accusations, I am of the belief that due to the sensitive nature of this case it would be impossible to maintain the appearance of judicial fairness in that the contents of this letter constitute an outright intentional attempt to influence the decision of this court.[59]

Director Ryan urged the court to reconsider. Ryan assured the judge that the government had had nothing to do with the letter, had no advance notice of it, and "dissassociate[d itself] from everything in it." Moreover, Ryan opined that the next judge assigned might receive a similar letter since the parties to the case could not "exercise any influence or control over the letter-writing of this private citizen."[60] The court declined to reconsider its decision and a new judge was assigned.

The government anticipated that it would take two months to try the case. They expected to introduce hundreds of exhibits. The case was complex, both because Romanian politics were complicated (Romania began as an Axis partner but joined the Allies in 1944), and because the anticipated defense was sophisticated. Trifa could argue that he had been a victim himself, since he had spent time in German concentration camps; the government needed to establish that he

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had been more a guest than a political prisoner. And if he argued that the government which crushed the Iron Guard also persecuted Jews, the government needed to show that this did not mean that the Iron Guard wasn't itself anti-Semitic. OSI was prepared to present a long and detailed explanation of Romanian politics. Preparing for the case, an OSI historian wrote a 500 page report outlining the relevant political and cultural issues.[61]

Among the most dramatic evidence the government planned to present was a series of postcards and letters found in the West German archives. They were sent in 1942 by Trifa from various German resorts and spas to his Iron Guard leader comrades. The correspondence supported the government's theory of the case – that Trifa, because of his high-level position with the Iron Guard, had been more a political refugee than a political prisoner.

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Although Trifa's handwriting was on the correspondence – and the government had a handwriting expert to so testify – Trifa claimed they were a Communist forgery. Using then brand-new laser technology, the FBI identified Trifa's latent fingerprint on one of the documents. The identification of a 40-year-old print was extraordinary; it was, and remains to this day, the oldest latent print ever matched by the Bureau. Indeed, a blowup of the print is on display at FBI headquarters for tourists to view.[62]

Last minute pre-trial settlement negotiations came to naught[63] and trial began in October 1982. The government opened its case with two days of testimony by an historian who discussed Trifa's role in the Iron Guard. Through him, the government introduced numerous articles written and edited by Trifa. On the morning of the third day, defense counsel offered to settle. Trifa conceded that he had been a member of the Iron Guard and that he had concealed that background when he entered the United States. He agreed to depart the United States within 60

days of receiving permission to enter another country. He designated Switzerland as the country to which he would like to be deported. He wanted, at all costs, to avoid returning to Romania which had convicted him *in absentia* and sentenced him to life imprisonment in 1941.

As part of the settlement, the United States agreed that if Switzerland refused to accept him, Trifa and the U.S. would have two years to find another country. If, at the end of that two year period no other country would accept him, the U.S. would seek to deport him to Romania. From the government's perspective, this "ensured[d] that in no way would the Department ever find itself in a position where we were sheltering him from possible return to Romania, in the event that no other country would accept him."[64] The potential two-year hiatus was acceptable to the government since it was shorter than the likely duration of an appeal had the trial proceeded to verdict.[65]

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Trifa's attorneys claimed that his abrupt abandonment of the case was due to the fact that he was "old and ill."[66] Trifa himself claimed that he wanted "an end to this. I feel victimized by the fact that things are picked up and enlarged in such a way as to mean completely different things."[67] The court entered an order of deportation in October 1982. It was the first judicial order of deportation litigated by OSI.

It was not easy finding a country to which Trifa could be sent. Switzerland refused to accept him. The United States made inquiries of Italy and (West) Germany. They too were opposed. Romania, the back-up country according to the settlement agreement, expressed extreme reluctance.[68]

Worried that Trifa might remain in the United States by default, the Justice Department sought to persuade Israel to extradite and prosecute him under a 1950 law punishing "crimes

against the Jewish people" committed during World War II. OSI Acting Director Sher went to Israel to discuss the matter.[69] The following week, DAAG Richard planned to meet with the Israeli Attorney General to continue the discussions. However, at the direction of the State Department, DAAG Richard cancelled the meeting when he learned that it was to be held in East Jerusalem; U.S. policy did not recognize Israel's annexation of that sector of the city. The cancellation received national coverage,[70] and sparked debate about the wisdom and proprety of sending Trifa to Israel. Some, including Teleford Taylor, former chief U.S. prosecutor at the Nuremberg war crimes trials, felt that it violated legal notions of fairness to deport someone to a country where he had never been, to be tried for crimes committed before that country had been established.[71]

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In the end, the question was moot. After a rescheduled meeting held in another sector of Jerusalem, Israel declined to accept Trifa.[72]

OSI considered another alternative which they dubbed "The Berlin Option." This involved deporting Trifa to the American-occupied sector of Berlin for prosecution.[73] As OSI saw it:

> We would not only fulfill our commitment to deport him; but we would also serve notice to our entire cast of defendants and subjects that deportation is not an idle threat. Moreover, there is great appeal in sending this Nazi war criminal to the former seat of the Third Reich; the symbolism should not be overlooked.
>
> . . . [B]y establishing this precedent, we can increase significantly the chances of negotiating more deportations.[74]

The Justice Department was skeptical. DAAG Richard was concerned that it would distort OSI's mandate. Having announced that the United States was unable to bring criminal prosecutions against OSI defendants, it should not suddenly change course – by prosecuting him

under American auspices – without compelling legal justification.[75] AAG Stephen Trott thought "dumping the body in Germany" was a "very hostile act."[76] The State Department too was unenthusiastic about the proposal and it never gained momentum.

While he awaited resolution of the matter, Trifa became ever more expansive with the press. He expressed skepticism as to whether any Jews had been killed during the war since he "didn't see any bodies."[77] Reflecting on his activities, he concluded: "With what I even know today, I wouldn't do differently than what I did" and warned that "all this talk by the Jews about the Holocaust is going to backfire. . . [b]e it legislative or whatever, against the Jews." He was sanguine about deportation.

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> You know, I'm not looking for any place too hot. Or too cold. I will not stay in a grass hut in the middle of Africa, either. I will be 70 in June. I'm looking for a place with a high standard of living, with culture.[78]

He found it. In August 1984, Portugal issued him a visa. Though Portugal later claimed that it had been unaware of Trifa's background when it issued the papers,[79] he was allowed to remain there until his death in 1987.

Trifa's followers brought his body back to the United States. He was buried on the grounds of the Romanian Episcopate in Michigan, where he had lived for so many years. There was no longer any basis upon which the U.S. could exclude him.[80]

Litigation concerning his wartime activities did not end even with his death. Pursuant to statute, the United States had terminated Trifa's social security payments as soon as he was deported.[81] Trifa challenged the termination on several grounds, one of which was his claim that he had an "informal" agreement with OSI that would allow him to retain his benefits after he left the country. He also argued that there was new evidence establishing that he should not have

been deported.

He died while these issues were still in litigation, and his executor persevered on behalf of the estate. A court ruled that the claims were merely an "an inappropriate attempt to go behind the order of deportation." As such, the claims were denied.[82]

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1 1. Unless otherwise noted, the Romanian history is taken from a 500 page, fully sourced report on "Viorel Trifa and the Iron Guard," prepared by OSI Historian Peter Black, Feb. 1982 (hereafter The Black Report).

2. Trifa changed his name from Viorel to Valerian after he came to the United States.

3. As reported in the Dec. 12, 1940 edition of the Romanian newspaper *Buna Vestire* in an article entitled "December 10 Under the Sign of Justice."

4. *E.g.,* a November 24, 1940 piece complained that the "kikes" had no interest in a pro-Axis policy because they wanted Romania "to be at the orders of Paris and London where the kikes were strong."

5. A front-page story in a Swiss newspaper referred to "extremists of the Iron Guard, whose uninhibited rule of terror the Romanian people is no longer willing to bear." "Die innere Lage Rumäniens," (The Internal Situation in Romania), *National-Zeitung* (Basel), Jan. 3, 1941. Franklin Mott Gunther, the U.S. Minister to Romania, described the Iron Guard's "entire history [as] shot through with assassinations and terrorism." Feb. 5, 1941 report to the Secretary of State re "The Iron Guard Revolution of January 21 to 23: A Summary of Its Causes, Course and Results," p. 3 (hereafter Gunther Report).

6. Gunther Report, *supra*, n. 5 at pp. 3-5.

7. Trifa maintained that he did not write the manifesto although he conceded that he did not oppose its issuance. Trifa Deposition, Jan. 25, 1977, p. 42; Trifa FBI interview, Dec. 1955. OSI never developed any independent evidence as to whether he was the actual author.

8. "The Rallies of the Legionary [Iron Guard] Movement on Sunday: The Movement's Leaders Delivered Addresses on the Subject of 'The Struggle of Germany and Italy for the establishment of a New European Order,'" *Universul* (Romanian newspaper), Jan. 21, 1941.

9. Franklin Gunther to State Department, No. 89, Jan. 30, 1941.

10. The Gunther Report, *supra*, n. 5, gave official figures of 236 killed, of whom 118 were Jews. Gunther thought this figure too low, but found "no good support for figures running beyond 300 to 400." Jewish groups gave much higher numbers. The JTA reported on Jan. 30, 1941 that 1,000 Jews were killed in Bucharest alone and another 1,000 in the countryside. "2,000 Jews Slain in Rumanian Terror; Eyewitness Tells Brutalities." *The Canadian Jewish Weekly* claimed that as many as 6,000 Jews were killed. "Nazi Murderer of 6,000 Jews Bishop in Cleveland Church," July 23, 1953.

11. Von Bolschwing was prosecuted by OSI in 1981. *See* pp. 259-270.

12. In 1946, he was again tried *in absentia* (by a new Romanian government) and sentenced to death for crimes amounting to genocide under the Romanian penal code. U.S. Emb. Bucharest to

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Sec'y of State, No. 2280, Apr. 12, 1979.

13. The IRO Manual for Eligibility Officers stated that Iron Guard members were "*prima facie* outside the mandate"of the IRO. As such, they were ineligible to emigrate under the DPA.

14. "Court Holds 5 in Contempt in Bishop Row," *The Philadelphia Enquirer*, Apr. 30, 1952.

15. CIC Report, Jan. 16, 1950, Ref. No. 8-50-17.

16. Aug. 6, 1951 report to DOS Division of Security.

17. Redacted Mar. 3, 1953 INS memorandum re "Trifa, Viorel."

18. Feb. 7, 1975 memorandum to Regional Commissioner, Northwest from District Director, Detroit, re "Valerian D. Trifa aka Viorel Trifa."

19. Nov. 16, 1973 memo to Trifa file from D.L. Milhollan (INS); Feb. 7, 1975 memo from INS District Director (Detroit) to INS Regional Commissioner (Northwest).

20. Mar. 3, 1953 INS memorandum re "Trifa."

21. Broadcast, May 29, 1955; *AP* column, June 4, 1955. Pearson attacked Trifa again in 1963. "3 War Criminals Remain in U.S.," *The Washington Post*, May 22, 1963. (The other two criminals were Andrija Artukovic, discussed at pp. 239-258 and Nicolae Malaxa, who died in 1972, before OSI's founding.)

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22. The INS had so advised Michigan Senator Homer Ferguson and Michigan Congressman George Dondero in letters dated June 28, 1951.

23. Nov. 29, 1978 memo to Martin Mendelsohn, Chief SLU, from trial attorney Eugene Thirolf. Mendelsohn wondered whether the FBI was protecting Trifa. The Bureau denied that he had ever been an asset or informant. Declassified FBI memorandum of Apr. 6, 1979 re "United States vs. Valerian Trifa;" Declassified and redacted FBI memorandum of Mar. 5, 1980 re "Valerian Trifa."

24. June 22, 1962 memorandum from Detroit Naturalization Examiner Sidney Freed to the Assistant Commissioner of Naturalization, Washington, D.C.

25. Apr. 9, 1974 letter from INS General Counsel Charles Gordon to James F. Greene, Deputy Commissioner.

26. Recorded interview with Allan Ryan, June 10, 2003.

27. "Bishop Admits Past Pro-Fascist Ties," by Hiley H. Ward, *The Detroit Free Press*, Aug. 27, 1972.

28. Dec. 14, 1972 memorandum from Sol Marks, INS District Director, New York to the Associate Commissioner of Operations, Central Office.

29. Oct. 1, 1973 letter to Deputy Attorney General William Ruckelshaus from Robert Morse, U.S. Attorney, E.D.N.Y.

30. "Bishop Under Inquiry on Atrocity Link," by Ralph Blumenthal, *The New York Times*, Dec. 26, 1973. Trifa made similar admissions to *The Detroit News*. "12 Witnesses May Tie Bishop to War Crimes," by Michael Wendland, June 2, 1974.

31. "Bishop is Facing Expanded Inquiry," by Ralph Blumenthal, *The New York Times*, Apr. 5, 1974.

32. "Rep. Holtzman Calls U.S. Lax on Nazi Inquiries," by Ralph Blumenthal, *The New York Times*, May 21, 1974; letter of same date from Holtzman to INS Commissioner Chapman. In February, 1975, she went to INS' offices to review various case files, including Trifa's. Feb. 14, 1975 memo from INS District Director (New York) to INS Regional Commissioner (Northeast).

33. Sept. 30, 1974 letter from INS Acting Deputy Commissioner Carl Wack, Jr. to Kremer (referencing an Apr. 1974 meeting between Kremer and the INS General Counsel); "12 Witnesses May Tie Bishop to War Crimes," *supra*, n. 30.

34. Feb. 7, 1975 memo; Feb. 20, 1975 memo to Assistant Attorney General for the Criminal Division from L.F. Chapman, Jr. INS Commissioner.

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35. Recorded interview with Mendelsohn, May 23, 2001.

36. Kremer provided the SLU with 186 documents he believed relevant to the prosecution. Dec. 20, 1978 memo from Thomas Fusi, SLU Criminal Investigator, to File, re "Interview with Dr. Charles Kremer on 12/15/78 in the case of Viorel Trifa." Overall, Dr. Kremer's evidence "tended to be more misleading than helpful" in that it suggested that Trifa was directly involved in the murder of Jews; in fact the government found no reliable evidence to substantiate that charge. Recorded interview with former OSI Chief Historian Peter Black, June 24, 2003.

37. Recorded interview with Gene Thirolf, June 13, 2003.

38. Apr. 3, 1980 memo from Thirolf to OSI Director Allan Ryan; June 22, 1979 testimony of Rep. Holtzman before the House Ways and Means Subcommittee on Trade.

Communist bloc countries were usually willing to help the United States pursue an alleged Nazi war criminal, though they were often slow to respond. Some speculated that the unusual recalcitrance in this case was due to fear that Trifa and his supporters might retaliate by revealing that some Iron Guard members were currently serving in the postwar Communist government. "U.S. Aide Says Rumania Fails to Help in Fascist's Trial," by David Binder, *The New York Times*, June 11, 1979.

39. May 8, 1980 memorandum from Thirolf to OSI Director Allan Ryan re "Our History of Contacts with the Government of Romania" (hereafter Thirolf memo).

40. "U.S. Aide Says Rumania Fails to Help in Fascist's Trial," by David Binder, *The New York Times*, June 11, 1979.

41. Statement before the House Subcommittee on Trade, House Ways and Means Committee, June 22, 1979. Rep. Holtzman acknowledged that cooperation with OSI did "not fall explicitly within the ambit of the freedom of emigration requirements." Nonetheless it was a reflection on Romania's willingness to work with the United States on a matter "of mutual concern."

42. "Romania Will Aid U.S. in Trifa Trial," by Susan Morse, *The Detroit Free Press*, July 6, 1979.

43. Holtzman interview, June 12, 2002.

44. Thirolf memo, *supra*, n. 39. A year later, when Romania's MFN status was again up for renewal, Holtzman asked the subcommittee to "strongly remind the Romanian government that its continued cooperation is expected." Submitted statement before the subcommittee, June 10, 1980 (emphasis in original).

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45. Kremer was head of the Romanian Jewish Federation of America, and later the Committee to Bring Nazi War Criminals to Justice in U.S.A., Inc.

46. Oct. 9, 1979 redacted memorandum from FBI Washington Field Office.

47. Black Report, *supra*, n. 1, at ch. IX, p. 55, n. 133.

48. Recorded interview with Thirolf, Feb. 22, 2002. According to Thirolf, the photograph had come from someone in the opposing faction of the Romanian church. The SLU had submitted the photograph to the FBI for analysis. They were unable to determine whether it had been altered. Mar. 13, 1979 report from FBI to Thomas Fusi, Investigator SLU.

Long after the Trifa litigation was complete, an official in the Romanian intelligence service, who had since defected, claimed that the Romanian premier had ordered evidence be manufactured against Trifa. *Red Horizons, Chronicles of a Communist Spy Chief*, by Ion Pacepa (Regnery Publishing).

49. The government issued a subpoena to reporter Ralph Blumenthal. Although *The Times* originally contemplated litigating the validity of the subpoena, the Department of Justice and the newspaper agreed without litigation on the parameters of Blumenthal's testimony. The government would call on Blumenthal to testify about Trifa's statements only if Trifa did not himself admit he had made the statements to Blumenthal and the government was not able to prove the admissions by independent means. Aug. 15, 1980 memo to AAG Heymann from Director Ryan re "New York Times Subpoena in United States v. Trifa;" July 2, 1980 memo to AAG Heymann from Ann Fleisher Hoffman, Executive Assistant to the Attorney General re

"Subpoena to the New York Times."

50. Radio Free Europe was founded in the 1950s and broadcast into Eastern Europe. It was originally run by the CIA as a propaganda organ for the United States. In 1971, control was turned over to The Board for International Broadcasting, an independent federal agency funded and overseen by Congress.

51. *See e.g.*, "A Government Blunder," *The St. Petersburg Times*, Dec. 16, 1979; "Trifa Case: Fire White House Aide," *The Miami Herald*, Dec. 14, 1979; Commentary on WEAM Radio, Dec. 19, 1979; Commentary by Jack Anderson on *Good Morning America*, ABC-TV, Dec. 6, 1979; "RFE's Bishop is Probed," Jack Anderson, Feb. 20, 1980; "Outrageous Program is At Issue," Jack Anderson, Feb. 20, 1980; "Broadcast by Clergyman Accused of Killing Jews Is Drawing Criticism," *The Washington Star*, Dec. 12, 1979.

52. June 11, 1979 letter to Mendelsohn from William Buell, Senior Vice President, RFE responding to a phone call from Mendelsohn; Nov. 14, 1979 letter to Buell from Mendelsohn.

53. "Legislator Assails Radio Free Europe," by David Binder, *The New York Times*, May 17, 1979. After two RFE workers who complained about the broadcast were fired, Rep. Holtzman directed the Subcommittee on Immigration to open an investigation into the matter. She also urged the president to fire a White House aide who defended the broadcast. (The aide survived the furor.) "Solon: Two RFE Workers Fired for 'Whistleblowing,'" *The Birmingham News*, Dec. 21, 1979; Dec. 20, 1979 letter from Holtzman to Congressman Dante Fascell, Chair of the Subcommittee on International Operations (which had oversight over RFE); "Note by Rep. Holtzmann [sic] Bids Carter Oust an Aide," *The New York Times*, Dec. 7, 1979. Rep. Holtzman also raised the issue on the House floor. Cong. Rec. Jan. 30, 1980, H. 425. At her urging, the Attorney General expressed support for an investigation into Trifa's broadcast. Jan. 17, 1980 letter from Attorney General Civiletti to Cong. Holtzman; Dec. 31, 1979 letter from the Attorney General to John Gronouski, Chairman, Board for International Broadcasting.

54. The show was broadcast on ABC's *News Closeup*, Jan. 13, 1980. At the time, ABC was one of only three nationally broadcast stations.

55. Sept. 8, 1980 memo from Thirolf to files re "U.S. v. Trifa;" and June 13, 2003 telephone conversation with District Judge George Woods, who was Trifa's attorney during the denaturalization phase.

56. Recorded interviews with Peter Black (June 24, 2003) and Eugene Thirolf (June 13, 2003). It is unclear why the denaturalization complaint had not been revised to reflect this thinking, as Thirolf recalls viewing Trifa early on as a propagandist rather than a murderer (recorded interview Feb. 22, 2002). Black's treatise, *supra*, n. 1, which provided the definitive analysis for the government, was written after the denaturalization case had settled.

57. OSI did not at first rely on the recently-enacted Holtzman Amendment which provided for deportation of persons who assisted Nazi Germany or its allies by ordering, inciting, assisting or

otherwise participating in the persecution of persons because of their race, religion or political opinion. As Romania had not entered the war on behalf of the Axis until June 22, 1941, there was concern that Trifa's activity six months earlier might not come within the scope of amendment. However, OSI established that Romania had requested a military mission from the Germans in September 1940 and had joined the Axis Tripartite Pact two months earlier. The government thereafter amended its papers to add a "Holtzman count." The advantage of adding this count was that, if proven, it eliminated the possibility of Trifa's getting a waiver to preclude deportation.

58. Dec. 24, 1981 letter to Imm. Judge Anthony Petrone.

59. Jan. 4, 1982 order *In the Matter of Valerian Trifa.*

60. Jan. 12, 1982 letter to Imm. Judge Petrone from Ryan.

61. Black Report, *supra*, n. 1.

62. Elements of the Trifa case were the topic of an episode in the documentary television series *Forensic Files*. The episode was broadcast on Court TV in Sept. 2001

63. Sept. 27, 1982 memo to DAAG Richard from Director Ryan re "Viorel Trifa."

64. Nov. 9, 1982 memo to The File from DAAG Richard re "Trifa Prosecution – Deportation to Romania."

65. Aug. 14, 1984 news conference with AAG Trott and Director Sher.

66. "U.S. to Deport Archbishop Accused as a Nazi Ally," *The New York Times*, Oct. 7, 1982. Trifa was 68 years old at the time.

67. "U.S. Seeks to Deport 10 Other Nazis," by Francis X. Clines, *The New York Times*, Oct. 9, 1982.

68. Mar. 14, 1983 letter to the Assistant Legal Advisor, Consular Affairs, State Department from Neal Sher, Deputy Director, OSI.

69. "U.S. Asks Israel to Try Ex-Nazis Being Deported," by Edward Walsh, *The Washington Post*, Apr. 29, 1983. Dr. Kremer, identifying himself as the president of the Committee to Bring Nazi War Criminals to Justice in U.S.A., Inc., had already implored the Israelis to accept Trifa. He received a non-committal handwritten response on stationery from the "Residence of the President of Israel." Jan. 11, 1983 letter from Kremer to Israeli President Yitzchak [sic] Navon and Jan. 28, 1983 response thereto.

70. *E.g.*, "U.S. Aide, in Israel on Nazi Cases, Rejects Meeting in East Jerusalem," by David Shipler, *The New York Times*, June 3, 1983; "Office Site Snags U.S.-Israeli Talks on Nazi

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Cases," by Edward Walsh, *The Washington Post*, June 3, 1983.

71. "Steps to Deport Nazi Backers Cause Legal Concern," by Stuart Taylor, Jr., *The New York Times*, May 9, 1983.

72. One of the problems in the Trifa case was that the Israeli law applied to those in countries hostile to the Allies at the time the crimes were committed. Since Romania had not officially declared war on the Allies when Trifa was involved in his incendiary activities, some felt the case would not be prosecutable. Ultimately, the Israelis decided that the first OSI defendant they would take would be John Demjanjuk, then (mis)identified as Ivan the Terrible. *See* pp. 150-174. According to DAAG Richard, Demjanjuk was a test case for the Israelis. They anticipated seeking extradition of other OSI defendants if that prosecution went well. It did not and no other OSI defendant has since been extradited to Israel.

73. Following World War II, Berlin was divided into four sectors by the victorious powers. The U.S., the U.S.S.R., England and France each occupied one sector.

74. Apr. 6, 1983 memo to DAAG Richard from Acting OSI Director Sher re "Trifa Deportation to United States Occupation Sector or Berlin."

75. Oct. 26, 2000 discussion with DAAG Richard.

76. Aug. 23, 1983 buck slip from AAG Trott to Associate Attorney General D. Lowell Jensen re "Trifa Deportation."

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77. "Trifa Speaks Out: 'I Was Not a War Criminal,'" by Stephen Franklin, *The Detroit Free Press*, July 17, 1983. Most of the Romanian Jews who died during the Holocaust did in fact die outside of Romania; they died in ghettos and concentration camps to which they had been deported. However, there were still many Jews who died within the country. In addition to those murdered during the January 1941 uprising, approximately 10,000 others were killed in the summer of 1941 during a pogrom in Jassy, Romania.

78. "Stateless Rumanian Archbishop Looks for a Country," by Howard Blum, *The New York Times*, Feb. 2, 1984.

79. "Deported Bishop Flies to Portugal," by Stuart Taylor, Jr., *The New York Times*, Aug. 15, 1984.

80. Before the body was returned to the United States, Director Sher contacted the State Department to learn if there was any way to prevent its return. He was told that the only bases of exclusion were (1) if the body were not properly embalmed; or (2) the person died of a communicable disease.

81. 42 U.S.C. § 402(n).

82. *Sibisan v. Bowen*, 1989 WL 281921 (N.D. Ohio) (unpub'd).

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Ferenc Koreh – A Lifetime of Propaganda

There is a measure of irony in the prosecution of Ferenc Koreh for his propagandist activities on behalf of the Nazis in that once he emigrated, Koreh devoted himself to propaganda on behalf of the United States. In the United States, Koreh inveighed against Communism; as a Nazi propagandist, he incited the populace to revile innocent civilians and exhorted the government to promote policies of discrimination and subjugation.

Koreh was born in Transylvania, a region which was part of Hungary at the time of his birth, but which was incorporated into Romania after World War II. During the war Hungary (as well as Romania) was allied with the Axis powers. Between 1941 and 1944, Koreh served as the "Responsible Editor" of a privately owned Hungarian daily.[1] His duties included writing, reading and editing articles, meeting with government officials to discuss the paper's content, publishing news stories received from the government, and assuring that the government's political policy was reflected in the paper.[2] During his tenure, the newspaper published dozens of pieces advocating the persecution of Jews as well as defeat of the Allies. Articles alleged that Jews had promoted and funded the war,[3] raped innocent Hungarian girls,[4] tarnished the professions,[5] and wantonly slaughtered military officers.[6] Scurrilous pieces which appeared under Koreh's byline covered the threat to commerce from Jewish immigrants because of their "unfair" practices;[7] Jewish sabotage and prayer "for the failure of the aspiration of every Hungarian;"[8] and the failure of the Hungarian press to cover adequately the theories of race philosophers.[9]

From 1944 to the end of the war, Koreh was Press Information Officer and Deputy Chief of the Information Section at the Hungarian Ministry of Propaganda. His responsibilities

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included preparing radio broadcasts, reviewing speeches, and monitoring Hungarian press coverage of various issues, including "the Jewish question." For a portion of his time at the Ministry of Propaganda, he also served as Responsible Editor of a government-owned weekly. That newspaper, like the privately owned one with which he was associated, was pro-Axis in its coverage. In 1946, the People's Court of Budapest found Koreh guilty of war crimes. The conviction was based on Koreh's work for the government publication. He was sentenced to a year in prison, to be followed by five years' suspension of his political rights.[10]

Koreh came to the United States in 1950. His visa application stated that he had written "cultural and literary" material for a private newspaper. Nothing indicated that he had been the paper's Responsible Editor nor that he had worked at the Ministry of Propaganda or been editor-in-chief of a government publication. Although he acknowledged being sentenced to a year in prison, he described this as political incarceration based on his anti-Communist stance. He denied having been a member of, or having participated in, any movement hostile to the United States.

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In 1956, Koreh became a United States citizen. He was an outspoken critic of the Communist regimes in Hungary and Romania. From 1951 until 1974, he was a broadcast journalist with Radio Free Europe. He remained with RFE on a freelance basis until 1989. Beginning in 1965, he also hosted a two-hour weekly radio program, a portion of which was devoted to the issue of Hungarians within Romania. He also helped organize demonstrations against the Romanian government and served for a period of time as president of an anti-Communist emigré organization.

In early 1977, *Dreptatea*, a Romanian language newspaper published in New York, ran

an article identifying Koreh as "Chief of the Nazi [Iron Cross] party and of all the political publications appearing in Northern Transylvania from 1940 to 1944." In addition, the piece held Koreh responsible for mass murders and reported that he had hunted his victims from horseback and had been condemned to death *in absentia* by a Hungarian court. A few months later, a similar article was published in *The United Israel Bulletin*, another New York paper. Koreh sued both publications and their editors for libel. The case settled in 1979 when the newspapers retracted all statements other than the ones holding Koreh responsible for mass murder.[11]

The SLU first learned about Koreh from an article in *The United Israel Bulletin*.[12] OSI inherited the investigation and filed a denaturalization complaint in 1989, charging that Koreh's visa should not have been issued because he had (1) assisted in the persecution of Jews through his position as Responsible Editor of the privately owned newspaper; (2) been a member of, or participated in, a movement hostile to the United States through his employment as a press officer in the Hungarian Ministry of Propaganda; (3) given "voluntary assistance" to enemy forces by his employment in the Ministry; and (4) failed to list his conviction as a war criminal.[13] The case received publicity, in part because (unbeknownst to OSI before the filing), one of Koreh's daughters was an FBI agent. Three days after the filing, an unidentified person threw an object through a window in Koreh's home with a note stating "Dog – You Will Die."[14]

The fact that Koreh's daughter was an FBI agent both complicated and slowed the prosecution. Colleagues in her New York office [NYO] elected, without any discussion with OSI, to analyze the case. Relying in part on material which had been prepared by Koreh for his earlier libel suit, they concluded that the government's case was based on documents fabricated by the Communist Romanian government.[15] In August 1989, they advised DOJ that it appeared

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OSI had been duped by a hostile intelligence service.[16] The New York agents suspected that Koreh had been targeted because he was an outspoken opponent of the Romanian president and an on-air employee of Radio Free Europe. They alerted FBI headquarters that they were preparing a report "recommending an investigative course of action" because they foresaw possible criminal violations stemming from the OSI filing. These included the making of false statements (to OSI) and obstruction of justice.[17]

FBI headquarters was skeptical that there was any predicate for either a counterintelligence or criminal investigation. They were concerned too about a potential conflict of interest because the report was being prepared by an agent who was romantically involved with Koreh's daughter.[18]

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The boyfriend (later spouse) prepared a 46 single-spaced page report. Its essence was that the Romanian intelligence services sought to discredit RFE employees and Romanian emigrés who had been active in anti-Communist activities. More than a third of the document discussed OSI's prosecution of Archbishop Trifa, who, like Koreh, had opposed the Communist regime. The report depicted Trifa as the victim of a Romanian disinformation campaign and saw the Koreh and Trifa cases as having "striking similarities."[19] The significance of the Trifa case, according to the report, was that it demonstrated the propensity of the Romanian intelligence community to engage in a disinformation campaign.

The document asserted flatly that "[m]ethods used in Mr. Koreh's case and in other instances include forged documents." In fact, however, none of OSI's evidence came from Romania. The case was based entirely on admissions made by Koreh (some of them in his deposition during the libel suit), newspapers from Hungarian archives, and Koreh's conviction

for war crimes by a Hungarian court.

Even though nothing in the report discredited the evidence upon which OSI based its case, its very existence created problems for OSI. The FBI's questioning whether the case was based on false documentation raised potential discovery and legal issues.

In preparation for trial, the defense wanted all government documents which would assist in their claim that Koreh had been set up by the Romanian government; this included the unredacted FBI report. However, the government was concerned that material in the report was privileged. The court agreed, approving a stipulation which gave the defense the essence of the classified material without revealing state secrets.[20] The stipulation stated that unnamed sources represented that the Romanian Intelligence Service (RIS) targeted many prominent Hungarian organizations and Hungarians, including Koreh, in the mid to late 1980s. The RIS wanted information about their private lives which could be used against them. However, the stipulation stated that there was no evidence that such information had in fact been collected about Koreh.

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Sparring over the report – its preparation and defense access to it – took three years.[21] The court finally reached the merits of the denaturalization case in June 1994. It acknowledged being torn by the defendant's situation.

> [T]he court has had to resolve certain difficulties in its own mind and thus has dragged its judicial feet in hopes that the case would be disposed of in ways other than this. On the one hand, the court is faced with a defendant who will be 85 years of age in September, 1994 and who has been in this country for 44 of those years working until his retirement and apparently with some distinction for Radio Free Europe; producing and broadcasting a Hungarian language radio program; and writing for and/or editing a Hungarian newspaper, a Hungarian magazine, and a Hungarian news quarterly. Importantly, there is no suggestion that defendant personally committed or supervised the commission of any of the atrocities that one typically sees in cases in which the United States seeks denaturalization; indeed, had the conduct in which he concededly engaged and the anti-Semitic and

> anti-Allied articles he is alleged to have written and admittedly published occurred in this country, that conduct and those articles would most likely be protected by the First Amendment. On the other hand, defendant's admitted and undisputed activities during the discrete periods of time to which the United States points . . . warrant denaturalization as a matter of law.[22]

The court relied only on facts which were stipulated or otherwise not in dispute. Thus, any articles written at a time when the defendant claimed he was away from the newspaper were excluded. So too were all articles printed under his name because the defendant ("most belatedly" according to the court) claimed these were Romanian forgeries. Even with all these exclusions, there were 55 articles to be considered. The court described them thus:

> The "alien-character" of the Jews was emphasized and Jews were described as constituting a separate and distinct race; Jews were portrayed as "traitorous, unscrupulous, cheating" . . . and a consistently dangerous element in Hungarian society responsible for the socioeconomic problems afflicting Hungary and the world; a portion of an article from the National Socialist German Workers Party publication was reprinted . . . concluding that . . . "everyone in Hungary is aware of the fact that a final solution may be achieved only by deporting Jewish elements". . . . [I]n the impoverished and poorly educated region which *Szekely Nep* reached, more than forty articles published while defendant was present blamed the Jews for the economic and social problems and the misery of the people in that region . . . and called for harsher restrictions and punishments, including the suggestion that the homes of Jews be taken away.[23]

The court concluded that as Responsible Editor of a privately owned newspaper, Koreh gave "assistance in the persecution" of Hungary's Jews; his work amounted to "advocacy" of such persecution, fostering a climate of anti-Semitism which conditioned the Hungarian public to acquiesce, encourage and carry out anti-Semitic policies. Moreover, his work on the paper constituted membership and participation in a movement hostile to the United States. For all these reasons, he should have been denied a visa to enter the United States. His citizenship was therefore revoked; the Third Circuit affirmed.[24]

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The government filed a deportation action but settled the case before trial because of Koreh's failing health. Koreh admitted responsibility for publishing anti-Semitic articles, conceded his deportability and designated Hungary as the country to which he should be sent. In January 1997, the court entered an order of deportation. The government agreed not to effect the order unless Koreh's health improved. It did not. He died three months later, at age 87.[25]

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1 1. There were some short gaps in this period of service, but they are irrelevant to the issues presented.

2. *U.S. v. Koreh*, 856 F. Supp. 891, 896 (D.N.J. 1994).

3. "Blood and Gold: The Role of Jewish Capital in the Present World War;" Jan. 31, 1942; "How the World's Jews Forced the American People to Go to War;" Feb. 15, 1942.

4. "Is It Possible for Szekely Maids to Continue to Serve in Jewish Homes?" (reporting that "it frequently occurs that some ugly Jewish man pursues and propositions the defenseless girls who find themselves in a situation of dependency"), Mar. 21, 1942.

5. "The Need to de-Jewify the Legal Profession," July 18, 1942.

6. "Jews Were the Murderers of the Polish Officers Killed in the Soviet Union," Apr. 16, 1943.

7. "We Are Demanding an Investigation," Aug. 5, 1941.

8. "Hucksters," Sept. 20, 1941.

9. "Subversives," Oct. 11, 1942.

10. He served seven months in jail.

11. Sept. 21, 1979 transcript of proceedings before the Hon. Thomas Griesa, Case No. 77 Civ. 2613 (S.D.N.Y.).

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12. Chronology of events in Koreh Investigation/Litigation prepared by OSI. The chronology references an Apr. 24, 1978 memo by the SLU about an article in *The United Israel Bulletin* concerning Koreh and Trifa. Simon Wiesenthal notified the SLU about Koreh in a July 21, 1978 letter to SLU chief Martin Mendelsohn.

13. Although OSI had investigated a range of allegations, including those leveled by the newspapers, in the end the government concluded that charges of murdering Jews and leading the Iron Cross were not sustainable. The documents connecting Koreh to the Iron Cross were photocopies. Although an FBI forensics examiner opined that Koreh "cannot be eliminated as the possible writer," he was unable to make a definitive determination absent the original documents. OSI was never able to get the originals from Romania and that part of the investigation was accordingly abandoned.

14. "Threats, Vandalism at Koreh Home," by David Voreacos, *New Jersey Record*, June 27, 1989; "Nazi Apologist in Engelwood? Daughter Denies U.S. Claim," by Ron Hollander, *New Jersey Record*, June 22, 1989. (The newspaper incorrectly reported the note as saying "You dog, you will die." A June 30, 1990 FBI teletype from Newark to FBI headquarters, re "Vandalism at 83 Grove Street, Englewood, NJ" makes clear what the note actually said.)

15. May 2, 1991 memorandum to File from Susan Siegal, then OSI Senior Trial Attorney re "Interview with John Schiman" Schiman was the NYO Assistant Special Agent in Charge of Terrorism.

16. Apr. 26, 1991 memorandum to File from Siegal re "discussion with Mary Lawton." Lawton was chief of the Justice Department's Office of Intelligence Policy and Review (OIPR).

17. Sept. 12, 1989 teletype from NYO to HQ.

18. Sept. 29, 1989 teletype from HQ to NYO. Regulations precluded – absent a written waiver by a supervisor – participation in a criminal investigation by anyone with a personal relationship with a person he knows has a "specific or substantial interest that would be directly affected by the outcome of the investigation or prosecution." 28 C.F.R. 45.735. The boyfriend did report the potential conflict to his supervisor but received only an oral waiver.

19. Although Trifa voluntarily surrendered his citizenship shortly before his denaturalization trial, and agreed to be deported in the midst of the deportation proceedings, the report did not see this as giving credence to the Justice Department's case. Instead, it attributed this to Trifa's desire "to avoid further embarrassment for his church and family and to eliminate protracted and costly litigation."

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20. Both the magistrate and district court rulings are published at *United States v. Koreh*, 144 F.R.D. 218 (D.N.J. 1992).

21. The FBI had first presented its concerns to DOJ in Aug. 1989. The final court ruling on state secrets was in Sept. 1992.

22. *U.S. v. Koreh*, 856 F. Supp. at 893.

23. *Id.* at 898.

24. *United States v. Koreh*, 856 F. Supp. 891 (D.N.J. 1994), *aff'd*, *United States v. Koreh*, 59 F.3d 431 (3d Cir. 1995).

25. The case had repercussions for others beyond the defendant. As early as 1992, OSI reported its concerns about to the FBI/OPR (Office of Professional Responsibility). OSI was concerned about

They had interviewed him in

July1991 when trying to sort out the merits in the allegations of the report.

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June 19, 1992 letter to Michael E. Shaheen, Jr., DOJ/OPR.

In June 1996, DOJ/OPR issued its findings. It found no misconduct by OSI. Acknowledging that "some of comments may have included words and phrases that could be colorful, his overall 'message' . . . was clearly one that needed conveying."

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The FBI never authorized the criminal investigation called for in the New York report. (Many of the FBI supervisors involved in preparation of the report were no longer with the Bureau and were therefore immune from OPR review.)

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Senior Officials

Andrija Artukovic – Justice Interminably Delayed

No case spawned as much litigation or extended over as long a period of time as that of Andrija Artukovic, the highest ranking Nazi collaborator ever found in the United States. Extradition proceedings were begun in 1951 – long before the creation of OSI; Artukovic was extradited in 1986. Collateral matters related to the case are still pending.

He was born in 1899 in Croatia, then a region within the Austro-Hungarian empire. Yugoslavia, created after World War I, was an amalgam of nations, including perennial enemies Serbia and Croatia. In April 1941, Germany invaded Yugoslavia and dismembered the young republic. One of the newly-created states was the "Independent State of Croatia," a Nazi puppet regime run by the fascist Ustasha party. The new government declared war on the United States in December 1941.

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Artukovic served the Ustasha government in various capacities, including Minister of the Interior and Minister of Justice and Religion. In these positions, he promoted policies that victimized Serbs, Jews, Gypsies, Orthodox Christians and Communists. Among other things, he issued a series of decrees mandating internment of these undesirables, empowering summary courts to impose death sentences, calling for execution of Communist hostages, confiscating Jewish businesses, and limiting state and academic employment to Aryans. In a speech to the Croatian State Assembly, he described Jews as having:

> prepared the world revolution, so that through it the Jews could have complete mastery over all the goods of the world and all the power in the world, the Jews whom the other people had to serve as a means of their filthy profits and of its greedy, materialistic and rapacious control of the world.[1]

Approximately 25,000 Jews, 250,000 Serbs, and numerous Gypsies, Orthodox Christians and Communists perished in the Independent State of Croatia between April 1941 and May 1945. After the war, Communists who had fought the Ustasha regime assumed power. They reunited Croatia with the rest of Yugoslavia and placed Artukovic's name on the United Nations War Crimes Commission list of war criminals. He was referenced in the Communist press as "The Butcher of the Balkans."

Artukovic entered the United States in 1948 on a 90-day visitors visa issued to him under an assumed name. He settled in California and began working for a construction company owned by his wealthy brother. His visa was twice extended, the second extension expiring in April 1949. In an effort to ensure his continued presence in the United States, his Congressman introduced a private bill to retroactively bestow lawful admission on Artukovic and his family.[2] Although no action was taken on the measure – which identified him by his proper name – it triggered the government's investigation.

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Artukovic's problems began when the bill was routinely sent to INS for review. INS' inquiries led to the realization that Artukovic had been unlawfully admitted under a false name and that he was wanted in Yugoslavia for war crimes. There were two options available for removing him from the United States – deportation and extradition. Both were pursued.

The two proceedings were filed in 1951. The deportation case began first. Artukovic did not challenge his deportability; he had, incontrovertibly, entered the United States under a false name and his visitors visa had long since expired. However, he sought refuge under a statutory provision that suspended deportation proceedings in cases where the defendant could show he was of "good moral character" and that deportation would impose "serious economic

detriment."[3] Artukovic was at that time the father of four, the youngest of whom had been born in the United States. The child was therefore a U.S. citizen. Artukovic argued that deportation would impose a severe economic hardship on his infant daughter.

Rather than litigating the economic issue, INS contended that Artukovic was ineligible for the exemption because he lacked good moral character. The government presented evidence to show that, as a cabinet minister, Artukovic had been a major Nazi collaborator, responsible for the deaths of innocent Serbs and Jews. The immigration judge agreed and the ruling was upheld on appeal.

> There appears to be little doubt (1) that the new Croatian state, at least on paper, pursued a genocidal policy in Croatia with regard to Jews and Serbs; (2) that Artukovic helped execute this policy in that, as Minister of Interior, he had authority and control over the entire system of Public Security and Internal Administration; and (3) that during this time there were massacres of Serbs and, perhaps to a lesser extent, of other minority groups within Croatia.
>
> [I]t is difficult for us to think of any one man, other than [the Croatian president] who could have been more responsible for the events occurring in Croatia during this period than was [Artukovic].[4]

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Having failed to get the proceedings suspended, Artukovic next sought a stay of deportation by claiming that he himself would be the victim of persecution if he were returned to the communist country of Yugoslavia. In making this argument, he acknowledged that as a Cabinet minister he had authorized the persecution of communists. The judge postponed ruling on the stay application pending resolution of the extradition request.

The extradition was predicated on a Yugoslav indictment charging Artukovic with having murdered, or caused to be murdered, 22 persons, including the Archbishop of Sarajevo. As is customary in extradition proceedings, Artukovic was arrested pending the outcome of the

hearing. Although defendants are rarely released on bail in such circumstances, the court made an exception for Artukovic. The court felt he presented no flight risk and the judge was skeptical about the merits of the case.

> I am impressed by the date of the alleged offenses, 1941; and the fact that Yugoslavia was invaded by Germany on April 6, 1941, and thereafter occupied by Germany until 1945 and that the whole world and especially that portion of the world, was in a terrible turmoil. . . . I cannot help but think that it might be possible, if extradition treaties with various countries were carried out to the letter in connection with charges that might be made, they might demand the extradition of every person who was a member of any armed forces against them and charge them with having committed murder, because surely people who are members of armed forces do kill other people, and they kill them just as dead as they would if they privately did it and certainly with as much intention.[5]

Artukovic argued that the U.S. courts should not address the extradition request because (1) the treaty of extradition – entered into in 1902 between the Kingdom of Serbia and the U.S. – was no longer valid; and (2) the charges against him were political and therefore could not form the basis for extradition in any event.

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The district court agreed with the first argument.. The court did not reach the issue of whether the crimes would be extraditable if there were a treaty.[6]

Up until this point, Yugoslavia had outside counsel representing its interests in court. The U.S., however, was concerned about the ruling as it was against the U.S. interest to have a judicial ruling that a change in government abrogates treaties. Accordingly, the U.S. joined Yugoslavia in successfully appealing the order. The Ninth Circuit reversed and sent the case back for a determination as to whether Yugoslavia's charges against Artukovic were political.[7]

The district court concluded that they were. It pointed to the "animus which has existed between the Croatians and the Serbs for many hundreds of years, as well as the deep religious

cleavage known to exist among the peoples in the Balkans." This ruling, affirmed by the Ninth Circuit, was vacated by the Supreme Court.[8] The matter then returned, yet again, to the district court, this time for a determination as to whether there was probable cause to believe Artukovic had committed extraditable offenses under the 1902 treaty.

The many appeals, reversals and remands had dragged on for eight years by the time the district court found no probable cause to believe that Artukovic had committed an extraditable offense.[9] It based this ruling on the fact that there was:

> no evidence . . . presented that the defendant himself committed murder. [Yugoslavia] relies entirely upon their evidence that members of the 'ustasha' committed murders upon orders from the defendant.

Although there was evidence that Artukovic had ordered internment, deportation, and in some cases killing, of civilians, the court analogized this to U.S. policy.

> It was common practice during World War II to intern anyone who was even suspected to be an enemy or possible enemy of the government in power. Our own government saw fit to intern all Japanese on the west coast, men, women and children of all ages, immediately following Pearl Harbor.

In the end, the court rejected the Nuremberg concept that leaders are accountable for decrees signed by them but carried out by others.

> To so hold would probably result in failure to find any candidate who would accept the responsibilities of such a position if he was going to be held to answer for crimes committed by his underlings without more definite proof that they were acting under his orders.

The request for extradition was denied. By law, the order could not be appealed.

Artukovic received more welcome news four months later. His long-pending application for a stay of deportation was granted. INS agreed with him that deportation to Yugoslavia would subject him to persecution because he had opposed the Communists when he was a

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Cabinet minister. However, INS warned him that the stay was "subject to revocation at any time upon written notice to you." As it developed, it was 18 years before the government sought to lift the stay.

During that interval, Artukovic was not completely out of the public eye. In 1961, his name surfaced during Israel's prosecution of Adolf Eichmann. Witnesses in that case testified about the deportation and slaughter of Yugoslavian Jews at Artukovic's behest; one described futile pleas to Artukovic to spare the lives of children about to be deported to death camps.[10]

INS reviewed the matter periodically. As late as 1974, it solicited the State Department's views as to whether it was still likely that Artukovic would suffer persecution if he were sent back to Yugoslavia. The State Department concluded that the threat of persecution remained.[11]

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The case resurfaced in 1977 when a delegation from the House Judiciary Committee went on an East European fact finding trip. They reported that Yugoslavia was "disappointed and revolted" by the fact that Artukovic had neither been deported nor extradited. The Yugoslavs wanted to try Artukovic for war crimes; they assured the lawmakers that the trial would be open to the public and would comport with U.S. standards of due process.[12]

Shortly thereafter, an INS Regional commissioner notified Artukovic that his stay would not be further extended unless he could provide new justification for an extension within 30 days. Rather than doing so, Artukovic sued the government to enjoin it from acting. He won at least a temporary reprieve when the court ruled that the government could not summarily lift the stay; the matter would have to be decided by the immigration courts.[13]

Before the matter returned to court, a change in the law substantially enhanced the government's position. The 1978 Holtzman Amendment eliminated the possibility of a stay of

deportation for aliens who had "assisted or otherwise participated in the persecution of persons because of race, religion, national origin, or political opinion on behalf of the Nazis and their allies."

After its founding in 1979, OSI's first court filing was a motion to lift Artukovic's stay on the ground that it was precluded by the Holtzman Amendment. In June 1981, the BIA granted OSI's request, concluding that the Holtzman Amendment applied to Artukovic because he had assisted in persecution. In reaching this result, the Board referenced its 1953 findings that Artukovic had been instrumental in persecution and therefore lacked good moral character. The BIA ordered Artukovic deported to Yugoslavia.[14]

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Artukovic appealed and got yet another reprieve. The Ninth Circuit held that it was improper to rely on the 1953 finding to justify deportation in 1981. The Circuit reasoned that the underlying issue considered in the 1950s – whether Artukovic could establish that there would be economic hardship to his daughter if he were deported – was different from whether the government could show that he fit within the parameters of the newly-enacted Holtzman Amendment. Although in fact the evidence presented in the 1950s concerned Artukovic's involvement in persecution, it would not suffice. The government would have to ask an immigration judge to hold a new hearing on the question of Artukovic's involvement in persecution.[15] The government did so in February 1984 and the new hearing was set for January 1985.

Meanwhile, the Yugoslav government had been signaling its interest in filing a new extradition request. (There is no bar to filing an extradition request after an earlier one has been denied.)

In 1981, shortly after the BIA revoked the stay of deportation, and again in 1982 when the Ninth Circuit ordered a new hearing, Yugoslav officials met with their counterparts from the State Department and the Department of Justice to discuss the mechanics of extradition.[16] The following year, Martin Mendelsohn, former Deputy Director of OSI, and now a private practice attorney representing Yugoslavia, reiterated his client's interest. As OSI understood it from Mendelsohn, Yugoslavia "would welcome an indication from the US that [an extradition] request would be appropriate."[17] In July 1983, DAAG Richard, along with Acting OSI Director Sher and Murray Stein, Associate Director of the Department of Justice's Office of International Affairs (OIA – which handles extraditions), went to Yugoslavia to discuss the procedures involved.

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At the same time that the Department of Justice was working with Yugoslavia on a possible extradition request, OSI was preparing for the new deportation hearing. In November 1983, an OSI historian went to Yugoslavia to do research. He found documents pertinent to the deportation case in the Yugoslav archives and asked that they be sent to OSI.

Yugoslavia submitted a formal request for extradition in August 1984, this time asserting that Artukovic was responsible for thousands of murders. Artukovic was arrested in November 1984 and his request for bail was denied. The deportation case was taken off calendar pending the outcome of the extradition hearing. Unlike the 1950s extradition hearing, this time the U.S. represented Yugoslavia in court. Lead counsel for the government was from the Los Angeles U.S. Attorney's office. He was assisted by OIA and OSI.

Artukovic at first attempted to block the hearing by asking another judge to hold the government in contempt. Artukovic claimed that extradition was an end run around deportation, designed to deprive him of the greater procedural safeguards and defenses available in a

deportation proceeding. His claim was summarily dismissed.

The first issue facing the extradition court was whether Artukovic was mentally competent to understand the proceedings and to assist his counsel. He was by this time 84 years old and suffering from a variety of ailments. Faced with conflicting testimony on the subject, the court appointed its own doctor to make an evaluation. Although this neutral expert found Artukovic incompetent and suggested delaying the proceedings while Artukovic underwent drug therapy, the court refused to do so. Based on his observation of Artukovic in court, the judge concluded that the defendant had good days and bad days. Accordingly, he fashioned a procedure to deal with the problem: a doctor was to prepare a daily report on Artukovic's condition. Court was convened on alternate half-days, Artukovic's health permitting.[18]

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After losing the competency issue, the defense next contended that federal officials had impermissibly encouraged Yugoslavia to request extradition. Although such encouragement is not itself improper, Artukovic argued that the extraordinary time lag – it had been 25 years since the first extradition request had been denied – worked to his disadvantage and thereby deprived him of due process. The magistrate ordered Director Sher to court, warning that "If it develops that some politician was trying to run for higher office by railroading Mr. Artukovic back to Yugoslavia, that would be impermissible."[19] After hearing from Sher, the magistrate concluded that there had been no wrongful conduct by the Justice Department, and that the extradition had been at the behest of the Yugoslavs.[20]

Finally, on the merits of the extradition itself – Yugoslavia's claim that Artukovic was responsible for thousands of murders – the government submitted statements from 52 affiants. The court relied on the only two that presented eyewitness accounts of Artukovic's involvement

in the murder of civilians.

The first was from Franjo Trujar, a police official in the Ustasha regime. When interviewed in 1984, he signed an affidavit saying that he had been interviewed once previously – in July 1952 – and that his memory now was insufficient. His 1984 affidavit relied on his earlier statement for pertinent details. That document stated that Trujar had witnessed Artukovic ordering the death of an outspoken former member of the Yugoslav parliament.

The second alleged eyewitness affidavit was from Bajro Avdic, who had been a member of an elite Ustasha motorcycle escort assigned to Artukovic. Advic's 1984 affidavit said that he had heard Artukovic order thousands of deaths, including: (1) the machine-gun firing of approximately 450 men, women and children for whom there was no room in a concentration camp; (2) the killing of all the inhabitants of a town and its surrounding villages; (3) the murder of approximately 5,000 persons near a monastery; and (4) the machine gun execution of several hundred prisoners who were then crushed by moving tanks.

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The magistrate ordered Artukovic extradited for the crimes set forth in the Trujar and Avdic affidavits.[21] That order was adopted in full by the district court.[22] Five days later, the Court of Appeals denied Artukovic's request for an emergency stay.[23] At 1:00 AM, February 12, 1986, just minutes after then Associate Justice William Rehnquist refused a request to delay the extradition order, Artukovic was flown to Yugoslavia.[24] He had been in custody since November 14, 1984.[25]

The deportation caused enormous consternation within the Croatian community, which had always seen the case as a Cold War issue. They feared that the Communists would not provide a fair forum for trial.[26] In Canada, a Croatian national set himself on fire in front of the

U.S. consulate as more than 2,000 people demonstrated to protest the deportation.[27]

Yugoslavia tried Artukovic two months after his arrival. The timing was dramatic because the history of wartime Yugoslavia was just then receiving worldwide attention from revelations that former U.N. Secretary General Kurt Waldheim had served as an intelligence officer in the Balkans. His unit had been involved in reprisal killings of partisans and Waldheim had been awarded a medal by the Ustasha regime.[28]

Artukovic's trial was broadcast on Yugoslav state television. Due to the tension between the Serb and Croat communities, Artukovic was kept behind bulletproof glass in the courtroom. Streets around the courthouse were blocked to traffic and policemen patrolled with machine guns and muzzled dogs.[29]

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Trujar and Avdic both testified. Trujar had difficulty recalling any pertinent events; Avdic provided new details not mentioned in his earlier affidavit.[30] After four weeks of trial, Artukovic was convicted on all counts. Under international extradition practice, his conviction was limited to those crimes for which he had been extradited. Nonetheless, the Yugoslav court made clear that it believed him responsible for running two dozen concentration camps where between 700,000 and 900,000 Serbs, Jews, gypsies and other prisoners were tortured and killed.[31] He was sentenced to death by firing squad. Due to his failing health, the death penalty was later commuted;[32] he died in a prison hospital in January 1988.

As complicated and drawn out as the above proceedings were over 35 years, they were not the only litigation involving Artukovic. His case spawned several tangential lawsuits. In 1984, a class action was filed against him by Yugoslav Jews who themselves had served time in Croatian concentration camps or had close relatives murdered during the Ustashi regime. The

plaintiffs sought compensatory and punitive damages, claiming Artukovic had violated the Hague and Geneva conventions, international law and the Yugoslavian criminal code. The suit was dismissed, the court ruling that it lacked jurisdiction as to some matters, while others were barred by the statute of limitations.[33] In addition, Artukovic himself filed suit to enjoin his extradition and to recover $10 million in damages on the ground that the Justice Department had conspired with the government of Yugoslavia to deprive him of his civil and constitutional rights. That case too was dismissed, both because there was no legal basis to support the monetary claim, and because the extradition made the request for an injunction moot.[34] And finally, as trial began in Yugoslavia, the family of the parliamentarian whose murder Trujar had discussed, sought, unsuccessfully, to freeze Artukovic's U.S. assets.[35]

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The issues surrounding Artukovic did not end with his death. In 1988, Artukovic's son sent a 135-page treatise to OSI, alleging that his father's extradition had been based on fraudulent documents.[36] He also filed a complaint with the Justice Department. His most serious allegation involved the Trujar and Avdic affidavits.[37] The son claimed that DOJ had improperly withheld documents that would have disproven the allegations contained in those documents. He pointed to earlier, somewhat contradictory affidavits by Trujar and Avdic as well as affidavits by others familiar with the incidents described by the two men. He also cited official Yugoslav reports from the 1950s questioning the reliability of the Trujar and Avdic accounts. None of these materials had been provided to the defense or the court, yet they arguably cast doubt on the accuracy of the affidavits filed in the 1985 extradition proceeding. Some of the doubt was due to minor discrepancies in recollection; some was more substantial, including a 1952 Yugoslav government report which said that Avdic "could not be used as a witness."

The son learned of this additional material from a variety of sources. Some documents came to light when a historian hired by the Artukovic family visited the Croatian Archives. He found the allegedly inconsistent documents, and discovered that some of them had been reviewed (or at least identified) by an OSI historian during his October 1983 visit to the archives. Moreover, at the OSI historian's request, these documents had been copied and sent to OSI. The son contended, therefore, that OSI should have been aware of the inconsistencies and known that the documents submitted in court were "fraudulent," especially since the same OSI personnel were working on the deportation and extradition matters.

The son pointed also to a 1988 book published by a former legal adviser in the Yugoslav Foreign Ministry. The author claimed that the events recounted by Avdic "never took place."[38] Although the book was published after the extradition was completed – and thus DOJ could not be held accountable for not knowing its contents – the son argued that OSI should itself have determined the veracity of Avdic's allegations. He pointed to OSI's oft-repeated claim that it gave close scrutiny to Communist-sourced material,[39] and questioned why no such scrutiny had been given in this case. An outside historian who had worked with OSI on the case gave some credence to the son's claims, publicly questioning the veracity of the 1984 Avdic affidavit.[40]

The son's allegations were referred to OPR for investigation. The charges – and the fact that OPR was investigating them – was given much play in the press.[41] Unfortunately for OSI, media coverage of the story tied it to charges of malfeasance surrounding the explosive *Demjanjuk* case.[42]

Reviewing its files to respond to the son's claims, OSI discovered that some (though not all) of the documents referenced were indeed in its files although they had never been reviewed

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or analyzed. That was due to the fact that they had been ordered from the Croatian archive as part of the deportation case. They arrived shortly before the deportation case was placed on hold pending the extradition outcome. OSI therefore did not review the new documents but simply left them in a file cabinet.

While there were some inconsistencies between the material submitted to court and the additional material cited by the Artukovic family, OSI maintained that none of it was significant enough in any event to alter the outcome of the case. Moreover, one of the key documents which the son argued should have been provided had actually been introduced into evidence in the 1951 extradition proceeding. It therefore was, or should have been, known to the defense at the time of the 1984 extradition hearing.

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More importantly, OSI argued that it was under no obligation to search its files for relevant material. Under established law, the U.S. government is not required to assess the validity of evidence presented by the requesting government in an extradition case. Nor is there a legal obligation to produce potentially exculpatory evidence to the defendant in an extradition proceeding.[43] The credibility of the requesting government's evidence is determined at trial abroad after the defendant is extradited. The question before the U.S. court is simply whether the requesting government's evidence is sufficient to establish probable cause that a crime has been committed and that this person committed it. OSI followed these standard procedures as it was directed to do by OIA.

Finally, OSI argued that the close scrutiny it gave to Communist-sourced evidence in Cold War era denaturalization and deportation cases was not appropriate in an extradition proceeding. In denaturalization and deportation, the evidence presented is on behalf of the U.S.

government. Therefore, the government is bound to satisfy itself about the reliability of evidence it is submitting. In extradition cases, the evidence is from, and on behalf of, the requesting government. If the United States were bound to determine the reliability of the evidence, the extradition would become a trial to resolve the guilt or innocence of the defendant. Extradition proceedings are designed to avoid that happenstance. Further details about the OPR investigation are unavailable at this writing.

The Artukovic case stands out in many respects. It was OSI's first filing. Artukovic was the only Cabinet official and the only Croat ever prosecuted by the office.[44] And he was the first OSI defendant to be extradited,[45] though he was followed just two weeks thereafter by John Demjanjuk. Artukovic matters have spanned decades. If one begins with the original INS deportation filing in 1951, the case and its progeny have been around for over half a century. By any measure, that is a testament to the arcane and labyrinthian procedures that apply in these proceedings.

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1 1. "The Sins of the Father," by Carla Hall, *The Washington Post*, Aug. 24, 1992.

2. It was the first of eight such bills introduced between 1949 and 1961. H.R. 3504 (81st Cong.), H.R. 8186 (82nd Cong.), H.R. 6700 (83rd Cong.), H.R. 2789 and HR. 2790 (84th Cong.), H.R. 2844 and H.R. 4760 (86th Cong.), and H.R. 2185 (87th Cong.).

3. The 1978 Holtzman Amendment ended such exemptions for OSI defendants. *See* p. 40.

4. *Matter of Artukovic*, (BIA 1953).

5. Transcript of the Sept. 1951 bond hearing, as set forth in *Artukovic v. Boyle*, 107 F. Supp. 11, 34, n. 4 (S.D.CA, 1952).

6. *Artukovic v. Boyle*, *supra*, n. 5, 107 F. Supp. 11.

7. *Ivancevic v. Artukovic*, 211 F.2d 565 (9th Cir. 1954). *See* p. 575, n. 4 of the court decision for a discussion of the U.S. interest.

Reviewing what had happened in the Artukovic matter, DAAG Richard became convinced that in future, U.S. interests would be best served by having the U.S. represent the foreign government in extradition proceedings. Partly as a result of his urging, this became a standard feature negotiated in extradition treaties. (Specific criteria must be met before the U.S. will begin the litigation process.)

8. *Artukovic v. Boyle*, 140 F. Supp. 245 (S.D.CA, 1956), *aff'd*, *Karadzole v. Artukovic*, 247 F.2d 198 (9th Cir. 1957), *vacated*, *Karadzole v. Artukovic*, 355 U.S. 393 (1958). Decades later, the Ninth Circuit noted that its application of the "political offense" doctrine to Artukovic became "one of the most roundly criticized cases in the history of American extradition jurisprudence." With hindsight, the Circuit conceded that the doctrine should not have applied to Artukovic. *Quinn v. Robinson*, 783 F.2d 776, 798, 799-800 (9th Cir. 1986).

9. *U.S. v. Artukovic*, 170 F. Supp. 383 (S.D. Ca. 1959).

10. "Eichmann Trial Witness Shows How He Escaped Nazis' Wrath," by Homer Bigart, *The New York Times*, May 20, 1961.

11. July 23, 1974 letter to Milton Karchin, President, National Taxpayers Ass'n from INS Deputy Commissioner James F. Greene.

12. "Human Rights and U.S. Consular Activities in Eastern Europe," Report of the House C'tee of the Judiciary, 95th Cong, 1st Sess., Based on a Factfinding Mission to Four Eastern European Nations, pp. 47-48.

13. Although Artukovic had been told in 1959 that the stay could be lifted "at any time upon written notice," INS regulations had since modified the procedures for lifting a stay.

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14. *In re Artukovic*, A7 095 961 (BIA 1981).

15. *Artukovic v. INS*, 693 F.2d 894, 899 (9th Cir. 1982).

16. Sher testimony at extradition hearing, Feb. 13, 1985.

17. Mar. 10, 1983 buck slip to Director Ryan from Deputy Director Sher.

18. "Nazi Suspect's Case Delayed," UPI, *The New York Times*, Feb. 26, 1985; "Court Orders Artukovic Sent to Yugoslavia," by William Overend, *The Los Angeles Times*, Mar. 5, 1985. Operating on this schedule, a five-day hearing extended over several weeks.

19. "U.S. Is Ordered to Respond in Yugoslav Extradition Case," *The Washington Post*, Feb. 12, 1985.

20. After the initial ruling, Artukovic asked the magistrate to reconsider the issue. Relying on a recently published book by a Yugoslav parliamentary official, he accused Sher of perjury. The book, *Ustashi - Minister of Death*, by Gojko Prodanic, stated that Justice Department officials had prodded the Yugoslavs to file a new extradition request. "Official May Have Lied," by Bill Farr, *The Los Angeles Times*, May 29, 1985. The motion to reconsider was denied.

21. The magistrate at first ordered the extradition only for the one murder described in the Trujar affidavit. Although he found probable cause to believe that the massacres described by Avdic had occurred at Artukovic's behest, they did not match any charges in the pending Yugoslavian indictment. They could therefore not form the basis of an extradition order. The magistrate gave Yugoslavia 60 days to amend its indictment to conform to information in the Avdic affidavit. It did so, and Artukovic was then ordered extradited for trial involving thousands of deaths.

22. *Artukovic v. Rison*, 628 F. Supp. 1370, 1378 (C.D. Ca. 1986). The district court opinion contains the full text of the magistrate's order.

23. *Artukovic v. Rison*, 784 F.2d 1354 (9th Cir. 1986).

24. "Nazi War Crimes Suspect Extradited," by Mary Thornton, *The Washington Post*, Feb. 13, 1986; "Artukovic Flown to Yugoslavia," by James Carroll and Larry Keller, *The Press-Telegram* (Long Beach, CA), Feb. 13, 1986; "Croatian War Criminal Sentenced to Firing Squad," by Michael Kaufman, *The New York Times*, May 15, 1986.

25. At one point, it looked as if he might be released on bail. Several months after his Nov. 1984 arrest, a different magistrate was assigned to consider whether Artukovic should be released on bail pending the outcome of the extradition hearing. The magistrate was favorably inclined, opining that it was "cruel and unusual punishment" to incarcerate someone with Artukovic's medical problems. "Man Accused of War Crimes is Scheduled to Have Bail Set," *AP*, *The New York Times*, June 29, 1985. Shortly after that statement was made, the case was sent back to the original magistrate and bail was denied. "Magistrate Sympathetic to Artukovic's Bail

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Removed," by William Overend, *The Los Angeles Times*, July 10, 1985.

26. *See e.g.*, "Extradition Request by Belgrade Scored," *The New York Times*, Sept. 4, 1951; "Move 'Made Farce' of U.S. Justice, Backers Claim," by Susan Pack, *The Press-Telegram* (Long Beach, CA), Feb. 13, 1986.

The Cold War aspects of the case took some unexpected turns. In the 1980s, Yugoslavia granted passage to a terrorist wanted for planning the hijacking of a U.S. ship (the Achille Lauro) and the murder of one of its U.S. citizen passengers. In part, Yugoslavia justified its action by pointing to the U.S. delay in extraditing Artukovic, whom they deemed a terrorist. "Yugoslavs of Two Minds on Battling Terrorism," by David Binder, *The New York Times*, Dec. 19, 1985. Artukovic's attorneys maintained that the U.S. should retaliate by releasing Artukovic. Oct. 16, 1985 telegram from Artukovic attorney Gary Fleischman to Secretary of State George Shultz.

27. "Man Sets Himself on Fire at Protest of Artukovic Deportation," *AP*, Feb. 24, 1986.

28. *See* pp. 310-329.

29. "Yugoslav Court Refuses Delay of Artukovic Trial," by Carroll Lachnit, *The Orange County Register*, Apr. 15, 1986. "At Collaborator's Trial, Yugoslavs Face Their Past," by Michael Kaufman, *The New York Times*, Apr. 16, 1986; "Croat Becomes Confused at War Crimes Trial," *The New York Times*, Apr. 19, 1986.

There had been palpable tension in the U.S. proceedings as well. In 1959, the court made note of this in its ruling. *U.S. v. Artukovic*, 170 F. Supp. at 384. And in 1984, a Justice Department attorney from OIA was sufficiently concerned for her personal safety that she withdrew her name from a court filing. Nov. 7, 1984 memo to files re "Artukovic," from Murray Stein, Associate Director OIA.

30. "Artukovic Witness Confused," by Carroll Lachnit, *The Orange County Register*, Apr. 23, 1986. "For the First Time, a Witness Says Artukovic Killed Several Prisoners," by Carroll Lachnit, *The Orange County Register*, Apr. 30, 1986.

31. "Croatian War Criminal Sentenced to Firing Squad," by Michael Kaufman, *The New York Times*, May 15, 1986. "Artukovic, Extradited As Nazi War Criminal," by Ted Rohrlich, *The New York Times*, Jan. 18, 1988.

32. "Ailing Former Nazi Artukovic May Not Be Executed After All," by Carroll Lachnit, *The Orange County Register*, Apr. 25, 1987.

33. *Handel v. Artukovic*, 601 F. Supp. 1421 (C.D. Ca. 1985).

34. Artukovic had tried to fashion a right to be free from extradition in order to avail himself of the procedural safeguards which apply to deportation proceedings. *Artukovic v. U.S. Dep't of Justice, et al.*, No. 85-2135 (D.D.C. 1986). Once Artukovic was extradited, the parties agreed to dismiss the pending appeal.

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35. "Yugoslavs Try to Freeze Collaborator's Assets," *The New York Times*, Apr. 17, 1986.

36. "Artukovic's Son Challenges U.S. Officials to Admit Error," *AP*, *The Los Angeles Times*, Feb. 13, 1988.

37. The other allegations, raised over a period of years, included charges that DOJ had improperly instigated the extradition request; that Sher had perjured himself in describing the government's contacts with Yugoslavia; that the government had misrepresented facts relating to the case in response to Congressional inquiries; that DOJ had abused the Freedom of Information Act by not turning over certain documents requested by the son; and that DOJ had not acted appropriately on his misconduct complaint.

38. "U.S. Nazi Hunters Target of Inquiry," by Jay Mathews, *The Washington Post*, May 8, 1990.

39. *See* pp. 538-539.

40. "U.S. Nazi Hunters Railroaded 'War Criminal,' Experts Say, by Michael Hedges, *The Washington Times*, Sept. 24, 1990.

41. *See e.g.*, "U.S. Nazi Hunters Target of Inquiry," by Jay Mathews, *The Washington Post*, May 8, 1990; "U.S. Nazi Hunters Railroaded 'War Criminal' Experts Say,"*supra*, n. 40; "Justice Department is Reviewing a 1986 War Crimes Case," by Jacques Steinberg, *The New York Times*, June 13, 1992.

42. *See e.g.*, "The Sins of the Father," by Carla Hall, *The Washington Post*, Aug. 24, 1992; "Ray of Hope in Son's Crusade," by Davan Maharaj, *The Los Angeles Times*, June 14, 1992; "U.S. Nazi Hunters Railroaded 'War Criminal,' Experts Say, *supra*, n. 40.

43. As discussed on p. 161, the Sixth Circuit did hold that there is such an obligation. *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993). However, that ruling is not controlling in other Circuits. The *Artukovic* proceedings were in the Ninth Circuit. Moreover, *Demjanjuk* was decided years after Artukovic had been extradited; OSI could not be expected to have foreseen its holding.

44. Others identified as Croatians and prosecuted by the office were in fact ethnic Germans (born in Croatia to German parents and self-identifying as German) *e.g.*, Anton Tittjung, Ferdinand Hammer, Michael Gruber and John Hansl. Moreover, changing borders made nationality ambiguous. In the case of Hammer, for example, the area in which he was born was part of Croatia only from 1941 to 1944, when it was annexed by the Independent State of Croatia. Croatia refused to recognize him as a Croatian or to accept him as a deportee. He ultimately was deported to Austria.

OSI did assist Croatia in bringing its own war crimes prosecution. In 1998, Croatia extradited from Argentina Dinko Sakic, the commandant of Jasenovac, Croatia's most notorious World War II concentration camp. OSI located a document in the National Archives that was used by the Croatian government at trial to establish the number of deaths at the camp. OSI also

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provided the Croatian prosecutors with background material from the Artukovic file and the names of survivor witnesses who could testify about conditions at Jasenovac. In addition, a delegation from the Croatian judiciary met with the State Department's Special Ambassador on War Crimes and then with members of OSI's legal and historical staff to discuss the presentation of war crimes cases.

Croatia charged Sakic with crimes against humanity in the deaths of more than 2,000 Jews, Romani (gypsies), Serbs and Croatians. He was convicted of torture, abuse and murder, and sentenced to twenty years in custody. "Croat Convicted of Crimes at World War II Camp," *The New York Times*, Oct. 5, 1999; "Supreme Court Upholds 20-Year Sentence for War Criminal," *BBC*, Oct. 10, 2000.

45. The only previous extradition of a Nazi war crimes suspect was Hermine Braunsteiner Ryan in 1973, before OSI's founding. As noted on p. 2, that case was handled by INS.

Because of Cold War tensions and due process concerns about Soviet judicial procedures, the U.S. had no extradition treaty with the U.S.S.R. The U.S. therefore routinely rejected Soviet extradition requests. According to the State Department, there were 8 such requests between 1945 and 1977. Sept. 19, 1977 letter to Rep. Joshua Eilberg, Chairman, House Subctee on Imm., Cit. and Internat'l Law, from Douglas Bennet, Jr., Ass't Sec'y for Congressional Relations, State Dep't, reprinted in Vol. 1, "Alleged Nazi War Criminals," Hearing before the Subctee, Aug. 3, 1977, p. 55. As of this writing, there is still no treaty of extradition with Russia. However, a Mutual Legal Assistance Treaty (MLAT), providing for closer law enforcement coordination between the two countries, was approved by the Senate in Dec. 2001.

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Otto von Bolschwing – An Eichmann Associate Who Became a CIA Source

Otto von Bolschwing worked with Adolf Eichmann and helped devise programs to persecute and terrorize Germany's Jewish population. As the chief SS intelligence officer, first in Romania and then in Greece, he was the highest ranking German prosecuted by OSI.

Von Bolschwing was an aristocrat who spoke several languages and had studied at the London School of Economics. He joined the Nazi party in 1932 and was a member of the Allgemeine SS, the racial elite of the National Socialist Movement. The Allgemeine SS formed the recruiting pool for the Gestapo and the SD, the intelligence-gathering arm for the Nazis. Von Bolschwing's career path was with the SD. From 1935 until 1937 he worked as its liaison in Palestine; from 1937 to 1939 he worked in its Jewish Affairs Office. That office collected statistical, economic and cultural information on Jews for use by the Nazi government. "The Jewish Problem," a report submitted by von Bolschwing in January 1937, proposed ridding Germany of Jews by forcing them to emigrate.[1]

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> The Jews in the entire world represent a nation which is not bound by a country or by a people but by money. . . .
>
> The leading thought . . . is to purge Germany of the Jews. This can only be carried out when the basis of livelihood, i.e., the possibility of economic activity, is taken away from the Jews in Germany.

The report recommended extensive use of propaganda to make the populace recognize the pernicious impact of the Jews. Once people were informed, their anger could be harnessed to:

> take away the sense of security from the Jews. Even though this is an illegal method, it has had a long-lasting effect. . . . [T]he Jew has learned a lot through the pogroms of the past centuries and fears nothing as much as a hostile atmosphere which can go spontaneously against him at any time.

Von Bolschwing recommended making passports in such a manner that the authorities

could "determine immediately whether the passport holder is a Jew." He recognized that this procedure was risky, however.

> It is expressly emphasized that such an identification can only be effected internally in order to avoid that foreign consulates refuse the issuance of a visa to the holder of such a passport.

He also urged denying passports to Jews for any purpose other than emigration and limiting the amount of money that emigrating Jews could take out of the country.

His later memos elaborated on these plans. His suggestions included having Jewish organizations assisting with emigration deal only with the SD and having foreign currency remittances from Jewish organizations abroad go directly to the SD rather than to Jewish organizations. In a letter to Eichmann (salutation "Dear Adolf"), von Bolschwing reported on snippets of an overheard conversation between two Jews and discussed ways to block their access to Germans who might assist them. The letter closed with "Heil Hitler."[2]

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In 1939, the work of the Jewish Affairs Office was transferred to the newly formed Reich Security Main Office (RSHA). Von Bolschwing began working for this new organization which unified under one jurisdiction the SD, the Gestapo and the Criminal Police.

For a little over a year, beginning in January 1940, he served as chief of the SD agents in Romania. Von Bolschwing provided sanctuary to several Romanian Iron Guard leaders (including Trifa) after their January 1941 rebellion and helped arrange their escape to Germany.[3]

Near the war's end, he moved to Austria and allied himself with the underground and the Allies. He won accolades from the U.S. military. One U.S. officer credited him with:

> materially assist[ing] the armed forces of the United States during our advance through Fern Pass and Western Austria prior to the surrender of the German Army.

> During our occupation, he personally captured over twenty high ranking Nazi officials and SS officers and led patrols that resulted in the capture of many more.[4]

In 1946, von Bolschwing was hired by the Gehlen organization, a group of former Nazi intelligence operatives who came under the aegis of the U.S. Army after the war. The group had provided Germany with data and sources useful in the war on the Eastern front; the U.S. wanted to develop and expand this material for use during the Cold War. Gehlen needed von Bolschwing to provide contacts among ethnic Germans and former Iron Guardsmen in Romania.[5]

In 1949, the CIA hired some members of the Gehlen organization; von Bolschwing was among those chosen.[6] The CIA knew about his Nazi party and SD connections. They also knew that he had supported the Iron Guard uprising and had helped leaders of that rebellion escape from Romania. He portrayed himself, however, as a Nazi gadfly[7] and the agency apparently accepted this characterization.[8] The agency was unaware that he had worked in the Jewish Affairs Office and that he had been associated with Eichmann.[9]

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Although he never developed into a "first-class agent," the CIA was sufficiently grateful to help him emigrate to the United States in 1954.[10] The CIA advised INS about his past as they understood it. INS agreed to admit him nonetheless.[11] He entered under the INA as part of the German quota. Once here, he worked as a high-ranking executive for various multi-national corporations; he did no further work for U.S. intelligence agencies.[12]

Even before von Bolschwing emigrated, however, the CIA was concerned that he might have difficulty obtaining citizenship.

> Grossbahn [von Bolschwing's code name] has asked a question which has us fairly well stumped. What should his answer be in the event the question of NSDAP [Nazi party] membership arises after his entry into the U.S., for example,

on the citizenship application forms? We have told him he is to deny any party, SS, SD, Abwehr [German military intelligence], etc. affiliations. Our reason for doing so runs as follows: his entry into the U.S. is based on our covert clearance. In other words, in spite of the fact he has an objectionable background, [ ] is willing to waive their normal objections based on our assurance that Grossbahn's services . . . have been of such a caliber as to warrant extraordinary treatment. Should Grossbahn later, overtly and publicly, admit to an NSDAP record, it strikes us that this might possibly leave [ ] with little recourse than to expel him from the U.S. as having entered under false pretenses. . . . At the same time, we feel such instructions might give Grossbahn a degree of control against us, should he decide he wants our help again at some future date – an altogether undesirable situation. What has Headquarters' experience been on this point? Have we instructed Grossbahn incorrectly? Cabled advice would be appreciated, as time to the planned departure date is running short.[13]

The response urged that von Bolschwing tell the truth.

Assuming that he has not denied Nazi affiliations on his visa application form, he should definitely not deny his record if the matter comes up in dealing with US authorities and he is forced to give a point-blank answer. Thus, if asked, he should admit membership, but attempt to explain it away on the basis of extenuating circumstances. If he were to make a false statement on a citizenship application or other official paper, he would get into trouble. Actually Grossbahn is not entering the US under false pretenses as [ ] will have information concerning his past record in a secret file.[14]

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It is unclear precisely what the State Department knew at the time of von Bolschwing's entry. He himself told them that he had been a member of the Nazi party and the Waffen SS (the military wing of the SS). In fact he had not been with the Waffen SS, but with the Allgemeine SS. A handwritten (but unsigned) note in the CIA files suggests that the CIA may have told the State Department that von Bolschwing was a member of the SD.

Although the INS generally keeps all immigration records in one "A-file," von Bolschwing had a secret second file. A memo in his A-file references that file containing a January 13, 1954 letter which has "no bearing on immigration status." By the time OSI was interested in von Bolschwing, INS could not locate the secret file. However, the CIA had a

January 13, 1954 letter addressed to the Commissioner of INS; this was presumably a copy of the letter in the missing file. The letter stated that von Bolschwing had been employed by the CIA, a full investigation had been conducted, and there was no reason to believe he was inadmissible or a security risk. The letter made no mention of von Bolschwing's Nazi background and urged that his entry be expedited.

Von Bolschwing applied for citizenship in 1959 without revealing his membership in the Allgemeine SS, the Nazi party, the SD or the RSHA, even though such information would have been responsive to questions on his naturalization application. However, he did send a letter to the INS which suggested that he had intentionally withheld certain information which might be relevant to his application for citizenship.

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> With regard to incomplete information on my application form . . . I spoke over the telephone to the information officer at your office . . . and was advised by him that my record, at your office, would contain such information which I am unable to give, and that I should submit my application as is pending subsequent explanation to be given by me verbally to your examiner.
>
> I am ready to give any additional information which you may require.[15]

The SLU first became aware of von Bolschwing while investigating the wartime activities of Valerian Trifa. The office recognized almost immediately that von Bolschwing might "be guilty of acts more heinous than anyone else currently under investigation."[16] In June 1979, just as OSI was getting established, attorney Eugene Thirolf interviewed von Bolschwing.[17] He denied membership in the SS. Although he acknowledged helping arrange for the escape of Iron Guard leaders, he described this simply as an effort to "create a peaceful settlement between the two warring parties."

OSI Deputy Director Martin Mendelsohn wrote to the CIA asking a series of pointed

questions.

(1) was there any objection to the initiation of proceedings and would von Bolschwing be able to "blackmail" the agency;

(2) would the CIA testify for him;

(3) had the agency known the full truth, would it would have assisted his entry into the U.S.;

(4) had the agency told von Bolschwing to reveal his Nazi background on his naturalization application;

(5) what information had the CIA given INS; and

(6) had von Bolschwing worked for the agency after coming to the United States.[18]

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The answers were varied. The CIA did not oppose the case filing nor feel vulnerable to blackmail. While von Bolschwing had been valuable, and they would so testify, they would also make clear what information he had given (and what he had not) concerning his World War II activities. They would not testify that he had misrepresented his past although they were unclear as to whether they would have aided his entry into the United States if they had known everything. Although headquarters had directed that von Bolschwing be told to answer truthfully all naturalization questions, it was unknown whether that message (negating previous counsel) had been passed on to von Bolschwing. The agency had no role in von Bolschwing's obtaining citizenship and he had not worked for them since he came to the United States.[19]

It was clear to the OSI investigating team that von Bolschwing had withheld relevant and pertinent information both when he applied for a visa and again when seeking citizenship. Yet

the legal case was murky for a variety of reasons.[20] First was the problem of the secret file. Since it was missing, von Bolschwing might claim that all the omitted information must be in that folder. OSI could not rule out the possibility that this had occurred, although it seemed unlikely. While the CIA had only the January 1954 letter in its files, they could not be certain that other written and oral communications had not been made at the time of the visa application.

A separate problem existed with regard to naturalization. Von Bolschwing's 1959 letter to INS alluded to additional information which might be in a file and which von Bolschwing would amplify in an interview. There was no information in the files (although again the missing file could be key) but OSI needed to learn if there had been any verbal explanation offered. They spoke with the examiner who interviewed von Bolschwing as part of his naturalization process. After reviewing his notations in von Bolschwing's file, the examiner was confident that von Bolschwing had not provided any of the relevant and missing information. Thirdly, von Bolschwing might claim (and ultimately did) that his lack of candor was at the behest of the Agency. Von Bolschwing's CIA contact had since died so there was no way to determine whether he had ultimately been told to be candid about his background.

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Despite these problems, Director Ryan believed the case was winnable and should be filed because von Bolschwing "played a significant role in the SD's program of persecution of Jews in the late 1930's."[21] He originally proposed charging misrepresentation both in the visa application and during the naturalization process. However, DAAG Richard feared that there were "too many potential defenses available to a charge that [von Bolschwing] materially misrepresented his background on entry to this country to warrant going forward on that basis."[22] He therefore directed OSI to prepare a complaint focused solely on the naturalization process.[23]

Since the CIA was not involved in the citizenship application, von Bolschwing alone could be accountable for any misstatements and concealments at that stage. AAG Trott agreed with this strategy.[24]

OSI filed a three-count complaint in May 1981 alleging (1) that von Bolschwing had procured his naturalization by concealment or misrepresentation since he failed to reveal his wartime activities and associations as part of his naturalization application; (2) that these memberships and activities were evidence of lack of good moral character requisite for citizenship; and (3) that his swearing to the truth of his naturalization application, when in fact the application was not truthful, was further evidence of lack of good moral character. The filing received much publicity. Von Bolschwing denied the charges, telling the press that he had been working for the OSS (predecessor agency to the CIA) during the war.[25]

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By the time the case was filed, von Bolschwing was in a nursing home suffering from a progressive neurological disorder which impaired his memory and intellectual functioning. There were questions as to his capacity to understand and assist in the proceedings. Even before the filing his attorneys had sought to settle the case in light of this problem.[26] Ryan was amenable since he thought "serious due process questions" would be raised if the government tried to deport someone unable to understand or assist in his defense.[27] DAAG Richard supported the disposition. Given the circumstances, he viewed surrender of von Bolschwing's naturalization certificate as "a significant victory."[28]

The district court approved the settlement. Von Bolschwing made no admissions about his work in the Jewish Affairs Office, but did acknowledge concealing his membership in the Nazi Party, the SS and the SD at the time he applied for citizenship. He agreed not to contest

the denaturalization and the United States agreed not to proceed with deportation proceedings unless his medical condition improved. He was to be reexamined annually. A consent judgment was entered on December 22, 1981.[29] Von Bolschwing died 10 weeks later. He was 72 years old.

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1. The report in OSI's files is not signed by von Bolschwing, though a cover letter contains a signature space with his name. Moreover, two SD memoranda referencing the report attribute it to him. Jan. 12, 1937 "Opinion on the write-up 'The Jewish Problem,'" by SS Senior Platoon Leader Kröder; unsigned Apr. 26,1937 memo re "Party Leader von Bolschwing (informer II 112)."

2. Nov. 20, 1937 letter from von Bolschwing to Eichmann.

3. *See* pp. 204-205.

4. June 7, 1945 memo "To Whom It May Concern" from Lt. Col. Ray F. Goggin, U.S. Army, 71st Inf. *See also*, Aug. 18, 1945 memo "To Whom It May Concern" from Capt. Edward Denges, U.S. Army, Inf., S-2, also released by the CIA in 2001 under the Nazi War Crimes Disclosure Act.

5. "The CIA and Eichmann's Associates," by Timothy Naftali, ch. 13 in *U.S. Intelligence and the Nazis*, by Richard Breitman, Norman Goda, Timothy Naftali and Robert Wolfe (published by the National Archives Trust Fund, May 2004), p. 346 (hereafter Naftali).

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6. Naftali, *supra*, n. 5 at p. 349.

7. Von Bolschwing's Sept. 14, 1949 Statement of Life History submitted to the CIA.

8. *See e.g.*, undated memo for Director of Security from Chief, EE re "Request for Aid in Facilitating US Entry for Agent."

9. Sept. 17, 1980 prosecution memo from Ryan to DAAG Richard, pp. 7-8. The von Bolschwing-Eichmann nexus did not come to light until 1960. Following Eichmann's capture that year by the Israelis, Germany reinstituted an active investigation of him. Reviewing captured war records in the U.S., the Germans found reference to von Bolschwing. This information was shared with the U.S. authorities and the Israelis. Feb. 2, 1961 memo to Chief/CI/ [ ] re "Otto Albrecht Alfred von Bolschwing." (The blank brackets indicate information not released when the document was declassified and approved for release by the CIA in 2001 pursuant to the Nazi War Crimes Disclosure Act.)

10. Naftali, *supra*, n. 5 at p. 352. *See also*, Nov. 25, 1953 memorandum from American Consulate General, Munich, Germany to Department of State; undated memo to Director of Security from Chief, EE, re "Request for Aid in Facilitating US Entry for Agent."

11. As set forth in a CIA memorandum declassified in 2001 under the Nazi War Crimes Disclosure Act:

> The true story, as CIA then knew it, was made known to them and they agreed after consultation with our Alien Affairs Staff, to make the administrative decision to admit [von Bolschwing] as an immigrant. CIA did not provide a

> sponsor but we are on record with I and NS [sic] as vouching for [von Bolschwing] and providing all assurance that he was not a security hazard. His entry was in effect accomplished by the CIA statement that his services on our behalf were of such a nature as to override his otherwise undesirable background as defined by the McCarran Act.

Undated and untitled memorandum found in vol. 2 of CIA "Name File on Otto von Bolschwing."

12. CIA files released under the Nazi War Crimes Disclosure Act indicate that von Bolschwing was "instructed to refrain from applying for sensative [sic] jobs with the United States government which will entail a thorough investigation."

13. Oct. 29, 1953 memo to Chief, EE from Chief, Salzburg, re "Grossbahn - Termination."

14. Nov. 24, 1953 memo to Chief, Salzburg from Chief, EE re "Grossbahn Termination." The blank brackets indicate information not released when the document was declassified and approved for release by the CIA in 2001 pursuant to the Nazi War Crimes Disclosure Act.

A responsive memo advised that Grossbahn would be instructed "immediately" to answer "any and all such questions truthfully." Dec. 10, 1953 memo to Chief EE from Chief Salzburg re "Grossbahn - Termination."

15. Jan. 24, 1959 letter from von Bolschwing to INS, New York.

16. Feb. 28, 1979 memo from SLU Chief Mendelsohn to AAG Egan.

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17. Thirolf described von Bolschwing as a dashing "Gary Cooper sort of character." Interview with Thirolf, Feb. 22, 2002.

18. Nov. 30, 1979 letter from Mendelsohn to the CIA.

19. Jan. 15, 1980 memo to Director Rockler and Deputy Director Ryan from OSI attorney Jeffrey Mausner re "Addition to Status Report on Bolschwing." The memo documents a Jan. 9, 1980 meeting at the CIA between officials of OSI and the CIA. *See also*, undated letter to Ryan from Joseph Kimble, a member of the CIA's Office of General Counsel. The Kimble letter was attached to Ryan's prosecution memo.

20. Prosecution memo, pp. 18-19.

21. *Id.*, p. 23.

22. Apr. 28, 1981 buck slip from DAAG Richard to AAG Lowell Jensen.

23. Apr. 22, 1981 memo to DAAG Richard from Ryan re "Otto A. von Bolschwing."

24. May 14, 1981 buck slip from AAG Trott to DAAG Richard approving the "modified complaint."

25. *See e.g.*, "California Man Accused of Nazi Crimes," by Robert L. Jackson, *Los Angeles Times*, May 28, 1981; "Probers Reject Nazi Suspect's Story," by Wayne Wilson, *The Sacramento Bee*, June 1, 1981.

26. Mar. 9, 1981 memo to file from Director Ryan.

27. Apr. 6, 1981 memo from Ryan to D. Lowell Jensen, Assistant Attorney General Designate for the Criminal Division.

28. Apr. 10, 1981 cover memo from DAAG Richard to AAG Jensen, forwarding the Ryan memo of Apr. 6. It is unclear whether DAAG Richard's concerns were directed at problems in the case itself (which had made him reluctant about the filing, *see* Dec. 3, 1980 memo from DAAG Richard to AAG Heymann) or the health issues, or both.

29. While the United States felt the settlement was justified because of the defendant's deteriorating health, the Soviet government called the settlement "a blatant outrage to the memory of millions of victims of the Fascists." "They Conceal Criminals," *Tass News Agency*, Dec. 26, 1981.

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Karl Linnas – Cold War Politics and OSI Litigation

Karl Linnas, chief of a Nazi concentration camp in Estonia, was one of the highest ranking Nazi collaborators ever found in the United States. As the head Estonian in the camp, he ordered guards to fire on prisoners kneeling along the edge of an anti-tank ditch; the dead fell directly into their graves. His persecution of civilians was the crux of both the denaturalization and deportation cases filed against him.

The legal proceedings, begun in November 1979, were one of the first OSI filings. Linnas never seriously contested the facts. He refused to participate in the deposition of Soviet witnesses on the ground that their testimony – taken in the presence of Soviet authorities – would be inherently unreliable.[1] He also defied the court's order to answer certain questions at his own deposition and presented no evidence countervailing any offered by the government.[2]

Linnas was denaturalized in 1982 and ordered deported two years later.[3] His case illustrates, arguably better than any other OSI matter, the impact of the Cold War on OSI prosecutions.

Linnas was born in Estonia, a nation forcibly annexed by the Soviet Union in 1940. The United States did not recognize the legitimacy of the Soviet annexation and yet, as a practical matter, until 1992 Estonia no longer existed as an independent country. Therefore, in the 1980s, whether and how someone could be deported to Estonia presented a political conundrum. The issue was complicated by the fact that the Soviets had charged Linnas with having taken an active part in the killing of 12,000 persons during the war.[4] He had been convicted and sentenced to death *in absentia* by the Soviet Union in 1962. Deportation to Estonia (on Soviet soil as a result of the annexation) therefore could have life or death consequences as well as

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significant repercussions on foreign affairs.[5]

When the U.S. immigration court ordered Linnas to designate a deportation designation, he chose "the free and independent Republic of Estonia," explaining that this should not be confused with "the puppet government formed by the Soviet occupiers of Estonia." For Linnas, the free and independent Republic referred to the government "still recognized by the United States." That was a government-in-exile, led by Estonian emigrés and operating out of offices in New York City.[6]

The immigration court did not address the issue of "the Free Republic of Estonia." It simply ordered Linnas deported to Estonia or, if that country were unwilling to accept him, then to the U.S.S.R. The U.S.S.R. was chosen by the immigration court because it was the country in which Linnas' place of birth – Estonia – was situated.[7]

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Linnas and his supporters challenged the ruling both in the court of public opinion and judicially. In both arenas they stressed Cold War concerns. Thus, his daughters argued in a letter to the Estonian community that:

> . . . U.S. government offices have been infiltrated by Soviet supporting activists.
>
> The creation of the Office of Special Investigations (OSI) in the Justice Department is one typical example. The persecution of so called "war criminals," 40 years after it supposedly happened, is just an attempt to silence anticommunist groups by leading Soviet style court cases in the U.S. and to promote communism in the free world.
>
> The denaturalization of our father . . . by [a judge] who accepted Soviet supplied "witnesses and documents" in U.S. courts is only the continuation of the 1962 Soviet "show trial". . . . As a final measure, the immigration judge . . . also accepted the Soviet "information". . . .[8]

While Linnas' judicial appeal raised a variety of issues, only one resonated with the BIA.

That was that designation of the U.S.S.R. was unreasonable in light of the United States' refusal to recognize the legitimacy of the Soviet annexation of Estonia. The BIA ordered a new deportation hearing. The immigration judge was told to "consider the implications of the United States' refusal to recognize the Soviet annexation of Estonia, [to] designate a country of deportation pursuant to the appropriate [statutory] provisions . . . and [to] articulate the statutory basis for selection, whichever country is designated."

OSI contacted West Germany (FRG) to determine whether it would accept Linnas. The basis for the request was that Linnas had resided in the FRG from 1945 to 1951 and had embarked for the United States from Munich. However, the FRG remained steadfast in the position it had adopted in the *Trifa* case: it would admit only German citizens.[9] Linnas did not qualify.

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In preparation for a new hearing before the immigration judge, the Justice Department sought input from the State Department. State was not anxious for a deportation to the Soviet Union. In light of the "special sensitivity" of the question, the State Department felt it would be "in the interest of the United States" to "more fully . . . explore the feasibility . . . of deporting Linnas to another country."[10] The State Department asked U.S. embassies to make overtures to 17 nations: Brazil, Colombia, Czechoslovakia, Germany, Greece, Israel, Italy, the Philippines, South Africa, Sri Lanka, Sweden, Switzerland, Thailand, Turkey, Venezuela, the United Kingdom and the U.S.S.R.[11] OSI reached out to the Canadians, Germans, Israelis and Russians. Of all the nations contacted, only the U.S.S.R. responded affirmatively.

After discussing the matter with the White House (NSC staff), the State Department prepared a declaration for submission to the deportation judge.[12] It stated that since no country, other than the U.S.S.R., was willing to accept Linnas, a deportation to that country "would not as

a matter of law contravene the longstanding and firmly held United States policy of nonrecognition of the forcible incorporation of Estonia into the U.S.S.R."

Linnas urged the court to consider the consequences of sending him to the Soviet Union. He pointed out – correctly – that his death sentence had been reported in the Soviet press even *before* his 1962 trial *in absentia* had taken place.[13] He argued that this demonstrated the impossibility of getting a fair trial in the Soviet Union. He also contended that his deportation "would lead the Soviets, as well as others, to believe that the United States can be indifferent to the process by which the Gulag acquires its inhabitants; that our concern for the religious, political and ethnic dissidents in Soviet camps, jails, insane asylums and internal exile is but a passing fancy to be ignored." Linnas accused OSI of having an "urge to kill" him and questioned whether the State Department (which he saw as a "rubber stamp" for OSI) had made sincere efforts to find an alternative deportation destination.[14]

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Although the U.S. argued that a deportee's treatment in the receiving state is "legally irrelevant" to determining the appropriate country of deportation,[15] the government was fairly confident that Linnas' earlier conviction and death sentence would not be binding. As early as August 1984, officials from the Soviet embassy had assured DAAG Richard and Director Sher that a new trial was "most likely."[16]

Before the new deportation proceeding began, Linnas galvanized political support. United States Senator Alfonse D'Amato (R-NY) and Congressman Don Ritter (R-Pa.) both argued that deportation to the Soviet Union would violate U.S. policy against recognizing Soviet incorporation of Estonia. They suggested he be sent to Israel for prosecution.[17] This, however, was not a viable option. Years earlier the Israelis had told DAAG Richard and Director Sher that

they would not accept Linnas because the critical incriminating evidence against him came from the Soviet Union. Since Israel did not have diplomatic relations with the U.S.S.R., it lacked access to the evidence.[18]

At Linnas' new deportation hearing, several people from the Baltic emigré community testified on the importance of the non-recognition doctrine. The immigration court was not persuaded. The court held that deportation to "the free Republic of Estonia" would be fruitless, since that entity, housed in the United States, lacked the authority to accept him. The court rejected the argument that the U.S.S.R. was not a proper designation because Linnas' conviction there did not comport with U.S. notions of due process. The court concluded that the U.S.S.R. was the proper destination both because it was the country within which his place of birth was now situated and because it was the only country willing to accept him.

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Although this was a victory for OSI, it was not in accordance with the very constrained mandates of the State Department, as set forth in their carefully worded declaration. The declaration had sanctioned deportation to the Soviet Union only because it was the sole country willing to accept Linnas. By citing an alternative basis for deportation, the court had arguably given credence to the Soviet position that Estonia was now part of the U.S.S.R. This was a cause of concern to the State Department. Since Linnas was appealing the ruling, OSI had an opportunity for judicial reconsideration of the basis for deportation. At the State Department's request, OSI argued that deportation to the U.S.S.R. was appropriate *only* on the ground that it was the sole country willing to accept Linnas.[19]

The BIA accepted the argument. Although the panel acknowledged that Linnas had been sentenced to death "in what appears to have been a sham trial," it was not persuaded by his

argument that deportation to the Soviet Union would deprive him of life without due process of law.

> [T]he Constitution does not extend beyond our borders to guarantee the respondent fairness in judicial proceedings in the Soviet Union. Moreover, under our immigration laws there is no requirement that a foreign conviction must conform to our constitutional guarantees.

Linnas appealed to the Second Circuit. Rudolph Giuliani, then the U.S. Attorney for the Southern District of New York, argued the case.[20] Shortly after the argument, OSI learned that Linnas had begun having his Social Security payments deposited directly into his account rather than sent to his home. Fearing that Linnas was planning to flee, INS began surveillance of his home, his workplace, the home of one of his daughters, and the home of an acquaintance. He was not seen at any of the sites. Sher worried that Linnas, as the "poster boy" for anti-Soviet sentiment, might have an underground support network which would help him flee to Canada.

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Before the Second Circuit issued its ruling, the U.S. Attorney's Office asked Linnas' attorney to bring his client to a meeting to discuss custody. Linnas and his attorney appeared at the requested time, whereupon Linnas was arrested. His attorney was outraged and accused OSI of having masterminded this perceived perfidy.[21]

While Linnas was in custody, the Second Circuit affirmed the deportation order. The court scoffed at Linnas' designation of "an office building in New York" as a deportation destination, saying it amounted to "wasting the opportunity to choose a proper place of deportation." The court acknowledged that there might be circumstances where the fate awaiting a deportee was so inimical to the court's sense of decency as to warrant judicial intervention. This, however, was not such a case.

> The foundation of Linnas' due process argument is an appeal to the court's sense of decency and compassion. Noble words such as "decency" and "compassion" ring hollow when spoken by a man who ordered the extermination of innocent men, women and children kneeling at the edge of a mass grave. Karl Linnas' appeal to humanity, a humanity which he has grossly, callously and monstrously offended, truly offends this court's sense of decency.

The planned deportation was attacked from a variety of quarters. Amnesty International was opposed because Linnas faced the death penalty in the U.S.S.R.[22] White House advisor Patrick Buchanan, emphasizing that he was speaking personally rather than institutionally, stated that it was "Orwellian and Kafkaesque to deport an American citizen to the Soviet Union to stand trial for collaboration with Adolf Hitler when the principal collaborator with Hitler in starting World War II was that self-same Soviet government."[23] Others urged the passage of legislation allowing alleged World War II war criminals to be charged criminally in the United States.[24]

Linnas' daughters also renewed their pleas for help in a letter addressed to "Concerned Americans."[25]

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> Civil trials do not permit juries, cross-examination of the witnesses, nor equal access to the records. This particular kind of civil matter well illustrates how our father has been denied the basic Constitutional right to due process: cross-examination, jury trial, and access to court appointed counsel. This kind of proceeding has brought forth a criminal death sentence to our father who has been denied a criminal trial!
>
> It is difficult to politically criticize the OSI without the risk of being branded anti-Semitic or nazi sympathizer. However, in a free society, we are able to question and challenge any government institution. *It is urgent that we now put aside our fears and inhibitions and bombard the Congress, the Senate, and the Executive branch of government with telephone calls and letters expressing our disapproval of OSI methods.*

(italics in original)

In addition to these appeals to the court of public opinion, Linnas asked the Supreme Court to review his case. He also replaced his counsel with Ramsey Clark, who had been Attorney

General of the United States during the Lyndon Johnson administration.[26] The key argument presented in the Supreme Court petition was that the pending death sentence in the Soviet Union made it an improper destination for deportation.

The government did not see this as an impediment. Officials at the Soviet Embassy had again assured the office of the "strong" likelihood that Linnas would be retried. Moreover, they indicated that the proceeding would be open to the public.[27] The Soviets "made it very clear that out of all of OSI's defendants, Linnas was the person who they most thought was deserving of criminal punishment and who they were most interested in having back on their territory." They felt his deportation would be the "crowning achievement" in their relationship with OSI.[28] The U.S. was confident its own evidence –"solid [and] irrefutable" – would be used by the Soviets, thereby precluding a sham conviction.[29]

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In anticipation of a denial of certiorari, OSI began to plan the details of deportation. At the time there were no direct flights to the Soviet Union. There would have to be a stopover, and OSI did not want this to be in a Western country where a request for asylum might lead to new proceedings. Sher believed that Eastern European countries, knowing the Soviet's intention to get Linnas within their territory as quickly as possible, would not be receptive to an asylum request.

OSI contacted various Warsaw Pact nations. In the end, Czechoslovakia was the pass-through nation. But in an unusual circumstance, Poland too had granted permission for a stopover.

Bruce Einhorn, then Deputy Director for Litigation, went to the Polish Embassy in Washington, D.C. He assumed that the Soviets would have laid the necessary groundwork, and that the request would be a mere formality. It was not. Einhorn recalled the Poles being "very

reticent." They advised that Linnas would need a visa, and the visa application needed to be signed by him. Einhorn requested the form, asked to use the restroom, and when he came out, turned over a completed form with a signature reading "Karl Linnas" at the bottom. Einhorn asked if anything else was needed. "There was a long hesitation after which the official in charge said 'No.'" [30]

With deportation looming, Patrick Buchanan sent a memo to Attorney General Meese on White House letterhead. It did not address the *Linnas* case directly but rather the general issue of "deportations of denaturalized citizens to Communist countries."

Buchanan told the Attorney General that he had received nearly 15,000 cards, letters and phone calls concerning the denaturalization, deportation and prosecution of suspected war criminals. While those writing supported finding, prosecuting and punishing war criminals, they had "serious concerns" with the current procedure. As summarized by Buchanan:

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> 1. The United States should not grant the Soviet Union or other communist governments the moral authority to try people for atrocities committed during World War II. The Soviet Government is itself guilty of massive war crimes, and it was the Soviet/Nazi Pact that allowed Hitler to pursue his own atrocities.
>
> 2. Suspected war criminals should be tried in the United States, Western Europe or Israel. U.S. accession to the Genocide Treaty should grant it the authority to try these persons even though the crimes were not committed on U.S. soil.
>
> 3. Currently, persons accused of war crimes are tried in U.S. courts under civil procedure which denies to them the right of trial by jury and court appointed counsel.
>
> 4. Deportation of Baltic nationals to the Soviet Union violates U.S. policy of non-recognition of Soviet authority over the Baltic States. Though the Department of State has determined that such deportations are consistent with the current statute, logic and common sense argue that the statute does not comply

with U.S. policy.[31]

Buchanan urged the Attorney General to "meet in the very near future with representatives of responsible East European American organizations to discuss this matter" and offered to assist in making the arrangements. The Attorney General responded to the suggestion and a meeting was held on March 5, 1987. The Attorney General, his Chief of Staff, the Associate Attorney General, and the Assistant Attorney General for the Criminal Division met with six Baltic leaders. No OSI representative was present. Reconstructing the meeting from handwritten notes taken by one of the DOJ participants, as well as from a newspaper account written by one of the Baltic participants,[32] it appears that the discussion was free-ranging and extensive.

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The emigré participants argued that the U.S.S.R. had no legal or moral right to try anyone for crimes against humanity. In their view, sending Linnas to the Soviet Union would seal his fate since he would be facing a political trial. They also discussed having criminal, rather than civil, prosecutions in the United States for alleged war criminals, even if this meant enacting new legislation. The emigrés wanted the safeguards of the criminal process, including trial by jury, for those facing charges stemming from their wartime activities; they believed the Attorney General was receptive to the idea.[33]

The meeting received favorable coverage in the Baltic press. One of the participants compared its positive tone to a meeting he had attended at the Justice Department a year and a half earlier.

> In contrast to the boorish behavior of OSI officials at our 1985 meeting, the climate on March 5 was positive and constructive. Mr. Meese was attentive. He took notes. He appeared interested in what we had to say.

The emigrés took away from the meeting a commitment by the Attorney General to look into

allegations of impropriety in OSI proceedings and a promise to appoint a non-OSI person within the Department of Justice to meet with the emigrés and report their concerns to him.[34]

Meanwhile, the case continued to receive media attention. Noted columnist William F. Buckley, Jr. took up the cause.

> [I]f it is a crime warranting execution to have collaborated with the Nazis, then just about every Soviet official over the age of 62 should be executed.
>
> * * *
>
> The entire episode is judicially revolting. How is it possible to try someone on the basis of Soviet testimony – which was written before the trial was actually conducted? Even if someone had films showing Linnas as a guard at a concentration camp in the early '40s, what is the appropriate penalty in 1986?
>
> One can be open to suggestion on the subject, but not to a suggestion that he be sent back to be shot in the country that signed a pact with Adolf Hitler and, in its bloody history, has slaughtered some 50 million people.[35]

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An Op-Ed piece in *The New York Times* called for a Congressional investigation into whether Buchanan had intervened improperly on Linnas' behalf.[36] Buchanan welcomed the challenge.

> But what is difficult to understand is how a handful of American Jews can routinely slander as "Nazi sympathizers" their fellow Americans simply because we do not wish to collaborate with a brutalitarian and anti-Semitic regime that is Hitler's surviving partner from World War II, and whose K.G.B. agents are today beating up Jewish women in the streets of Moscow.[37]

On December 1, 1986 the Supreme Court declined to review the case. With deportation imminent, politicians again weighed in. Three senators wrote to the Attorney General and expressed concern about deporting someone to the U.S.S.R. based on "Soviet evidence."[38] Fourteen others, joined by 54 Representatives, urged the Attorney General to allow the deportation to proceed.[39]

AAG Trott asked the State Department to weigh in. The State Department replied that it had "treated the case as a purely legal matter, and have neither expressly opposed nor supported Linnas' deportation to the U.S.S.R." State recounted its efforts to find a country to accept Linnas,[40] and concluded that no more could be done.

> We would naturally prefer to avoid deporting Linnas to the U.S.S.R. because if he gets a new trial it will be pro forma at best. However, our experience with his and similar cases leads us to conclude that further efforts to persuade countries other than the U.S.S.R. to accept him at this time would be futile.[41]

Then, suddenly, in April 1987, Panama offered Linnas asylum. According to the Minister of the Panamanian Embassy, the decision was based "on humanitarian grounds."[42] Sher learned of it from the INS office in New York. It was news "out of the blue" and he was "devastated."[43]

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Whether or not Panama would have been a viable option at the start of the case, Sher felt it was not appropriate at this late date. "We fought like hell to get an order to the Soviet Union. That issue was litigated all the way to the Supreme Court." Both Sher and AAG Trott feared that the Soviets might limit their cooperation with OSI if the original deportation order were not carried out.[44] That cooperation – involving access to essential witnesses and documentation – was crucial to the investigation and prosecution of OSI cases.

There were other concerns as well. Even before the Panamanian offer emerged, DAAG Richard feared that:

> [b]y refusing to deport Linnas to the Soviet Union, the only country that will take him, we would be carving out an unprecedented exception to deportation for a Nazi war criminal in contravention of the intent of Congress which provided that Nazi war criminals should not be eligible for discretionary relief from deportation.

He noted too that refusal to send Linnas to the Soviet Union would afford the Russians "an unprecedented propaganda victory."

> The fact that our own courts have unequivocally found Linnas to be a war criminal while he ends up walking the streets of the United States because of our refusal to deport him will be cited by the Soviets as confirmation of their position that our government knowingly harbors such Nazi criminals in our midst.

And finally, he warned that refusal to deport Nazis to the Soviet Union could "destroy the OSI project."

> [I]t is the fear of ultimate deportation to the Soviet Union that has in part led to the voluntary departure from the United States of several OSI targets and defendants. If these su no incentive for them to leave and our entire litigative program in this field will become an exercise in futility.[45]

AAG William Weld (Trott's successor) shared these concerns.[46]

OSI leaked the Panamanian offer to the press in an effort to embarrass the Panamanian government, which had a working relationship with Israel.[47] The Panamanian Jewish community was also galvanized to bring pressure to bear. The president of Panama, a figurehead in a country actually run by military strongman Manuel Noriega, was himself Jewish. A message was gotten to him that he must act.[48] It is likely that a message was sent also to Noriega. To the best of Einhorn's recollection, Noriega's children attended a Jewish Day School in Panama City and he was advised that they would not be welcome if the Linnas plan took hold.

On April 15, 1987, Sher learned that the matter was on the agenda for the Attorney General and some of his counselors. Sher was not invited to the meeting. However, from the Attorney General's antechamber, and within earshot of Attorney General's secretary, Sher called Liz Holtzman[49] to inform her about the situation. "I wanted people [in the Attorney General's office] to know I had called. I wanted to be in their faces."

The Jewish community mobilized. Rosenbaum told the press that sending Linnas to Panama would be "a subversion of justice in monumental proportions." He rued that Linnas

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would have a "comfortable retirement under the Panamanian palm trees."[50] Elizabeth Holtzman opined that the Justice Department had acted intentionally during the Passover holidays when Jewish leaders would not be available to mobilize.[51] Despite the holiday she, Rosenbaum and Menachem Rosenshaft of the International Network of Children of Jewish Holocaust Survivors, went from New York to Washington and met with the Panamanian Ambassador to the United States. Later in the day, Panama withdrew its offer of asylum.

Although the press reported that the United States had wanted Panama to accept Linnas,[52] the evidence suggests otherwise. The State Department cables listing countries to be contacted did not mention Panama.[53] Neither did a DOJ memorandum on the issue.[54] The Panamanian statement withdrawing asylum referred to the request it had received on behalf of the Linnas family. In court papers, Linnas referenced efforts to have Austria, Sweden, Norway, Panama, and Paraguay accept him as a deportee.[55] Moreover, an undated and unsigned handwritten note in the Department of Justice *Linnas* file has Ramsey Clark's name with five countries listed beneath it: Portugal, Costa Rica, Panama, Bolivia and Uruguay. All this suggests that it was the defense which approached the Panamanian government.[56]

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The Panamanian turnaround was a major national story. While OSI was pleased that Linnas would not find safe haven in Panama, they were disturbed over one aspect of the coverage. *The Washington Post* reported that Attorney General Meese "had been inclined to agree to the Panamanian refuge because of doubts about the Soviet supplied evidence used to convict Linnas of obtaining his U.S. citizenship fraudulently."[57]

Director Sher was irate and expressed his anger in a memo to DAAG Richard.

As you know, this Department has repeatedly and vigorously contended in

> court papers and appearances that the Soviet-supplied evidence in this case was fully admissible and reliable. Moreover, each and every United States tribunal which reviewed the Soviet evidence concurred in the Department's position. The statement in the Post is particularly troublesome since the petition presently pending before the Supreme Court is based on Linnas' renewed claim that Soviet evidence is unreliable.[58]

Others were similarly distraught. The WJC accused the Attorney General of showing "greater sensitivity for the rights of Nazis than for their victims."[59] A cartoon to similar effect appeared in *The Miami News* and was reprinted in *The New York Times*.[60]

The day after the Panamanian turnaround, a spokesman for the Attorney General said the Justice Department would continue to consider offers from any country that would accept Linnas.[61] When no other countries came forward, the Attorney General acceded to the Soviet designation.[62]

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Linnas was taken to the airport from the Metropolitan Correctional Center in New York City, where he had spent the year since his arrest in the U.S. Attorney's Office. OSI had three phone lines open. One was to the airport in order to be notified about flight plans; a second was to the Supreme Court in case the Chief Justice issued a stay; the third was to the Soviets in order to keep them apprised of the situation.[63] Minutes after Chief Justice Rehnquist denied a final request to prevent Linnas' deportation, the plane was airborne.

The media and Jewish groups, alerted by OSI, were there to see him go. *The New York Post* ran a banner page one headline: "Nazi Butcher Kicked Out Screaming." At a stopover in Prague, Czech officials found and confiscated a razor blade in Linnas' tobacco pouch. Whether this was a potential suicide weapon is unknown; Linnas claimed he needed the blade to clean the bowl of his pipe.[64] From Prague, Linnas was flown non-stop to Tallin, Estonia.

Opinion was divided over whether he should have been sent either to Panama or to the Soviet Union. *The Boston Globe* labeled the Attorney General's actions to find a "haven" for Linnas "shameful."[65] Former Congresswoman Holtzman had a similar view. She accused the Attorney General of attempting to "pervert justice" by trying to "sneak Linnas into Panama."[66] *The Washington Post* thought the greater problem lay in sending Linnas to the U.S.S.R.

> Justice must be done to Nazi war criminals, but a true and disturbing question remains whether justice by accepted American standards was done in this case, where a human life – never mind what kind of a human he may have been – is on the line.[67]

The New York Times saw it differently. It supported the deportation and hailed the Attorney General for bringing it about.

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> Mr. Meese overrode strong right-wing sentiment in the case of Karl Linnas, deporting the former concentration camp commander to the Soviet Union where he is under a death sentence for killing innocent Jews.
>
> * * *
>
> What made Mr. Meese's straightforward action[] remarkable was [its] political setting. This is the Administration that countenanced President Reagan's tribute at the Bitburg cemetery honoring SS troopers who ran German death camps. Mr. Reagan's former communications director, Patrick Buchanan, resisted the Linnas deportation long and loud, with intemperate charges of caving in to Soviet injustice.[68]

It was not only the media that was divided over how to assess the deportation. Within OSI itself there were divergent views. An historian of Lithuanian heritage, who had been with OSI for five years, resigned over the case. Although he supported Linnas' denaturalization and had no doubt that he met the criteria for deportation, he thought it wrong to deport him to the Soviet Union.[69]

The Attorney General was clearly troubled by the case. He requested that the Justice

Department's Office of Legal Policy review alternatives to deportation in the case of persons accused or tried *in absentia* for Nazi war crimes in jurisdictions where there was concern about the fundamental fairness of the legal system. The resulting memorandum, 18 single-spaced pages, was completed two months after Linnas' departure. It outlined a variety of options, all designed to delay departure from the U.S. so dramatically that the aged defendant would likely die before he had to leave the country.[70] When Attorney General Meese resigned a year later, none of the suggestions had been implemented.

Meanwhile, Linnas remained incarcerated in Tallin until June 1987 when he was transferred to Leningrad (St. Petersburg) where he underwent two emergency operations. He died on July 2.[71] With him at the time of death were his eldest daughter and his attorney, Ramsey Clark. He was buried in Long Island, New York.[72]

Looking back on the case, Sher saw it as pivotal for OSI. "If it had gone the other way, I don't think the office could have survived. . . . I would have resigned, made a lot of noise and who knows where that would have gone." It was "far and away the most tense moment in OSI as far as I was concerned."

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1 1. The district court, sensitive to the possibility of witness intimidation, used the deposition testimony only to corroborate other unrefuted government evidence, including documents signed by Linnas as chief of the camp. *U.S. v. Linnas*, 527 F. Supp. 426, 434 n.16 (E.D.N.Y. 1981).

2. *Id.* at 429, 434.

3. *United States v. Linnas*, 527 F. Supp. 426 (E.D.N.Y., 1981), *aff'd*, 685 F.2d 427 (2nd Cir.) *Matter of Linnas*, A08 085 626 (Imm. Ct. N.Y., N.Y. 1983), *aff'd in part and remanded* (BIA 1984), *decision on remand*, (Imm. Ct., N.Y., N.Y. 1985), *aff'd*, 19 I & N Dec. 302 (BIA 1985), *aff'd*, 790 F.2d 1024 (2nd Cir.), *cert. denied*, 479 US. 995 (1986).

4. "Soviet Condemns Three," *The New York Times*, Jan. 21, 1962. Asked at the time about the Soviet trial, a State Department spokesman said the United States knows of "no evidence that Linnas was ever a war criminal." "Reds to Try Ller [Long Islander] Today 'In Absentia,'" *New York Newsday*, Jan. 16, 1962.

5. Boleslas Maikovskis was the only other OSI defendant sentenced to death *in absentia* by the U.S.S.R. However he fled to Germany before the court ruled on OSI's request that he be ordered deported to the Soviet Union. *See* p. 430. Feodor Fedorenko was tried and sentenced to death in the Soviet Union *after* he had been deported.

6. Ironically, the Office of International Affairs (OIA) within the Department of Justice had made a very similar argument as early as 1974 when discussing the possibility of an extradition (rather than deportation) of an OSI subject to Latvia, another of the Baltic countries annexed by the Soviet Union.

> [T]he United States government still recognizes in exile the former governments of Latvia, Lithuania and Estonia with whom this government has viable extradition treaties. Thus, technically, if the Department of State were to receive an extradition request from the Latvian Soviet Socialist Republic in Riga, Latvia, State would be obliged by protocol to formally present same to the representatives of the former government of Latvia, to wit the Consul General of Latvia last known to be located in Philadelphia, Pa.

Apr. 26, 1974 memorandum to INS Regional Commissioner, Northeast Region from Deputy Commissioner, re "Lists of reported Nazi War Criminals Residing in the United States; Your WF 50/10.1 memorandum dated January 23, 1974, w/ attachments re Boleslav Maikovskis, A8 194 566 and Karl Linnas, A8 085 626, and prior correspondence."

7. The U.S.S.R. had wanted to extradite Linnas, but was precluded from doing so by the lack of an extradition treaty between the U.S. and the Soviet Union. Oct. 26, 1984 memo from Director Sher to File re "Karl Linnas (OSI 132)."

8. June 14, 1983 letter from Anu, Tiina and Epp Linnas to "Estonians and friends of Estonians."

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9. Jan. 28, 1983 memorandum from Neal Sher to DAAG Richard recounting meeting he and then Director Ryan had with a legal officer at the FRG Embassy re whether they would accept Valerian Trifa as a deportee. For a fuller discussion of Germany's position on admitting OSI defendants, *see* pp. 426-442.

10. Oct. 16, 1984 letter from Daniel McGovern, State Department Acting Legal Adviser to DAAG Richard.

11. *See* State Department cables No. 337437 of Nov. 14, 1984 and 367835 of Dec. 14, 1984.

12. Mar. 12, 1986 memo to the Attorney General from AAG Trott re "Deportation of a Nazi War Criminal to the U.S.S. R.: Karl Linnas."

13. The trial was originally scheduled for Jan. 2, 1962 but was continued until Jan. 16. In mid-January, before the trial began, the Soviet magazine *Sotsialisticheskaya Zakonnost* published an interview with the prosecutor, who gave details of the testimony and sentence. The Soviets later withdrew the magazine from the newsstands and issued a new edition after the trial was completed.

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14. Respondent's Memorandum of Law Opposing Deportation to the U.S.S.R., filed Feb. 28, 1985.

15. Government's Reply to Respondent's Memorandum of Law Opposing Deportation to the U.S.S.R., p. 2, filed March 8, 1985.

16. Dec. 4, 1984 memo to Attorney General William French Smith from AAG Trott re "Upcoming Deportation of Karl Linnas and Feodor Fedorenko to the U.S.S.R." Not all groups were concerned about Linnas' fate in the Soviet Union. Eli Rosenbaum, then working for the World Jewish Congress, told a reporter: "If we had the authority, [Linnas] would have been executed. Hence I don't much care what happens to him following deportation." "Nazi Hunt Methods Protested; Ethnic Coalition Objects to Soviet Evidence, Lack of Juries," by Jay Mathews, *The Washington Post*, Mar. 23, 1985.

17. Dec. 14, 1984 letter from Senator D'Amato to Director Sher. Ritter Op-Ed piece written for the Allentown, Pennsylvania *Sunday Call Chronicle*, Feb. 3, 1985. D'Amato later retracted his statements, saying he had known only that Linnas was from Estonia but not that he was a "potential war criminal." He charged that the Joint Baltic American National Committee had deceived his staff on this matter. "D'Amato: I was Duped [sic] for Alleged Nazi," by Judith Bender and Alan Eyesen, *Long Island Newsday*, Jan. 15, 1985.

18. Nov. 18, 1986 memo to DAAG Richard from Sher re "Linnas – Summary and Evidence of Wartime Activities." *See also*, Oct. 20, 1986 memo to Deputy AG Burns from AAG Weld re "Karl Linnas - Deportation Proposal." The Israelis reiterated their position when Linnas' deportation was more imminent. Dec. 24, 1986 memo to DAG Burns from DAAG Richard re "Linnas."

The Israelis found a way around the diplomatic relations problem when they extradited and prosecuted Demjanjuk. *See* p. 170-171, n. 13.

19. June 7, 1985 letter to Director Sher from Mary Beth West, Assistant Legal Adviser for European and Canadian Affairs. However, in at least one other Cold War era case OSI designated the U.S.S.R. pursuant to the theory that it was now the country in which the defendant's place of birth (Lithuania) was situated. *Matter of Palciauskas*, 939 F.2d 963, 967 (11th Cir. 1991).

20. Giuliani later served as mayor of New York City from 1994 to 2002. Having a U.S. Attorney argue a case is unusual. It generally indicates the significance (and or political importance) of a case. Director Sher noted an additional factor: "To have a Republican arguing for sending him to the Soviet Union" sent a powerful message. Recorded interview with Neal Sher, May 25, 2001. All references hereafter to Sher's actions or recollections come from this interview unless otherwise indicated.

21. May 1, 1986 letter to David Milhollan, Chair, Board of Immigration Appeals from Ivars Berzins.

22. Later, after reviewing material supplied by Eli Rosenbaum, they changed their position, opposing only the death penalty but not the deportation. Oct. 31, 1986 letter from Jessica Neuwirth at Amnesty International to Eli Rosenbaum at the WJC.

23. Both the Amnesty International and Buchanan positions were reported in "U.S. Nazi Hunters Brace for Criticism; Doubts about Soviet Evidence Surround Move to Deport Linnas," by Jay Mathews, *The Washington Post*, July 13, 1986.

24. *E.g.,* "An American Trial for Karl Linnas; Let a Jury Decide his Case before He's Shipped Off to the Soviet Union," by Jay Mathews, *The Washington Post*, Aug. 29, 1986.

25. Aug. 1, 1986 letter from Anu, Tiina and Epp Linnas.

26. Years later, Ramsey Clark also represented OSI defendant Jack Reimer.

27. July 17, 1986 memo from Sher to File re "Meeting with Vadim Kuznetsov;" July 25, 1986 untitled memo to File from OSI Deputy Director Michael Wolf.

28. July 25, 1986 memo from Wolf, *supra*, n. 27.

29. Sept. 16, 1986 memorandum from Sher to DAAG Richard re "Karl Linnas."

30. As Einhorn saw it, there was no deception because the officials knew what had transpired. He saw them as "bureaucrats first, last and always, and authoritarians much lower down on the totem pole of priority." Recorded Einhorn interview, Oct. 2, 2001. All references to Einhorn's thoughts or actions come from this interview unless otherwise indicated.

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31. Patrick Buchanan urged U.S. trials as well in a debate about Linnas with Eli Rosenbaum (then with the WJC). They appeared on the television program *Crossfire*, Apr. 15, 1987.

32. "Faces and Places," by Myron Kuropas, *The Ukrainian Weekly*, March 22, 1987.

33. "Balts, Ukrainians Meet with Meese to Discuss Concerns about OSI," by Marianna Liss, *Ukrainian Weekly*, Mar, 15, 1987.

34. "Faces and Places," by Myton Kuropas, *The Ukrainian Weekly*, Mar. 22, 1987.

35. "In U.S.S.R., the Verdict Comes before Trial," by William F. Buckley, Jr., *The New York Daily News*, Dec. 12, 1986.

36. "Deport Karl Linnas to the Soviet Union," Op-Ed, March 31, 1987 by Menachem Rosenshaft of the International Network of Children of Jewish Holocaust Survivors.

37. Letter to the Editor, *The New York Times*, April 7, 1987 by Patrick Buchanan.

38. Jan. 28, 1987 telegram to the Attorney General from Senators Dixon and Simon; Feb. 5 letter to the Attorney General from Sen. Riegle.

39. Mar. 26, 1987 letter from Senators Adams, Boren, Boschwitz, Chafee, Chiles, Conrad, D'Amato, Danforth, Gore, Graham, Hatch, Kerry, Specter and Wilson, along with Representatives Ackerman, Atkins, Berman, Biaggi, Bustamante, Cardin, Conte, Coyne, DeFazio, DioGuardi, Durbin, Edwards, Evans, Fascell, Fazio, Frank, Frost, Gallegly, Gejdenson, Gilman, Glickman, Green, Hall, Hayes, Hoyer, Hughes, Jeffords, Kostmayer, Lantos, Lehman, Leland, Levine, Lewis, Martinez, Owens, Pepper, Porter, Roe, Roybal, Scheuer, Schneider, Schumer, Solarz, Skiorski, Schroeder, Smith, Torricelli, Wilson, Vento, Weber, Wyden, and Yates. Congressman Rodino, chair of the House Judiciary Committee, wrote a separate letter to the same effect on Feb. 26, 1987.

40. In addition to the specific requests made about Linnas in 1984, *see* p. 275, the Department had polled all its diplomatic posts in Sept. 1987 to ascertain generally if any would be willing to accept persons deported under the Holtzman Amendment.

41. Mar. 13, 1987 letter to AAG Trott from Mary V. Mochary, Deputy Legal Advisor, Department of State.

42. "U.S. Asks Panama to Take Nazi but Is Rejected," by Kenneth Nobel, *The New York Times*, April 16, 1987.

43. Einhorn recalled it differently. According to him, they learned about it in a phone call from Liz Holtzman.

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44. Aug. 10, 1984 from Sher to DAAG Richard re "Linnas - BIA Decision." *See also* Jan. 13, 1986 memorandum to U. S. Attorney Giuliani from Sher re "Linnas." AAG Trott's views were set forth in a draft memo to the Attorney General which was leaked to the press. "U.S. Nazi Hunters Brace for Criticism," by Jay Mathews, *The Washington Post*, July 13, 1986.

45. Sept. 17, 1986 memo to the Deputy Attorney General from DAAG Richard re "Deportation of Karl Linnas to the Soviet Union." Sher also worried that failure to send Linnas to the U.S.S.R. would have a deleterious effect on OSI's program. It would send a message to OSI's "opponents" that "there is no real significance to our litigation." Sept. 16, 1986 memorandum from Sher to DAAG Richard re "Karl Linnas."

46. Handwritten notation by AAG Weld on DAAG Richard's memo. AAG Weld added that he would condition deportation on receiving adequate assurances from the Soviets that the trial would be open to international observation. He later followed this up with a suggestion that the U.S. ask for a "gesture" from the Soviets "along the line of allowing the exit of an appropriate number of Soviet dissidents." Oct. 20, 1986 memo to Deputy AG Arthur Burns from AAG Weld re "Karl Linnas - Deportation Proposal."

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47. Einhorn interview, *supra*, n. 30.

48. The president was Eric Devalle Maduro. As best Einhorn could recall, the message to him was sent through the American Jewish community.

49. Holtzman was then the District Attorney in Brooklyn, N.Y. The account of Sher's calling her comes both from his interview and her book, *Who Said it Would be Easy? One Woman's Life in the Political Arena* (Arcade Publishing), p. 94.

50. "Meese Decides to Deport Linnas to Panama; Panamanian Government Suspends Plan," by Pete Yost, *AP*, Apr. 15, 1987.

51. *Id. Accord*, recorded interview with Ms. Holtzman, June 12, 2002.

52. *See e.g.*, "U.S. Asks Panama to Take Nazi but Is Rejected," *The New York Times*, Apr. 16, 1987. *The Times* reported that the Attorney General's decision to allow Linnas to go to Panama was made over the objections of several Justice Department officials, including AAG Trott, AAG Weld and Director Sher.

53. Department of State, Cable Nos. 337437 (Nov. 14, 1984) and 367835 (Dec. 14, 1984).

54. Feb. 9, 1987 memorandum to Sher from OSI attorneys Philip Sunshine and Aron Golberg re "Countries Approached to Accept Linnas as Deportee." *See also*, Mar. 13, 1987 memo to DAAG Richard from Director Sher re "Linnas: Efforts to Locate a Country Other than the U.S.S.R."

55. Motion and Application for a Temporary Restraining Order, p. 8, filed Apr. 20, 1987 in the U.S. District Court for the District of Columbia.

56. The Justice Department gave conflicting messages on the issue. One unnamed Justice Department official was quoted as saying that the Attorney General had tried to arrange asylum for Linnas in Panama. "The World," *The New York Times*, Week in Review, Apr. 19, 1987. Yet another (or perhaps the same) unnamed spokesman said the deal disintegrated before Justice Department officials could investigate, at the Attorney General's request, its existence and legal basis. "Agreement to Send Linnas to Panama Is Canceled," by Jay Mathews, *The Washington Post*, Apr. 16, 1987. An on-the-record statement by a Department spokesman insisted that the Attorney General did nothing to seek out Panama as an alternative destination. "Reagan's Won His Last Election . . . But He Wants to Exit Campaigning," by Dick Kirschten, May 2, 1987, *National Journal*, at p. 1079.

New York Times columnist Anthony Lewis, who had chastised the Attorney General for trying to send Linnas to Panama, apologized. He came to believe that the Attorney General did not initiate the idea, but only explored it after Panama made an offer "because he had doubts about the Soviet legal system." Lewis went on to credit the Attorney General with reviewing the record and sending Linnas to the Soviet Union only after he determined that the findings against Linnas were correct. *See* "A Strange Solicitude," by Anthony Lewis, *The New York Times*, Apr. 21, 1987 and "Poisoning Ourselves," by Anthony Lewis, *The New York Times*, Apr. 24, 1987.

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57. "Agreement to Send Linnas to Panama Is Canceled," *supra*, n. 56.

58. Apr. 17, 1987 memorandum from Sher to DAAG Richard re: "Linnas: Washington Post Article of April 16, 1987."

59. "Agreement to Send Linnas to Panama is Canceled," by Jay Mathews, *supra*, n. 56.

60. Drawing by Don Wright, *The Miami News*, reprinted in *The New York Times*, Apr. 26, 1987. It depicted the two hemispheres of Meese's brain. "Things That Matter" were in the right half. The only issue found there was "accused Nazi war criminal."

61. "U.S. Looking for Takers for Nazi Case Suspect," *AP*, *The Chicago Tribune*, Apr. 16, 1987.

62. Martin Mendelsohn was no longer at the Department of Justice during the *Linnas* deportation proceedings. Nonetheless, he followed the case. According to him, he and Meese had a mutual friend. Mendelsohn told the friend that Linnas should be sent back to the U.S.S.R. He sent the friend a copy of the Circuit opinion and asked him to talk to Meese. The friend called back a few days later. "I go through life dropping pebbles into bottomless wells. I just heard a splash. You have nothing to worry about." Recorded interview with Mendelsohn, May 23, 2001.

63. Einhorn interview, *supra*, n. 30.

64. Apr. 23, 1987 memorandum from OSI investigator Thomas Fusi to Sher re "Deportation of Karl Linnas."

65. "Coddling a War Criminal," *The Boston Globe*, editorial, April 21, 1987.

66. *The New York Times*, "U.S. Deports Man Condemned to Die in Soviet Union," by Kenneth Noble, April 21, 1987.

67. "The Linnas Case," *The Washington Post*, editorial, Apr. 23, 1987.

68. "Mr. Meese vs. the Nazis," *The New York Times,* editorial, Apr. 29, 1987.

69. Telephone interview with Saulius Suziedelis, Mar. 5, 2002.

70. June 25, 1987 memorandum to Attorney General Meese from Stephen Markman, AAG for Legal Policy. The delaying tactics included:

(1) determining that it was "inadvisable" to execute the order of deportation and then trying to find an alternative destination by contacting other countries *seriatim.* If this delay alone did not resolve the issue, it nonetheless

> may have the added advantage of allowing a politically charged situation to diffuse somewhat, which in itself may lead to alternate solutions. For example, if there could have been additional delay of deportation in the Linnas case, it might not have been necessary to ask third countries to accept Linnas during a time when the case was so prominently portrayed by the media. With less publicity it might have been possible for a country to accept him quietly.

(2) prosecuting the alien for failing to "voluntarily depart" after the order of deportation has been entered. The memo acknowledged that the Attorney General has traditionally carried out orders of deportation but concluded that he was not obligated to do so. If the Attorney General did not act, the writer opined that alien would be obligated to depart on his own. Failure to do so would leave him vulnerable to prosecution for "willfully refusing to present himself for deportation" – a crime punishable for up to ten years.

> With regard to Nazi operatives, most of whom are in their late sixties or older, a ten-year sentence would effectively ensure that they would never have to return to the country specified on the deportation order, yet would remain incarcerated.

For added insurance, the memo suggested increasing the statutory maximum period of incarceration for failing to willfully depart.

(3) prosecuting the alien criminally for misrepresentations based on current "reliance . . . or use of fraudulently-acquired citizenship or naturalization documents." Charging multiple misrepresentations would lead to a long jail term. The memo also suggested increasing the penalty for such crimes and extending the statute of limitations.

(4) arranging for extradition to a country which has jurisdiction to try the alien for his alleged war crimes;

(5) repealing or modifying the Holtzman Amendment, although the memorandum acknowledged that this was not politically feasible;

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(6) amending the Immigration and Nationality Act to (a) prohibit the deportation of aliens to countries with"sham legal systems" or (b) provide the Attorney General with discretion to withhold deportation to such countries. The memo recognized that it would be difficult to establish criteria to identify such legal systems, and if any "friendly countries" met such criteria, this could cause "considerable political damage."

(7) amending the law to provide for criminal prosecution in the United States before an individual could be deported to a country with a "sham legal system." (This, the memo acknowledged, presented the same difficulties as the preceding suggestion.)

(8) entering into an agreement with another country to accept an OSI defendant in exchange for some requested favor.

71. The Soviets reported that he suffered from heart and liver disease. "Nazi War Criminal Karl Linnas Dies," *Tass*, July 2, 1987.

72. *See* p. 227, n. 80, re the circumstances under which a deported person can return to the United States for burial.

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Chapter Four: Protecting Our Borders

Introduction

OSI's litigation generally targets persecutors who have settled in the United States. There are, however, many instances of persecutors applying to enter on a less permanent basis – for tourism, business, family visits, or simply to transfer airplanes *en route* elsewhere. It is much simpler and quicker to keep someone from entering than it is to denaturalize and/or deport him after he has gained admission. Not only is the process more streamlined at this early stage, but the burden of proof is different. It rests with the alien to establish his eligibility to enter, rather than on the government to prove his ineligibility to remain. Moreover, one who is excluded cannot avail himself of the many levels of legal appeal open to defendants in denaturalization and deportation proceedings. OSI has been able to prevent many more persecutors from entering the country than it has ejected through litigation.[1]

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1. Between 1989, when OSI began keeping detailed records of the matter, and this writing, the government has kept almost 200 people of concern to OSI from entering the United States. By contrast, since OSI's founding in 1979, 62 people left the country as a result of litigation or threatened litigation. (This figure is not a full measure of OSI's efforts, however, since many died before a case was filed or litigation was complete.)

The Watchlist

OSI's ability to preclude entry depends largely on "the Watchlist." Although the term is singular, the Department of Homeland Security (DHS) and the State Department each has its own list of excludable persons.[1] The DHS list is in part a composite of lists originally prepared by Customs and INS, which both now are part of DHS. DHS uses its list to screen entrants at ports of arrival; the State Department list is intended to keep consular officials abroad from issuing a visa to persons ineligible to enter. The lists contain millions of names, among them terrorists, suspected drug dealers and criminals. Up to 80,000 names were placed on each list at OSI's behest. They include SS officers, concentration camp guards, members of mobile killing units (Einsatzgruppen), persons denied entry to the United States under the DPA, individuals wanted or convicted by other nations of war crimes, and persons successfully prosecuted by OSI.

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The only criterion for placement on the Watchlist is that there be a "reasonable basis to suspect" that the individual is excludable. OSI recommends placement on the Watchlist if there is reason to believe a person assisted the Axis powers in persecution based on race, religion, national origin or political persuasion because such a person would be excludable under the Holtzman Amendment.

When someone on the Watchlist applies for a visa, the State Department notifies OSI. If OSI determines that the person is *per se* excludable (he served in a unit or organization which had persecution as its principal purpose), no visa will be issued. However, if the applicant is arguably admissible (*e.g.*, he served with the SS but it is unknown whether his unit was involved in persecution), OSI will do research, send pertinent information to the State Department, and request that they question the applicant on specific issues. Based on his answers and the

information gathered by OSI, a determination of eligibility is made by the State Department Consular Officer. If the applicant is admissible, his name is removed from the Watchlist and the visa is issued.

Not all aliens go through the visa process however. In July 1989, the United States instituted a program to permit most nationals of selected countries to enter the United States for up to 90 days without a visa.[2] OSI feared that an unintended consequence of this tourist-enhancing program would be to facilitate the entry of persons involved in persecution during World War II. The office therefore proposed limiting the waivers for Germans to those born after 1925. The State Department refused, concerned that such a restriction:

> would not be consonant with our stated policy of requiring that the program be the same in the U.K., Japan, and any other country named to participate. Such a step would be perceived in Germany as the de facto penalization of a whole generation of Germans, and would stimulate a strong and negative reaction.[3]

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INS, however, did make an accommodation at OSI's request after the visa waiver program was instituted. In 1995, they modified the questionnaire which must be completed by persons entering the United States from visa waiver countries before they can disembark from an overseas flight. INS form I-94 now includes the question: "[B]etween 1933 and 1945 were you involved, in any way, in persecution associated with Nazi Germany or its allies?" If the person answers yes (no one ever has), he will not be admitted.

When a visa waiver traveler whose name is on the Watchlist arrives in the United States, Immigrations and Customs Enforcement (ICE) – successor to INS – notifies OSI;[4] OSI then faxes questions to be asked of the traveler. Unless it is quickly clear that the person should not be on the Watchlist, or does not match the name listed, he is sent back to his originating port.[5] He can

then apply for a visa; if he does so, OSI will have sufficient time to determine whether he is excludable under the Holtzman Amendment. If he is, OSI passes that information on to the State Department.

In some instances, a person entering *with* a visa is stopped at the port of entry because his name is on the Watchlist. (Most likely he was issued a visa because he was not examined fully at the time he applied or was not truthful in the answers he gave during the application process.) Again, OSI is notified and faxes questions to be posed to the applicant under oath. For those on SS lists, OSI also may ask that the traveler remove his shirt to determine whether he has a tattoo under his left armpit. (Many, though not all, SS members were given a tattoo denoting their blood type.)

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The inspector is instructed to call OSI as soon as the interview is complete. If the answers indicate that the visitor's Nazi-era past was fully examined by the State Department before the visa was granted (and the State Department confirms this was so), the applicant is admitted and his name removed from the Watchlist. However, if the visa was granted before he was placed on the Watchlist, if the traveler was not questioned about his wartime activity when he applied for the visa, or if it appears in some respect that the visa was improperly granted, then OSI asks that the visa be cancelled. If the person is clearly inadmissible (*e.g.*, a camp guard), he is given the options of remaining in custody pending a hearing before an immigration judge or departing on the next available flight. (Most persons take the second option.) If the traveler is in the grey area of admissibility (*e.g.*, an SS officer who claims his unit had no involvement in persecution), he may be allowed in for the duration of his visit or scheduled for another interview ("a deferred inspection") several days hence. The traveler's passport, itinerary and return ticket

are taken by the inspector to insure that he will return for the next interview. By then OSI will presumably have gathered more information. If it turns out that there is no basis for exclusion, the deferred inspection may be cancelled. Alternatively, if there is added reason to doubt his eligibility to enter, there will be additional questioning and he may be told to leave.[6]

Of the tens of thousands of names OSI has placed on the Watchlist, most come from massive lists of potentially excludable people (*e.g.*, SS officers). OSI first began placing names on the list in 1980 and has added to it as more World War II era documents become available. (In August 2000, an OSI attorney determined that if all persons over 90 were eliminated from OSI's entries – based on the presumption that they are either dead or unlikely to travel – there would be 24,000 names still on the list.)

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The presumptive validity of the listing for a particular individual can be tested once the person applies for a visa or makes an effort to enter the country.[7] In a few instances, however, OSI has undertaken a comprehensive investigation to determine whether a particular person should be preemptively listed or removed from the list. The most famous of these individual watchlist studies is that of Kurt Waldheim, former Austrian President and United Nations Secretary General. His listing is discussed elsewhere in this report.[8]

OSI prepared two other exhaustive and independent Watchlist reports. One concerned Harry Männil, an Estonian who OSI learned had been a wartime member of two organizations which persecuted Jews.[9] When denied entry in 1994, Männil hired Martin Mendelsohn to persuade the government to delete his name from the Watchlist. At the time, Mendelsohn also represented the SWC in the United States. Ironically, the Wiesenthal Center's Israeli office first brought Männil to OSI's attention.

Mendelsohn forwarded affidavits in support of Männil to OSI.[10] One was from former President Gerald Ford who had known Männil since 1974. President Ford swore that he found Männil "to be an upstanding[] fair, honorable, humane citizen" who had:

> never exhibited tendencies or character that would lead me to believe that he engaged in anti-Semitic activity or that he was someone who engaged in the killing or arrest of individuals while in the service of Estonian Self Government under the occupation of Nazi Germany.

OSI reviewed archival material, transcripts from relevant war crimes trials, as well as statements made by Männil and people who knew him during the war. It concluded that there was credible evidence not only that Männil had served in persecutory organizations, but that he personally arrested and interrogated Jews and suspected Communists. His name therefore remained on the Watchlist.

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Things went differently for André Bettencourt, a French Senator, former Cabinet official, and industrialist whose name was referred to OSI by Serge Klarsfeld, a prominent French Nazi hunter. Klarsfeld reported a series of allegations stemming from Bettencourt's having written anti-Semitic articles in the French press during World War II. Because France had no mechanism for dealing with Nazi propagandists, Klarsfeld urged the United States to place Bettencourt on the Watchlist. New York's Governor George Pataki and Senator Alfonse D'Amato joined in the request.[11]

Bettencourt conceded that he had written some anti-Semitic articles and expressed regret for having done so. OSI reviewed his writing (only two articles referenced Jews) and found it significantly different from the writings of propagandists OSI had prosecuted.[12] Whereas they had described Jews "as posing such an immediate and serious danger to society as to make the

drastic measures adopted against them appear to be justified," Bettencourt had focused more on historic misdeeds by Jews.[13] His name was therefore not referred to the Watchlist.

It is hard to prove that a person did *not* come to the United States because he knew he was listed on the Watchlist. Nevertheless, in at least one instance it seems possible that a highly prominent Nazi who would otherwise have come refrained from doing so. Georg Liebbrandt was the third ranking official in the Reich Ministry for the Occupied Eastern Territories. He was one of only 15 persons attending the Wannsee Conference in January 1942 where plans for implementing the "Final Solution" were discussed. Among his many contributions to the Third Reich, Liebbrandt had helped draft a decree which defined the term Jew more broadly than it had been defined under the notorious Nuremberg laws. This expanded definition subjected more people to annihilation.

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In 1979, the newly formed OSI learned that Liebbrandt had been issued a visitors visa five years earlier. (INS records show that he spent five weeks in the United States in 1974.) At OSI's request, Liebbrandt was placed on the Watchlist and his visa was revoked in December 1979. Although people are not generally told that they are listed, they do get notified if their visa is revoked. Liebbrandt never applied for another visa; he died in 1982.[14]

Less prominent than Liebbrandt, but still significant in the Nazi power structure, was Hermann Josef Abs, honorary president and former director of West Germany's Deutsche Bank. His wartime responsibilities at the bank included supervising and financing the Nazi Aryanization program which compelled the sale of Jewish companies to German enterprises at vastly undervalued prices. Abs also had served on the Board of Directors of several companies that exploited slave labor to reap large profits during the war, including I.G. Farben, Siemens,

BMW, Daimler-Benz and Mannesmann Iron Works. After the war, he was convicted, *in absentia*, of war crimes by a Yugoslav court.

As a prominent international banker, Abs had traveled to the United States many times.[15] In 1982, he was appointed by the Vatican to serve on an advisory board to the Vatican bank, which was then under investigation. OSI believed this appointment would lead to additional U.S. travel. In January 1983, OSI asked that he be placed on the Watchlist.[16] Although INS agreed to do so,[17] OSI learned years later that the agency did not follow through.[18] This error was apparently without consequence, however, since there is no record of Abs' having returned to the United States after 1981.

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Although the Watchlist is generally a mechanism for keeping people from entering the country in the first instance, it has on at least two occasions served to alert OSI that someone may have erroneously been allowed to enter the U.S. years earlier. Alexander Schweidler, an ethnic German from Slovakia, emigrated to the U.S. from England in 1965. He had served as a guard at the Mauthausen concentration camp in Austria. His name was one of many which OSI, as part of its routine research, asked INS to check in the 1980s. It came back negative, causing OSI to conclude that he was not in the United States. By chance, Schweidler traveled outside the United States for the first time in 1992. When he tried to reenter, there was a Watchlist hit. As a documented alien (he had never sought citizenship), he was allowed to reenter, but OSI began an investigation and ultimately filed a deportation action. Schweidler was deported to England in 1994.[19]

The events of 9/11 indirectly led to the second instance of after-the-fact Watchlist identification. As a result of increased security following the attacks of 9/11, DHS began to run

Watchlist checks on all resident aliens seeking to renew their green cards. One such check in May 2005 provided a hit for a former SS officer who had been in the United States since 1960. As of this writing, he is under investigation by OSI.

Not all Watchlist hits have gone smoothly. One significant mishap involved Gunther Tabbert, who entered from Germany in September 1993. (A deferred inspection was set up because Tabbert had a visa issued years earlier.) By the time of the deferred inspection, OSI knew that Tabbert had been chief of a branch office of German Security Police in Latvia. In a 1970 German trial for war crimes, the court found that Tabbert had selected the site for a mass murder of ghetto Jews and had ordered his forces to dig a trench which later served as the death pit. Nonetheless, he was acquitted, the court surmising that he acted out of fear of retribution.

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Whether or not he was criminally liable in Germany, his actions involved persecution of Jews on behalf of the Nazis. After OSI interviewed Tabbert, INS told him he would have to leave the next day.[20] Overnight, and without any notification to OSI, INS changed its position. They offered a plethora of reasons, including the fact that Tabbert had only a few days remaining on his scheduled tour; there was no likelihood that he would overstay; sending him back would be vindictive; he posed no present danger; he was old; his wife was with him; he had not actually been convicted of war crimes; he had a visa, and he had been in the United States twice previously. He returned to Germany several days later when his tour was completed.

It is, of course, impossible to know the number of times the system has failed completely and a person on the Watchlist has been admitted to the U.S. If the person is traveling under an assumed name there would be no Watchlist hit. But at least twice persons traveling under their proper names and birthdates have been admitted despite the fact that their names were listed.

In 1995, Helmut Oberlander, who at age 17 allegedly served as an interpreter for an SS mobile killing unit, entered the U.S. from Canada. (The day preceding, the Canadians had filed a denaturalization case against him.) OSI received a tip about the entry from a Canadian who also alerted the office to the fact that Oberlander owned a condominium in Florida. Director Rosenbaum and an OSI investigator flew to Florida. They found Oberlander and his wife in an apartment which the wife acknowledged they had owned for six years.[21] The OSI team advised Oberlander that if he did not leave voluntarily, he would be turned over to INS and detained until he had a hearing on his admissibility. He chose to leave. OSI helped make the travel arrangements; Rosenbaum and the investigator drove him to the airport, and he left that day.[22]

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The second known failure of the system concerned Chester Wojciechowski, against whom OSI had filed a denaturalization complaint in 1985. Two years later, before litigation was complete, Wojciechowski moved to Germany. An order of denaturalization was issued and Wojciechowski was placed on the Watchlist. Since he had not been deported, he was allowed by law to receive his Social Security payments in Germany.

In response to a routine inquiry from the Social Security Administration in 2001, Wojciechowski stated that he was about to return to the United States for a visit with his family. Social Security notified OSI. A check of INS records showed that Wojciechowski had made at least three extended visits to the United States since his voluntary departure. At OSI's behest, a State Department consular official in Germany presented Wojciechowski with a letter from Director Rosenbaum notifying him that he could not return to the U.S.[23]

While the typical use of the Watchlist in OSI-related matters is to prevent Nazi persecutors from entering the country, there have been a few unusual uses of the Watchlist. One

involved Japanese persecutors who wanted to enter the United states in order to apologize and explain their role in World War II. Their story is set forth elsewhere in this report.[24]

Another involved a *criminal* prosecution of Germans placed on the Watchlist by OSI. The matter was handled by the United States Attorney's Office in Hawaii. Two German nationals stopped at the Honolulu airport in 1990 were charged with making a false statement (denying their wartime activity when applying for a visa) and using a visa procured by means of fraud. One of the men pled guilty, was fined $55,000 and returned to Germany; the other was convicted after trial and deported.[25]

Finally, OSI once was in the anomalous position of filing a lawsuit simply to ensure that it could ultimately place someone *on* the Watchlist. In 1990, OSI learned that a naturalized U.S. citizen, who had served as a camp guard, was living abroad. He had moved overseas in 1975 and there was no indication that he intended to return to the United States. However, there was no way to preclude his doing so – for either a visit or permanent relocation – since U.S. citizens cannot be prevented from returning to the country. Rather than the usual situation of filing a case in the hope of ultimately *evicting* a Nazi persecutor from the U.S., OSI filed a denaturalization action to preclude his ever *returning*. The case settled, citizenship was revoked, and his name was then placed on the Watchlist.[26]

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1 1. While there is an enormous overlap, the lists are not identical.

2. Those coming in under the program waive the right: (1) to review or appeal the determination of admissibility at the port of entry; or (2) to contest, other than on the basis of application for asylum, any action for deportation.

3. Feb. 2, 1989 letter to Director Sher from Joan Clark, State Department Assistant Secretary for Consular Affairs. Two years later, when the State Department proposed adding Austria to the list of waiver countries, OSI raised the same objections, again to no avail. Other countries of concern to OSI (Hungary, Latvia, Lithuania and Slovakia) were added in 2008. In all, 34 countries are on the waiver list.

4. Unfortunately, in a fair number of cases, the call mistakenly goes to the State Department rather than OSI. If no one at State is reached or they do not pass the information over to OSI, the traveler is admitted. If and when OSI learns of the entrance, it is sometimes too late to track down the traveler. OSI's efforts to have the office number posted at all ports of entry have had limited success.

INS was dissolved in 2003. Most of its former responsibilities relating to OSI matters were transferred to ICE, the largest investigative arm of DHS.

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5. In two cases, investigations were begun and denaturalization cases filed in Canada after OSI informed the Canadians of the travelers' background. *See* p. 487.

6. Airlines with landing rights in the United States have entered agreements providing that they are responsible for return airfare if a visa waiver traveler is turned back at the port of entry. If a traveler is allowed to enter the United States while the government gathers information, it is not clear who is responsible for paying the cost of return passage. In some instances, the United States purchases the ticket.

7. Because the names were incorporated *en masse*, there are many errors possible in the listings. Among them is the fact that some of those on the list became U.S. citizens before their names were listed; citizens cannot be kept from entering the country. OSI's only recourse then is to file a denaturalization case.

8. *See* pp. 310-329.

9. The Estonian Political Police in Tallinn and the Estonian Home Guard Omakaitse. Männil is discussed further at pp. 515-518.

10. For a listing of the affiants, *see* p. 521, n. 34.

11. "U.S. Urged to Bar Frenchman for War Deeds," by Doreen Carvaja, *The New York Times*, Feb. 22, 1995.

12. May 7, 1996 memorandum to Rosenbaum from OSI historian Elizabeth White, then Chief of Investigative Research. All references to OSI's research on Bettencourt come from this memo.

13. In one of the articles however, Bettencourt writes of the "Jews' cry of 'May his blood fall again on us and our children:' You know, moreover, in what way it [Christ's blood] has fallen and still falls. It is necessary that the prescriptions of the eternal book be carried out." While OSI acknowledged that this sounded "perilously close to a justification for the persecution being suffered by the Jews in France," it concluded that this was not its intent since it was unlikely Bettencourt was aware of actions being taken against Jews at that time.

14. Jeffrey Mausner, the OSI attorney who handled the matter, could not recall how he had first learned about Liebbrandt's visa. But once he did, Mausner prepared a report outlining Liebbrandt's activities on behalf of the Third Reich. Although his memo was forwarded to Germany, the Germans never charged Liebbrandt with a crime.

15. INS records establish that he visited the United States 14 times between 1972 and 1981.

16. Jan. 27, 1983 letter to Andrew Carmichael, INS Associate Commissioner for Examinations from OSI Deputy Director Charles Gittens.

17. Mar. 11, 1983 memo from INS General Counsel Maurice Inman, Jr. to Marvin Gibson, Acting Associate Commissioner, Examinations.

18. May 15, 1990 letter to Richard Norton, Associate Commissioner for Examinations from Director Sher.

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19. For a discussion of his fate in England, *see* p. 492.

20. Sept. 15, 1993 memo to Director Sher from Edward Stutman, OSI senior trial attorney. All statements hereafter about the Tabbert affair come from this memo unless otherwise noted.

21. This suggests that they probably entered the country multiple times, but it is unknown whether that is indeed the case.

22. May 10, 1995 memo to Oberlander file from Thomas Fusi, OSI Criminal Investigator, re Enforced Departure of Helmut Oberlander." *See also*, "US Sends War Crimes Suspect Back to Canada," by Stephen Bindman, *The Toronto Star*, May 10, 1995.

In Feb. 2000, a Canadian court concluded that Oberlander's citizenship had been obtained by fraud. His citizenship was revoked in July 2001. The ruling was reversed in May 2004 on the ground that the Canadian Cabinet – which ultimately determines whether citizenship should be revoked – did not consider Oberlander's personal circumstances, including "50 years of irreproachable life in Canada," nor did it explain how his case complied with government policy on denaturalization. As of this writing, the Canadian government is seeking to reinstitute denaturalization proceedings. "CTV News Says Government to Move to Strip Citizenship of five Suspected Nazis," *The Canadian Press*, June 10, 2005; "Canada Struggles for Six Decades

to Bring War Criminals to Justice," by John Ward, *The Canadian Press*, Oct. 15, 2005.

23. The letter explained, in part, that he would have to complete an I-94 Form (*see* p. 300) and that if he falsely denied assisting in persecution he would be subject to criminal prosecution. *See* discussion of *U.S. v. Paal* at p. 305, where one such case was prosecuted.

24. *See* pp. 503-505.

25. Both defendants had gotten visas shortly before the visa waiver program went into effect. Although the men could simply have been sent home – as OSI would have handled the case – there may have been other factors at play. The USAO had shortly before criminally charged several Japanese crime figures with visa fraud, leading some to accuse the U.S. Attorney of racial bias. INS suggested to Director Rosenbaum that the criminal prosecution of Germans was in part intended to show that there was no racial motivation in the earlier prosecutions.

A historian recommended by OSI testified at the trial, and OSI helped the USAO assemble and analyze historical material. The Hawaii conviction was upheld on appeal. *U.S. v. Paal*, (unpub'd), 937 F.2d 614, 1991 WL 126642 (9th Cir. 1991).

26. The reference is to Martin Zultner, who came to the United States in 1950, became a U.S. citizen in 1959, and moved to Austria in 1975.

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Kurt Waldheim – A Prominent International Figure

Austrian President Kurt Waldheim is the only head of state ever placed on the Watchlist. The decision to place him there was made by the Attorney General of the United States after consultation with the State Department and review of a report prepared by OSI. The listing put OSI at odds, in varying degrees, with Waldheim, the Austrian government and Simon Wiesenthal.

Waldheim's wartime activity was first brought to the government's attention by the WJC. In January 1986 Eli Rosenbaum – who had been an OSI attorney and would later return to OSI – was serving as General Counsel to the WJC. The WJC had received a tip that Waldheim had served as a senior intelligence officer with the German army in the Balkans from 1942 to 1945. Rosenbaum began to investigate.

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At the time, Waldheim was a candidate in the upcoming Austrian presidential election. He had already served two terms (1972 - 1982) as Secretary General of the U.N. His recently published autobiography, like all official statements about him, stated that he had been wounded on the Russian front in 1941 and had spent the remaining war years as a law student in Vienna.[1]

Rosenbaum began to learn otherwise. He found documents showing that Waldheim had served in a unit that had taken civilian hostages, burned homes, and shot male prisoners. The WJC gave its preliminary findings to *The New York Times.*[2] After doing some of its own investigation, the newspaper reported that Waldheim had served with a German Army command that fought "brutal campaigns against Yugoslav partisans and engaged in mass deportations of Greek Jews." His commanding officer had been executed for war crimes.[3]

Faced with documentation establishing his wartime posting, Waldheim conceded that he

had served in the Balkans rather than attended school from 1942 to 1945. However, he denied knowing about, or being involved in, any atrocities or persecution. He insisted that he had been a mere functionary and accused his opponents of releasing derogatory information in order to damage him in the upcoming presidential election.[4]

Shortly after the allegations became public, both the WJC and former Congresswoman Elizabeth Holtzman asked the Attorney General to place Waldheim on the Watchlist.[5] At the Attorney General's request, Director Sher reviewed the documents released by the WJC. As early as April 7, 1986, Sher recommended the Watchlist placement.

> As a counterintelligence officer in a unit which – according to orders of its commander – was engaged in activities which included reprisals against civilians, the taking of hostages, the burning of homes and destruction of villages, and the shooting of male prisoners, Waldheim must be considered implicated in activities which fit squarely with[in the Holtzman Amendment]. This conclusion is strengthened by the fact that among his responsibilities were prisoner interrogations (and we know from the military order that prisoners were treated very harshly) and "special tasks."

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Sher concluded that:

> if such a person was a United States citizen (who had concealed his wartime service in the Balkans, as Waldheim has done for decades) he would be an OSI subject and a prime candidate for denaturalization proceedings.[6]

DAAG Richard joined in the Watchlist recommendation, although he noted it might be best to defer action until renewing longstanding requests to the United Nations. to turn over its war crimes files.[7]

Waldheim's son sought a meeting with officials at the Justice Department to present his father's response to the allegations. After meeting with him and reviewing some of the material, AAG Trott urged caution.

> I am not persuaded that we ought to take any action at this juncture other than to continue privately to review with great care the evidence on the subject. I remain very skeptical based on the timing of these charges, the fact that Kurt Waldheim has been a world-renown person for years without any of this coming to the fore, Waldheim's assertions that he can refute or explain everything, and Waldheim's support by no lesser an authority than Simon Wiesenthal.
>
> So, let's get the United Nations (U.N.) file and continue to study the evidence, and let's do it without any public comment whatsoever. . . . We have a special obligation under these unusual circumstances not only to enforce our own laws but also to not allow ourselves to be used as a wedge in the Austrian electoral process. It also goes without saying that we do not want to slander any person before we get all the facts and determine what they mean.[8]

(emphasis in original).

The U.N. files, obtained shortly thereafter, revealed that Waldheim's name was on a U.N. War Crimes Commission list of persons who "should be delivered up for trial."

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Sher again recommended a Watchlist posting.[9] Before either of his memoranda reached the Attorney General, and only nine days before the Austrian election, one of Sher's memos was released to the media "by a former Justice Department official."[10] AAG Trott sought to determine the source of the leak;[11] he was unable to do so.[12]

The Austrian government also reacted to the leak. In a letter to the Attorney General, the Austrian Ambassador warned that placement on the Watchlist at this time "could be considered in Austria first and foremost as an interference in the current presidential campaign."[13] The Attorney General assured the Ambassador that the Justice Department would act "with due regard for the sensitivities of the Presidential campaign to avoid as much as possible any appearance of interference."[14]

On May 4, 1986, Waldheim received 49.64% of the votes – just short of the majority needed. He won a runoff election the following month. Many, including Waldheim, his chief

opponent, the president of Vienna's Jewish community and Simon Wiesenthal, credited the Nazi allegations with strengthening Waldheim's support. In their view, the Austrians were reacting, in part, to perceived outside interference in their internal affairs.[15]

Days after the election, Sher wrote yet another memorandum urging that Waldheim be placed on the Watchlist.[16] Meanwhile, OSI began looking into the allegations. It relied largely on the material from the WJC but also uncovered new information from the Yugoslavian archives. This information concerned the role Waldheim's unit had played in processing prisoners for deportations and executions.[17] OSI (and Rosenbaum, then still at the WJC) also reviewed hundreds of pages of material presented by Waldheim's son and attorneys.[18] The material came in waves, as Waldheim responded to a series of new revelations. OSI found his responses riddled with inconsistencies, distortions, and misleading statements.[19] AAG Trott thought Waldheim's submissions were starting "to sound like the 'I-just-worked-there-and followed-orders' explanation."[20]

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Waldheim's responses also contained prophecies of dire consequences to the world political order if the U.S. were to place him on the Watchlist. According to Waldheim's attorneys:

> The action of the Department in the matter of Kurt Waldheim will have significance far greater than that contemplated by the narrowly focused issues addressed by the Immigration and Nationalities Act, and greater even than any injury to personal reputation or status that might result from Dr. Waldheim's name being placed on the "watch list". Adverse action against Dr. Waldheim by the U.S. Government would seriously undermine larger U.S. interests in which Austria is a factor. Such an action could hamper the effectiveness of Dr. Waldheim's leadership, and thereby reduce Austria's pivotal role in Europe, where it enjoys a unique status as a bridge between the eastern and western blocs.[21]

In April 1987, OSI completed a 204-page report containing a comprehensive account of Waldheim's wartime service from 1942 and 1945 and a detailed refutation of Waldheim's defense. The report concluded that Waldheim – who was awarded a prestigious medal by the Nazi puppet regime in Croatia – had been involved in the transfer of civilian prisoners to the SS for exploitation as slave labor, the mass deportation of civilians to concentration and death camps, the use of anti-Semitic propaganda, the turning over of Allied prisoners to the SS, and reprisal executions of hostages and other civilians. Moreover, as the officer responsible for assessing prisoner of war interrogation reports at the headquarters of his Army Group, Waldheim played a key role in determining the fate of individual prisoners. His wartime record thus established that he had "assisted or otherwise participated in persecution because of race, religion, national origin or political opinion." OSI again recommended that he be placed on the Watchlist.[22]

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By happenstance, before the Attorney General reviewed the report, a reporter was preparing an article on the possible deportation of Karl Linnas to the Soviet Union. The reporter went to OSI's offices to meet with its deputy director. The resulting article was as much about Waldheim as Linnas. Indeed, the opening line read: "A photo of Austrian President Kurt Waldheim . . . hangs on the wall of the unmarked offices. . ." The article ended with another reference to Waldheim.

> There have been calls for the office to take up the Waldheim case following allegations that the former U.N. secretary-general was aware of German atrocities in the Balkans. [OSI's deputy director] denied that any formal investigation is under way.
>
> Asked why Waldheim's picture was hanging on his wall, he replied with a smile: "No comment."[23]

The article (the accuracy of which the former deputy director disputes)[24] triggered a protest from the Austrian ambassador. He complained that the picture display:

> might even suggest that the part of the arm of the Department assigned to gather, consider and evaluate evidence for decision making by you as Attorney General lacks the appropriate objectivity. To convey the impression of such an attitude seems all the more disturbing since it concerns a matter with broad international implications.[25]

On April 27, 1987, the Department of Justice and the Department of State announced that Kurt Waldheim "as an individual" was being placed on the Watchlist. While he remained president, he could enter the U.S. for matters of state. Admission would be denied only if the State Department concluded that the visit would be "prejudicial to the public interest."[26] However, he would not be allowed to enter for non-official reasons during his presidency nor for any reason after his presidency ended.

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The Justice Department's press release explained that:

> [t]he standards applied in placing persons on the Watchlist do not require a finding of having engaged in "war crimes" or "crimes against humanity." The statutory standard is met if a person assisted or participated in any material manner in any form of proscribed persecution. Such cases are frequently based upon a person's membership in an organization listed as "inimical" because of its particularly heinous activities, or upon a person's playing a role in an organization or operation that provides a reliable basis for inferring the proscribed assistance or participation. Efforts by a person to hide or otherwise distort potentially improper activities have routinely been regarded as significant in determining whether a prima facie case exists.

The release also sought to stanch any diplomatic fallout.

> Relations between the people and Government of the United States and the people and Government of Austria have traditionally been close and friendly. We share a fundamental commitment to democracy, human rights and the rule of law. We highly value our relationship with Austria and we will work to strengthen our friendship.

Shortly after the Watchlist decision was announced, DAAG Richard and Director Sher – at the request of the State Department -- went to Vienna to explain the findings which led the Attorney General to his decision. Despite U.S. efforts to preserve the diplomatic status quo, there were repercussions from the Watchlist decision. Austria briefly recalled its ambassador to the United States[27] and opened a global public relations campaign to regain international acceptance of President Waldheim.[28] Concomitantly, the State Department ordered the U.S. Ambassador to limit his contacts with the new Austrian president.[29]

Years later, Austrian sensitivities were still raw. In 1990, Sher told a WJC meeting in Berlin that he was proud to report that Waldheim would remain "*persona non grata*" in the United States. Austria summoned Washington's chargé d'affaires to express concern over the remark and to make clear that Sher was unwelcome in Austria. Sher had planned to travel to Vienna with then OSI Principal Deputy Director Rosenbaum to participate in an OSI deposition. The Austrians advised that it would not comport with consular conventions for "a functionary of a foreign administration" to conduct official business in Austria. Sher could come only as a "private citizen." Rosenbaum went to Vienna alone.[30]

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Although the Justice Department released the broad outlines of its Waldheim report,[31] the document itself was not made public. When an international commission of historians appointed by the Austrian government to examine Waldheim's past asked for the report, their request was denied. However, Director Sher sent a letter assuring the commission that the Justice Department's findings were sufficient "to implicate Mr. Waldheim personally."[32]

The contents of Sher's letter were reported in the media.[33] Once again, the matter escalated diplomatically. The Austrian Embassy sent a diplomatic note to the State Department

saying that it was "astonish[ed]" by OSI's lack of cooperation and "dismayed" by the fact that Sher's letter had been quoted in the newspapers.[34]

The international commission was not the only outside group seeking a copy of OSI's report. Two lawsuits were filed under the Freedom of Information Act (FOIA) to obtain the report and supporting documentation. In one case, the plaintiff was a curious prisoner; in the other, the plaintiffs were a retired intelligence officer and a journalist. The government opposed release of the material on two grounds set forth in an affidavit from Director Sher: (1) the report was an "internal, pre-decisional" document designed for the Attorney General; and (2) its release would enable Waldheim "to tailor testimony and shape evidence in a manner favorable to him" should the Austrian government challenge the listing.[35] In both lawsuits, the court upheld the government's right to withhold the material.[36]

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Shortly after the decision involving the journalist and intelligence officer was issued, Eli Rosenbaum's book *Betrayal, the Untold Story of the Kurt Waldheim Investigation and Cover-Up*, was published. Rosenbaum began writing the book while serving as General Counsel to the WJC; he completed the book on his own time after he returned to OSI. The book recounted the WJC's efforts to document Waldheim's World War II past.[37]

In an effort to bolster his FOIA case, counsel for the journalist and intelligence officer referenced the book in a letter to the Deputy Assistant Attorney General. The letter complained that Rosenbaum, as a non-governmental employee working for the WJC, had been given access to documents denied the FOIA plaintiffs.

> [I]ndeed, Rosenbaum boasts in his book that he was twice given special access to secret Justice Department documents on Waldheim, and that he frequently had conversations relating to the Waldheim investigation with OSI Director Neal

Sher.

The attorney added that he had discussed the book with the Austrian ambassador who was:

> extremely troubled that a high-ranking Justice department official can publish a devastating attack on Waldheim (which, for all I know, is entirely accurate) while the Austrians are being denied any access to the materials on which the Justice Department's decision was based.[38]

The Attorney General had already assured the Austrians that the Department would review its position on the Waldheim materials.[39] In March 1994, the Department released the report under recently-loosened FOIA guidelines.[40]

In addition to the FOIA cases, the Waldheim matter spawned litigation abroad. In 1988, the Austrian government filed a criminal defamation action against Edgar Bronfman, president of the WJC. The litigation was triggered by Bronfman's statement that Waldheim "was part and parcel of the Nazi killing machine." The Austrians requested assistance from the Justice Department because Bronfman was an American citizen.[41] The Department turned down the request, concluding that it would create "an untenable conflict" to play a role "no matter how minor, in facilitating a criminal defamation prosecution by Austria where we have already confirmed the truthfulness of the statements which form the basis of this prosecution."[42] The Austrians ultimately dropped the case, citing the Justice Department's refusal to cooperate as one reason for doing so.[43]

In February 1988, the Austrian-appointed international commission of historians issued its report. Although they found no evidence that Waldheim was personally involved in war crimes, they strongly criticized him for not trying to halt atrocities of which he was aware and for concealing his wartime record.[44] Waldheim touted the report as proof of his "personal

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innocence."[45] As he saw it, condemnation of him would necessitate condemnation of other soldiers who served in areas of fierce fighting, including those in Viet Nam, because they knew that "terrible things happened."[46] OSI did not share this perspective. In a comment which reportedly angered many Austrians, Sher opined that the historians' report "would probably have sufficed to condemn [Waldheim] at Nuremberg."[47]

A year later, the British issued their own Waldheim report, narrowly focused on whether Waldheim had interrogated British prisoners of war in the Balkans or was responsible for the harsh treatment or execution of British commandos. They found no evidence of his personal involvement, although they concluded that he must have been aware of the activities. Sher was publicly critical of the British report. "To say that he had no involvement is preposterous, clearly absurd."[48]

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The Waldheim matter also brought OSI into conflict with Simon Wiesenthal, the 1980 recipient of a special Congressional gold medal for having helped track down over 1,100 Nazis worldwide.[49] Wiesenthal, who lived in Austria, repeatedly voiced doubt that Waldheim had been personally involved in any acts of persecution. He saw Waldheim as an "opportunist" rather than a war criminal, but did challenge Waldheim's claim of ignorance concerning the persecutory activities committed by others in his unit.[50] Sher accused Wiesenthal of warning him not to push too hard on the matter.[51] Wiesenthal vehemently denied trying to intervene in OSI's investigation and the two men exchanged testy letters.[52] Tensions escalated even further after the publication of *Betrayal*, as the book discussed, in very harsh terms, Wiesenthal's efforts to "protect" Waldheim.

In 1996, Rosenbaum was invited to discuss his book on a German television program.

He agreed, after cautioning the producers that he would not be speaking as a government official but rather in his private capacity as an author. He asked that a statement to that effect be made to the viewers.[53] Unfortunately, it was not. On the contrary, he was identified during the show as "Chief, Nazi Prosecutions, U.S. Department of Justice."

During the broadcast, Rosenbaum was asked about Wiesenthal. While acknowledging that Wiesenthal had achieved some "positive things," he was very critical of the Nazi hunter.

> He claims to have found 1,100 or now 1,200 Nazis. I think he's mostly a Nazi-hunter and not a Nazi finder. The number is surely very, very low; it might be under ten.
>
> * * *
>
> I don't believe that without Wiesenthal's support Waldheim could have been elected president.
>
> * * *
>
> The words I would use for Mr. Wiesenthal? Incompetent, egomaniac, spreader of false information, tragic figure. . . . He betrayed the hopes, even the dreams of survivors who thought that there would be some serious, credible effort led by this man to bring to justice the killers of their families, and he betrayed the hopes of all of us who are not survivors who shared that dream.[54]

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The comments drew enormous media attention in Germany and galvanized Wiesenthal supporters in the United States. Wiesenthal himself threatened to go before Congress and renounce the gold medal he had received sixteen years earlier.[55] U.S. Senator Christopher Dodd, the son of a Nuremberg prosecutor, wrote to the Attorney General to express his "outrage" at Rosenbaum's comments.[56]

The Department of Justice assured Senator Dodd that it was "working diligently with representatives of the Wiesenthal Center in Los Angeles and Mr. Wiesenthal's attorney" to resolve the contretemps. As part of the effort, Attorney General Reno agreed to speak at the Wiesenthal Center.[57] Her remarks, delivered on June 13, 1996, described Wiesenthal as "an

individual who has devoted his life to insuring that Holocaust victims receive a justice in death that they were denied in life." The Department also arranged for Wiesenthal to receive a letter of praise from President Clinton. Using the occasion of the 50th anniversary of the Nuremberg War Crimes Tribunal, the president praised Wiesenthal for "forcing an often reluctant world to confront [a] painful subject." He added that "[o]ur government appropriately recognized your visionary leadership in the arena of international human rights when Congress authorized the President to confer a gold medal on you in 1980."[58]

Over the years, there have been various efforts made to persuade the United States to remove Waldheim from the Watchlist. In 1989, the Austrian government sent a diplomatic note to that effect to the State Department and Waldheim himself sent a handwritten letter to President George H.W. Bush.[59] In 1994, the Austrian Foreign Minister urged U.N. Secretary General Boutros Boutros Ghali to intervene in order to enable Waldheim (whose presidential term had ended) to attend celebrations marking the 50th anniversary of the United Nations.[60] That same year, shortly after public release of the OSI report, the Austrian Ambassador appealed to the Department of Justice to rescind the Watchlist decision.[61] In 1998, the Austrian ambassador to the United States asked the State Department to issue a visa allowing Waldheim to attend a U.N. celebration of its fiftieth anniversary of peacekeeping operations.[62] And in 2001, the Austrian government again urged reconsideration of the Watchlist decision based on the fact that recently declassified CIA material contained no reference to Waldheim's wartime activities.[63] All these requests were denied.

OSI's working relationship with the Austrians had been strained even before the Waldheim matter arose[64] and the countries had been trying to negotiate a mutual cooperation

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agreement on OSI/Nazi matters. That initiative was derailed in light of the Watchlist decision.[65] In addition, the Austrians suddenly refused to honor a 1954 commitment to readmit persons who emigrated from Austria to the United States under the RRA if the United States could show that the emigrant had obtained a U.S. visa "by fraudulent means or on the basis of false statements."

The issue came to a head in 1988 after OSI defendant Josef Eckert, who had entered the United States under the RRA, was ordered deported to Austria. Austria indicated that it was not willing to accept him. Officials from the Departments of State and Justice (including OSI Assistant Deputy Director Michael Bernstein) met with the Austrians to discuss the matter, first in Washington and then again in Vienna. At the conclusion of those negotiations, the two governments agreed to a procedure that would assure readmission in most RRA cases.[66]

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While the December 1988 agreement resolved the question of readmission (Austria accepted Eckhart in 1989), the issue of investigative cooperation remained unsettled. During an informal meeting with an attorney-advisor at the State Department in 1994, the Austrian Ambassador indicated that a legal assistance agreement would not be signed unless the Department agreed to reexamine the Waldheim decision. Nonetheless, the U.S. did not alter its position. It was another four years before a Memorandum of Understanding was finally adopted providing for judicial assistance from Austria in OSI cases.[67]

The impact of the Waldheim exposé and his placement on the Watchlist was enormous. In 1991, the Austrian government officially acknowledged the country's role in the Holocaust, thus ending its long-held position that the country was Nazi Germany's first victim. An Austrian historian involved in bringing about this acknowledgment credited the Waldheim affair with creating a climate in which such a reckoning was finally possible.[68] Although the WJC had been

the first to publicize Waldheim's direct involvement in acts of persecution, OSI's additional research made the case stronger. The U.S. government's decision to place a sitting president on the Watchlist – despite the inevitable diplomatic awkwardness of such a move – gave enormous credibility and legitimacy to the matter. The world was forced to confront the fact that a renowned diplomat had worked with the Nazis to persecute civilians and then had concealed the matter for decades. Although Waldheim won the Austrian election, he was largely isolated during his presidency. Very few foreign countries or dignitaries would deal with him directly.

While he stands out as the only head of state ever placed on the Watchlist, his listing was unusual in another regard as well. Prior to the Waldheim revelations, the U.S. had not put any members of the regular German Army (Wehrmacht) on the Watchlist. SS men were presumed to have been involved in persecution; military men were not. After Waldheim – and others who served with him – were listed, the historical record was made that persecutory activity was not as "confined" as previously thought.

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In 1992, Waldheim chose not to seek reelection. He received a U.N. pension and remained on the Watchlist until his 2007 death in Austria.[69]

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1. Kurt Waldheim, *In the Eye of the Storm: A Memoir* (Adler and Adler).

2. June 2, 1986 memorandum to WJC president Edgar Bronfman from Rosenbaum.

3. "Files Show Kurt Waldheim Served Under War Criminal," by John Tagliabue, *The New York Times*, Mar. 4, 1986. A day earlier *Profil*, an Austrian news magazine, had published some of the same allegations.

4. "Waldheim Says his Past was Misrepresented," by John McQuiston, *The New York Times,* Mar. 6, 1986.

5. Mar. 25, 1986 letter from Rosenbaum to Attorney General Edwin Meese; Apr. 2, 1986 letter from Brooklyn D.A. Holtzman to the Attorney General.

6. Apr. 7, 1986 memo to DAAG Richard from Sher re "Kurt Waldheim: Allegations Concerning Wartime Activities and Excludability from the United States," p. 6.

7. Apr. 7, 1986 memo from DAAG Richard to AAG Stephen Trott re "Kurt Waldheim." The United Nations War Crimes Commission (UNWCC) was established in 1943 to collect, record and investigate evidence of war crimes and to advise governments on the legal procedures to be adopted in bringing suspects to trial. It circulated lists of war crimes suspects and brief details of their alleged crimes alleged to Allied governments. The organization remained active until 1948.

As early as April 1980, the newly-formed OSI had requested access to the files. *See* Apr. 28, 1980 letter to Secretary General Waldheim from Attorney General Civiletti referencing an April 3, 1980 request by OSI personnel. Access to the files for research purposes was denied. On June 8, 1984, Director Sher renewed the request in a letter to John Scott of the U.N. Secretariat. Once again, access for general research purposes was denied. However, the U.N. offered access for particular charge files provided that the name and identifying data of the subject were provided to the U.N. *See* Sept. 23, 1986 letter to Alf Erlandsson, Chief Archivist, U.N. Archives from AAG Weld.

8. Apr. 10, 1986 memo from AAG Trott to DAAG Richard and Sher re "Waldheim Investigation."

9. Apr. 21, 1986 memo from Sher to DAAG Richard re "Kurt Waldheim."

10. "Justice Department Official Urges Waldheim be Barred from U.S.," by Philip Shenon, *The New York Times*, Apr. 25, 1986. *See also*, "Aide urges U.S. to bar Waldheim," by Aaron Epstein, *The Philadelphia Inquirer*, Apr. 25, 1986; "Justice Dept. Official Recommends Barring Waldheim from U.S.," by John Goshko, *The Washington Post*, Apr. 25, 1986.

11. Apr. 25, 1986 memo from AAG Trott to Sher re "Leak of Waldheim Report."

12. DAAG Richard called a meeting of OSI personnel to express his strong displeasure about the leak. He warned that office matters should not be discussed with former Department officials or

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members of OSI and advised that anyone unable to abide by such rules should leave the Department of Justice. Apr. 30, 1986 memo from DAAG Richard to AAG Trott re "Waldheim – Visit with OSI." Director Sher denied that OSI played any role in leaking the document. Apr. 30, 1986 memo from Sher to AAG Trott re "Leak of Waldheim Report."

13. Apr. 28, 1986 letter to Attorney General Meese from Austrian Amb. Thomas Klestil.

14. May 6, 1986 letter to Amb. Klestil from Attorney General Meese. Not all public figures shared the Attorney General's sensitivity. Shortly before the election, N.Y. Sen. Daniel Moynihan warned that "the people of Austria really ought to know that to elect Waldheim would give a kind of symbolic amnesty to the events at Salonika." "Moynihan: Waldheim Is a Liar," by David Holmberg, *New York Newsday*, Apr. 22, 1986. (Waldheim served with a German unit stationed in Salonika, Greece when Jews from that town were rounded up and deported to concentration camps.)

15. *See e.g.*, "Waldheim is Given Plurality in Vote but Faces Runoff," by James Markham, *The New York Times*, May 5, 1986; "Waldheim Tops Vote for Austrian President," by Tyler Marshall, *The Los Angeles Times*, May 5, 1986; "Austria's Dubious New President," *The Chicago Tribune* (editorial), June 11, 1986; "Nazi Hunter Assails Jewish Group on Waldheim Campaign," *The Chicago Tribune*, May 18, 1986; "Waldheim Survives Slurs to See Popularity Rise," by Misha Glenny, *The Guardian* (London), Mar. 17, 1986; "Nazi Hunter Assails Jewish Group on Waldheim Campaign, New York Times News Service, *The Chicago Tribune*, May 18, 1986.

16. May 9, 1986 memo from Sher to DAAG Richard re "Waldheim."

17. In accordance with DOJ wishes, the office did not contact any countries other than Yugoslavia for pertinent information, nor did it contact persons Waldheim suggested. He himself was not questioned. Mar. 12, 1987 memo to DAAG Richard from Sher re "Waldheim;" Apr. 7, 1986 memo to AAG Trott from DAAG Richard re "Kurt Waldheim;" "Inquiry Studied Data Waldheim Gave in Rebuttal," by Leslie Maitland Werner, *The New York Times*, Apr. 29, 1987.

18. In his 1993 book *Betrayal, The Untold Story of the Kurt Waldheim Investigation and Cover-Up* (St. Martin's Press), p. 314, Rosenbaum describes having the material delivered to him by an intermediary from "a mutual friend at Justice." (The book was co-authored by William Hoffer.)

19. Waldheim Report (fully cited *infra*, n. 22), at pp. 3, 74, 105, 108, 117, n. 318, 180, 184; *see also*, Oct. 31, 1986 memo to the Attorney General from AAG Weld re "Waldheim;" "Inquiry Studied Data Waldheim Gave in Rebuttal," *supra*, n. 17.

20. May 28, 1986 memo to Attorney General Meese from AAG Trott re "Waldheim."

21. Aug. 11, 1986 letter to Attorney General Meese from Donald E. Santarelli, Esq.

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22. The report. "In the Matter of Kurt Waldheim: A Report to the Assistant Attorney General, Criminal Division, U.S. Department of Justice (1987)" can be found at www.usdoj.gov/criminal/osi/press/osi-reports/ (last visited Nov. 2008).

23. "Crucial Tests Confront Nazi-Hunting Bureau," by Michael Dobbs, *The Washington Post*, Mar. 24, 1987.

24. As former deputy director Michael Wolf recalls the interview, he explained to the reporter that the photograph "reminded me why I was doing this sort of work. I opined that if Waldheim was not too old to be President of Austria, then our defendants could not be too old to be prosecuted." Aug. 20, 2003 e-mail from Wolf to Judy Feigin.

25. Mar. 24, 1987 letter to Attorney General Meese from Austrian Ambassador Klestil.

26. 8 U.S.C. § 1102.

27. A new ambassador returned in November 1987.

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28. "Ex-Official Pleads Case in U.S.," by Don Shannon *The Los Angeles Times*, June 13, 1987.

29. "New Envoy: Native Son for Vienna," by Henry Kamm, *The New York Times*, Jan. 21, 1988.

30. "Austrian Complaint Prompts U.S. Investigator to Cancel Visit," by Michael Wise, *The Washington Post*, May 12, 1990; "Remark Irks Austria," *Newsday* (New York), May 10, 1990.

31. *See e.g.*, "Waldheim Barred from Entering U.S. Over Role in War," by Leslie Maitland Werner, *The New York Times*, Apr. 28, 1987.

32. Dec. 2, 1987 letter to Brig. Gen. James Collins, Jr. from Sher.

33. *See e.g.*, "U.S. Links Waldheim to Persecution," by Ralph Blumenthal, *The New York Times*, Dec. 5, 1987; "Waldheim's Commission Expected to Damage Him," *The Washington Post*, Dec. 6, 1987.

34. Dec. 7, 1987 diplomatic note from the Embassy of Austria to the State Department.

35. Supplemental Declaration of Neal Sher, filed in *Nevas v. Dep't of Justice*, No. 89-00042 (D.D.C.).

36. *St. Hilaire v. Dep't of Justice*, 1992 WL 73545 (D.D.C. 1992); *Mapother and Nevas v. Dep't of Justice*, 3 F.3d 1533 (C.A.D.C. 1993). (In the latter case the court remanded to the lower court the question of whether the Department should have released just that portion of the report that contained an inventory of Waldheim's military postings.)

37. One of the conditions of Rosenbaum's return to the Justice Department was that he be recused from all matters relating to Waldheim.

38. Dec. 1, 1993 letter to Merrick Garland, DAAG, Criminal Division from Public Citizen Litigation Group re *Mapother v. Department of Justice*; *Nevis v. Department of Justice*.

39. The assurance was apparently given orally at a forum sponsored by the American League for Exports and Security Assistance. *Id.*

40. The guidelines, issued in 1993, provided that documents were to be withheld only if "disclosure would be harmful" to the government. In Oct. 2001, these guidelines were superseded by others calling for the withholding of documents as long as there was a "sound legal basis" for doing so. In Dec. 2007, the original standards were restored legislatively. **CITE**

41. The Austrians asked the U.S. to execute letters rogatory, which involve a formal request from a court in one country to "the appropriate judicial authorities" in another country for compulsion of testimony, documentary or other evidence, or service of process.

42. July 8, 1988 letter to Mary Mochary, DOS Principal Deputy Legal Adviser from DAAG Richard.

43. Two other reasons given were their view that an international commission had "determined Waldheim's personal innocence," and "an endeavor to contribute to calming down and reconciliation." "Waldheim Cancels Suit Against Bronfman," AP, *The New York Times*, July 3, 1988. The international commission report is discussed on p. 318.

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44. "Panel Criticizes Waldheim but Sees No War Crimes Role," by Robert McCartney, *The Washington Post*, Feb. 9, 1988.

45. "Waldheim Cancels Suit Against Bronfman," AP, *The New York Times*, July 3, 1988.

46. Waldheim interview on British television show, "David Frost on Sunday," Mar. 12, 1989.

47. "Waldheim's Cloak of Rationalization," by Adrian Peracchio, *Newsday*, Feb. 12, 1988.

48. "London Discounts Role by Waldheim," *The New York Times*, Oct. 18, 1989.

49. "Badge of Courage," by Megan Rosenfeld, *The Washington Post*, Aug. 5, 1980.

50. *See e.g.*, "Former UN Head Kurt Waldheim 'in the eye of the storm,'" by Elizabeth Pond, *The Christian Science Monitor*, Apr. 9, 1986; "Will to Forget, Anti-Semitism May Elect Waldheim," by Ray Moseley, *The Chicago Tribune*, May 4, 1986; "Nazi Hunter Assails Jewish Group on Waldheim Campaign," *The Chicago Tribune*, May 18, 1986.

51. June 19, 1990 memo from Sher to Waldheim file re "Wiesenthal's Letter of June 12, 1990." Sher made a similar statement on the German newsmagazine program "Panorama," Feb. 8, 1996.

52. June 12, 1990 letter from Wiesenthal to Sher; June 14, 1990 letter from Sher to Wiesenthal.

53. Jan. 18, 1996 e-mail from Rosenbaum to reporter John Goetz re "interview request."

54. "Panorama," Feb. 8, 1996. Rosenbaum is not the only public figure to have questioned Wiesenthal's role in finding Nazi persecutors. *See e.g.*, *And the Sea is Never Full*, by Elie Wiesel (Alfred Knopf), pp. 127-131.

55. March 1, 2000 recollection of DAAG Mark Richard.

56. Feb. 15, 1996 letter to Attorney General Reno from Senator Dodd.

57. May 22, 1996 letter to Senator Dodd from Andrew Fois, AAG for Legislative Affairs.

58. Sept. 24, 1996 letter to Wiesenthal from President Clinton. Four years later, in August 2000, President Clinton presented Wiesenthal with the Presidential Medal of Freedom, the nation's highest civilian honor.

59. "U.S. Requests Austrian Request to Lift Waldheim Ban," *Reuters*, June 16, 1989; CBS Evening News with Dan Rather, July 21, 1989 and Supplemental Declaration of Neal Sher in *Nevas v. Department of Justice*, No. 89-0042 (D.D.C.).

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60. Cable 08653 from AmEmbassy, Vienna to the Secretary of State, Sept. 29, 1994.

61. June 15, 1994 letter to Austrian Ambassador Helmut Tuerk from AAG Jo Ann Harris.

62. Oct. 2, 1998 memo to Attorney General Janet Reno and Deputy Attorney General Eric Holder from James Robinson, AAG of the Criminal Division re "Potential effort by Kurt Waldheim to enter the United States on Tuesday, Oct. 6, 1998."

63. "Official Wants Waldheim Off 'Watch list,'" by David Sands, *The Washington Times*, May 22, 2001.

64. *See e.g.*, May 2, 1986 letter from Director Sher to James Hergen, Ass't Legal Advisor at DOS, advising that the Austrian government was granting only restricted access to their archives and would not allow OSI any contact with Austrian residents who might possess information useful in OSI investigations. Although the letter was unequivocal, in fact there had been some level of cooperation. One such example was Austria's willingness to have OSI contact Robert Jan Verbelen and anyone else in country as part of OSI's investigation of the U.S. government's post-war relationship with Verbelen. Verbelen is discussed at pp. 385-389.

65. Jan. 8, 1991 memo to DAAG Richard from Sher re "Austrian Assistance."

66. Austria would be given the evidence in all RRA cases and would have 30 days to seek consultation with the United States. Absent a request for consultation, the Austrians would grant readmission. If a consultation were sought and the parties could not thereafter agree, the

U.S. could still seek readmission and all efforts would be made to resolve the issue "through diplomatic negotiations."

The agreement was signed on December 21, 1988. That day Bernstein flew from Vienna to London. He made a last minute change of plans and boarded Pan Am flight 103 from London to New York. A bomb exploded mid-air, killing all 259 people on board (plus 11 on the ground). In August 2003, Libya accepted responsibility for this terrorist act.

67. Under the agreement, assistance is to include information from, and access to, court and administrative files, including military files and archival documents. Austrian authorities will take testimony in the presence of U.S. representatives who can suggest questions. Independent investigatory activities are prohibited.

68. "Austria Admits Role in Holocaust," by Michael Wise, *The Washington Post*, July 9, 1991.

69. The Omnibus Diplomatic Security and Antiterrorism Act of 1986 contained a "sense of the Congress" provision calling on the president to "instruct the Permanent Representative of the United States to the United Nations to act to amend the 1986-1987 Regular Program Budget to eliminate funding of Kurt Waldheim's retirement allowance and to act to deny Kurt Waldheim a retirement allowance in all future budgets. Pub. L. 99-399, Title XIII § 1303 (Aug. 27, 1986).

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Chapter Five: Alleged U.S. Support for Entry of Former Nazis into the Country

Introduction

Whether the United States helped persecutors enter the country has implications for our nation in terms of the values it may reflect. Did we knowingly permit major or even minor Nazi persecutors to enter, and if so, what justification was given? At what level within the government was there legal and moral authority to advance such a policy? And were efforts made to conceal such activities from the public in order to advance some perceived higher national good?

OSI did not originally conceive its mission as including the need to answer these questions. But it was inexorably drawn to the issues when subjects argued that they were in the country at the behest, or with the knowledge, of the United States – allegedly in return for information or services supplied to the government during or after the war.

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OSI learned that some persecutors were indeed knowingly granted entry. America, which prided itself on being a safe haven for the persecuted, became – in some small measure – a safe haven for persecutors as well. Some may view the government's collaboration with persecutors as a Faustian bargain. Others will see it as a reasonable moral compromise borne of necessity.

Arthur Rudolph – An Honored Rocket Scientist

As early as July 1945, the U.S. War Department brought selected German and Austrian scientists to the United States under military custody for "short-term exploitation." The immediate goal was to have them pursue military research in an effort to shorten the war with Japan. The longer term goal was to keep the Soviet Union and other countries from gaining access to the information and skills of many elite members of the scientific community.

With the direct approval of the president of the United States, the program was extended after the close of hostilities:

> in order to permit the Armed Services of the United States to take advantage of German scientific and technical progress in such fields as guided missiles and aerodynamics, pending formulation of governmental policy to permit legal entry of these and other specialists. . . to pursue research and development projects for both military and civilian agencies.

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Ultimately codenamed "Operation Paperclip," the program was designed to exclude anyone who was more than a "nominal participant" in Nazi party activities or had been an "active supporter of Nazism or militarism." Those scientists who wished to settle permanently in the United States could, "at a later date . . . be granted regular status under the immigration laws."[1]

Eventually, hundreds of scientists came to the United States under the program. Those seeking permanent residence had to apply for a visa. Once it was issued, they had to leave the country and then "formally" reenter. They generally did so through a Mexican border city.

During the war, Arthur Rudolph had served as Operations Director at the massive Mittelwerk underground V-2 rocket manufacturing facility. The factory was part of the Dora-Nordhausen concentration camp complex and used prisoners of war and slave laborers. The latter group included thousands of Czech, Polish, Russian, and French political prisoners, as well

as Jewish and Jehovah's Witness inmates.[2] The laborers, wearing striped concentration camp uniforms, came from Nazi camps including Auschwitz and Buchenwald. They were guarded by armed SS men as well as kapos, and worked 12-hour shifts in cold, damp, and dusty tunnels. Thousands perished, generally from malnutrition, exhaustion and overwork; some were murdered. Until Dora got its own crematorium, the dead were burned at Buchenwald.

Rudolph was one of the first Germans to come to the United States under Operation Paperclip; he arrived in December 1945. Although INS knew that he had been a member of the Nazi party and that he had worked at Mittelwerk, there is no indication that they had any information about his use of slave labor.[3] On the contrary, there was much to recommend Rudolph. The number two official at the Department of Justice urged INS (an agency then under the jurisdiction of the Justice Department) to admit him. Based on information from the Joint Chiefs of Staff and the Department of the Army, the official opined that failure to do so "would be to the detriment of the national interest."[4]

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In 1949, Rudolph went to Ciudad Juarez, Mexico, where he received a visa and then formally reentered the United States under the INA. Although the "assistance in persecution" provisions of the DPA and RRA were inapplicable, State Department visa regulations prohibited the entry of an alien "who has been guilty of, or has advocated or acquiesced in, activities or conduct contrary to civilization and human decency on behalf of the Axis countries."

Rudolph became a naturalized U.S. citizen in 1954 and worked in the U.S. rocket program until his retirement from NASA in 1969. He was considered the father of the Saturn V rocket which enabled the United States to make its first manned moon landing. At his retirement, NASA awarded him the Distinguished Service Award, its highest honor.

OSI learned about Rudolph by chance. Two recently published books attracted Eli Rosenbaum's attention in 1979, shortly after he completed a summer internship at OSI. One was about the Dora camp itself; the other discussed German scientists in the United States rocket program.[5] The latter had a reminiscence from Rudolph about his dismay at being called from a New Year's Eve party in 1943/1944 to have rocket parts moved. An accompanying picture showed prisoners of war moving the parts.[6] Rosenbaum knew that the Geneva convention forbids having prisoners of war work on munitions,[7] and he was particularly offended by Rudolph's taking umbrage at missing a gala party while slave laborers toiled. When he began work at OSI a year later, he persuaded the office to open an investigation of Rudolph.

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Nineteen people from the Dora-Nordhausen complex had been tried in 1947 before a U.S. military court in Dachau, Germany.[8] The transcript of that trial, as well as much of the pre-trial investigative material, was on microfilm at the National Archives. The investigative material included a 1947 interview of Arthur Rudolph, who was a potential witness in the case. He discussed attending a hanging of 6 to 12 Dora inmates accused of sabotage, and ordering the laborers under his supervision to bear witness.[9] The file also contained a diagram, prepared by the 1947 prosecution team, of the underground rocket factory. A dotted line labeled "Path of Overhead Crane Trolly [sic] On Which Men Were Hung" came very close to Rudolph's office. Testimony at the German trial indicated that Rudolph received daily prisoner strength reports which showed the number of prisoners available for work, the number of "new arrivals," and the number of people lost through sickness or death.

Armed with this information, OSI twice interviewed Rudolph. He acknowledged knowing that prisoners were dying of disease, overwork, mistreatment and malnutrition. Faced

with a diminishing work force, he had requested labor replenishments from the SS, and knew that these replacements came "probably from Buchenwald or somewhere else." He also allocated the laborers within Mittelwerk.

Given Rudolph's statements, both in 1947 and to OSI, the office recommended filing a denaturalization action alleging that Rudolph should not have been allowed to formally enter and obtain citizenship. OSI argued that as a supervisor, Rudolph was directly responsible for exploiting slave laborers and that this was persecution which violated the State Department regulation barring entry to persons who participated, advocated, or acquiesced in activities or conduct contrary to civilization and human decency. Forcing slave laborers to watch hangings was, according to the prosecution memo, a form of "terror" which further added to the persecution.[10] OSI also recommended that this persecutory activity be the basis for a charge that Rudolph lacked the good moral character essential for citizenship.[11]

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Although the U.S. knew when he entered the country that Rudolph had been at Mittelwerk, OSI contended that its own research – including its two interviews of Rudolph – gave a much clearer picture of his true accountability than had been previously known. The office acknowledged that some might argue against prosecuting Rudolph because of his contributions to the space program. OSI countered, in part, that *failure* to bring charges would present more serious concerns. Among other things, it would give credence to the criticism that the office discriminated against non-Germans (*i.e.*, Lithuanian, Ukrainian and Latvian camp guards) who occupied low-level collaborationist positions during the war, never belonged to the Nazi party, and lived quiet lives in the U.S.[12]

The Department of Justice authorized filing the case and OSI notified Rudolph. Faced

with the prospect of an imminent prosecution, he entered into a written agreement with the government: he would leave the United States and renounce his citizenship. The United States agreed to withhold any announcement of the matter until Rudolph had departed. Rudolph in turn agreed not to contest allegations that, while at Mittelwerk, he participated in the persecution of unarmed civilians because of their race, religion, national origin or political opinion.

OSI hoped the agreement would have an impact far beyond the individual case.

> When other OSI subjects and defendants see that the department is prepared to go after someone of Rudolph's stature and importance (and presumed official "connections"), the depth of the Government's commitment to the Nazi prosecution program will become ever more apparent to them. The fact that a man of Rudolph's obvious sophistication and intelligence was willing to surrender without a fight cannot fail to make a powerful impression upon them and to increase significantly the likelihood of our securing similar settlements in other cases.
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> * * *
>
> The government's willingness (without any "outside" prodding, moreover) to publicly acknowledge – and punish – the complicity in Nazi persecution of such an individual will, I am convinced, significantly bolster the public's confidence in the integrity of the Justice Department's Nazi prosecution program.[13]

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Rudolph went to Germany in October 1984 and forfeited his U.S. citizenship. When questioned by the press, however, he denied any wrongdoing. He maintained that he "tried to help the poor forced laborers to have their conditions improved" and that he renounced his citizenship only to avoid the sensationalism and cost of litigation in light of his health and age.[14] Former Congresswoman Holtzman, convinced of the accuracy of OSI's conclusions, asked NASA to rescind the medal earlier awarded Rudolph. The agency refused to do so.[15]

As recounted elsewhere in this report,[16] the West Germans did not initially welcome Rudolph's return; they were angered that they had not been forewarned by OSI. Nonetheless,

they began an investigation of their own (aided by material provided by OSI) to determine whether Rudolph was subject to criminal prosecution for murder, the only relevant crime not barred by their statute of limitations. In the end, no charges were filed, and Germany restored the citizenship Rudolph had renounced when he became a naturalized United States citizen.[17]

In 1989, Rudolph went to the U.S. Consulate in Hamburg, Germany and applied for a visa to reenter the United States. His request was denied. The following year, the Department of Justice learned that Rudolph was planning to fly to Canada.[18] OSI alerted the Canadians, who briefly detained Rudolph when he arrived, then released him on bond pending deportation proceedings. The case received extensive publicity in the United States, as Rudolph's cause was championed by Ohio Congressman James Traficant.[19]

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Rudolph testified at the Canadian hearing, claiming he had been shocked to learn that concentration camp inmates would be used as a source of labor at Mittelwerk. One day after this testimony, a historian at the Smithsonian Institution's National Air and Space Museum notified OSI of two documents he had found in Germany. They showed that Rudolph was not simply aware of the use of slave laborers at Dora; he had in fact worked to institute that program.

The first document was an April 1943 report, signed by Rudolph, stating that he had recently visited a factory which utilized concentration camp inmates as forced laborers under SS guard; Rudolph recommended that the same system be used in the rocket program. The second was minutes of a June 1943 meeting attended by Rudolph in which he was told to work with the camp commandant to implement such a program.[20] OSI obtained copies of both documents and forwarded them to the Canadian authorities. The Canadian court concluded that Rudolph "called for, made use of and directed" slave laborers who suffered "indescribably brutal"conditions.[21]

Rudolph was sent back to Germany in 1992.

Shortly thereafter, he filed suit against the Department of Justice, the Attorney General, the Secretary of State and four OSI attorneys who had been involved in his case.[22] He sought to have his settlement agreement rescinded and to be granted readmission into the United States. He claimed that the government had misled him into believing that it had sufficient evidence to file a denaturalization suit when in fact a key witness had actually exculpated him in a declaration under oath. His suit was dismissed on the ground that it was barred by the doctrine of sovereign immunity.[23] He filed another suit, this time claiming that he was wrongly denied a visa to enter the United States in 1989 and the right to enter Canada in 1990. He asserted also that his civil rights had been violated during his OSI interviews because some of the questions had been "incriminatory, impermissibly suggestive and argumentative" and he had not been advised of his right to, or need for, an attorney prior to the second interview. These claims too were rejected by the court, some because there was no basis for them under the law and others because they were barred by sovereign immunity.[24]

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Rudolph died in Germany in 1996. He was the only Paperclip scientist prosecuted by OSI.[25] His case raises the question of whether persons involved in persecution on behalf of the Nazis can ever expiate their past. Patrick Buchanan, often an OSI critic,[26] believed that the contributions Rudolph made to the United States space program earned him the right to remain in the country.[27] Ray Cline, a former Deputy Director of the CIA, expressed a similar view.

> I am inclined to think he should have been recognized as having paid whatever debt to society his World War II activities deserved because of his very deliberate effort to contribute his science and technology, which was of great genius to the United States and to the strategic defenses of this country in the troubled period after World War II.[28]

OSI saw it differently.

> [D]eciding to refrain from seeking Rudolph's denaturalization simply because of the work he performed for our government would, it can be argued, amount to a desecration of the memories of Albert Einstein, Enrico Fermi, Niels Bohr, and other leading scientists who made at least equally substantial contributions to our nation – but who did so either after being forced by the Nazis to leave Germany or after voluntarily risking their lives to flee the introduction of Hitler's racial policies in Europe.[29]

However one views Rudolph's life work, there is no doubt that camp inmates were victimized by a brutal system of which he was a part. In 1990, the Air and Space Museum of the Smithsonian Institution opened a permanent exhibit on V-2 rockets. One of the exhibit panels reads:

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> Concentration camp prisoners built V-2s under unbearably harsh working conditions. Thousands perished in the process.

1 1. Aug. 30, 1946 Memorandum for the President from Acting Secretary of State Dean Acheson, re "Interim Exploitation of German and American Specialists in the United States," along with Enclosure, App. A, Annex to App. A and App. B. Operation Paperclip was approved by President Truman on Sept. 3, 1946.

2. The percentage of Jews at Mittelwerk was relatively low.

3. His "Statement of Personal History" (date unknown) explained why he had joined the Nazi party. As he saw it, the vast unemployment in Germany caused a proliferation of socialist and communist parties which could take control of the government. He joined the Nazi party "to help, I believed, in the preservation of the western culture."

4. Feb. 28, 1949 memorandum from Peyton Ford, The Assistant to the Attorney General to Commissioner, Immigration and Naturalization re "German Scientists Program Immigration of Arthur Louis Hugo Rudolph." (The position of Deputy Attorney General, the current number two position, was not officially established until 1950. Prior to then, The Assistant to the Attorney General was second in command.)

5. Jean Michel, *Dora: The Nazi Concentration Camp Where Modern Space Technology Was Born and 30,000 Prisoners Died* (Holt, Rinehart & Winston); Frederick I. Ordway, *The Rocket Team from the V-2 to the Saturn Moon Rocket – The Inside Story of How a Small Group of Engineers Changed World History* (Thomas Y. Crowell).

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6. The picture was listed as coming from the personal collection of Werner von Braun who came to the United States as part of Operation Paperclip in 1945. Von Braun went on to become the first Director of the Marshall Space Flight Center, serving from 1960 to 1970. He died in 1977, before OSI's founding.

7. Geneva Convention, ch. 3, Art. 31.

8. One of the defendants, George Rickhey, had come to the U.S. under Operation Paperclip. He was arrested in Ohio and sent back to Germany to face trial. Fifteen of the defendants were convicted of various crimes; Rickhey was one of the four acquitted.

9. June 2, 1947 interview of Rudolph by Maj. Eugene Smith of the U.S. Army Air Force, p. 22.

10. Apr. 21, 1983 Prosecution Memorandum to DAAG Richard from Director Sher.

11. OSI did not recommend charging Rudolph with either misrepresentation or concealment, although most OSI cases at that time had one or both as part of the filing. The office did not want to give Rudolph a "triable issue" as to whether the government was aware, prior to his entry, of his wartime activities. Prosecution memorandum, pp. 7-8.

12. *See* p. 533.

13. Dec. 2, 1983 memo to DAAG Richard from Director Sher re "Agreement in Rudolph Case."

14. "Ex-Nazi Denies Role in Deaths of Slave Laborers," by James Markham, *The New York Times*, Oct. 21, 1984. *See also*, "'Coerced' to Leave U.S., Moon Rocket Designer Says," by Uli Schmetzer, *The Chicago Tribune*, Oct. 22, 1984. Director Sher responded to the *Chicago Tribune* article in a letter to the editor, printed on Nov. 15, 1984.

15. "NASA Refuses to Rescind Award," *The Washington Post*, Feb. 12, 1985.

16. *See* pp. 432-433.

17. In order to prove murder, Germany would have to establish "base motive" - a mental state (such as racial hatred) at the time of the offense. Germany lacked proof that Rudolph had knowledge of the executions beforehand. July 30, 1990 memorandum to Rosenbaum from Peter Black, Chief Historian, OSI re "West German Investigation of Arthur L.H. Rudolph."

18. The Department's Office of Public Affairs received an inquiry from a reporter about a plan by Rudolph to travel to Canada to meet with Congressmen James Traficant. June 29, 1990 memo from Director Sher to DAAG Richard re "Possible Attempt by Arthur Rudolph to Enter USA."

OSI believed the motivation for Rudolph's trip was to gain entry into the United States. June 1990 letter from Deputy Director Rosenbaum to Supt. Donald Maas, and Inspector Robert Goguen, RCMP War Crimes Investigation Section. Others saw it as Rudolph seeking a platform to make his case before the Canadians, with the hope of affecting American politicians and public opinion. "War-Crime Charges Haunt Scientist," by John F. Burns, *The New York Times*, Aug. 6, 1990.

19. *See e.g.*, "War-Crime Charges Haunt Scientist," *supra*, n. 18; "Congressman Takes Up Case of Scientist Accused of Nazi Brutality," *The Associated Press*, May 2, 1990; "Representative James Traficant," a profile on the CBS news magazine *60 Minutes*, Nov. 11, 1990; "Ohio Congressman Says U.S. Pressured German Scientist to Leave Country," *AP*, May 1, 1990; "Congressman Defends Bid by Scientist for Citizenship," by Paul Moloney, *The Toronto Star*, July 5, 1990; "Scientist Accused of War Crimes Deserves Hearing," by John Bonfatti, *AP*, July 5, 1990; "Traficant Implores Rudolph to Return," *The Huntsville News*, May 14, 1990.

At a dinner honoring Rudolph, Traficant opined that "a powerful Jewish lobby" had pressured the Justice Department to deport Rudolph. "'Polyester Cowboy' Defends Old Nazi," *American Political Network, Inc.*, May 16, 1990. Traficant believed that Rudolph left the U.S. only because OSI played on his ill health and his fear of losing his NASA retirement benefits. "Traficant Supports Rudolph," by Mike Paludan, *The Huntsville Times*, May 13, 1990.

Traficant's opposition to OSI is discussed further on pp. 160, 543, 553, notes 56-58.

20. Aug. 3, 1990 memorandum from Rosenbaum to the Rudolph file re "Documents on Rudolph Found at Freiburg by Dr. Michael Neufeld." The documents, as catalogued in Freiburg, are RH8/v.1210, pp. 105-06, 136-37.

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21. *Rudolph v. Minister of Employment and Immigration*, Federal Court of Appeal, Ottawa, Canada, No. A-403-91 (May 1, 1992), p. 2.

22. The attorneys were Allan Ryan, Neal Sher, Eli Rosenbaum and Bruce Einhorn. The first three conducted the initial OSI interview of Rudolph; Sher and Rosenbaum did the second.

23. *Rudolph v. U.S. Dep't of Justice, et al.*, No. C 92-20116 JW (N.D. CA. Feb. 10, 1993).

24. *Rudolph v. U.S. Dep't of Justice, et al.*, No. C 94-20411 JW (N.D.CA., Apr. 12, 1995).

25. Others were investigated but not prosecuted, either because the government lacked sufficient evidence, the men were too ill, or they died before OSI's investigation was complete. After the Rudolph case, and likely as a consequence of it, none of the rocket scientists would submit to an interview with OSI.

In 1993, the WJC brought public pressure to bear on Ohio State University and Brooks Air Force Base in San Antonio, each of which had honored Hubertus Strughold, a Paperclip scientist who had been a leader in the field of aerospace medicine. (Strughold died in 1987.) As a result of the WJC pressure, Ohio State removed reference to Strughold from a stained glass mural commemorating leaders in the history of medicine. "Alleged Nazi's Name on Library Stirs Protest," by Mark Smith, *The Houston Chronicle*, Oct. 29, 1993. In 1995, after Air Force personnel reviewed material at OSI, the Strughold Aeromedical Library at Brooks Air Force Base was renamed. "Name of Scientist Nixed from Library Due to Nazi Past," by Alissa Kaplan, *JTA*, Oct. 6, 1995. Eleven years later, pressure from the ADL led the New Mexico Museum of Space History to remove Strughold's name from its Hall of Fame. "Former Nazi Removed from Space Hall of Fame," *The San Jose Mercury News*, May 18, 2006.

In 2003, the Space Medicine Branch of the Aerospace Medical Association contacted OSI about Strughold. The association awarded a prize in his name and had recently been asked to rename the award. In order to evaluate the request, they wanted accurate information about Strughold's past. OSI advised that Strughold had been the subject of "a promising investigation in the early 1980s that had to be terminated after it was learned that he was no longer mentally and physically competent." The basis of the investigation was Strughold's apparent support of the infamous Dachau experiments, involving immersion of live subjects into freezing water for prolonged periods. Many of the subjects died. Mar. 23, 2004 letter to Dr. Denise Baisden from OSI Chief Historian Elizabeth White. As of this writing, the prize is still awarded in Strughold's name.

26. *See e.g.*, pp. 95, n.1, 174, n. 46, 277, 279-281, 378, 552, notes 47 and 53.

27. "Of Nazis and NASA: The Case of Arthur Rudolph," *CrossFire*, July 11, 1990.

28. ABC News *Nightline*, Oct. 18, 1984.

29. Prosecution Memorandum, p. 45.

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Tscherim Soobzokov – The Victim of Vigilantes

The story of Tscherim Soobzokov was suffused with intrigue from the start. There were allegations that he was a Nazi murderer, a CIA operative and a white collar criminal. Although none of the charges was ever tested in court, Soobzokov was killed, apparently by someone who believed the Nazi allegations to be true.

Soobzokov was the only OSI defendant from Circassia, then an Islamic region of the Soviet Union between the Black and Caspian Seas.[1] He worked with the CIA during the 1950s. In 1955 he was admitted to the U.S. under the INA from Amman, Jordan. According to the Agency, it had no involvement in his obtaining a visa.[2]

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Six years after he emigrated, Soobzokov became a U.S. citizen. He settled in Paterson, New Jersey where he became active in Democratic party politics and was a controversial leader in the local Circassian community. In the 1960s, several members of that community urged INS to review his activities both before and after he entered the country. INS found no basis for action.[3]

In 1972, one of Soobzokov's political rivals reported him to the Social Security Administration. He claimed that Soobzokov was presenting fraudulent birth certificates to the Social Security Administration and bribing someone in the bureaucracy to accept the documents in order to obtain government subsidies for members of the Circassian community. While looking into the charges, the Social Security investigator heard rumors that Soobzokov had been in the SS and was involved in the killing of three Soviet officials during World War II. The investigator requested information from the Berlin Document Center (BDC), a repository of personnel and membership records of the Nazi party and its affiliated organizations. He received

a roster showing that first lieutenant Soobzokov had transferred from a foreign army into the Waffen SS in January 1945.[4] A cover letter from the Director of the BDC said that while there were no other records about Soobzokov, she "assumed," "based on similar cases," that Soobzokov transferred from a group that had worked either with SS partisan-hunting units or SS mobile killing units.[5] The investigator passed this information along to INS. In 1974, when the Justice Department released its list of 37 individuals under investigation for alleged war crimes, Soobzokov's name was among them.[6]

Reacting to pressure from Congresswoman Holtzman and "various individuals and groups in New York including B'nai B'rith," INS ordered "a full-scale and comprehensive investigation."[7] Soobzokov gave a sworn statement, outlining his wartime activities. He claimed that after the Germans had overrun his home town, he performed clerical duties for the local chief of police (who was under German supervision) and then joined a German military unit in order to fight the Russians. He denied knowledge of any Nazi execution squads and claimed he had deserted after a few months. His asserted goal was to assist a group of Circassian refugees trying to escape from both the Germans and the Russians. He explained that a Circassian general fighting in an SS unit against the Soviets provided him with an SS uniform and listed him as a member of the unit. Soobzokov said that this enabled him to travel more readily in Nazi-occupied territory. He denied taking part in any duties or assignments for the SS. While acknowledging that he had not revealed his full background on his visa application (he had not mentioned any SS affiliation), he said that "[t]he correct information was given to another government agency and I do not understand why they have not come forward."

INS interviewed members of the New Jersey Circassian community.[8] The results were

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ambiguous.

> [T]he Service is becoming more and more involved in the internal feud of the Circassian Community of which [blanked out name] and Soobzokov are the leaders. Each childish action taken by one side is repeated by the other and then some sort of information is forwarded to this Service so that we become involved. It is becoming more and more difficult to maintain any type of dignity to this investigation because those members of the community who refuse to become involved look upon us as pawns of the leaders and shun our inquiries.[9]

In March 1976, INS announced that it was dropping the investigation.[10] It was officially closed in January 1977.[11] Ironically, that same month, the bestseller *Wanted! The Search for Nazis in America* was published. While alleging that there were dozens of war criminals in the country, the book focused on four, one of whom was Soobzokov. According to author Howard Blum, Soobzokov served as a first lieutenant in a mobile killing unit that had participated in the murder of 1,400,000 Jews on the Eastern front. The book also accused Soobzokov of criminal activity in the United States, specifically the Social Security scam outlined above. Blum suggested that Soobzokov's political connections were protecting him from prosecution. After the book was published, the Jewish Defense League (JDL), a militant organization whose motto was "Never Again," twice picketed Soobzokov's home, chanting "Death to Soobzokov" and "No trial for Nazi murderers."[12] They also picketed the home of his attorney.[13]

Soobzokov aggressively fought the allegations in the media.[14] He also filed several lawsuits against persons both inside the government and out. These included libel as well as invasion of privacy claims. The privacy suit was dismissed; a libel action against Blum and the book publishers was settled, with the terms sealed.[15]

The book and the attendant publicity led to renewed law enforcement interest in

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Soobzokov. In May 1977, the U.S. Attorney's Office for the Southern District of New York opened a criminal investigation to determine whether Soobzokov had lied to INS in his sworn interview, whether he was in fact involved in a bribery scheme with Social Security, and whether INS or the Social Security Administration had improperly thwarted an investigation.[16] The State Department, at the request of the USAO, prevailed upon the Soviets to get statements from Soviet citizens who might have served with Soobzokov or known of his wartime activities. The Soviets forwarded a group of statements (taken between 1944 and 1978). Some of those questioned claimed to have seen Soobzokov murder Soviet officials on behalf of the SS, others to have only heard about such crimes; one said Soobzokov had admitted the murders to him.[17] To counter these claims, Soobzokov submitted his own set of affidavits from persons who had known him during the war, including some of the refugees he allegedly had helped.[18]

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The SLU was established a month after the U.S. Attorney's office opened its criminal investigation. In 1979, the U.S. Attorney's Office closed its investigation and INS' civil investigation passed from the SLU to the newly-formed OSI. At just about this time, a pipe bomb was left in a cigar box outside Soobzokov's home. A note attached to the device read "Buddy. You didn't kill enough of them. Have a smoke on me. Fedorenko."[19] A caller to the Associated Press warned that this was the first of many to be sent "to Nazi war criminals across the United States."[20]

OSI reviewed the material gathered by the Social Security Administration, the U.S. Attorneys Office and the SLU.[21] These included the SS roster, a criminal record from the U.S.S.R., and the Soviet statements. OSI also obtained a 1978 deposition Soobzokov had given in the libel action against Blum. According to that deposition, Soobzokov had told the U.S. Vice

Consul in Amman about his SS membership and submitted a written statement about the matter. Soobzokov claimed the matter had been fully investigated before his visa was granted. Since Soobzokov's INS record made no mention of a statement to the U.S. Vice Consul, OSI asked the State Department to search its files for the document. State found no reference to it.[22] OSI also contacted the CIA and learned that Soobzokov had told the agency about his SS service at some point after he emigrated and before he became a citizen.[23]

Although the statements by Soviet witnesses tied Soobzokov to possible persecutory actions, OSI personnel had not met the declarants. Moreover, "most of the better circumstantial witnesses" were dead. Without testing the testimony of the remaining witnesses "according to U.S. standards of due process and admissibility," OSI was unwilling to base its case on their claims.[24] However, the newly-established office wanted to file some cases quickly.[25]

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The Soobzokov case was particularly pressing since he was the only subject in Blum's best-selling book against whom charges had not yet been filed.[26] Rather than charging him with involvement in persecution, the government focused on his failure to disclose his full military and criminal history to the State Department at the time of his visa application, and to the INS when he sought citizenship. OSI filed charges in December 1979, alleging illegal procurement of citizenship (in that he had never been "lawfully admitted" because he had concealed pertinent information which would likely have barred his entry) and misrepresentations in his citizenship application. The complaint also charged that Soobzokov lacked the good moral character necessary for citizenship; the lack of good moral character was based on his misrepresentations. The media, in reporting on the case, stated that Soobokov had "worked as a U.S. intelligence agent in Jordan in the 1950s, and may have been granted asylum secretly."[27]

Three months after the complaint was filed, Soobzokov submitted to OSI a copy of a 1952 document (State Department Personal Data Form V-30) on which he had listed all the information that the complaint alleged had been concealed. Soobzokov said he had given the form to the Consul in Amman at the time he applied for a visa. Although OSI had not seen this document in State Department or CIA files before the case was filed, it asked both agencies to search their files anew for any reference or copy of the form. The State Department found nothing, though it noted that some of its records from that era had been routinely destroyed.[28] The CIA, however, produced copies of the Form V-30 as well as two other relevant documents. All were State Department records, though none were in the State Department's own files.

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OSI had examined the CIA records before filing suit, yet found no copy of this material. The CIA told Director Ryan that the problem stemmed from application of the "third agency rule." Under that doctrine, one agency may not reveal documents classified by another. The CIA asserted that when it made its file available to OSI for review, it had removed the form V-30 and substituted a manila envelope captioned "State Department" and marked with the date of the document. This was done so that the reviewing OSI attorney would know to contact DOS and seek disclosure from that agency of the missing information. The OSI attorney who had reviewed the CIA files denied seeing any such envelope.[29]

Whatever happened during the file review, the documents were now part of the case, and OSI had to determine their authenticity and impact. The office contacted persons who had been in Amman at the time the newly discovered documents were apparently prepared. Though none could remember the specific case, they did attest that the documents were of the type in use at the time.[30] OSI also asked the FBI to examine the typeface on the documents; they learned that it

was from a typewriter manufactured in the mid-1930s and could well have been used in Amman.

Since the new information indicated that Soobzokov had told the State Department about his past when he applied for a visa, the Department of Justice determined that it could not, in good faith, pursue the SS misrepresentation charges, which were the crux of the complaint. And without misrepresentation, there was no longer a basis for the lack of moral character charge. The only charges left were those involving the unreported criminal record. Although the Soviets claimed Soobzokov had spent five years in custody, the statutes violated involved hooliganism and arbitrariness, both crimes used by the Soviets to pursue those who opposed the Communist state.[31] The Soviet Union was unwilling to give details about the alleged criminal activity. Without additional information, the Department was not willing to pursue this charge either. Accordingly, in July 1980, the government moved to dismiss the complaint. The motion detailed the efforts OSI had made to verify its facts both before and after the case was filed.[32]

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OSI Director Ryan also issued an extensive statement of explanation to the press. In addition to reviewing the sequence of events, he sought to answer questions that he knew would be raised by the case.

> Some may find it ironic that we must terminate this litigation because the defendant admitted his affiliation with organizations loyal to the Third Reich. But that, in my opinion, is the law, ironic or not, as it applies to this case. . . .
>
> The question might well arise whether Soobzokov had any independent connection to the Central Intelligence Agency apart from the fact that the State Department apparently forwarded to that agency the information I have described. . . . I am aware that a claim of such a connection has been made in the public media. My answer to such a question is simply that I am not at liberty to reveal any such connection, if it exists, in this case or in any other case. I will state what is more to the point: My decision to seek dismissal of the complaint in this case, or in any other case – and indeed my decision whether or not to institute a proceeding in any case – is entirely independent of whether or not an individual

> has any connection with the Central Intelligence Agency or any other government agency. I will also state that the CIA has not directly or indirectly sought to influence the decision to institute this case or to withdraw it. On the contrary, the CIA has been responsive to the requests we have made in our investigations. I take this occasion to restate what has been my determination since I came to the Office of Special Investigations in January: a decision to file legal proceedings, and necessarily any decision to withdraw proceedings once filed, will be made on the evidence and the law.[33]

Ryan went on to say that the investigation remained open; if the government developed sufficient evidence to prove Soobzokov had taken part in persecution, a new action would be filed.

Shortly thereafter, an OSI attorney traveled to the U.S.S.R. to question those witnesses who had previously given statements to the Soviet authorities. Those he could interview had limited, if any, information, and most of it was hearsay. The most damning information – alleged admissions of murder made by Soobzokov – came from an ally of Soobzokov's rival for leadership of the Paterson Circassian community. There was, therefore, the possibility of bias. Accordingly, OSI recommended, and the Criminal Division agreed, that the investigation be closed.[34]

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There were varying reactions to the aborted case. Some were openly skeptical about whether the late-discovered documents were genuine, especially since the State Department, apparently the originating agency of the documents, had no record of them.[35] Others found the CIA explanation plausible.[36]

Dismissal of the case was, tragically, a pyrrhic victory for Soobzokov. The Jewish Defense Organization (JDO), a splinter of the JDL, repeatedly called for violence against him.[37] On August 14, 1985, a week after their last such exhortation, Soobzokov reported to the police that two people in a car had tried to run him down.[38] Hours later, a fire broke out in the

Soobzokov car, parked in front of his home. A neighbor went to alert the family and a bomb exploded as Soobzokov opened the door.[39] Soobzokov was fatally injured and died three weeks later. His wife, daughter and four-year old grandchild suffered injuries in the blast.

The JDO and JDL both denied responsibility. Nonetheless, the JDL "applaud[ed] the action"[40] and the JDO described it as "a righteous act."[41] The FBI suspected the perpetrators were also responsible for two other bombings.[42] One injured OSI defendant Elmars Sprogis;[43] the second resulted in the death of Alexander Odeh, a west coast regional director of the American-Arab Anti-Discrimination Committee. As of this writing, none of these cases has been solved.[44]

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1 1. It is today part of the Karachay-Cherkessia Republic of the Russian Federation.

2. July 15, 1975 letter to INS Director from CIA (name deleted as part of declassification process) re "Your Request for Information Dated 3-21-75 Regarding Tscherim Soobzokov." CIA authorization for his continued work with the Agency was cancelled in Apr. 1960 based on his poor performance during a series of polygraph examinations. *See* n. 34, *infra.*

3. June 30, 1972 memorandum from Dominick Rinaldi, INS District Director, Newark, New Jersey to INS Assistant Commission, Investigations, Central Office, re "Your CO 703.1066 of April 19, 1972; letter to Senator Buckley;" Aug. 26, 1974, Report of Investigation re "Soobzokov" from INS Investigator James W. Pomeroy.

4. Undated draft Prosecution Memorandum prepared by OSI attorney Joseph Lynch.

5. Apr. 11, 1973 letter to Reuben Fier, SSA from Matild E. Holomany, Director, BDC.

6. Membership in a Waffen SS unit was not a disqualifying factor at the time that Soobzokov was seeking a visa (though it had been under the DPA). Participation in a mobile killing unit would, however, have made him ineligible to emigrate to the United States.

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7. May 31, 1974 memorandum from Acting District Director, New York, New York to District Director, Newark, New Jersey.

8. Aug. 16, 1974 Report of Investigation by INS Investigator James Pomeroy.

9. May 28, 1975 memo "Undeveloped Leads," by Pomeroy.

10. "Immigration Service Drops Probe of County Inspector," by Dean Bender, *The Morning News* (Paterson, NJ), Mar. 26, 1976.

11. Jan. 27, 1977 memorandum from INS Regional Director, Eastern Division to District Director, New York.

12. "Ex-SS Officer Cleared of War Activity Charges," *The* (New Jersey) *Star-Ledger*, May 28, 1979.

13. June 12, 1978 memorandum to Soobzokov file from Martin Mendelsohn, SLU Chief.

14. *See e.g.*, The MacNeil/Lehrer News Hour, "Nazis in America," Feb. 2, 1977; "The Trouble with Howard Blum's Wanted!" by Richard Steinger, *The Soho Weekly News*, May 26, 1977.

15. There were several libel suits. Defendants in two libel actions included Blum, his publisher and distributors, as well as several sources named in the book. A member of the Circassian community, depicted in the book as an accomplice of Soobzokov's in the alleged Social Security scam, also sued. "Second Suit to Be Filed Over Book," by Mark Gabriel, *The Evening News* (Paterson, NJ), Feb. 7, 1977.

In a separate libel case, Soobzokov sued CBS, a reporter and the producer, writer and executive producer of "Shadows Behind the Golden Door – Eye on Nazis," a show which aired on television in Jan. 1975, long before the book was published. "Soobzokov Files $5 Million Libel Suit," *The Paterson* (New Jersey) *News*, Dec. 13, 1975; "County Aide Sues TV for 'Nazi' Libel," *The Herald-News* (North New Jersey), Dec. 19, 1975.

The privacy suit was against Blum, the INS and Social Security investigators who looked into the allegations against Soobzokov, and HEW, then the parent agency of the Social Security Administration. The thrust of the privacy lawsuit was that the government's investigators had violated the law by giving information collected during their investigations to the author. *Soobzokov v. Blum, et. al*, No. 77 Civ. 1750-CLB (S.D.N.Y. 1978).

16. Affidavit of AUSA Jerry Siegel, filed in *Soobzokov v. Blum, et al.*, No. 1927/77 (Sup. Ct. County of Nassau). *See also*, "U.S. Jury Probing Atrocity Charges," by Nadine Joseph, *The Bergen* (NJ) *Record*, Mar. 6, 1978; "Jerseyan Downplays Nazi Probe," by Herb Jaffe, *The Sunday Star-Ledger* (Newark, NJ), Mar. 12, 1978; "Time Running Out for Jury in Probe of Nazi Suspect," by Herb Jaffe, *The Star-Ledger*, Sept. 11, 1978.

17. *See* Mar. 29, 1978 letter from Soobzokov's attorney to AUSA Siegel as well as Nov. 21, 1980 memo from OSI attorney Richard Sullivan to Ryan re "Soobzokov Investigation" (hereafter Sullivan memo). These two documents outline much of the evidence against Soobzokov and tell how and when it was collected.

18. Mar. 29, 1978 letter from Soobzokov attorney Michael Dennis to AUSA Siegel.

19. In another example of the perpetrator's sick humor, the return addressee on the envelope was Karl Linnas, against whom OSI filed charges several months later. Linnas was never a suspect in the pipe bombing. June 14, 1979 FBI teletype from Washington Field Office to FBI Director.

20. "Ex-Nazi Gets Parcel Bomb in Paterson," *The Sunday Star-Ledger*, June 3, 1979; "Bomb Likely Planted by Professional," *The Record* (Northern New Jersey), Aug. 16, 1985. Soobzokov called the police when he saw the note. They removed the device and detonated it at a firing range.

21. Because of statutory restrictions, the USAO could not share any grand jury material.

22. July 27, 1979 letter to DOS Visa Office from OSI attorney Joseph Lynch.

23. Undated draft prosecution memorandum prepared by OSI attorney Joseph Lynch (hereafter Lynch memo). Only a draft of the prosecution memorandum remains in the files and Joe Lynch has since died. It is therefore not clear what information was in the final version which the AAG reviewed before authorizing the filing.

24. Lynch memo, *supra*, n. 23.

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25. Apr. 24, 2003 recorded interview with Richard Sullivan, an OSI attorney from 1979-1983, who became involved in the Soobzokov case after it had been filed; Oct. 6, 2000 recorded interview with Allan Ryan, who joined OSI a month after the case was filed.

26. The other three featured subjects were John Demjanjuk (against whom charges were filed in 1977); Valerian Trifa (1975) and Andrija Artukovic (1951).

27. "Alleged Nazi Charged," *The Washington Post*, Dec. 6, 1979; *see also*, "Odyssey of a Nazi Collaborator," by Charles R. Allen, Jr., *Jewish Currents*, Dec. 1977, published a year before the case was filed.

28. June 26, 1980 letter to Lynch from Frank Machak, DOS Information & Privacy Coordinator, Foreign Affairs Information Management Center.

29. Apr. 9, 1980 memo from Ryan to DAAG Richard re "Review of CIA Files."

30. OSI also found the secretary who had worked at the Embassy in Amman. However, she was no longer mentally competent.

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31. The Soviet Criminal Code defined hooliganism as mischievous acts accompanied by manifest disrespect for society; arbitrariness was wilful exercising outside of established authority by any person of his actual or assumed right called into question by another person.

32. In one respect the motion misstated the facts. The moving papers asserted that pre-filing checks with the FBI and CIA revealed no information about Soobzokov having served with the Waffen SS, the local police or the Northern Caucasian Legion. In fact, as set forth in the draft prosecution memorandum, OSI knew that Soobzokov had advised the CIA of his SS connection after he arrived in the United States. The complaint, however, was based on his failure to notify the State Department or INS.

33. Ryan statement, issued July 9, 1980.

34. Sullivan memo, *supra*, n. 17; Dec. 3, 1980 memo to Sullivan from Director Ryan re Soobzokov Investigation; and Dec. 30, 1980 memo from Ryan to DAAG Richard re Tscherim Soobzokov.

In 2004, pursuant to the Nazi War Crimes Disclosure Act, the CIA declassified various documents concerning Soobzokov. One discussed a series of polygraph examinations given to him by the Agency in 1953, 1956, 1957 and 1959. Untitled (due to redaction for declassification) memo hand dated Apr. 1960 (though in fact that date must be erroneous since the document references incidents of a later date.) In all, Soobzokov was polygraphed by the Agency seven times, each of them inconclusive according to a July 19, 1974 CIA document (untitled due to redaction prior to declassification) re Soobzokov.

In the 1957 polygraph, he admitted giving false information to the American Consulate in Jordan when seeking to emigrate. The report did not specify what information was false. In 1958, he acknowledged being in charge of an execution squad which killed a Soviet partisan.

(The polygrapher concluded that Soobzokov was an "incorrigible fabricator.")

Notes in OSI's files from one of the attorneys working on the case indicate that OSI was aware of all the polygraphs. However, most anti-partisan activity, even if it rose to the level of a war crime, would not come under the Holtzman amendment. There are exceptions however, *e.g.*, if a partisan had been killed simply because he was Jewish.

As of this writing, OSI is unaware of evidence that Jews were still in the area when Soobzocov claims to have been active. OSI believes that the evidence to date would not establish that Soobzocov participated in crimes against Jews. Feb. 10, 2006 discussion with Director Rosenbaum.

35. Congresswoman Holtzman voiced skepticism. "CIA 1952 Files Save Ex-Nazi in Deportation Case; Blushing Prosecutors Withdraw Suit," by Thomas O'Toole, *The Washington Post*, July 10, 1980. So did Bruce Einhorn, former Deputy Director of OSI. Recorded interview, Oct. 2, 2001. However, it should be noted that OSI has never come across a V-30 form in any State Department case file throughout the years. This suggests the possibility that these forms were not typically made part of the permanent record.

36. Mark Richard was in the latter camp.

> I don't want to sound like an apologist for the intelligence community, but especially in the early 80s, their file system was so rudimentary in terms of their ability to retrieve documents, that it was problematic at any given point that you had access to all documents on any given subject, notwithstanding that it was their intention. I have seen in the criminal area, the Agency just throwing up their hands at their inability to know what they even had. There were so many different systems of records. If you didn't think to query a different component, no one would think of it.

Recorded interview, Apr. 18, 2001. Richard Sullivan, who worked at the CIA after leaving OSI, was in full agreement with this view. He noted that the matter arose in pre-computer days and that when the agency was established in 1947, it pulled together files from various organizations around the world. He recalled seeing "piles and stacks" of documents which no one had examined. Recorded interview, Apr. 24, 2003.

Allan Ryan too was not skeptical about the turn of events: "The fact that some consular file from Amman, Jordan in the early 50s . . . was not able to be reassembled from State Department files in 1980 doesn't strike me as particularly unusual." Recorded interview, May 7, 2003.

37. "JDL Assassins of Tscherim Soobzokov Are Still at Large in NJ," *New Jersey Prosecutor*, June 16, 1986.

38. "Ex-Nazi Loses Foot as Bomb Rips Home," *New York Post*, Aug. 16, 1985.

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39. "Man Accused on Nazi Past Injured by Bomb in Jersey," by Ralph Blumenthal, *The New York Times*, Aug. 16, 1985.

40. "Former Nazi Critically Injured by Bomb at Paterson Home," by Edna Bailey, *The Newark Star Ledger*, Aug. 16, 1985.

41. "Man Accused on Nazi Past, Injured by Bomb in Jersey," *supra*, n. 39.

42. "Official Says F.B.I. Has Suspects in Blasts Laid to Extremist Jews," by Stephen Engelberg, *The New York Times*, July 17, 1986.

43. *See* p. 527.

44. A macabre footnote to the Soobzokov story surfaced two years after his death when the *New York Post* ran a nine-page display of wartime photographs allegedly found in a Paterson garbage heap three blocks from the Soobzokov home. The newspaper admitted paying $5,000 for the pictures, which showed hanged partisans and POWs, as well as images of Hitler, Mussolini and Goering on the Eastern front. The pictures were found in the back of a stamp album and one of Soobzokov's neighbors told the newspaper that Soobzokov had been an avid stamp collector. Based on this, as well as the fact that some of the pictures appeared to have been taken in Soobzokov's native Caucasus region, the newspaper concluded that "a mass of circumstantial evidence" indicated the photos belonged to Soobzokov. They drew this conclusion despite the fact that the Soobzokov family had moved from the area shortly after the bombing. "Album of Evil," *New York Post*, Aug. 24, 1987. Although experts believed the photos were genuine, there was no evidence about who placed them in the garbage or how that person obtained them. Nonetheless, the leader of the JDO said "It looks like history's proven us right." "War Photos Found in Trash," by Leslie Berger, *The Bergen Record*, Aug. 25, 1987.

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The Belarus Conspiracy – Sensationalism vs. Reality

Over the years, John Loftus, a former OSI attorney, has made sweeping allegations of a government conspiracy to intentionally, but covertly, admit legions of Nazi war criminals into the United States. Loftus' claims, rejected by historians as well as by the GAO, have focused on emigrés from Belarus.

Belarus (formerly Byelorussia or White Russia) has a tortured history of twentieth century subjugation. The country was partitioned by Poland and the U.S.S.R. after the Russo-Polish War (1919-1921). The portion taken by the Soviets became the Byelorussian Soviet Socialist Republic (B.S.S.R.).

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The Molotov-Ribbentrop Pact of August 1939 provided for the division of Poland between Germany and the U.S.S.R. in the event of war. The following month both Germany and the Soviet Union invaded Poland. The Soviets formally annexed portions of the former Polish territory into the B.S.S.R. and Ukraine. Two years later, Germany invaded the U.S.S.R. and occupied Byelorussia, installing Nazi sympathizers in government posts. In 1944, the Soviets "liberated" the area and reinstalled it as a Soviet republic. With the collapse of the Soviet Union, the independent state of Belarus was established in 1991.

The fate of Byelorussian Nazi collaborators became a matter of abiding interest to Loftus when he joined OSI shortly after its founding.[1] In February 1980, he wrote a memo stating that approximately 40 of the top 100 Nazi collaborators in Byelorussia were in the United States. He described them as:

> cabinet level rank and above: Presidents, Vice Presidents, Senators, Governors (both civilian and military), Ambassadors, Editors in Chief, Army and Police Commanders, Cabinet Secretarys [sic] and their Division Heads, and other

luminaries of the Nazi regime.[2]

Loftus told then OSI Deputy Director Ryan that the U.S. intelligence community had knowingly defied immigration laws to make this wholesale emigration possible. The motive, according to Loftus, was to have the Byelorussians assist the intelligence community in anti-communist activities. Loftus even suggested that Ronald Reagan (who had been an actor during the relevant years) had been involved in the conspiracy.[3]

In October 1980, Ryan sent a memorandum (drafted by Loftus) to the Attorney General about the "Belarus Project." Although OSI did not routinely apprise the Attorney General of matters under investigation, Ryan did so in this case partly because Reagan was then a presidential candidate. "I didn't want any accusation that we were trying to cover things up or save Reagan a month before the election. . . . I also wanted expanded resources for this investigation."

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The memorandum detailed Loftus' thesis, *to wit*, that the Office of Policy Coordination (OPC), a component of the CIA which worked with the Departments of State and Defense, had assisted Byelorussian Nazis in entering the United States under the guise of displaced persons. Based on "updated" information, the memo stated that virtually *all* the Nazi leaders had been brought over, not just the 40% Loftus had originally estimated. Although many of the emigrés had since died, the memorandum focused on five individuals considered most worthy of further investigation. Ryan advised that "the Belarus investigation is the single most important matter that OSI is now engaged in, and that thorough exploration of its ramifications is essential if OSI is to fulfill the Department's mandate to take appropriate legal action against Nazi war criminals."

Shortly after this memorandum was completed, additional information fueled Loftus' concerns. As noted elsewhere,[4] in 1978 Congress had asked the GAO to determine whether the government had diligently investigated alleged Nazi persecutors living in the United States. The GAO concluded that no "widespread conspiracy" existed to obstruct the investigation of "Nazi war criminals" although there might have been undetected, isolated instances of deliberate obstruction.[5] As part of its investigation, GAO had requested 111 files from the Department of Defense (DOD).[6] In two instances, both involving Byelorussians, DOD had denied having information. Yet DOD's response to a 1979 request from OSI for hundreds of files had included information on both men. Ryan reported this discrepancy to DAAG Richard. DAAG Richard referred the matter to the Public Integrity Section of the Criminal Division for investigation into whether there had been an obstruction of Congress. The referral letter – relying on Loftus' assertions – credited OSI (*i.e.*, Loftus) with finding the missing files. It also charged DOD with sanitizing information in one of the files.

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Loftus left the government in August 1981 before any Byelorussian cases were filed.[7] As others in OSI took over Loftus' investigations, they began to question his thesis. Although some individual investigations seemed plausible, no one could find evidence of a conspiracy to transplant *en masse* Byelorussian Nazis to the United States.[8]

Early in 1982, the media reported that Loftus had provided Congressman Barney Frank (D-Mass.) with material (some of it then classified) that suggested that the CIA, Air Force, Army, State Department, FBI, INS and a special group of the NSC were all part of a conspiracy. According to Loftus, these agencies employed Nazi war criminals as informants, knew of their "illegal" entry into the United States, and withheld that information from Congress during the

1977 hearings that had helped lead to the creation of OSI.[9] Loftus also told the Congressman about the two Byelorussian men whose files he had allegedly uncovered. One was an SS general employed by the CIA/OPC, and the other was a cabinet-level official who worked as an informant for a number of U.S. agencies. Both had emigrated to the United States but had since died. Congressman Frank, concerned about a coverup, passed this information on to the chairman of the House Judiciary Committee.[10]

In addition to promoting his ideas to Congress, Loftus wrote to DAAG Richard with a strategy for pursuing Byelorussian cases. He suggested proving that the "Byelorussian Collaborationist Movement" was linked to systematic persecution of Jews and therefore that mere membership in the movement would warrant denaturalization. OSI found his arguments too facile. According to then OSI historian David Marwell:

> The allegations lodged against Byelorussians living in the United States are, almost without exception, limited to mere membership in one or more of the following organizations. . . . My initial investigation, although not complete, revealed no evidence to suggest that mere membership in any of these organizations would be sufficient grounds even to suspect persecution, let alone to initiate legal action.[11]

Nothing Marwell found in subsequent research altered his opinion.

Meanwhile, Loftus began a public campaign to promote his ideas. On May 16, 1982 he appeared on *60 Minutes*, then the most popular television show in the country. He reiterated and expanded upon the allegations he had made to Congressman Frank: he now asserted that files had been withheld not only from Congress, but also from the courts, from the CIA, and from local agents of the Immigration Service. Loftus described finding the missing files in the Army's vaults. Moreover, he estimated that with the knowledge of the FBI, CIC, the Army and

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the State Department, "more than 300" Byelorussian Nazis were in the United States, some working for "quasi-governmental" agencies like Radio Free Europe and Radio Liberty.

Loftus expounded also on his thesis that the Army had withheld relevant information from Congress; he believed it called into question the GAO's 1978 finding of no conspiracy to obstruct investigations. For Loftus, the conspiracy was ongoing. He claimed to have access to classified information which showed that the U.S. had recently admitted someone who had cooperated with the OPC "way back then." According to Loftus, there was "substantial evidence" that the recent admittee had persecuted hundreds of thousands of civilians.

Loftus' television appearance received front page coverage in major newspapers.[12] Dozens of Congressmen wrote to the Attorney General, asking him to investigate whether there had been any violation of federal law.[13] Both the chairman and the ranking minority member of the Judiciary Committee asked the GAO to reopen its investigation.[14] (GAO ultimately limited the focus of the new investigation to whether the U.S. government had assisted Nazi war criminals in entering the country.) DOJ issued a press release stating that the Public Integrity Section of the Criminal Division was investigating whether DOD had withheld documents.[15]

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In order to further stanch the impact of Loftus' allegations, Ryan, with the approval of AAG Jensen, wrote to *60 Minutes*. An excerpt of the letter was aired two weeks later (in a portion of the show then reserved for viewer comments). The letter asserted that the Byelorussian investigations were continuing and that cases would be brought if the evidence warranted.

AAG Lowell Jensen deemed the *60 Minutes* broadcast of sufficient import to warrant alerting the Attorney General of its "consequences . . . and the action now being taken by the

Department."[16] He reported that OSI was investigating several Byelorussians, but so far had not found sufficient evidence linking the slaughter of Jews in Byelorussia to persons in the United States. He also told the Attorney General that the estimate of 300 Byelorussians was likely a vast exaggeration. Finally, he expressed concern that Loftus had improperly turned over classified material to Congressman Frank and had divulged some of that information (including the names of current OSI subjects) on television. He assured the Attorney General that the Criminal Division was looking into the matter.

60 Minutes rebroadcast the Loftus segment in September 1982. Ryan wrote a letter to be used in the rebroadcast, in which he challenged Loftus' assertion that over 300 Byelorussian Nazis were in the United States.

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> This irresponsible statement has understandably been taken by many people to mean that there are 300 Byelorussian war criminals living in the United States: "people who kill babies," in Mr. Loftus' words.
>
> That is not true. Mr. Loftus persistently made such claims while he was employed by this Office, but he was unable to document them satisfactorily and eventually he left the Office. The investigation has continued quite thoroughly without him.[17]

The rerun included a statement by Ryan that "[t]he person [Loftus] described as persecuting hundreds of thousands of civilians was not a Nazi but a Middle Eastern national who had nothing to do with World War II."

Two months after the rebroadcast, publication of a book by Loftus brought the issue again before the public.[18] The book expanded his charges beyond Byelorussia, alleging that between 1948 and 1950 "the State Department systematically imported the leaders of nearly all the puppet regimes established by the Third Reich from the Baltic to the Black Sea."[19] It opened with a

dramatic account of Loftus surreptitiously making a midnight visit to a cemetery in New Jersey that held the remains of dozens of Byelorussian "war criminals." Describing Byelorussia, Loftus wrote: "In no other nation under German occupation did the inhabitants so willingly and enthusiastically visit such a degree of inhumanity upon their neighbors."[20]

OSI had not been contacted for any fact checking by the publisher before the book went to press. Reviewing the book for the office, Marwell found it to be:

> the worst kind of amateur history. It is bad history because it is poorly written, poorly researched, and poorly documented. It is fraudulent history because it mangles facts, distorts events, and misrepresents major themes.[21]

Checking various citations in the book, Marwell discovered that they often did not support Loftus' claims; in many instances they flatly contradicted them. This included matters of major import to Loftus' thesis. Thus, his claim that the Byelorussian Nazis "ran everything for the Germans" [22] referenced (with an improper number) a microfilm which in fact established that the Germans bemoaned Byelorussian inertia.

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> Pogroms against the Jews have been till now next to impossible to stage because of the passivity and political indifference of the White Russians.
>
> * * *
>
> A pronounced Anti-Semitism is missing. . . . The population has general feelings of hate and rage against the Jews and approves of the German measures (establishment of ghettos, creation of work columns, security police management, etc.) However, it is not in the position to seize the initiative in handling the Jews. It can be said very generally that the population lacks activism; the reason for this is to be found probably to a certain extent in its treatment by the soviets.[23]

The book also made some grandiose generalizations. Thus, it suggested that all members of the Waffen SS were "war criminals" and hence ineligible to enter the United States. In fact, mere membership in the Waffen SS – which was all that could be established for many in the

cemetery visited by Loftus – was not disqualifying for those who entered after April 1951.[24]

Despite these factual concerns, the book had wide appeal. Indeed, CBS used it as the plotline for an attempted revival of "Kojak," an immensely popular television series.[25]

In March 1983, the Public Integrity Section completed its investigation of the alleged obstruction of Congress. They found "[n]o evidence . . . which demonstrates an intentional effort by anyone to obstruct the GAO investigation." It was indeed the case that files of two Byelorussians had been requested but had not been turned over to the GAO. However, one of the Byelorussian names was on a document that was only partly legible. In an effort to supply the requested material, DOD had searched under several variations of the purported name and birth date. Unfortunately – but innocently – it had not come up with the proper combination. (This was in the very early computer era, and programs automatically providing variations were unavailable.) Once given the proper spelling by OSI, the Army had located the file.

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The explanation for the missing files on the second name was no more damning. They had been found – by the Army – in a cross-reference from another OSI requested file.[26] Thus, in both cases, DOD – rather than Loftus – had located the missing files. Since DOD turned over the relevant files to OSI in 1979, Public Integrity found no reason to impute a nefarious motive to the 1978 incidents. Public Integrity concluded that human error was a more likely explanation than malfeasance. This was especially so since DOD had handled hundreds of requests (most from OSI, but dozens also from GAO), yet:

> there has been no suggestion that the responses were less than candid and complete except with regard to these two individuals. There is no apparent reason why these two individuals would be singled out for concealment of files when the files on everyone else– including other war criminals – were being produced.[27]

As for Loftus' claim that one file ultimately turned over had been "sanitized," Public Integrity compared an early microfilmed version of the file with one that had been turned over. They were identical.

In 1985, the GAO issued a new report. It found no evidence of a concerted effort by the intelligence agencies to bring Byelorussian Nazis and Axis collaborators to the United States. Most of the collaborators who had assisted the U.S. remained in Europe. The government had chosen whom to help on a case-by-case basis; they were not part of an overall aid program. The report referenced five individuals who had emigrated with U.S. assistance.[28] All were investigated by OSI.

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In the end, OSI prosecuted two Byelorussians, Basil Arteshenko and John Avdzej. (Some who might have been prosecuted had died in the interim.) Avdzej had in fact been identified by John Loftus as a potential defendant. Indeed, he was one of the five men listed as priorities in the memorandum sent to the Attorney General in October 1980. The case ultimately filed, however, bore little relationship to the one set forth in Loftus' writings.

Loftus had partly confused Jan Avdzej with his brother, who in fact *was* denied a visa because of his wartime activities.[29] Moreover, the memo to the Attorney General had misrepresented some significant aspects of World War II history and Jan Avdzej's personal story.[30] For example, Loftus reported that Avdzej was "wanted for his war crimes by several nations" when in fact no nation had ever sought his apprehension. The memo claimed that he, along with other Byelorussians, had exterminated "virtually the entire Jewish population" of their area "with little, if any, German assistance." However, as discussed earlier,[31] the Germans directed the massacres and were in fact disappointed at the level of assistance they received from the Byelorussians. The memo also claimed that Avdzej was "the subject of massive publicity in

both the Polish and Soviet press, so that we can anticipate historical corroboration of his quisling status." In fact, OSI could find no such publicity. The Soviets and Poles informed the office that they had no corroborating evidence. In June 1991, OSI closed its investigation of a "Byelorussian Collaborationist Movement," though individual cases remained open for review.

Loftus' wide-ranging accusations have had both short and long-term impact. Little more than a year after Loftus' book and television revelations, OSI historian Elizabeth White began work on the Verbelen Report.[32] She needed Army and CIA cooperation to access documents in their files. Both organizations were distrustful, citing Loftus' public dissemination of material he had earlier gathered at the behest of OSI. According to White, it took tremendous effort to "work through" these reactions.[33]

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Although scholars have dismissed Loftus' claims as hyperbolic, his allegations – dramatic and conspiratorial – have clearly resonated with a segment of the public. Even today – more than 25 years after Loftus first made his claims – OSI speakers are often are asked about the Belarus allegations.

The Belarus Secret launched Loftus' career as a "whistle blower." He describes himself as someone who "may know more intelligence secrets than anyone alive"[34] and he has gone on to other exposés. Some of them involve Jewish and/or World War II issues, *e.g.*, the "Bush-Nazi scandal" and "the truth about Jonathan Pollard."[35] He also co-authored two books, *The Secret War Against the Jews: How Western Espionage Betrayed the Jewish People*[36] and *Unholy Trinity: The Vatican, The Nazis, and Soviet Intelligence*[37] and served for several years as president of the Florida Holocaust Museum. Loftus continues to be a featured speaker before many Jewish organizations. As of this writing, a radio show titled "The Loftus Report" airs three nights a week on the Talkline Communications Network[38]

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1. Loftus traces his involvement in Jewish causes back to 1973 when he claims to have "helped train Israelis on a covert operation that turned the tide of battle in the 1973 Yom Kippur War." www.John-Loftus.com (last visited, Dec. 2008). Loftus expanded on this in a newspaper interview. According to Loftus, the U.S. knew of Arab plans to attack Israel in 1973 but Secretary of State Kissinger chose to withhold supplies from Israel for political reasons. Loftus says he worked behind the scenes with then Chief of Staff Alexander Haig to help the Israelis. On Haig's orders, Loftus gave 40 Israeli officers a crash course in how to use a newly introduced missile system. Days later, the Israelis used that very system to prevent an Egyptian tank advance. "Ex-prosecutor Crusades to Unveil 'Evil,'" by Graham Brink, *The St. Petersburg Times* (Fl.), Mar. 22, 2002.

2. Feb. 8, 1980 memo from Loftus to Director Rockler, Dep'ty Dir. Ryan, Art Sinai and Neal Sher re "OSI #4374: Belarus Network: Cabinet Level War Criminals."

3. Recorded interview with Allan Ryan, Jan. 4, 2005. All references to statements or actions by Ryan in this chapter come from this interview unless otherwise noted.

4. *See* p. 2.

5. *Widespread Conspiracy to Obstruct Probes of Alleged Nazi War Criminals Not Supported by Available Evidence – Controversy May Continue* (GAO/GGD-78-73, May 15, 1978).

6. For various reasons, mostly due to time constraints, the GAO ultimately looked into only 94 of the cases.

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7. He had prepared one promising prosecution memorandum, but the subject died within days of the memo's completion.

8. *See e.g.,* June 17, 1982 memo from OSI trial attorney Betty Shave to Ryan re "Status of Tumash." Shave felt the investigation was still worth pursuing (it ultimately closed) but that many of the citations given by Loftus did "not stand for the proposition" for which they were cited. *Accord*, Ryan interview, *supra*, n. 3.

9. Loftus justified turning over classified documents on the ground that he simply "provided Congress records they were supposed to get." "Possible Cover-Up on Nazis is Focus of New U.S. Inquiry," by Ralph Blumenthal, *The New York Times*, May 23, 1982.

10. Feb. 23, 1982 letter to Chairman Peter Rodino.

11. June 8, 1982 memo from Marwell to Ryan re "Belarus."

12. *See e.g.*, "American Officials Accused of Aiding Nazi Collaborators," by Dale Russakoff, *The Washington Post*, May 17, 1982; "Nazis Brought to U.S. to Work Against Soviets in Cold War," by Thomas O'Toole, *The Washington Post*, May 20, 1982; "The Secret Under the Little Cemetery," by Thomas O'Toole, *The Washington Post*, May 23, 1982; "Possible Cover-Up on

Nazis is Focus of New U.S. Inquiry," by Ralph Blumenthal, *The New York Times*.

13. May 28, 1982 letter to AG William French Smith from Congressmen Addabbo, AuCoin, Barnes, Beard, Bedell, Blanchard, Brodhead, Brown, Burton, Courter, Coyne, Edgar, Edwards, Fascell, Fauntroy, Fazio, Fenwick, Foglietta, Florio, Ford, Forsythe, Frank, Frost, Gejdenson, Gilman, Green, Hall, Heckler, Hollenbeck, Horton, LaFalce, Lantos, LeBoutillier, Lehman, Lent, Long, McGrath, McHugh, Mineta, Mitchell, Moffett, Molinari, Oberstar, Ottinger, Porter, Richmond, Roe, Rosenthal, Scheuer, Schroeder, Schumer, Shamansky, Simon, Weiss, Wilson, Wyden, and Yates.

14. May 17, 1982 letter from Chairman Rodino to GAO Comptroller General Charles Bowsher; May 18, 1982 letter from Congressman Hamilton Fish to Comptroller General Bowsher.

15. DOJ Press Release, May 17, 1982.

16. May 25, 1982 memo from AAG Jensen to the Attorney General re "'60 Minutes' Segment on Byelorussian Nazi War Criminals."

17. Sept. 1, 1982 letter from Ryan to Mike Wallace, CBS News.

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18. *See e.g.,* "Cold War Cited in Letter to INS; Nazi Collaborators were Recruited as 'Assets,'" by Thomas O'Toole, *The Washington Post*, Nov. 8, 1982; "Books of The Times," by Ralph Blumenthal, *The New York Times*, Dec. 28, 1982; "Nazi War Criminals in the US," by Spencer Punnett, *The Christian Science Monitor*, Feb. 2, 1983.

19. *The Belarus Secret*, by John Loftus (Alfred A. Knopf), p. 84.

20. *The Belarus Secret, supra*, n. 19, p. 29.

21. The portion of the memorandum available is undated and incomplete and therefore cannot be more fully cited. Another scathing criticism of the historical content of the book can be found in "How *Not* to Pursue War Criminals in USA, What's Wrong with *The Belarus Secret*," by Charles Allen, *Jewish Currents*, Apr. 1984.

22. *The Belarus Secret, supra*, n. 19, p. 24.

23. Ereignesmeldungen No. 43, National Archives Microfilm Section T175, Roll 233, frames 2721786 and 2721780.

24. Instruction Memo No. 206, Apr. 15, 1951 from John Gibson, DPC Chairman to European Coordinator, DPC. Although service in the Waffen SS was originally *per se* disqualifying, by November 1951, the United States was making measured distinctions. Those below the rank of major in "military" units were admissible, barring relevant information warranting a contrary determination. *See e.g.*, Instruction Memo No. 242, Nov. 12, 1951 to All Senior Officers from Robert J. Corkery, DPC Coordinator for Europe. (Camp guard duty, for example, was relevant

material warranting exclusion.)

25. In the show, broadcast on Feb. 16, 1985, the police try to solve the murders of three elderly Russians who may have been Nazi war criminals. The answer to the mystery lies in "the Belarus file," a top-secret document in the possession of the State Department. The show credits acknowledged that the plot was based on *The Belarus Secret*.

26. In the second case, DOD had actually turned over one file, but failed to locate two others on the subject. Public Integrity acknowledged that one of the two later-located files might have been identifiable in 1978. However, there was no way to determine this with certainty in part because there was no way to ascertain the computer indexing which would have appeared in 1978.

27. Mar. 28, 1983 memorandum re "Allegations that the 1977-78 GAO Investigation of Nazi War Criminals was Obstructed," p.15.

28. *Nazis and Axis Collaborators Were Used to Further U.S. Anti-Communist Objectives in Europe – Some Immigrated to the United States* (GAO/GGD-85-66, June 28, 1985)

29. Oct. 24, 1983 memo to AAG Trott from DAAG Richard re "Proposed OSI Denaturalization Prosecution – John Avdzej: District of New Jersey."

30. Jan. 12, 1984 memo from Rosenbaum to Neal Sher, Michael Wolf and Belarus Team re "Annotated Version of John Loftus' Account of John Avdzej's Wartime Activities & Postwar Immigration."

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31. *See* p. 362.

32. *See* pp. 385-389.

33. In the end, CIA restrictions on publication of the Verbelen report were so extensive that the Justice Department was unable to publish an appendix of supporting documents. Whether the Loftus matter contributed to these restrictions is unknown.

34. www.John-Loftus.com

35. Both pieces can be accessed from a link on Loftus' website.

In the Bush piece, Loftus argues that the Bush family made its fortune from the Holocaust. He asserts that family members served on corporate boards of Nazi front groups even after it became apparent that doing so helped the Third Reich.

The Pollard piece was originally published in *Moment* magazine, June 2003. Loftus argues that Pollard was "framed" and that the U.S. was "conned" into convicting him of compromising U.S. methods and sources. According to Loftus, the information Pollard was convicted of passing on actually came from Aldrich Ames and Robert Hanson, both later determined to be spies within the U.S. intelligence community. The only crime committed by

Pollard, according to Loftus, was giving Israel the names of Saudi and Arab intelligence sources in order to "help protect[ ] Israelis and Americans from terrorists."

36. St. Martin's Press (1994). The book, written with Mark Aarons, accuses western diplomats and governments of extraordinary perfidies against the Jewish people and Jewish state. Among the allegations in the book: that an anti-Semitic and anti-Zionist Allen Dulles (later head of the CIA) helped set up dummy corporations to absorb Jewish assets confiscated by the Nazis and that, while ostensibly supporting Israel in the Six Day War, both the U.S. and U.K. shared Israeli defense plans with Arab oil producers.

37. St. Martin's Press (1991). The book, also written with Mark Aarons, claims that the Pope entered into a post-war espionage alliance with British and American intelligence agents. According to the authors, the three powers ferreted Nazi criminals out of Europe to use in the fight against Communism. The book also argues that U.S. and Britain bugged Swiss banks during the war and then buried secrets of Nazi gold transfers in order to protect improprieties by Allen Dulles.

38. www.TalklineCommunications.com. For several years prior, Loftus had a nightly five-minute open-source intelligence piece on ABC National Radio (The John Batchelor Show).

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Chapter Six: Expanding Jurisdiction

Introduction

When allegations arose of U.S. assistance to some notorious persecutors who had never even entered the United States, the public demanded that the claims be investigated. Successive administrations turned to OSI to determine what role, if any, the government had played. OSI's reports on these matters are seen by some as its greatest contribution to social justice. Others, concerned that the additional assignments were not accompanied by expanded resources, view the reports as a diversion from OSI's main mission, *i.e.*, the removal of Nazi persecutors from the United States. Whatever one's perspective, it cannot be gainsaid that the reports address matters of national and international concern. They also provide a comprehensive review of some of the moral issues that arise in the world of realpolitik.

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Although written solely to answer pressing questions about specific matters, the reports had the unanticipated effect of increasing OSI's visibility on the world stage. The reports ultimately uncovered questionable conduct by various countries and triggered reflection on the role of governments around the world. The significance of the issues raised in the reports, and the quality of the scholarship evident in their preparation, drew the attention of the international media. As a result, OSI's profile was enormously elevated.

OSI began exerting a presence overseas in other ways as well. Its role gradually expanded to include helping, encouraging, and sometimes pressuring, other countries to acknowledge more openly their role in World War II and to prosecute Nazi persecutors in their midst.

Reports

Klaus Barbie – The Butcher of Lyons

That OSI personnel would help prepare a report on Klaus Barbie – or anyone else – was not readily foreseeable when OSI was founded. OSI's mission was framed in terms of its litigative purpose: to secure the denaturalization and deportation of persons in the United States who assisted the Nazis in persecuting civilians between 1933 and 1945.[1] Such a mandate did not necessarily include writing reports about U.S. post-war activity. Moreover, since Barbie was not in the United States, there was no obvious reason for OSI to focus on him.

Klaus Barbie, a German by birth, joined the SS and served the Nazi cause in Vichy France. Between 1942 and 1944, he served in the intelligence branch of the German security apparatus and headed the Gestapo in Lyons. His rank at war's end was captain. During his tenure in Lyons, thousands of Jews and resistance fighters were tortured by the Gestapo and sent to concentration camps. Most died. Because of his alleged role in many of these atrocities, Barbie became known as "the butcher of Lyons."

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At the war's end, France submitted a statement of charges against Barbie to the United Nations War Crimes Commission.[2] Among the alleged crimes were "murder and massacres, systematic terrorism, and execution of hostages." He was sentenced to death *in absentia* by a French postwar military tribunal.[3]

In 1963, the French government learned that Barbie was living in Bolivia under the name Klaus Altmann.[4] It did not seek his removal until nine years later, when Beate Klarsfeld, a Nazi hunter living in France, uncovered the information and made it public. In 1972, and again in 1975, Bolivia's military government – with which Barbie had close ties – refused France's

request for extradition on the ground that there was no extradition treaty between the two countries.[5] After civilians regained control of the Bolivian government in 1982, France filed a new indictment against Barbie, charging him with "crimes against humanity," and again requested his return. Although there was still no extradition treaty, the new administration devised an alternative method to oust him. He was charged with making a fraudulent loan to the Bolivian government and expelled to French Guyana. When his plane landed, the French, who had been forewarned, arrested him and flew him to France. He arrived in Lyons on February 6, 1983.

News of his expulsion unleashed a flood of information. A former American intelligence officer asserted that the U.S. had protected Barbie and paid him $1,700 a month for intelligence information after the war.[6] Newspapers reported that while the Americans were harboring Barbie in Germany, they turned down French requests to locate him.[7] A Canadian, claiming to know Barbie from Bolivia, recalled Barbie's telling him that he had come to the United States several times during the 1960s and 1970s.[8] Many in the media called for a governmental investigation to determine what relationship, if any, the U.S. had with Barbie. The Justice Department, the State Department, the CIA, and Defense Department were all suggested as appropriate agencies to pursue the allegations.[9] In a well-publicized letter, the Chairman of the House Judiciary Committee wrote to Attorney General William French Smith, suggesting that OSI:

> could play a unique and valuable role in any investigation conducted by the Executive Branch. Given the expertise of OSI's staff, and the fact that attorneys and investigators there have the necessary security clearances, it would seem that the office would be ideally suited to coordinate such an inquiry. More importantly, OSI, with no direct ties to the intelligence community and no vested interest in any predetermined outcome, is sufficiently detached to assure that its findings would be viewed as complete and honest.

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> . . . While the primary function of OSI must remain the prosecution of denaturalization and deportation actions involving suspected Nazi war criminals in this country, the case of Klaus Barbie is potentially too important a part of the historical record to be left unattended.[10]

Some within the Department feared that taking on the task might lead to an inundation of similar assignments. The Department might be asked to conduct inquiries on all sorts of prior government conduct.[11] The Attorney General decided against investigating the Barbie matter on the grounds that no prosecution was likely to result (the statute of limitations on any crimes having long since passed), and that historical inquiry was not the work of the Justice Department in any event.[12] William Clark, the national security advisor, urged the Attorney General to reconsider.[13] Outside groups also pressed to have the matter investigated,[14] and nine members of Congress appealed to President Reagan to authorize an investigation.[15]

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As this pressure was mounting, OSI Director Allan Ryan received a call from an ABC News reporter who had gone to Bolivia to pursue the story.[16] He told Ryan he had documents showing that Barbie had worked for U.S. intelligence and that the United States had helped him escape to Bolivia. The story would air on that evening's news. Ryan relayed this information to the Attorney General's office; within hours the Attorney General authorized the Department to conduct an inquiry.

Ryan had indicated his intention to leave government service before the Barbie issue arose. He was, however, intensely interested in the Barbie controversy. Therefore, he was very amenable when AAG Jensen asked him to lead the Barbie investigation. He was named AAG Jensen's Special Assistant for the duration of the project. Ryan selected two investigators, one historian, and one attorney, all from OSI, to work with him full time.[17] The report was

completed five months later.

It revealed not only that the Army used Barbie as an informant after the war,[18] but that it had ignored several requests by the French for extradition, had misled the State Department (which then passed on this misinformation to the French) as to Barbie's whereabouts, and had used the services of a shady intermediary to help Barbie escape to Bolivia in 1951 under the name Klaus Altmann.[19] Once he was there, the U.S. no longer protected or used him. He obtained Bolivian citizenship and twice made business trips to the United States under his new name;[20] the visits were not connected to any agency or activity of the U.S. government.

The 218-page report (with over 600 pages of attachments) was detailed and pointed.[21] It recounted the enormous pressure on the Army to develop "sources" during the early Cold War period, and concluded that from 1947 – when Barbie first began working with the United States – until 1949, the U.S. did not know that he was accused of involvement in wartime atrocities. (The report suggests that this information was available, but not readily so.) By 1949, however, the allegations were inescapable, as Nazi victims and former Resistance fighters were publicly claiming that Barbie had used torture as an interrogation technique.

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Ryan concluded that the Army officials who continued to use and protect Barbie, even after they had reason to suspect he was a war criminal, did so for two reasons: (1) surrender of Barbie would "embarrass" the U.S. by revealing it had worked with a former Gestapo official, and (2) it would risk compromising procedures, sources and information. The latter concern was based on the fact that Barbie had recruited informants from within the German Communist Party as well as right-wing groups. At the time, the U. S. believed that French intelligence had been penetrated by Communists. Therefore, if Barbie were turned over to the French, the Communists

might learn about U.S. sources. This not only could compromise U.S. operations, but also might jeopardize the lives of the informants.[22]

The report was non-judgmental about the initial decision to work with Barbie.

> . . . I cannot conclude that those who made the decision to employ and rely on Klaus Barbie ought now to be vilified for the decision. Any one of us, had we been there, might have made the opposite decision. But one must recognize that those who did in fact have to make a decision made a defensible one, even if it was not the only defensible one. No one to whom I spoke in this investigation was insensitive to the horrors perpetrated by Nazi Germany, nor entirely comfortable with the irony of using a Gestapo officer in the service of the United States. They were, on the whole, conscientious and patriotic men faced with a difficult assignment. Under the circumstances, I believe that their choice to enlist Barbie's assistance was neither cynical nor corrupt.

Once the United States had reason to believe that Barbie was involved in war crimes, however, Ryan opined that there was no longer any moral or legal underpinning to the Army's actions. By lying to the State Department about Barbie, and then helping spirit him out of the country, Army personnel precluded the U.S. from making a fully informed decision about whether to honor France's request for extradition. According to Ryan, the Army's actions amounted to a criminal obstruction of justice. The question then became how to deal with – and prevent future occurrences of – such conduct.

Prosecution was not an option, since the five year statute of limitations on obstruction of justice had run. The obstruction had occurred in 1950 when Army officers – knowing that the State Department was considering an extradition request from France – falsely told the State Department that Barbie's whereabouts were unknown.

Ryan held out no hope that legislative or regulatory reforms would be effective.

> [G]iven the almost infinite variety of circumstances that an intelligence agency encounters in the course of its operations, it would be exceedingly difficult to

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> define a class of eligible informants based on their background or status. And any such line-drawing would require the comparison of . . . two fundamentally dissimilar considerations . . . : the need for information of strategic importance versus the repugnance of dealing with criminals, or former enemies, or brutal thugs, or officials of evil institutions. Even if there were a consensus on whom we ought not to deal with, any workable definition would be so broad as to be useless to those who must apply it, or so narrow that it would be of little practical significance.

He was optimistic, however, that during the thirty years since the United States had ended its relationship with Barbie, there had developed a greater sense of accountability on the part of the various intelligence agencies.[23] The report ended on an upbeat note, hopeful that persons faced with similar issues in the future would not assume that anything was permissible, including obstruction of justice, simply because it falls under the cloak of intelligence.

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These findings and conclusions – that the United States had worked with a Nazi Gestapo leader and that Army officers had obstructed justice on his behalf – would alone have been sufficiently shocking to make headlines, as had the allegations leading to the report. However, Ryan went further. In a letter accompanying the report, and addressed to the Attorney General, Ryan urged that the United States publicly apologize to France.

> It is true that the obstruction of efforts to apprehend and extradite Barbie were not condoned in any official sense by the United States Government. But neither can this episode be considered as merely the unfortunate action of renegade officers. They were acting within the scope of their official duties. Their actions were taken not for personal gain, or to shield them personally from liability or discipline, but to protect what they believed to be the interests of the United States Army and the United States Government. Under these circumstances, whatever may be their personal culpability, the United States Government cannot disclaim responsibility for their actions. Whether Barbie is guilty or innocent of the crimes with which he is charged will be decided by a French court. But whatever the verdict, his appointment with justice is long overdue. It is a principle of democracy and the rule of law that justice delayed is justice denied. If we are to be faithful to that principle – and we should be faithful to it – we cannot pretend that it applies only within our borders and nowhere else. We have delayed justice in

Lyons.

> I therefore believe it appropriate, and I so recommend, that the United States Government express to the Government of France its regret for its responsibility in delaying the due process of law in the case of Klaus Barbie. We should also pledge to cooperate in any appropriate manner in the further investigation of the crimes for which Barbie will be tried in France.
>
> This is a matter of decency and of honorable conduct. It should be, I believe, the final chapter by the United States in this case.

This recommendation had originally been in the report itself. However, after receiving an advance copy of the document, the State Department expressed some reservations.[24] In order to accommodate their concerns – and yet not back down on the need for an apology – Ryan proposed excising the recommendation from the report and instead making it a separate memorandum to the Attorney General. The State Department could then present the final report to the French, along with a formal note of apology which the State Department prepared. The Justice Department would withhold public release of the report and the memorandum until after the apology had been made.[25] DAAG Richard helped negotiate these accommodations with the State Department.[26]

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On August 12, 1983, the State Department presented the full report to the French chargé d'affaires in Washington, along with a note expressing the United States' "deep regrets over the actions taken in Germany . . . to conceal Barbie." Five days later, the cover letter, report and apology were made public. The story received enormous attention. It was page one in *The New York Times*, which printed Ryan's cover letter in its entirety, large excerpts from the report, and a statement by Ryan as its "quotation of the day." The Justice Department held a news conference and the presidential press secretary announced delivery of the note to the French.[27] Ryan was a

guest on two of the three major network morning news shows as well as on public television's *MacNeil/Lehrer News Hour*.

Although there was much praise for his scholarship, there was some debate over his conclusions. Conservative newspaper columnist Patrick Buchanan, who had no sympathy for Barbie, thought an apology unwarranted.

> Ironic, is it not? The U.S., which gave thousands of its sons freeing France from the grip of Adolf Hitler, finds itself apologizing to the French nation, many of whose citizens actively collaborated with Hitler.[28]

Liz Holtzman questioned Ryan's belief that the Americans working with Barbie prior to 1949 did not know of his true wartime activities: "[F]or me to accept that conclusion, I would have to believe either that these people were very unintelligent or that they wore the narrowest of blinders."[29] Some Jewish leaders shared her skepticism.[30] Other public figures did as well. Flora Lewis, foreign affairs columnist for *The New York Times*, found the report "unconvincing" in its conclusion that the obstruction of justice was limited to only about a dozen officers; she suspected others higher up in the administration were involved.[31] Her suspicions got some support from Eugene Kolb, an Army colonel who had supervised the Barbie matter in the early years. He opined that Ryan's inability to establish culpability higher up the chain might be due to the fact that decisions at the higher levels were often made during phonecalls, leaving no paper trail.[32]

For the most part, however, reaction to the report and the apology was positive. *The Washington Post* found the "candor and balance" of the report "a credit to the Justice Department and particularly to its principal author, Allan A. Ryan, Jr."[33] *Time* magazine called the report "remarkable."[34] *The New York Times* noted "[h]ow rare it is for a proud and powerful nation to

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admit shabby behavior." It described the report as one which "serves history and invites us to learn from it."[35] Newspapers in both France and Germany praised the work, with one German paper extolling the United States' "powerful and impressive capacity for democratic self-purging."[36] And the GAO, which later investigated the Barbie matter for Congress, fully endorsed Ryan's report.[37]

The decision to prepare the report had a significant impact on OSI. Strictly speaking, the report was not an OSI project; Ryan was no longer OSI Director when he prepared the document, though he relied on OSI staff exclusively to assist him. Nonetheless, Ryan had been chosen because of his OSI connection and the credibility he had helped establish for the office. He further enhanced that credibility by producing a document of unassailable scholarship and by directly taking on the issue of the government's moral and legal posture *vis à vis* Nazis in the post war period.

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When the next Nazi-era investigation needed to be conducted, there was no issue about whether the Department of Justice should be involved or which office should prepare the document. OSI was the natural and noncontroversial choice to do the investigations and to write reports on Robert Verbelen, Kurt Waldheim, and Josef Mengele, each discussed elsewhere in this report.[38] The quality of the Barbie and subsequent reports helped establish OSI as an essential resource for persons dealing with World War II issues.

As one result of that development, the Attorney General designated the OSI Director to represent the Justice Department on the Interagency Working Group (IWG), created to implement the Nazi War Crimes Disclosure Act of 1998 and the Japanese Imperial Government Disclosure Act of 2000. The IWG is charged with locating, identifying, inventorying,

recommending for declassification and making available all classified Nazi war criminal records, subject to certain specified restrictions. The restrictions include records related to or supporting any active or inactive investigation, inquiry, or prosecution by OSI and any records solely in the possession, custody or control of the office.[39]

The Barbie report has thus had the unforeseeable effect of subtly expanding OSI's recognized mandate. After the report was issued, it became a given that the mandate went beyond prosecutions and covered matters beyond U.S. borders.

As for Barbie, in 1987, after an eight-week trial in France, he was convicted of crimes against humanity and sentenced to life in prison.[40] He died four years later.

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1 1. Department of Justice Order No. 851-79, Sept. 4, 1979.

2. *See* p. 324, n. 7 re the role of the UNWCC.

3. Under French law the conviction lapsed after twenty years. "Exorcising Old Ghosts," *Time*, Feb. 21, 1983.

4. "France Had Data on Barbie in '63, Document Shows," by Paul Webster, *The Washington Post*, Feb. 16, 1983.

5. *Latin American Newsletters, Ltd.*, Mar. 9, 1973; *Latin American Newsletters, Ltd.*, Jan. 3, 1975.

In 1976, the Bolivian Ambassador to France was murdered. His alleged role in attempting to stop the French government from seeking Barbie's extradition was given by the terrorists as one reason for the assassination. "Envoy of Bolivia is Slain in Paris, " by Andreas Freund, *The New York Times*, May 12, 1976.

Apart from the French request, Peru sought to extradite Barbie on charges of currency fraud and smuggling. He was in Bolivian custody for almost 8 months before the Peruvian request was denied. "War Crimes Suspect Released by Bolivia," *The New York Times*, Oct. 30, 1973.

6. "Ex-Gestapo Official in Lyons is Linked to U.S. Intelligence," by Ralph Blumenthal, *The New York Times*, Feb. 8, 1983. "Canadian Says Barbie Boasted of Visiting U.S.," by Ralph Blumenthal, *The New York Times*, Feb. 28, 1983.

The Department of Justice report ultimately issued on Barbie casts serious doubt on the $1700 figure. It concludes it much more likely that Barbie was paid about $100 per month in food, cigarettes, ration cards and German currency.

7. "Klaus Barbie's American Connection" (editorial), *The Washington Post*, Mar. 1, 1983.

8. "Canadian Says Barbie Boasted of Visiting U.S.," *supra*, n. 6.

9. "Obligation to History," *The New York Times* (editorial), Mar. 3, 1983.

10. Feb. 24, 1983 letter to Attorney General Smith from Peter Rodino, Chairman of the House Committee on the Judiciary. For reports of the letter, *see e.g.*, "U.S. is Reported to Have Evidence That Barbie Visited in '69 and '70," by Ralph Blumenthal, *The New York Times*, Mar. 8, 1983; "Rodino Asks Probe of U.S. Aid to Seized Nazi," by Robert Cohen, *The Newark Star-Ledger*, Mar. 9, 1983.

11. Jan. 12, 2002 recollection of DAAG Richard.

12. Mar. 3, 1983 letter to Chairman Rodino from Attorney General Smith. *See also*, "U.S. is Reported to Have Evidence that Barbie Visited in '69 and '70," *supra*, n.10.

Martin Mendelsohn shared this view. He believed a congressional committee or specially

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designated commission should investigate the "sordid mess," leaving OSI to focus on finding and expelling Nazi war criminals. "Nazi Hunting for Nothing," by Martin Mendelsohn, *The San Jose Mercury News*, June 12, 1983. At the time he wrote the article, Mendelsohn served as legal counsel to the Simon Wiesenthal Center in Los Angeles; it is unclear whether he was speaking for the organization.

13. "U.S. Plans an Inquiry on Barbie," by Ralph Blumenthal, *The New York Times*, Mar. 15, 1983. The file containing Clark's request (#182-1359) was destroyed by the National Archives in due course (Jan. 1999) before this report was written.

14. "Justice to Probe Whether U.S. Protected Nazi," by Mary Thornton, *The Washington Post*, Mar. 15, 1983.

15. "U.S. is Reported to have Evidence that Barbie Visited in '69 and '70," *supra*, n. 10.

16. Recorded interview with Ryan, Dec. 13, 2002. All statements in this chapter concerning Ryan's positions come from this interview.

17. Neal Sher was named Acting Director of OSI while Ryan worked on the project.

18. During the period covered by the Barbie episode, intelligence work in Europe was handled by the CIC. Although the National Security Act of 1947 created the CIA, it was several years before the agency was fully operational.

19. The Army used an underground railroad of sorts, which had been established by others to evacuate defectors or informants who had come to Austria from the Soviet zone or Soviet bloc countries. The escape route, known as the "rat line," ran from Austria to Italy. There, for an exorbitant fee, a Croatian priest helped Nazis obtain passports from the International Red Cross and visas from various South American countries. One Army document described the priest as "a Fascist, war criminal, etc." Ryan came across no other instance in which the United States used the rat line.

20. Barbie traveled to the U.S. in 1969 and 1970, before OSI was formed. It was of course also before OSI entered tens of thousands of names to the Watchlist. *See* p. 297. In any event, a Watchlist posting of the name "Barbie" would have been useless since he traveled under the name Altmann.

21. The report, "Klaus Barbie and the United States Government: A Report to the Assistant Attorney General, Criminal Division, U.S. Department of Justice (1983)" along with supporting exhibits, can be found at www.usdoj.gov/criminal/osi/press/osi-reports/ (last visited Nov. 2008).

The great majority of documents reviewed for the report had been classified when executed and remained classified during the intervening years. The agencies involved, particularly the U.S. Army, declassified extensive amounts of material so that it could be included in the report's appendix. The declassifications were done in full consultation with Ryan. In the report's introduction Ryan expressed confidence that the material still classified did

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not in any way detract from the completeness of the report.

22. Statement of Eugene Kolb, who supervised and directed the Americans working with Barbie, on *The MacNeil/Lehrer News Hour*, Aug. 16, 1983.

23. The 1976 Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities of the United States Senate, 94th Congress, 2nd Session (generally referred to as "the Church Report"), had detailed abuses in counterintelligence by the FBI and CIA. This increased public awareness of the issues and led to new guidelines for domestic intelligence agencies.

24. The Department of Justice records do not contain the letter sent by the Secretary of State. However, extrapolating from an extant draft letter for the Secretary of State's signature, which was given to Ryan and attached by him to a memo to AAG Jensen, State was not opposed to the concept of an apology, but believed that it should not be included in the published report. They also wanted assurance that the French would receive a copy of the report before it was made public. Aug. 3, 1983 memo to AAG Jensen from Ryan re "Draft State Department letter re Klaus Barbie."

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25. Aug. 7, 1983 memo to AAG Jensen from Ryan re "Klaus Barbie – State Department Options."

26. Dec. 13, 2002 recorded telephone interview with Ryan.

27. "U.S. Says Army Shielded Barbie; Offers its 'Regrets' to the French," by Stuart Taylor, Jr., Aug. 17, 1983. Press Secretary Larry Speakes said "there was no interagency conspiracy to conceal Barbie from the French."

28. "Successors of Klaus Barbie," by Patrick Buchanan, *The New York Post*, Aug. 18, 1983.

29. "What Job Specifications Call for a War Criminal?" by Stuart Taylor, Jr., *The New York Times*, Aug. 21, 1983. Holtzman was no longer in Congress when the report was issued. She was serving as the District Attorney in Brooklyn, New York.

30. *See* statements of Julius Berman, Chairman of the Conference of Presidents of Major American Jewish Organizations, *The MacNeil/Lehrer News Hour*, Aug. 16, 1983.

31. "Barbie's American Connection," by Flora Lewis, *The New York Times*, Aug. 25, 1983.

32. *The MacNeil/Lehrer News Hour*, Aug. 16, 1983.

33. "The Barbie Case" (editorial), *The Washington Post*, Aug. 18, 1983.

34. "Delaying Justice for 33 Years: How 'the Butcher of Lyons' Got Secret U.S. Help and Protection," by Maureen Dowd, *Time* magazine, Aug. 29, 1983.

35. "Shame, Pride and Klaus Barbie" (editorial), *The New York Times*, Aug. 18, 1983.

36. The *Stuttgarter Zeitung*, as quoted in "Uneasy Europeans Praise U.S. 'Mea Culpa' in Klaus Barbie Case," by William Drozdiak, *The Washington Post*, Aug. 19, 1983.

37. *Nazis and Axis Collaborators Were Used to Further U.S. Anti-Communist Objectives in Europe – Some Emigrated to the United States*, (GAO/GGD - 85 - 66, June 28, 1985), pp. 21-22.

38. *See* pp. 310-329, 385-405.

39. OSI has interpreted the restriction narrowly and has waived it entirely in many cases.

40. France had abolished the death penalty in 1981.

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Robert Verbelen – Another Barbie?

The Verbelen assignment came on the heels of the Barbie report and in many ways was a natural outgrowth of the earlier document. The Barbie report shocked the public with news that U.S. intelligence services had worked with a known Nazi collaborator after the war. Verbelen raised the question of whether the Barbie case was unique.

During World War II, Robert Jan Verbelen commanded an SS security corps which terrorized the Belgian populace in retaliation for activities conducted by the Belgian underground. Acts of reprisal included the arbitrary arrest, beating, torture, imprisonment, deportation, and murder of innocent civilians. In 1947, a Belgian military court convicted Verbelen *in absentia* and sentenced him to death. At the time of this conviction, he was living in Austria and working under a pseudonym for the CIC.

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In 1983, the ADL filed a Freedom of Information Act (FOIA) request for documents about Verbelen. The responsive material established that Verbelen had worked for the CIC from 1947 to 1956, although the redacted documents suggested that CIC had been unaware of his true identity.

The ADL likened the matter to the Barbie revelations and petitioned the Attorney General to institute a "comprehensive examination" of working relationships between Nazi collaborators and U.S. intelligence services.[1] AAG Trott asked OSI to conduct a preliminary inquiry into the allegations "as expeditiously as possible."[2] This initial inquiry quickly confirmed the broad outlines of Verbelen's work for the United States – he ran a network providing intelligence and counterintelligence information – but it also raised a host of additional questions. Among them were when the Army had first learned Verbelen's true identity, whether there were other known

Nazi collaborators working for CIC, and whether the Army had protected him. After meeting with Director Sher and the historian working on the report, AAG Trott authorized OSI to expand its inquiry in order to resolve these issues.[3]

In June 1985, before OSI completed its investigation, the GAO issued a report dealing with some of the same matters. The GAO report had been commissioned by the House Judiciary Committee. Its purpose was to determine, in part, whether federal agencies helped Nazi war criminals and collaborators emigrate to the United States and/or conceal their backgrounds once they were admitted. The GAO concluded that U.S. intelligence agencies knowingly employed alleged Nazis and Axis collaborators who could provide information about Communist agents in western Europe.[4] The report stated that 12 such cooperators had emigrated to the United States, four with U.S. assistance. The report did not name the twelve, although the GAO provided the names to OSI.[5]

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OSI completed its own report in October 1986. Due to the amount of classified material cited, it took another year and a half before the report was cleared for release by the State Department, the CIA and the Army.[6] The June 1988 document concluded that the Army had been ignorant of Verbelen's true identity and full history until 1956, although it did know from the outset that he had been an SS officer and was trying to avoid arrest for his wartime activities. CIC severed ties to Verbelen for reasons independent of his past;[7] there was no evidence that the United States attempted to prevent his being brought to justice.

On the broader question of whether the U.S. systematically used known Nazi collaborators as intelligence sources, the answer was an emphatic yes.

For the CIC, its mission of protecting American security apparently

> justified the use of persons who were morally repugnant. A . . . CIC directive explained that, while it was preferable to use informants whose ideals were similar to those of the United States, this did not preclude "use of an informant of the 'stab-your-neighbor' type if it seems that there is definite value to be obtained thereby. It is realized that all types of characters must be used in order to obtain adequate coverage." Nearly all the former CIC agents interviewed in the course of this investigation acknowledged that membership in the SS or participation in questionable war-time activities did not disqualify a person from use as a CIC informant. Indeed, Verbelen's first CIC control agent maintained that it was advantageous to use such persons, not only because of their knowledge and experience, but also because their dependence upon the United States for protection ensured their reliability.[8]

OSI cited 13 unnamed individuals with Nazi backgrounds who had been used by the CIC in Austria, noting that in some instances the CIC protected the men from arrest.[9] The list was intended to be illustrative but not exhaustive.[10]

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The report did not have the impact of other OSI special projects. Perhaps this is because its most astonishing conclusion – that there had been a pattern of reliance upon Nazi collaborators – had been foretold by the GAO two years earlier. The matter had received wide media coverage at that time.[11] Moreover, Verbelen – unlike Mengele, Barbie and Waldheim – was not a household name. Therefore, news of his connection to U.S. intelligence services did not generate front page coverage or public outrage.

At the time the report was issued, Verbelen was living in Austria, writing espionage novels and working as a speaker and publicist for neo-Nazi organizations. He died in 1991; according to newspaper accounts, his funeral was attended by a muster of approximately 100 former SS troops and neo-Nazis.[12]

1 1. Dec. 16, 1983 letter to Attorney General Smith from Justin Finger, Director, ADL National Civil Rights Division.

2. Dec. 27, 1983 memo from AAG Trott to DAAG Richard and Director Sher; Dec. 27, 1983 memo from AAG Trott to Attorney General Smith.

3. Sept. 8, 2003 interview with OSI Chief Historian Elizabeth White, who worked on the Verbelen report; Mar. 30, 1984 memo to file from Sher re "Authorization to Conduct Full Investigation."

4. *Nazis and Axis Collaborators Were Used to Further U.S. Anti-Communist Objectives in Europe – Some Immigrated to the United States* (GAO/GGD - 85-66, June 28, 1985).

5. June 5, 1985 letter to Director Sher from GAO evaluator John R. Tipton. One of the twelve had already been prosecuted by OSI and another was under investigation. Two others were dead. OSI opened investigations on the remaining eight. For various reasons, none of these investigations led to prosecutions. Some of the subjects died before the investigation was complete; in other cases, there was insufficient evidence to take to court.

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6. Ultimately, the Army declassified all CIC files pertaining to Verbelen. The CIA was more problematic. The agency was concerned that release of some of the documents referenced in the report might compromise liaison relationships or cover assignments. In the end, as noted on p. 365, the Justice Department forewent publishing an appendix of supporting material because the CIA mandated redactions were so extensive.

7. They were concerned that at least one foreign intelligence agency knew about his work with CIC and they felt that his intelligence gathering capabilities were no longer of value.

8. "Robert Jan Verbelen and the United States Government: A Report to the Assistant Attorney General, Criminal Division, U.S. Department of Justice (1988)"can be found at www.usdoj.gov/criminal/osi/press/osi-reports/ (last visited Nov. 2008).

9. The Justice Department took the additional precaution of not revealing the names of the countries associated with these individuals when doing so might help a reader ascertain the informant's identity.

10. May 26, 1988 memo from John Keeney, Acting AAG for the Criminal Division to Mark Levin, Chief of Staff to the Attorney General, re "Response to Memorandum of May 11, 1988 regarding OSI's Verbelen Report."

11. *See e.g.*, "2 War Criminals had Official Help in Getting to U.S., Study Finds," by Ralph Blumenthal, *The New York Times*, June 29, 1985; "U.S. Aid in Emigration of Nazis Reported," by Don Shannon, *The Los Angeles Times*, June 29, 1985; "U.S., Nazis Traded Escape, Facts: GAO Study," AP, *The Chicago Tribune*, June 29, 1985; "U.S. Used Ex-Nazis Against Soviets,

Hill Told," by George Lardner, Jr., *The Washington Post*, June 29, 1985.

12. "Robert Jan Verbelen Dies at 79," by Ralph Blumenthal, *The New York Times*, Jan. 8, 1991.

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Josef Mengele – The Angel of Death

That a piece of Dr. Josef Mengele's scalp would wind up in the desk of the OSI Director is an irony that Mengele could hardly have imagined.

Josef Mengele was one of the most notorious Nazis to escape prosecution. He spent most of the war at the Auschwitz concentration camp, where he helped determine which inmates would go to the gas chambers and which, by virtue of their ability to work, could be used as forced laborers. Hundreds of thousands were sent to perish immediately. Many of those "spared" became subjects in gruesome and sadistic pseudomedical experiments, including castration, forced miscarriages and intentional exposure to fatal disease and radiation. Mengele's work at Auschwitz led many to refer to him as the Angel of Death.

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Mengele's doings and whereabouts after the war were the subject of much pop culture speculation.[1] The general consensus was that he was in Paraguay, living in splendor under the protection of its dictator, General Alfredo Stroesser.[2] He was therefore not on OSI's agenda.[3]

All that changed in January 1985, when the SWC released documents obtained from the Department of Defense under the Freedom of Information Act. The material indicated that Mengele might have been arrested and released in the American occupation zone of Vienna shortly after World War II, and that he might have applied for a Canadian visa in 1962.[4] This revelation set off a spate of news stories suggesting that Mengele had been in the United States.[5]

The story was particularly poignant as it came on the eve of the fortieth anniversary of the liberation of Auschwitz. The Canadian Prime Minister immediately called for an "urgent investigation." In Washington, the State Department's Assistant Secretary of State for Human Rights and Humanitarian Affairs announced that the Administration wanted the matter examined

by OSI.[6]

The Justice Department welcomed the opportunity.[7] The Attorney General called on OSI to compile all credible evidence on Mengele's current whereabouts as well as information concerning his travel in occupied Germany, his suspected flight to South America and the reliability of reports that he had visited the United States.[8]

The proposed inquiry differed from the Barbie and Verbelen reports in one significant respect: there needed to be a worldwide hunt for Mengele. In light of this, the Department of Justice assigned the U.S. Marshals Service to work with OSI. As originally conceived, OSI would focus on the historical issues: had Mengele ever been in the U.S.? had he worked with U.S. agents? The Marshals Service would take the lead in finding him.[9] Simon Wiesenthal, the West Germans and the Israelis were also committed to finding Mengele; all parties agreed to work cooperatively.

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The matter galvanized the public. Spurred on, perhaps, by millions of dollars in privately sponsored reward money,[10] citizens reported Mengele sightings as diverse as the Club Med in Bora Bora, a Chinese restaurant in Salt Lake City, and a nursing home in Massachusetts. After undergoing hypnosis, one citizen reported being tortured by a neo-Nazi group that included Mengele. A psychic offered to use her powers to help the government in its search.

Just as OSI was to begin its investigation, a Senate panel convened to hold hearings on the matter.[11] Allan Ryan was one of many speakers at a hearing filled with dramatic testimony. New York senator Alphonse D'Amato, citing CIA reports, testified that Mengele might have financed his life and travels as a fugitive in South America by trafficking in cocaine. The dean of the SWC passed on reports that Mengele was in Paraguay where he had taken up the hobby of

bee collecting. And a three-star general, Assistant Chief of Staff for Army intelligence, was strongly rebuked for not being fully informed on Mengele's post-war activity. The chair of the subcommittee opined that "[i]t is time the Army gave some priority to Josef Mengele."[12]

The Army took heed. That very day, a task force was established to assist the Department of Justice in its Mengele quest.[13] The Army agreed to supply "approximately 20 personnel" to conduct a "frame by frame" search of relevant microfilm reels.[14]

All parties presumed that Mengele was alive. Director Sher was optimistic that Mengele would be brought to justice.[15] The working assumption was that Mengele would be returned to Germany or Israel, each of which had an outstanding warrant for his arrest.[16]

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Unfortunately, there were no good leads as to Mengele's whereabouts. The break came when German law enforcement officials, acting on a tip, raided the home of a long-time employee of the Mengele family business in Germany.[17] They found a series of letters apparently mailed by Mengele from Brazil between 1972 and 1978, as well as letters from a Brazilian couple who had sheltered Mengele on the outskirts of Sao Paolo. A 1979 letter from the couple reported that Mengele was dead.[18]

Sao Paulo police raided the couple's home and found writings and diaries that the couple said were Mengele's. There were also pictures of an elderly man and of Rolf Mengele – Josef's grown son now living in Germany. The couple said Mengele had drowned in 1979 and they led the authorities to his putative grave. The Brazilians exhumed the body amid much publicity; they agreed to work with foreign experts to determine whether the remains were Mengele's.[19]

These developments created two independent strands to the investigation – determining whether (1) the writings, photos and possessions found in Brazil belonged to Mengele; and (2)

whether the exhumed body was his. OSI commissioned a handwriting analyst and a paper and ink document examiner to study the Brazilian writings. Both experts had worked on OSI cases before, analyzing whether World War II documents found in the Soviet Union were genuine. For the handwriting expert, the Mengele comparison was easier to make than most because the well-educated Mengele had ingrained writing habits by the time he joined the SS. The documents in the SS file and the Brazilian writings were so similar that they looked as if they were penned within weeks of each other.[20] The paper and ink analysis confirmed that the materials used had been available in Brazil during the 1970s when the diaries were purportedly written.[21]

A team of six American forensic experts traveled to Sao Paolo to study the remains. Three of the experts were chosen by the Marshals Service; the other three were selected by the SWC.

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At the time of the exhumation, the two most reliable methods for rendering a positive identification were x-ray and fingerprint comparisons. Neither seemed possible in this case. There were no known x-rays of Mengele from Germany or Brazil to compare with the corpse. Although there were fingerprints in Mengele's SS file, the corpse's skin had so decomposed that no print could be taken.[22] Nonetheless, in less than two weeks, the scientists made a preliminary assessment that the body was Mengele's. They expressed confidence "within a reasonable scientific certainty."[23]

Their confidence was based on a variety of factors, the most persuasive of which was an innovative West German photographic comparison in which pictures of the exhumed skull were matched on a video terminal to known photographs of Mengele in his SS file. The skull pictures were also compared to the photographs found in Brazil. Given 24 points of comparison, there

was overwhelming identity among the pictures. In addition, the corpse's gender, height and age at death were consistent with Mengele's. The bones in the upper jaw of the skeleton showed a gap between the front teeth which matched a known gap in Mengele's jaw; it also matched a denture found with the Brazilian belongings. German dental records showed that Mengele had fillings in his molars; so too did the teeth from the skeleton. Moreover, the fillings in the skeletal teeth were European rather than Brazilian.

The Brazilian and German governments, as well as the SWC, quickly embraced the scientists' conclusion. The U.S. Attorney General was also convinced. He announced that OSI would now focus on the historical portion of the case, determining whether Mengele had ever been in U.S. custody or had any relationship with U.S. officials.[24] Director Sher and the associate director of the U.S. Marshals service told Congress that the Department "accept[ed] the conclusion" that the exhumed body was Mengele's.[25] The Marshals' role in the investigation was ended.[26]

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In fact, not everyone was fully convinced that the body was Mengele's. There were several loose ends that Israel, the U.S. Army, and some within OSI and the Department of Justice wanted resolved. Most importantly, there was no evidence of osteomyelitis in the skeletal bones despite the fact that Mengele's SS records indicated that he had suffered from the disease. In addition, there was concern that a careless exhumation might have compromised the integrity of the bone samples. Moreover, the Brazilian diaries mentioned dental x-rays, yet no one had located these films to compare with the teeth in the coffin. The diaries also documented root canal work performed by someone named Gama in the town of Sama. However, there was no such town and the only dentist named Gama who could be found had no records paralleling the

entries in the diary.[27]

These unresolved issues raised two disturbing possibilities: (1) assuming Mengele had been living in Brazil, this was an elaborate hoax to connect him to an unrelated dead body in order to end the worldwide manhunt;[28] or (2) the scientists were right, but for insufficient reasons, and the case "would plague everyone forever."[29] Although the Attorney General's pronouncement had nominally ended inquiry into the identity of the corpse, the government kept the matter under review as part of its ongoing historical investigation. Thus, four months after the identity issue was supposedly resolved, DAAG Richard and Director Sher attended a meeting in Jerusalem with Israeli and German officials to discuss the need for more medical evidence. Director Sher attended a followup meeting the next month as well.[30]

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The most important breakthrough in the historical research occurred when OSI historian David Marwell reviewed a manuscript which Mengele had sent to his son.[31] Mengele described it as an "autobiographical novel." In it, the protagonist explained that he had been detained briefly by the Americans after the war. He also described how his discharge papers (issued under an alias) had later been altered to another pseudonym. Marwell assumed that Mengele was the protagonist and that none of the people mentioned in the "novel" were identified by their real names. He then extrapolated from the code used to alter the protagonist's discharge papers, in order to ascertain the true name of a Munich doctor mentioned as having been with the protagonist in an American POW camp. The extrapolation was not precise, however; several names were possible fits.

This was the pre-computer era. Marwell checked old Munich telephone directories at the Library of Congress. One of the possible names was listed in the 1950 phonebook. Marwell

then went to the National Archives and searched through a microfilm card index of medical officers who served in the German military. He found a match, and the Consulate in Germany located the doctor in a small German village. Reluctantly, he spoke with Marwell. He provided a plethora of previously unknown information about Mengele's post-war aliases and travels.[32] The military task force then located personnel files of those who could have come in contact with Mengele at the various places mentioned. The Army obtained current addresses for the men from the Veterans Administration.

OSI interviewed scores of these witnesses and learned that Mengele had been in custody in two separate POW camps immediately following the war. He had used an alias, at least initially, and U.S. forces never realized that he was a war crimes suspect. He was released in routine fashion in the chaotic conditions that existed at the time. He did not work with the U.S. authorities nor did he ever travel to Canada or the United States.[33]

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With the historical inquiry largely complete, a dramatic breakthrough was made in identifying the corpse. By happenstance, the U.S. Consul General in Sao Paolo was an erstwhile oral pathologist. The dental questions therefore particularly intrigued him. In a eureka moment, he realized that the reference to Sama, where Mengele's diary said he had his root canal work done, could be an abbreviation; the Consul General guessed it was shorthand for Santo Amaro:

> There was one last hopeless place we had not looked – the yellow pages of the phone book. And there it was, Dr. Hercy Gonzago Gama Angelo in Santo Amaro. My secretary called and asked for an appointment and she was told, "yes, but Dr. Gama does only root canals."

Dr. Gama's records established that he had seen a patient using a known Mengele alias on the dates listed in Mengele's diary. Mengele's precise recording of payments also dovetailed

with the doctor's records, and the patient's address was the home of the couple who had sheltered Mengele. Although Dr. Gama had no x-rays, he mentioned that the patient had been referred by a dentist named Kasumasa Tutiya. As the Consul General recalled:

> By then I was hyperventilating. . . . Mengele had told [the couple who sheltered him] that he went to a Japanese dentist because, he said, all Japanese looked alike and so Japanese could not tell one white from another. But he never told [them] the name of the dentist.
>
> When visited, Dr. Tutiya promptly found the dental charts . . . and, disproving Dr. Mengele's thesis, he also recognized photographs of the patient.
>
> . . . I then asked him sort of casually, "You wouldn't have any x-rays, would you?" And he said "Wait a minute" and came back 30 seconds later with eight dental films. . . . When the x-rays dropped on the table, I thought I had won the lottery.[34]

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Although there were no German x-rays with which to compare, the finding was key. The recent x-rays were consistent with dental information contained in Mengele's SS file and with the seven teeth found in the coffin. The dentist also confirmed that the bridges and crowns in the skull were his own work.[35] All but one of the dozens of dental appointments listed in Mengele's diary matched the dentist's records.

OSI pressured the Brazilians to obtain medical information from other doctors mentioned in Mengele's writings.[36] When they failed to do so, Marwell went to Brazil himself. Accompanied by members of the German, Brazilian and Israeli investigative teams, he found and interviewed various doctors. Everything he learned corroborated the diaries. One interview was especially pivotal as it connected the diarest with the pre-war Mengele. The diary discussed a 1972 surgical procedure. The Brazilian doctor recollected the case as one performed in his out-patient clinic; he was certain that he would not have kept the records. Nonetheless, he acceded to Marwell's request for permission to search the files.[37] Within 15 minutes the team found records

under the name of a known Mengele alias. The patient's medical history stated that he had had a hernia operation 48 years earlier. That would have been 1924. Mengele's SS file listed such an operation that very year. Marwell returned from Brazil convinced that "we have removed the basis for any reasonable doubt that Josef Mengele died in Brazil in 1979."[38]

There were, by now, plausible explanations for the osteomyelitis conundrum. Reading a German medical article from the 1920s, Marwell discovered that the term osteomyelitis in prewar Germany was broadly inclusive of various conditions, some of which would not be detectable on x-rays. In addition, a paleopathologist (expert in detecting disease in skeletal bones) examined Mengele's bones at OSI's behest. He noticed a previously undetected small circular depression on one of the bones which could have been caused by osteomyelitis as the Germans then defined it.[39]

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The Israelis, however, wanted more definitive proof.[40] For them there were "emotional and political reasons" which made it difficult to close the case.[41] They prevailed upon the Justice department to defer issuing a report until DNA analysis – then a nascent technology – could be performed.[42]

At OSI's request, the Consul General in Brazil obtained a judicial order authorizing release of part of the skeletal remains for examination in the U.S. (It was this which led to a piece of Mengele's scalp being held in Director Rosenbaum's drawer before being turned over to the FBI.) Although the FBI was unable to extract a sufficient quantity to create a DNA profile,[43] the British, using new techniques, could do so. However, there was no DNA from Josef Mengele with which it could be compared. The German, Israeli and American authorities proposed getting DNA from Mengele's former wife and his son Rolf, both of whom lived in Germany.

The comparison would establish whether the son was the biological offspring of the man buried in Brazil. If so, the body was Mengele's.

Unfortunately, the son and former wife refused to provide blood samples. The Israelis suggested retrieving DNA from saliva left on glasses in a restaurant, but were advised that this would violate German privacy laws. The German prosecutor proposed an alternative plan: Mengele came from a prominent family which operated the largest factory in the small town of Gűnzburg. The prosecutor directed two German policemen to go to Gűnzburg, find the local gravedigger, and ask him to point out where Mengele's father was buried. They were to warn the gravedigger to tell no one that they had been there.

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The policemen followed these directions and then waited several days. Nothing happened. The prosecutor had them return and repeat the drill with the town's retired gravedigger. They did so. Three days later a call came from Mengele's son: he and his mother would submit to DNA testing.

This was, as Marwell saw it, "a wonderful story about a guy [the German prosecutor] who understood psychology and politics and what a company town was all about." He knew that word would get to Mengele's family and that they would fear that the authorities were about to exhume their ancestors in order to do a DNA analysis. Giving blood would avoid the desecration of ancestral remains.[44]

Once the DNA comparison was made, there was no doubt that the body was Mengele's. Israel no longer objected to issuing the report and it was released in October 1992, almost eight years after it had been commissioned.

The OSI historian and attorney who had been given primary responsibility for preparing

the report had varying perspectives on the outcome. For the historian, there was satisfaction. This discrete project had overcome many hurdles and had resolved, definitively, a matter of important historical concern. The attorney was somewhat less sanguine. While he shared satisfaction in knowing that the historical issues were resolved, he had hoped that the report would lead to an expanded mandate for OSI. Had Mengele been found alive and brought to justice, the enormity of that accomplishment might have created pressure for OSI to assume an active role in searching for other prominent Nazis worldwide.[45] As it was, the focus remained on those who had come to the United States. For the most part, these were underlings.

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1 1. Among the most popularized depictions of him were as a mad scientist in both "Boys from Brazil" (1976 book, 1978 movie) and "The Marathon Man" (1976 movie).

2. H. Cong. Res. 235, introduced in the House of Representatives in Dec. 1981, called upon Paraguay "to apprehend and extradite Josef Mengele to stand trial in the Federal Republic of Germany." (The resolution was never reported out of subcommittee.) *See also*, "Nazi Germany's 'Angel of Death' Is Still at Large," by Jack Anderson, *The Washington Post*, July 18, 1984. In November 1984, Elizabeth Holtzman, then District Attorney in Brooklyn, N.Y., French Nazi-hunter Beate Klarsfeld, Menachem Rosenshaft, Chair of the International Network of Children of the Jewish Holocaust Survivors, and Bishop Rene Valero of the Brooklyn Catholic Diocese, met with various government officials in Paraguay to urge a nationwide manhunt for Mengele. "Paraguay Pledges to Hunt Auschwitz 'Angel of Death,'" *New York Post*, Nov. 23, 1984. Simon Wiesenthal also thought Mengele was in Paraguay. "Investigators Get New Lead on Location of Mengele," by John McCaslin, *The Washington Times*, May 22, 1985.

3. Sporadic assertions that Mengele was in the United States had brought him to the government's attention, but these rumors had been quickly discounted after minimal inquiry. Thus, in 1979, the Justice Department was alerted that Mengele might be on a flight from Paraguay to Miami. He was not. Three years later, a member of the Miami Jewish community reported that someone named Mengele had checked into a hotel with an elderly man. An OSI historian, fluent in German, flew down to speak with the travelers. The young man was Mengele's nephew; the elderly gentleman was unrelated.

In Dec. 1984, Holtzman, on behalf of the group which had traveled to Paraguay two months earlier (*see* n. 2, *supra*), asked the Attorney General to send OSI personnel to Paraguay to "observe and/or participate" in a Paraguayan investigation of Mengele's whereabouts. Dec. 20, 1984 letter from District Attorney Holtzman to Attorney General Smith. As events unfolded, this request became moot.

4. "Papers Indicate Mengele May Have Been Held and Freed After War," by Ralph Blumenthal, *The New York Times*, Jan. 23, 1985.

5. *See e.g.*, "Was Mengele Ever in L.A.?" by Rabbi Yale Butler, *B'nai Brith Messenger*, Feb. 1, 1985. Similar stories had been published even earlier. *E.g.*, "Angel of Death in Westchester," by Elli Wohlgelernter, *New York Post*, May 26, 1981.

6. "U.S. May Investigate Mengele Case," by Ralph Blumenthal, *The New York Times*, Jan. 24, 1985.

7. Jan. 28, 1985 memo to the Attorney General from AAG Trott re "Nazi War Criminal Josef Mengele."

8. Feb. 6, 1985 Department of Justice press release.

9. Statement of AAG Trott before the Senate Judiciary Juvenile Justice Subctee, Mar. 19, 1985.

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10. Over $3,000,000 was offered from various sources: Israel ($1,000,000), Friends of the Simon Wiesenthal Center ($1,000,000), *The Washington Times* ($1,000,000), the West German government ($300,000), Simon Wiesenthal ($50,000) and Beate Klarsfeld ($25,000). "Israel Offers $1 Million Reward for Mengele's Capture," *The New York Times*, May 8, 1985. When the SWC offered the first million in Feb. 1985, it was the highest bounty ever offered for a criminal. "Mengele: $1M bounty," by Gregory Katz, *USA Today*, Feb. 26, 1985.

11. Senator Arlen Specter, chair of the Juvenile Justice Subcommittee of the Judiciary Committee, felt that the matter was within his committee's purview since many of Mengele's victims had been children. "Senate Panel Will Conduct Hearing on Mengele," by John Kendall, *The Los Angeles Times*, Feb. 13, 1985.

12. "Senator Cites Possible Mengele Drug Link; Nazi May Have Financed Self by Selling Cocaine, D'Amato Testifies," by Robert Jackson, *The Los Angeles Times*, Feb. 20, 1985; "Army Task Force to Help Hunt Mengele," *Reuters*, *The New York Times*, Feb. 21, 1985; "Mengele Link to Drug Trafficking is Reported in C.I.A. Documents," by Ralph Blumenthal, *The New York Times*, Feb. 26, 1985.

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13. Feb. 20, 1985 memorandum for Chief of Staff, U.S. Army General Counsel from Secretary of the Army, John O. Marsh, Jr. re "Search for Information Concerning Dr. Mengele."

14. Memorandum of Understanding Between the Central Security Facility and OSI, Mar. 15, 1985. During the first seven months of its existence, the Army's Task Force reviewed hundreds of reels and indexed 272,319 entries. In that pre-computer era, the work took 21,766 hours (10.4 man years). Nov. 22, 1985 letter and enclosure from Thomas Taylor, Sr. Ass't to the Dep't of the Army General Counsel, to David Marwell, OSI Historian.

OSI historians were given unprecedented access to the military files. Ultimately, this became a cause for concern to the Army. Information serendipitously discovered by one of the OSI historians was relevant to another OSI investigation. When OSI requested access to the new material, the Army feared that OSI had exploited the situation. OSI denied the accusation, explaining that it was obligated to follow up on all relevant information. Oct. 22, 1985 memorandum from Marwell to Sher re "Meeting at Ft. Meade." *See also*, Jun. 13, 1986 letter from Sher to Lt. Col. Tom Johnson at Ft. Meade.

15. "U.S. is 'Optimistic' on Nazi's Capture," by Philip Shenon, *The New York Times*, Apr. 22, 1985.

16. "Mengele Can be Seized, Justice Dept. Says," *AP*, *The New York Times*, Mar. 20, 1985; Statement of AAG Trott, *supra*, n. 9.

17. The authorities were acting, in part, on information from a university professor who had overheard the employee boasting that he had helped funnel money to Mengele.

18. The letter suggested several reasons for not announcing his death, one of which was to cause Nazi hunters to waste time and money on a fruitless search. "Mengele Trail: Clues of

Paper, Then of People," by Ralph Blumenthal, *The New York Times*, June 23, 1985.

19. "Brazil is Seen Accepting Foreign Help on Mengele," by Alan Riding, *The New York Times*, June 10, 1985.

20. Recorded interview with forensic document analyst Gideon Epstein, Dec. 6, 2000. It helped too that Mengele's diaries and SS documents were all written in German. In the more typical OSI cases, involving camp guards, the defendants were barely literate and poorly educated during the war. Their original language often had a cyrillic alphabet. Thus, comparisons have to be made between often primitive cyrillic script on military documents and more sophisticated Latin alphabet handwriting in the U.S. For further discussion of this, *see* pp. 537-538.

21. July 31, 1985 FBI Report prepared by Dr. Antonio Cantu to Howard Safir, Associate Director for Operations, U.S. Marshals Service.

22. So many people had handled the artifacts found in the Brazilian home that there were no prints identifiable as Mengele's. "Brazil is Seen Accepting Foreign Help on Mengele," by Alan Riding, *supra*, n. 19. Of course even if his prints were on the artifacts, that would not establish the identity of the corpse.

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23. "Scientists Decide Brazil Skeleton is Josef Mengele," by Ralph Blumenthal, *The New York Times*, June 22, 1985.

24. Department of Justice press release, June 21, 1985.

25. "U.S. Justice Department Closes its File, Agrees Body in Brazil was that of Mengele," *AP*, *The Los Angeles Times*, Aug. 3, 1985.

26. Statement of Howard Safir, Associate Director for Operation, U.S. Marshals Service, before the Senate Subctee. on Juvenile Justice, Aug. 2, 1985.

27. July 16, 1985 memo to Sher from Philip Sunshine re "Mengele Investigation – Information on Death in Sao Paulo;" Oct. 30, 1985 Draft memo "For Discussion Purposes Only" from Sunshine to Sher re "Summary of Allegation that Mengele died on Feb. 7, 1979 in Sao Paulo, Brazil."

The paucity of corroborating medical evidence led the WJC to begin its own investigation of Mengele's death. "Jewish Group Questions Mengele Probe," by Jack Anderson and Dale Van Atta, *The Washington Post*, Jan. 29, 1986. Others also were skeptical that the body was Mengele's. *E.g.*, "Nazi-Hunter [Tuviah Friedman] Believes Mengele is Still Alive," by Dody Tsiantar, *The Washington Post*, June 15, 1985; "Why the Nazi Hunters Keep Pressing On," *U.S. News and World Report*, June 24, 1985; "Evidence is Shaky in Mengele's Death; Witnesses Conflict," by Jack Anderson, *Newsday* (Long Island), June 26, 1985; "One Piece of Mengele Puzzle Won't Fit," by Jack Anderson and Joseph Spear, *The Washington Post*, Feb. 25, 1986; "Grave Doubts," *The Daily News* (New York), June 10, 1985.

28. Oct. 30, 1985 Draft memo, *supra*, n. 27.

29. Recorded interview with former OSI historian David Marwell, July 17, 2003.

30. Mar. 6, 1986 memo to the Attorney General from AAG Trott re "Developments in the Mengele Investigation – Submission of Final Forensic Report;" Jan. 2, 1986 memo to Mengele Files from Sher re "Meeting in Jerusalem (Dec. 11-12, 1985)."

31. The son had sold it to a German publishing company, which allowed Marwell to read the manuscript at their offices in Germany.

32. Oct. 21, 1985 memo from Marwell to Mengele File re "Interview with Dr. Fritz Ulmann."

33. It is not the purpose of this chapter to detail, or even summarize, all the information ultimately included in OSI's report. Rather, this section is intended to give context to the preparation of the report. The report, "Josef Mengele: A Report to the Attorney General of the United States (1992)" can be found, with exhibits, at www.usdoj.gov/criminal/osi/press/osi-reports/ (last visited Nov. 2008).

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34. "Sleuths Uncover Dental Records, Clinching Mengele Identification," by Alan Riding, *The New York Times*, Mar. 28, 1986.

35. "Dogged U.S. Dentist-Envoy Finds X-Ray of Mengele," by Richard House, *The Washington Post*, Mar. 28, 1986.

36. Dec. 27, 1985 memo from Sher to DAAG Richard re "Update on Mengele Investigation."

37. The group with Marwell included two armed Brazilian policemen. Brazil had recently emerged from a period of brutal military dictatorship. Marwell suspected that the presence of the policemen was helpful in getting the doctor's acquiescence for the search. The policemen "gave us a lot of credibility." Recorded interview, July 17, 2003.

38. May 6, 1986 memo from Marwell to file re "Trip to Brazil," Apr. 16 - 23, 1986.

39. Dec. 18, 1985 memo to file from Sunshine re "Meetings with Dr. Ortner."

40. July 13, 1987 memo to file from Sunshine re "Current Israeli Position on Mengele – Additional Investigative Action to be Taken by Israel and the United States."

41. June 8, 1989 memo to the Attorney General from AAG Dennis re "Mengele Report."

42. July 1, 1988 memo to Sher from Marwell re "Mengele;" Dec. 12, 1988 memo from Sher to DAAG Richard re "Update on Mengele."

43. May 18, 1989 memo to DAAG Richard from Sher re "Mengele – Update on DNA Testing."

44. Information about the abortive effort to get a saliva sample comes from Director Rosenbaum. His source was Hans Klein, the prosecutor handling the Mengele investigation in Germany. By the time this report was prepared, Mr. Klein was deceased.

Details about the ruse at the cemetery come from a recorded conversation with David Marwell, July 17, 2003. His source was the two policemen sent to Gűnzburg. (As Marwell recalled the incident, the British were able to make a determination based solely on a comparison with the son. In fact, however, both the son and ex-wife were tested. DNA Analysis Report, p. 423 of Mengele Appendix.)

The DNA analysis was done with a blood sample rather than saliva. Although saliva is simpler to obtain, blood is preferable. Saliva, composed largely of water, must be analyzed quickly. Moreover, unlike blood, it cannot be permanently preserved.

45. Interview with Phil Sunshine, July 15, 2003.

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Looted Assets

Looting by the Third Reich was both prodigious and notorious; the regime plundered vanquished nations as well as individuals. Booty included gold bullion, coins, metals, paper currency, securities, jewelry, precious and semi-precious stones, books, artwork, religious objects, even dental fillings and crowns. Between 16 and 30% of all gold accumulated by the Third Reich was likely taken from individuals.[1]

The Nazis segregated gold from other assets. Most gold was smelted into bars and deposited in the Reichsbank, Germany's central bank at the time. Germany sold the majority of these gold reserves to neutral nations in order to acquire foreign currency for financing the war effort. The largest purchaser of gold from the Reichsbank was the Swiss National Bank.

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At the end of the war, the Allies sought to recover, from Germany as well as from the neutral nations, assets appropriated by the Nazis. Representatives of 18 Allied nations agreed at the Paris Reparations Conference to distribute assets both to the nations whose treasuries had been plundered and to war victims.[2]

They struggled, at the Conference and thereafter, to categorize the gold and set rules for its distribution.[3] In broad terms, "monetary gold" was defined as gold bars and coins; "non-monetary" gold was all else, including jewelry and dental work from camp inmates. They agreed that monetary gold should be returned to claimant countries in proportion to their losses. Non-monetary gold was to be liquidated and given to an international relief agency for humanitarian aid to the "non-repatriables" – Jewish and other homeless victims of the war.

Although the terms "monetary" and "non-monetary" were thus based on the form rather than the origin of the gold, shorthand descriptions often referred to the two categories as

"currency" and "victim gold." This fostered the false impression that the former was inevitably pure and the latter inevitably "tainted."

France, Britain and the United States established a Tripartite Gold Commission (TGC) to oversee the distribution of monetary gold. The procedure for identifying and collecting the gold was varied. While the Allies seized the reserves in defeated Germany, they could not do the same with neutral nations; they had to negotiate with these countries to determine the amount of gold involved.

Negotiations with the Swiss were especially contentious. They ultimately agreed to contribute $58 million to the TGC. This was approximately two-thirds of the $88 million that Switzerland acknowledged purchasing from the Reichsbank.

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The Swiss contribution, combined with gold relinquished by other neutral nations, gold purchased with the proceeds from liquidation of assets of German diplomatic missions, and gold bars found by allied forces in defeated Germany, gave the TGC approximately $260 million. It was all deemed monetary gold.

By 1996 (when the value of gold had increased almost tenfold), the TGC was ready to distribute the final $68 million in its coffers. That money, referred to as "residual gold," had been held back, in part to cover administrative expenses and contingencies. Before the final distributions were made, however, the matter of Nazi gold broke into the headlines.

It arose in relation to dormant Jewish bank accounts. In 1995, following the collapse of East Germany, the West gained access for the first time to records from the Stasi (East German secret police). Those records revealed the hitherto unknown fact that 13,000 Hungarian Jews had opened Swiss bank accounts in the hope of ransoming their lives from the Nazis.[4] This added

urgency to ongoing requests by the World Jewish Restitution Organization for access to dormant accounts.[5]

In response to calls by Jewish organizations, both the House and Senate banking committees held hearings. The Senate committee, aided by the WJC, serendipitously uncovered some significant and headline producing documents concerning Nazi gold. One set of documents suggested that the Truman administration had downplayed the amount of gold Switzerland purchased from the Reichsbank.[6] Although the State Department estimated that Switzerland had purchased almost $300 million worth of Nazi gold, the Secretary of State discounted the estimate when questioned by a skeptical member of Congress.[7] A second set of documents called into question the presumed purity of monetary gold. The documents suggested that the Reichsbank's wartime ingots contained gold smelted from the teeth of slaughtered Jews as well as from personal jewelry and other Jewish properties.[8]

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Inclusion of victim gold into the Reichsbank reserve did not prove that "tainted" ingots had been sold to Switzerland or other neutral countries. However, it did raise the possibility that this was so. It also raised the possibility that gold transferred by the Allies from the Reichsbank reserves to the TGC was tainted. Given that some of that gold remained on deposit, Jewish organizations asked that this residual account be distributed to survivors, rather than to central banks.[9]

In part to determine whether the U.S. should support this request, President Clinton ordered a formal inter-agency effort to investigate the U.S. role in the seizure, retrieval and disposition of Nazi assets.[10] The group's mandate included an investigation into "allied and neutral nation actions during and after the war to handle Nazi assets and dormant accounts."[11]

The president asked Under Secretary of Commerce Stuart Eizenstat to oversee the project, including a report to be written by the State Department Historian.[12]

The Justice Department was one of 11 government components asked to assist in the effort.[13] OSI served as the lead DOJ representative. It reviewed material already gathered by the WJC and the Senate Banking Committee and assumed some independent investigative efforts as well. Much as in its own case investigations, OSI studied wartime documents, post-war interrogations of SS officials, and trial transcripts from Nuremberg.[14]

The material established that from August 1942 until the war's end, the SS delivered valuables taken from victims in the concentration camps and extermination centers to the Reichsbank. This plunder included victim gold. The SS deposits were listed in an account under the name of Colonel Melmer, the SS officer who delivered the assets to the bank. The Reichsbank purchased the gold bullion and coins in the SS shipments at full value and credited the SS account at the Reich Ministry of Finance with the equivalent amount in Reichsmarks. The bank sent dental gold and other small items, such as wedding rings, to the Prussian mint for resmelting into ingots; they were then incorporated into Germany's gold reserves at the bank. Larger items were sent to the Berlin Pawn Shop which arranged for the more valuable items to be sold abroad for foreign currency; the remainder were sent to Degussa, a private refinery in Frankfurt, to be smelted and then added to the Reichsbank gold stocks. Some of these stocks were so impure that, after being seized by the Allies at war's end, they were refined and resmelted before going to the TGC.

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Given these facts, OSI concluded that it was most likely – though not certain – that victim gold had been included both in some wartime shipments to Switzerland and in the Allies'

postwar shipments to the TGC.[15]

Reichsbank gold was not the only victim loot purchased by the Swiss. OSI discovered documents showing that jewelry taken from Jews was routinely transferred (without resmelting or other alteration) by the Reich in diplomatic pouches to Switzerland. It was then retrieved by a German agent and traded for industrial diamonds vital to the war effort.[16]

The State Department completed a draft of its report in January 1997. It held the Swiss accountable for serving as bankers and financial brokers for the Third Reich and suggested that their role might have helped prolong the war. Moreover, it characterized Swiss postwar conduct as obstructive and asserted that their participation in postwar European rehabilitation was insignificant both materially and morally.

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Although these were serious charges, the draft stated that there was *no* evidence that looted gold had made its way to Switzerland or to the TGC. It also made no mention of the fact that the Truman Administration apparently misled Congress about the amount of German gold bought by the Swiss National Bank – a fact which had already been reported in the press.[17]

Director Rosenbaum was sufficiently concerned about these two points to alert Ambassador Eizenstat on February 6, 1997 of the disagreements between OSI and the State Department historian. Rosenbaum warned that he could not "in good conscience" recommend that DOJ sign off on the report in its current form. Eizenstat encouraged him to do whatever possible to assure the accuracy of the report.[18]

The report was scheduled to be released on March 25. In late February, OSI found a "smoking gun" document proving that victim gold had been sent to Switzerland and had been incorporated into the TGC account as well.[19] The document had been prepared by the U.S.

government before it transferred gold to the TGC.[20] It therefore established that the United States knew at the time that some portion of victim gold was being used to compensate looted treasuries rather than to help war victims.

By the time OSI found this material, the report was undergoing final revisions. On March 9, some conclusions from the soon-to-be-released document were leaked to the press. As described by unnamed sources, "the records do not establish definitively that so-called nonmonetary gold from personal effects was accepted by Switzerland."[21]

OSI believed the material it had found did provide such definitive proof. Rosenbaum protested to the State Department and, at their suggestion, submitted a written summary of his concerns and proposed revisions.[22] Ambassador Eizenstat convened a meeting to discuss the issues. At that meeting it was agreed that the report should be revised to make clear that victim gold *had* been sold to Switzerland and that it had been included in some of the ingots transferred by the Allies to the TGC.[23]

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While OSI welcomed those changes, it remained concerned that the report did not address what OSI saw as the Truman Administration's dissembling to Congress. Not only had Secretary Dean Acheson lent credence to the Swiss $88 million figure, so too had the president. In a letter to Senator Harley Kilgore, the president referred to that figure as the only amount which was "fairly provable."[24] Yet experts at both the State Department and the Treasury Department then believed the true amount to be much higher. The State Department's expert estimated the figure as $414 million; Treasury's expert, relying on ledgers from the Reichsbank, estimated $289 million.[25] Rosenbaum believed that it was essential to discuss the disparity between these studied estimates and the $88 million figure given by the Swiss and supported by the

Administration. He warned that failure to do so might yet cause him to recommend that DOJ withhold support for the report.[26]

In order to address Rosenbaum's concerns, Ambassador Eizenstat postponed publication of the report.[27] The postponement extended six weeks. When the report was finally issued in May 1997, all major points of contention had been resolved.

The report held the Swiss accountable for buying tainted gold and then lying to the Allies about the amount purchased.[28] (There was no evidence, however, that Switzerland knew at the time that victim gold was a component of the Reichsbank shipments.)[29] The report also revealed U.S. shortcomings -- its knowing transmittal of some "tainted gold" to the TGC and the Truman Administration's understatement to Congress of the amount of Nazi gold the government believed had been purchased by the Swiss.[30] Proof that tainted gold had been transferred to the TGC ended the myth that all looted assets collected at war's end had been distributed to victim assistance organizations. It further corrected the historical record by disentangling the terms "monetary" and "non-monetary" from the issue of victim loot.

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Ambassador Eizenstat credited OSI with "the discovery and thorough documentation" of the Nazi practice of converting victim gold into Reichsbank reserves. In addition to the historical importance of this information, he noted it as "a critical factor in . . . negotiations aimed at providing restitution and reparations to remaining victims of Nazi persecution."[31]

The report was titled a "Preliminary Study."[32] It focused largely, although not exclusively, on Switzerland. The State Department planned to prepare a separate study on the conduct of other neutral countries which had purchased Nazi gold as well as on allegations that

the Axis government of Croatia had transferred gold to the Vatican.[33] It hoped to publish this second report before a scheduled December 1997 conference in London on Nazi gold.

OSI was not involved in research for, or drafting of, the supplemental report, but it did receive a copy for comment. It recommended several changes which were ultimately incorporated into the report.

The supplemental draft noted that two private financial institutions in Germany, the Dresdner and Deutsche banks, sold gold on the Turkish free market; it cited a British report which opined that this gold had been looted from European central banks. OSI was able to document that at least some of the gold came from victims.[34]

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OSI also urged revision of the draft's contention that trade with Germany amounted to support of the Third Reich. OSI noted that trade had to be placed in context, including consideration of the amount of trade these same countries were doing with the Allies.[35] OSI opined that the draft was unduly harsh on Argentina.[36] These comments were of sufficient import to cause the State Department to postpone the release date until some time after the London conference.

The conference, with participants from 41 nations, dealt with the question of residual gold. In response to the revelation in the Preliminary Study that some of that gold was tainted, several countries agreed to contribute money due them to a fund for Holocaust survivors. While not all the residual gold was so distributed, a portion of it did go to needy survivors.[37]

Coincidently, just as the conference opened, a privately-held cache of microfilmed Reichsbank records became accessible.[38] The records belonged to an Austrian concentration

camp survivor who, after the war, did extensive research on the gold trade of the Reichsbank. His private collection included a report about the Melmer account by Albert Thoms, the wartime Reichsbank Director. At Ambassador Eizenstat's request, OSI reviewed this newly-available material. Based on Thoms' figures, OSI calculated that the SS had deposited over $4.6 million dollars worth of gold into the Melmer account – much more than previously had been provable.[39]

OSI also examined the records of the private smelting firm used by the Reichsbank to transform large gold articles in the SS shipments into bullion. Although the firm had intentionally destroyed most pertinent documents, enough was extant to show that the firm was aware that the gold came from Jews.[40] Both the revised Melmer figures and the smelting company's complicity were included in the final report. Ambassador Eizenstat described the recalculation of the Melmer account as "the most dramatic" finding of the study.[41]

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OSI's contribution to the report is evident in other ways as well, especially in the report's nuanced distinctions among the neutral nations. OSI's information about victim gold for sale on the Turkish free market led inexorably to the conclusion that Turkey was more involved in the marketing of victim gold than had previously been known. OSI's analysis of Argentine gold records showed that Argentina was less involved; indeed, it had purchased no Nazi gold at all. The State Department acknowledged that OSI's analysis of these Argentine documents was crucial.[42]

The Supplemental Study was released in June 1998.[43] It did not, however, end OSI's involvement on matters relating to Nazi assets. While working on the gold studies, OSI became

involved in additional asset issues.

According to a post-war agreement among the Allies, looted cultural items were to be returned to their country of origin, and, if possible, to their rightful owners. At an early (December 1996) meeting of the interagency working group on the Preliminary Study, one of the participants mentioned a 1940s memo from an Army archivist suggesting that the Library of Congress may have inappropriately acquired books looted by the Nazis. Director Rosenbaum asked an OSI historian to look into the matter.

OSI's research established that there was no basis for the allegation.[44] On the contrary, the Library had adopted and followed detailed regulations to ensure that it did not obtain or retain any books whose provenance could be ascertained. If the provenance was undeterminable and the material had national, cultural, or religious significance, the regulations called for distribution to an appropriate institution. Of the more than 3,000,000 looted books gathered by the U.S. government, two and a half million were distributed according to these guidelines. Since it was not possible to identify the owners or country of origin for the remaining half million, they were given to the Commission on European Jewish Cultural Reconstruction (JCR), an organization comprised of American Jewish religious leaders, scholars and educators. The JCR distributed them to centers of Judaism and Jewish learning throughout the U.S. and Israel. At the JCR's direction, several thousand volumes went to the Library of Congress.[45]

The second asset forfeiture issue that spun off from OSI's work on Nazi gold involved looted artwork. In February 1997, a source informed the office of previously classified documents from the Office of Strategic Services (predecessor to the CIA) listing artworks the

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OSS suspected had been stolen by the Nazis. The list, compiled shortly after the war, drew upon the memories and records of theft victims as well as art dealers who sold works on behalf of the Nazis. It also referenced captured German correspondence, receipts, museum accession reports, and inventories.

Despite these extensive sources, there were limitations to the OSS listings. Titles were often imprecise, either because the work was untitled or because the true title of the work was unknown to the person providing the information to the OSS. Thus, there were a number of "Still Life," "Portrait" and "Landscape" entries. In addition, artists often created multiple works with the same title and the OSS list rarely contained distinguishing information, such as canvas dimensions. OSI pared down the list and then reviewed books, websites, and archival material (including post-war claims filed by private citizens) in an attempt to match works on its list with holdings in the U.S. and abroad. The office was particularly interested in determining whether any looted artwork was held at the National Gallery of Art. Ultimately, OSI identified four possibly looted pieces at the museum.[46] The National Gallery did additional research and determined that one of the four had indeed been taken from a Jewish family. The museum returned the painting to the owner's heirs amid much public fanfare. In announcing this decision, the museum took sole credit for determining the provenance.[47] The Department of Justice issued its own statement crediting OSI with raising the issue.[48]

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Since the gold studies, OSI has periodically been called upon to share its expertise on asset issues.[49] OSI's work in this area is yet another example of how the government has broadened OSI's mandate and how the office has helped the public understand the history of Holocaust. To the extent that OSI's scholarship has helped bring about restitution, it has also

shaped that history.

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1. This was the estimate of historians at a Dec. 1997 conference on Nazi gold in London. "Victim Fund Gets Pledges from U.S. and Britain," by Alan Cowell, *The New York Times*, Dec. 3, 1997.

2. The conference convened in 1946. The 18 nations were Albania, Australia, Belgium, Canada, Czechoslovakia, Denmark, Egypt, France, Greece, India, Luxembourg, the Netherlands, New Zealand, Norway, South Africa, the United Kingdom, the United States, and Yugoslavia. The U.S.S.R. had earlier waived any claim to the assets.

3. The evolving definitions are discussed in the State Department's Preliminary Study, fully cited *infra*, n. 32, at pp. 171-177, 179-81.

4. "Jews Look to Swiss to Reclaim Nazi Plunder," by Jay Bushinsky, *The Chicago Sun-Times*, Sept. 15, 1995. *See also*, "Swiss Banks Undervalue Unclaimed Holocaust Accounts," by Batsheva Tsur and Marilyn Henry, *The Jerusalem Post*, Feb. 9, 1996; "Quest for Nazis' Loot; Dispute Focuses on Role of Swiss Banks," by David Ottaway, *The Washington Post*, Dec. 8, 1996.

5. The World Jewish Restitution Organization was founded in 1993. It works for the return to the Jewish people of heirless and unclaimed properties of communities, associations, organizations and individuals; the payment of compensation where restitution is impossible; and the restitution of private property and compensation to Holocaust survivors.

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6. "Quest for Nazis' Loot, Dispute Focuses on Swiss Banks," *supra*, n. 4.

7. July 31, 1946 letter from Acting Secretary of State Acheson to Congressmen Joseph Baldwin, July 3, 1946. Portions of the letter are quoted in the State Department's Preliminary Study, *infra*, n. 32, at pp. 86-87.

8. Bank's Gold Inspires Tales of Plunder," by Clyde Haberman, *The New York Times*, Sept. 27, 1996; "Heat on Geneva to Return US $5b in Nazi Gold Loot," by Neil Behrmann, *Business Times* (Singapore), Sept. 12, 1996. The documents led New York's Senator Alphonse D'Amato, chair of the Senate banking committee, to suggest that the amount of Swiss payments should now be renegotiated. "Time to Settle the Score," by Marilyn Henry, *The Jerusalem Post*, Nov. 1, 1996.

9. "U.S. to Launch 2nd Inquiry into Fate of Gold Stolen from Jews," by Marilyn Henry, *The Jerusalem Post*, Oct. 13, 1996.

10. "U.S. to Launch 2nd Inquiry into Fate of Gold Stolen from Jews,"*supra*, n. 9.

11. Oct. 30, 1996 letter from President Clinton to WJC president Edgar Bronfman.

12. At the time Eizenstat was serving as Under Secretary of Commerce for International Trade and Special Envoy of the Department of State on Property Restitution in Central and Eastern

Europe. Shortly after the report was released, he became Under Secretary of State for Economic, Business & Agricultural Affairs.

13. The 11 were: CIA, the Departments of Commerce, Defense, Justice, State and Treasury, the FBI, the Federal Reserve Board, the National Archives and Records Administration (NARA), the National Security Agency (NSA) and the U.S. Holocaust Memorial Museum.

14. Several German bank executives were charged at the war's end. As noted earlier (*see* p. 7), Walter Rockler, OSI's first Director, had been on the bank prosecution team at Nuremberg. Among the defendants he prosecuted was the vice-president of the Reichsbank.

15. Feb. 2, 1997 memo from OSI Chief of Investigative Research Elizabeth White to Director Rosenbaum re "Evidence of SS-Looted Persecutee-Origin Gold in the TGC 'Gold Pool;'" Jan. 29, 1997 e-mail from White to Rosenbaum re "Monroe/Nuremberg Testimony."

16. Industrial diamonds are used, among other things, to shape artillery shells, to facilitate the manufacture of wire, to produce anti-aircraft artillery shell fuses, to cut and test tank armor, and to machine differential gears for vehicles. "The Conversion of Looted Jewish Assets to Run the German War Machine," by Michael MacQueen, *Holocaust and Genocide Studies* (Spring 2004).

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17. "Quest for Nazis' Loot, Dispute Focuses on Role of Swiss Banks," *supra*, n. 4.

18. Mar. 17, 2001 letter from Rosenbaum to State Department Historian William Slany re "March 7, 1997 Draft Interim Report on 'Nazi Assets.'"

19. The document showed that gold from the Melmer account was added to a 1943 smelting of looted Dutch guilders. Eighty-three percent of the bars resulting from this smelting were eventually traded to the Swiss National Bank. In addition, a 1944 smelting of gold bars from the Netherlands included six gold bars that the Reichsbank had received from the SS. OSI determined the numbers given the bars after being resmelted and confirmed that six bars with these same numbers were transferred by U.S. forces from Germany's captured gold reserves to the TGC.

20. The report was prepared by the Foreign Exchange Depository of the U.S. Military Government in Germany.

21. "U.S. Can't Tie Holocaust Victims' Jewels, Dental Gold to Swiss," by Laura Myers, *AP*, Mar. 9, 1997.

22. Mar. 10, 1997 letter to Amb. Eizenstat from Rosenbaum; Mar. 11, 1997 letter from Rosenbaum to State Department Historian Slany.

23. Mar. 12, 1997 e-mail from Rosenbaum to DAAG Richard re "Nazi Assets: Important Update."

24. July 3, 1946 letter from President Truman to Senator Kilgore.

25. State Department's Preliminary Study, *infra*, n. 32, at p. 66.

26. Mar. 17, 1997 letter from Rosenbaum to State Department Historian Slany.

27. Eizenstat's public statements at the time attributed the delay to the need to review recently declassified documents. "U.S. Report to Sting Swiss: New Documents to Shed Light on Neutral Countries' Links to Nazi Loot," by Eric Greenberg, *The Forward*, Mar. 28, 1997. However, he acknowledged in his memoir that OSI was the precipitating cause. *Imperfect Justice, Looted Assets, Slave Labor, and the Unfinished Business of World War II*, by Stuart Eizenstat (Public Affairs), p. 101. *See also*, Mar. 20, 1997 e-mail from Rosenbaum to OSI attorney William Kenety re "J. Barnett - Reply."

28. The report focused primarily on the Swiss purchase of gold bars; it did note, however, (pp. 170, n. 43 and 180), OSI's discovery that victim gold had been transferred by diplomatic pouch to Switzerland.

29. The Swiss insisted that they had no such knowledge. *See e.g.*, "Swiss: No Victims Gold but Admit Profiting from Nazis," *Newsday* (New York), Dec. 14, 1996; "Three Nations Agree on Freezing Gold Looted by Nazis," by David Sanger, *The New York Times*, Feb. 4, 1997.

The report presumed, however, that the Swiss did know that some portion of the gold was looted from occupied countries. (Such knowledge would have come from public knowledge about the low level of the Reichsbank's gold reserves and repeated warnings from the Allies.)

30. The report shied away from holding Secretary of State Acheson accountable for his statement that "there was no reasonable evidence that Switzerland had purchased $300,000,000 worth of gold looted by Germany." The report stated that Acheson's letter had been drafted by an underling and "presumably was not seen by Acheson." There was no basis given for this presumption. "Preliminary Study," *infra*, n. 32, at p. 87.

31. Sept. 28, 1997 letter from Amb. Eizenstat to Attorney General Reno.

32. "Preliminary Study on U.S. and Allied Efforts To Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II." The report can be accessed at www.state.gov/www/regions/eur/holocausthp.html#rpt (last visited Sept. 2008).

33. Technically, only Switzerland and Sweden were "neutral" countries during the War. Spain, Portugal, Turkey and Argentina were "non-belligerent" but not neutral. However, for the sake of simplicity, the report referred to them all as "neutrals" when mention of them was made collectively.

34. An OSI historian recalled from her research for the Preliminary Study that the Reichsbank sold Melmer account gold to the Deutsche and Dresdner banks. Apr. 1, 2004 e-mail from Chief Historian Elizabeth White to Judy Feigin re "I got it, I think." An OSS document unearthed by the SWC added further detail included in the final report. It explained that the German

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government used victim gold to finance overseas operations and to influence foreign nations' diplomats. Apr. 1, 2004 e-mail from White to Feigin re "query."

35. Sept. 30, 1997 letter to Bennett Freeman, Senior Advisor to the Under Secretary of State for Economic, Business, and Agricultural Affairs, from DAAG Richard.

36. In fact, German investment in, and trade with, Argentina was dwarfed by the British interests there. Moreover, the draft wrongly suggested that Argentina could have been made to return all German assets in its territory. Since Argentina joined the Allies before war's end and signed the 1945 Act of Chapultepec, it acquired exclusive rights to German assets in its territory. (More significant than these trade figures is the fact that Argentina accepted more Jewish refugees between 1933 and 1945 than any other country in the Western hemisphere.)

OSI was especially well poised to discuss these issues since its then-Chief of Investigative Research had authored a book which covered this subject. *German Influence in the Argentine Army, 1900 to 1945* by Elizabeth White (Garland Pub.).

37. Two and a half years after the conference, only $21 million had been dispersed. The effort was hampered in part by infighting over who had the moral authority to distribute the funds. "Half of Nazi Victims Aid Funds Not Yet Distributed," by Marilyn Henry, *The Jerusalem Post*, June 4, 2000. The TGC itself was disbanded in 1998. "International Panel Closes Books on Gold Seized by Nazis in War," by Craig Whitney, *The New York Times*, Sept. 10, 1998.

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38. "Microfilms Trace the Path of Nazi Gold Movements," by Eric Frey, *The Financial Times*, Dec. 2, 1997.

Reichsbank records from the Precious Metals Department had been located earlier at the National Archives. They did not include information about the Melmer account, and therefore were not especially helpful in preparing the report on Nazi gold. Nonetheless, their discovery was wonderfully serendipitous.

The records had been microfilmed by the Allies; the Reichsbank no longer had the originals. An OSI historian found a receipt at the Archives showing that a microfilm duplicate set of these records (comprising 65 reels) had been transferred in 1948 from the U.S. Army to the Treasury Department. However, the Treasury Department informed OSI that it no longer possessed the microfilm.

While reviewing Dutch bank records at the Archives (to determine the extent of Nazi looting from Dutch reserves), an OSI historian and a NARA archivist came upon an unmarked box. It contained 65 rolls of microfilm – unmarked, not on spools, and wrapped with rubberbands.

39. Dec. 27, 2001 letter to Amb. Eizenstat from Deputy Attorney General Eric Holder re "Additional Department of Justice Research on Nazi Gold." (Only weeks earlier, a Swiss commission studying the issue estimated that $2.5 million and "possibly" as much as $4 million flowed through the Melmer account. "Swiss Say Nazis Stole More Victim Gold than Believed," by Alan Cowell, *The New York Times*, Dec. 2, 1997.)

After the supplemental report was issued, another historian pointed out that OSI had

misinterpreted some of the information in the Thoms' study. While that miscalculation caused the $4.6 million figure to be higher than it should have been, the error is likely inconsequential. The Thoms' report did not reference millions of dollars worth of gold taken from Jews before they were sent to the camps. The records for this gold are incomplete and it therefore cannot be ascertained whether these additional millions were deposited in the Melmer account. However, it is likely that they were since there is sufficient documentation to establish that they were shipped to the SS for that purpose. "The Disposition of SS-Looted Victim Gold During and After World War II," by Elizabeth White, *Amer. U. Int'l L. Rev.*, vol. 14, No. 1 (1998), p. 218, n. 12.

It should be noted that the $4.6 million figure came from Thoms' study, rather than the Reichsbank records. They, like the records found at the Archives, did not have material on the Melmer account. However, Thoms had apparently referenced the now-missing Melmer records when he prepared his report.

40. Dec. 21, 2001 letter from Rosenbaum to Amb. Eizenstat.

41. "A Lingering Ledger of Grief," by Marilyn Henry, *The Jerusalem Post*, June 8, 1998.

42. Preface to the Supplemental Study, *infra*, n. 43, at p. xxviii. The Argentine gold records were given to the SWC by the Argentine government in 1996.

43. "U.S. and Allied Wartime and Postwar Relations and Negotiations with Argentina, Portugal, Spain, Sweden, and Turkey on Looted Gold and German External Assets and U.S. Concerns About the Fate of the Wartime Ustasha Treasury" (Supplement to Preliminary Study on U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II.) The Supplemental Study can be found at www.state.gov/www/regions/eur/holocuasthp.html#rpt (last visited Sept. 2008).

44. The historian studied records from the Library of Congress and the U.S. military government in Germany.

45. The precise number the Library obtained is uncertain because some were sent by the Library to other institutions. In no event was the number retained by the LoC greater than 21,000.

Although the matter of looted books was not included in either governmental report, an article on the topic written by an OSI historian assures that it is now part of the public record. "Returning Jewish Cultural Property: The Handling of Books Looted by the Nazis in the American Zone of Occupation, 1945 to 1952," by Robert G. Waite, *Libraries and Culture*, Vol. 37, No. 3, Summer 2002. (OSI had proposed including the information in the Preliminary Study. Mar. 11, 1997 letter from Rosenbaum to Slany.)

46. Sept. 29, 1998 letter to Under Sec'y Eizenstat from DAAG Richard; Dec. 2, 2003 e-mail from Rosenbaum to Judy Feigin re "Re Query."

47. "National Gallery of Art to Return Painting to Heirs as a Result of Gallery Research and Web Posting," National Gallery of Art News Release, Nov. 20, 2000; "National Gallery to Return a

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Family's Painting Looted by the Nazis," by Celestine Bohlen, *The New York Times*, Nov. 21, 2000; "Museum to Return Plundered Painting,"by Michael Dobbs, *The Washington Post*, Nov. 21, 2000.

48. "U.S. Told Museum in 1998 Canvas Could be Nazi Loot," by Joan Uralla, Reuters, Nov. 22, 2000; "Agency Says Museum Took Too Long to ID Nazi Loot," CNN.com-arts& style, Nov. 23, 2000, posted at 11:17 a.m. EST. *See also*, "Who Found Looted Still Life?," by Paula Amann, *Washington Jewish Week*, Nov. 30, 2000.

49. Several examples:

1. Hungarian Jews and their descendants whose personal property and valuables were loaded onto a "Hungarian Gold Train" by the pro-Nazi Hungarian government during World War II sued the U.S. government because the U.S. Army had captured the train in May 1945 and shipped its contents to Salzburg. The plaintiffs alleged that the Army and individual members thereof improperly expropriated much of the cargo. *Rosner et al., v. U.S.*, Civ. No. 01-1859 (S.D. Fl.). The lawsuit was defended by another section within the Department of Justice. OSI's assistance included participation in court-ordered mediation of the case and the preparation of a methodology to calculate payments if the case settled. Nov. 1, 2004 memo to Daniel Meron, Principal Deputy Ass't Attorney General from Rosenbaum and Elizabeth White re "Proposed Formula for Arriving at a Settlement in Rosner v. United States." The court approved a $25 million settlement in Sept. 2005.

2. OSI helped prepare the Department's response to a draft ABA resolution urging the U.S. to ratify the 1954 Hague Convention Concerning the Protection of Cultural Property in the Event of Armed Conflict. Jan. 10, 2001 memo to AAG James Robinson from Director Rosenbaum re "ABA House of Delegates Resolution Concerning the Protection of Cultural Property."

3. OSI was asked to comment on drafts of a report prepared by the Presidential Advisory Commission on Holocaust Assets in the United States. The final report was issued in Dec. 2000. It can be found at http://www.pcha.gov (last visited Dec. 2008). The report specifically acknowledged the contribution of OSI historian Robert Waite for his research on looted books and OSI attorney William Kenety for his investigation into looted art.

4. OSI's input was sought by the Department of Justice's Office of Legislative Affairs on the appropriate U.S. response to Germany's handling of Holocaust-era insurance claims. Nov. 7, 2001 e-mail from Rosenbaum to Adrien Silas re "Draft Testimony of Amb. Bindenagel."

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OSI Goes International

Germany

Germany's relationship to OSI has two crucial aspects: its assistance in investigating cases and its willingness to accept into its territory persons prosecuted by OSI. In considering each of these issues, it should be remembered that for the first ten years of OSI's existence, Germany was a divided country. The German Democratic Republic (East Germany (GDR)) and the Federal Republic of Germany (West Germany (FRG)) dealt with the U.S. separately. East and West Germany reunited in 1990.

Investigative Assistance

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Before they reunited, East and West Germany had separate archives. OSI's access to material from the East German archives was limited. The Office of the General Prosecutor of the GDR forwarded OSI's requests to the Stasi-controlled National Socialist Archive. That organization first made a political determination as to whether to provide assistance. If they chose to do so, the material was retrieved and then reviewed by the Stasi before it was sent to the Department of Justice.[1] OSI lacked direct access to the archives and could not gather background information unrelated to a specific subject.

Most of the World War II records were, however, in West Germany. The two facilities there most essential to OSI were the Berlin Document Center (BDC) and the Ludwigsburg Zentrale Stelle. The BDC material includes Nazi party (NSDAP) membership cards, NSDAP membership applications, disciplinary actions against NSDAP members, SS officer files, SS racial purity records (containing information on SS men who were married and those seeking permission to marry), SS enlisted men records, SA (storm trooper) files, immigration and

reimmigration files (on individuals of ethnic German origin who immigrated or re-immigrated to Germany), applications for membership in German cultural organizations, court records, and registries of physicians and teachers. Some of these files include photographs, handwriting, and fingerprints as well as wartime activities and place of operation.

Until 1994, OSI's access to the BDC was assured, since it was under U.S. control.[2] Control was then ceded to the German government. In negotiating the transfer, the State Department consulted with OSI to ensure that the Justice Department's investigative and prosecutorial interests were protected.[3] Germany agreed to microfilm all BDC documents for the U.S. National Archives and guaranteed the U.S. access, in perpetuity, to the original documents for forensic and judicial purposes.[4]

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By contrast, the Ludwigsburg Zentrale Stelle is an entirely German operation. Established in 1958, it is the repository for records from war crimes trials held throughout Germany.

It was not initially clear that the Ludwigsburg material would be as readily available to OSI as was the BDC information. Mutual legal assistance agreements between the U.S. and Germany provide the U.S. access to German material for use in *criminal* prosecutions. OSI cases are *civil* matters. Nonetheless, West Germany from the outset opted to treat OSI's cases as if they were criminal, reasoning that the substance of the cases (often murder or accessory thereto) would be treated criminally in Germany.[5] This flexibility has allowed OSI the full range of assistance available in criminal proceedings, including access to criminal trial records (a source of witnesses and corroborating testimony) and compelled testimony from reluctant German witnesses. As one German Justice Ministry official acknowledged, this piece of legal

legerdemain had a weak foundation; its maintenance required both the political good will of the FRG and OSI respect for FRG criminal procedures.[6]

German good will was evident in other ways as well. In several key areas, they allowed the Department of Justice to avoid the often cumbersome and time-consuming diplomatic process for handling matters of judicial assistance. Thus, as early as 1982, the West Germans allowed U.S. Embassy personnel to contact potential witnesses directly;[7] they also sanctioned direct contact between OSI and personnel at Ludwigsburg. After a 1991 meeting with representatives from Australia, Great Britain, Canada and the United States, Germany authorized the free exchange of German-sourced documents among those countries.[8]

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This is not to suggest that there are not still areas of frustration. Most prominent is that requests that do go through the standard bureaucratic process (*e.g.*, pension inquiries) get caught in an administrative quagmire. Response times of over one year are not uncommon.[9] Nonetheless, the overall working relationship between the Department of Justice and Germany in Nazi prosecution cases is productive and positive.

It is also mutually beneficial. Before reunification, both East and West Germany conducted World War II investigations and trials.[10] The unified Germany continues to do so as of this writing.[11] OSI has assisted by interviewing and/or identifying witnesses of interest to the Germans,[12] sharing OSI research and records,[13] and serving subpoenas on U.S. residents needed to testify in German prosecutions.[14]

Admitting OSI Defendants into Germany

Fulfilling the mission of OSI depends, ultimately, on being able to remove from the United States those who assisted the Nazis in persecuting civilians during World War II.

However, the United States cannot unilaterally send a defendant to a designated country; that country must be a willing recipient. Very few countries are anxious to have "Nazi war criminals" in their midst. Even Germany, which has expressed contrition and claimed responsibility for its role in the war,[15] has been ambivalent about accepting OSI defendants.

The issue first surfaced in the pre-OSI era. Boleslav Maikovskis was a Latvian chief of police who, during World War II, had participated in the arrest of civilians and the burning of their dwellings. INS contacted West Germany in 1973 about seeking Maikovskis' extradition. The West Germans acknowledged that the branch of the auxiliary police to which Maikovskis belonged had been under the supervision of the German civil police; the higher police chiefs were appointed with the consent of the Germans, and these chiefs reported to, and were supervised by, the Germans. Nonetheless, they thought the significance of all this was outweighed by the fact that Maikovskis himself was immediately commanded by Latvians and paid with funds from the Latvian Police budget.[16] Moreover, they claimed constraint because Maikovskis was not a "German national," either at the time the crimes were committed or currently and because his acts were not directed against German nationals.[17] Although they could prosecute Maikovskis if he had been acting on behalf of the Reich, they concluded that he had not been. As the West Germans saw it, Latvian opposition to German occupation during the war was evidence that Latvia should be considered separate and apart from Germany.[18]

Despite this intransigence about Maikovskis, West Germany was not opposed to extradition in all cases. Around the same time that they rejected the Maikovskis request, they sought extradition of New York City housewife Hermine Braunsteiner Ryan. They distinguished her from Maikovskis because she had been a supervisor in a German concentration camp. As

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such, her activities were undertaken "in the exercise of German sovereignty."[19] Once she was extradited, she was tried, convicted, and sentenced to life in prison.

When OSI was established in 1979, the Department of Justice anticipated that extradition would be an oft-used procedure which would expedite removal.[20] Germany seemed to OSI the most likely venue for extradition for two reasons. First, Germany bore moral responsibility for the war. Second, many alternative destinations were not viable options. Most of OSI's subjects performed their wartime service in the U.S.S.R. (which, until 1989, included Estonia, Latvia and Lithuania), and the United States had no extradition treaty with the Soviet Union.

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In October 1980, shortly after OSI's founding, Director Ryan went to Germany to discuss the mechanics of extradition. He was quickly disabused of the idea that extradition to Germany would be the default procedure for OSI. The Germans made clear that extradition would be a rare occurrence, possible only if the defendant could be tried for murder, the only relevant crime not foreclosed by the statute of limitations. Even then, if the defendant were a non-German who had acted outside Germany's borders, it would be problematic.[21] Since most OSI subjects were Latvians, Ukrainians and Lithuanians, they would not fit within the parameters established by Germany.[22]

Simon Wiesenthal put forth a proposal which would have resolved the impasse. He suggested that subjects be divided into two categories, those who worked on behalf of sovereign countries (*e.g.*, Hungary or Romania) and those who worked for the Nazis in occupied areas. The latter group would include those from the Baltic states as well as Ukraine. Although the Germans agreed to consider the matter, and OSI was also interested, the proposal was never

adopted.[23]

The Attorney General wrote to his counterpart in West Germany urging resolution of the problem. His plea was based on ethical rather than legal grounds.

> As the highest legal officers of our respective governments, we share a solemn responsibility to see that justice is done in cases involving Nazi crimes. We recognize the extensive efforts that the Federal Republic has made to that end, and I am grateful for the cooperation that your government and your Ministry have extended to us in our recent efforts to gather evidence after so many years. Although many years have passed since the fall of the Nazi regimes, our common obligation to enforce our respective laws against those who were responsible for the crimes of that era continues.[24]

In response, the West German Minister of Justice acknowledged that war crimes should not be "left unatoned." Nonetheless, he reiterated that there was no jurisdiction to try foreign nationals for acts committed in "occupied territory" absent "exceptional circumstances."[25]

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Although this was not encouraging, it did not preclude *deportation* or a voluntary departure to Germany. In either of these situations, unlike extradition, the person would not have to stand trial once he arrived in Germany.

OSI had its first opportunity to pursue one of these alternatives in October 1982, when Archbishop Trifa agreed to depart the United States under the terms of his settlement agreement. Although Trifa was not German, he had a strong nexus to the country, which gave him refuge during most of the war. Nonetheless, West Germany informed OSI that as a non-citizen, Trifa was inadmissible.[26]

Trifa was not the only well-publicized OSI defendant to whom West Germany denied admittance. It also refused to accept Bohdan Koziy and Karl Linnas, both of whom are discussed elsewhere in this report.[27] Even after acknowledging that it had "no doubt" about OSI's evidence

against Koziy (evidence which, among other things, showed him responsible for the cold-blooded murder of a four year old Jewish girl), West Germany still refused him entry. They did so on the grounds that (1) he never possessed German citizenship; (2) his crimes were committed on foreign (Ukrainian) soil; and (3) the government would be unable to establish "base motive," a prerequisite to a murder conviction under German law.[28]

Two years later, the issue of Maikovskis' departure resurfaced. After West Germany refused to seek his extradition in 1973, INS had filed a deportation action. That case was ultimately taken over by OSI, and Maikovskis was ordered deported in 1984. He designated Switzerland as his chosen country of deportation. After the Swiss notified the Justice Department that they would not accept him, the State Department asked Germany if Maikovskis could enter as a deportee. They refused permission to do so.[29]

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There was a country which did want him, however – the U.S.S.R., which years ago had sentenced him to death *in absentia* for his World War II activity.[30] In 1987, OSI requested that the court modify its order to designate the U.S.S.R. as the country for deportation. Before the court ruled, Maikovskis fled to West Germany – having been given a visa to enter despite West Germany's earlier refusal to seek extradition or to accept him as a deportee. According to Maikovskis' attorney, the Germans issued the visa for "humanitarian reasons" when they learned that he might be sent to the Soviet Union.[31]

A year later – after the Soviets publicly called upon the West Germans to arrest Maikovskis, and only days before the West German Chancellor was scheduled to visit Moscow – the West Germans arrested the 84-year-old Maikovskis and placed him in custody. Although Germany had earlier refused to seek his extradition on the ground that he could not be criminally

charged, he was now brought to trial. One of the witnesses was the OSI attorney who had handled the deportation case. He testified about Maikovskis' admissions during the deportation proceedings, specifically that he had been chief of police and that he had carried out orders to arrest and imprison all villagers and to burn the village. The prosecution was suspended midway due to Maikovskis' ill health. It never resumed, and he died in Germany in 1996.

Additional tensions surfaced over emigrés who had entered the United States under the RRA. As noted earlier,[32] one of the conditions for admittance under the RRA was that the country from which one departed had to guarantee that one would be taken back if in fact the visa had been procured through fraud or misrepresentation of material facts. Germany had made a written commitment to that effect in 1954; it covered all persons embarking from their shore. Although the number of native-born Germans coming to the U.S. in the early post-war years was limited,[33] many Eastern Europeans and Ukrainians came to the U.S. from displaced persons camps in Germany.

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In 1983, during discussions about Trifa, Germany advised OSI that it doubted the validity and enforceability of its 1954 agreement.[34] And indeed, the German government later contended that it could not locate an original copy of such an agreement and therefore did not feel bound by its terms. At OSI's request, the State Department twice formally requested that Germany search its files.[35] In November 2005, the German government advised that it had finally located the document.[36]

That it took over two decades to resolve this issue was frustrating for OSI. In fact, however, it did not affect large numbers of OSI defendants. OSI filed 21 cases against men who entered under the RRA. **Update number?** Of these, between 10 and 12 had departed from

Germany. (Information on the country of departure was not readily available in two of the cases.) Six of the men ultimately wound up in Germany, though they were not admitted pursuant to the agreement.[37] Two others went to Lithuania before deportation proceedings, and therefore before the U.S. could have demanded action under the agreement.[38] Of the four possibly remaining,[39] one died while his case was in litigation; the U.S. agreed not to seek deportation of the other three because of their ill health.

Indeed, Germany accepted many more OSI defendants than it declined. As of this writing, 23 OSI defendants have gone to Germany. **Update number?** One was extradited;[40] some fled in the midst of OSI proceedings;[41] others left the United States as a result of pre- or post-filing settlements with OSI;[42] some were admitted after deportation orders were entered.[43]

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Six of the twenty-three were German citizens, and thus had to be admitted under German law.[44] Most of the others entered unannounced with their U.S. passports. The Germans did not know at the time of entry that they were either OSI subjects or defendants.[45] In most cases where Germany later learned of the connection, they let the matter lie. Their reaction was quite different, however, in the two cases where OSI was involved in the defendant's plan to go to Germany.

John Avdzej and Arthur Rudolph went to Germany as part of an agreement with OSI to avoid prosecution in the United States. Each renounced his U.S. citizenship shortly after arrival. Although OSI knew about the defendants' plans, Germany had not been forewarned nor had the State Department.[46] When they entered Germany, neither man acknowledged that he was doing so in order to avoid prosecution in the United States.

The Germans sent a strongly worded Diplomatic Note in protest.[47] They made clear that

they would not have admitted either man had they known the true circumstances of his departure from the United States; the admittees' lack of candor rendered their admissions unlawful.[48] Germany asked the United States to take the men back and went so far as to threaten to withhold investigative cooperation in future OSI endeavors. Indeed, the Diplomatic Note pointedly warned that Germany might end the charade of treating these cases as criminal matters so that they would be covered under the mutual assistance treaty.

> The Government of the Federal Republic of Germany also deems it necessary to point out that assistance to the OSI has been provided in accordance with the principles of judicial assistance in criminal matters. The present cases, however, lie outside the category of judicial assistance in criminal matters. They belong to the administrative process.[49]

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The U.S. refused to allow the men reentry although it did, ultimately, change its policy in response to White House pressure. AAG Jensen, DAAG Richard, and Director Sher were summoned to the National Security Council on June 7, 1984 to discuss the matter. Sometime thereafter, AAG Jensen advised DAAG Richard that the program of encouraging defendants to go to Germany unannounced could not be continued absent State Department support.[50]

The State Department was not, however, in favor of OSI's policy in this regard. In December 1987, it issued a new policy: U.S. nationals who renounced their citizenship and had no other nationality or had not been accepted for permanent residence by another country could be involuntarily returned to the United States unless it was against U.S. interests to do so.[51]

In 1993, OSI agreed to provide the Germans with a list of current OSI defendants along with their date and place of birth, the status of the litigation, and a summary of the defendant's World War II service. The Germans wanted the information to help control their borders. They continued to accept some OSI defendants until well into the 1990s.[52] However, in the late 1990s,

the Germans announced that they would no longer accept any non-German OSI defendants as deportees. It is unclear what caused this change. Some at the State Department thought that pending litigation concerning Holocaust victim assets might explain Germany's intransigence.[53] Director Rosenbaum thought it more likely that the collapse of the Soviet Union was the key factor. As he saw it, the Germans were willing to accept non-German OSI defendants only in order to prevent their deportation to the Soviet Union.[54]

The problems caused by Germany's hardening position came to a head in the cases of Bronislaw Hajda, Anton Tittjung and Nikolaus Schiffer. Hajda, a Pole who served as an SS guard at various Polish camps, including the Treblinka labor camp, was denaturalized and ordered deported to Poland (his country of birth) or Germany (the country from which he embarked to the United States) in 1998. Poland refused to accept him on the ground that he had expatriated himself by his collaboration with the Nazis.

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Tittjung, born in Yugoslavia (now Croatia), was a German national. As a member of the Waffen SS, he served as a guard at Mauthausen in German-annexed Austria. He lived in Austria for seven years after the war and received his entry visa there. He was denaturalized and ordered deported to Croatia in 1994. The Croatian government refused to accept him because he was neither born in that country nor a citizen thereof. The United States asked Austria to admit him, but the request was denied; Austria noted that he had never been a citizen of that country.[55]

Schiffer, a German national from Romania, served in the Waffen SS as a concentration camp guard in both Poland and Germany, and was ordered deported to Romania in 1997. That country refused to accept him on the ground that he had surrendered his Romanian citizenship when he left Romania and voluntarily joined the German armed forces.[56]

OSI urged the State Department to pressure Germany to accept all three men, warning that Congress, the media and the public would be highly critical if Germany did not.[57] Rosenbaum was particularly outraged since he felt that now, more than ever, Germany "owe[d] us big time." (They had just obtained what he felt was an agreement overly favorable to them on the issue of slave labor reparations.)[58] The State Department, however, insisted on further pursuit of diplomatic channels with Poland, Croatia and Romania before increasing pressure on Germany. State hoped that as new democracies, these countries would want to be seen as "European" and therefore would respond favorably.[59]

Romania, particularly, was importuned on several fronts. In July 2000, the U.S. Solicitor General raised the matter in a meeting in Romania with the Romanian Deputy Prime Minister and Minister of Justice. He followed up with a letter to the Minister of Justice in which he observed that "there are, in any system, unique cases that assume a significance transcending the importance of the particular facts involved. In the eyes of the United States, this is such a case." That same month, the U.S. Ambassador to Romania raised the issue with the Chief of Staff of the Romanian President. Shortly thereafter, U.S. Embassy officials met in Bucharest with officials from the Romanian Ministry of Justice and Ministry of the Interior. And in February 2001, the Attorney General of the United States raised the issue with the Romanian Minister of Foreign Affairs. These efforts bore fruit in January 2002, when Romania advised the State Department that it was willing to accept Schiffer. He went that May, at age 83.

He may be the last OSI defendant that country will accept. Shortly after his arrival, Romania adopted new legislation barring the entry of persons as to whom "there are serious reasons to consider that they have committed criminal offences or took part in committing

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criminal offences against peace and humanity, war crimes or crimes against humanity."[60]

The United States continued to pressure Germany about the other two defendants. Rosenbaum met with the German Consul General and offered the Germans political cover in case they were concerned about world reaction if they failed to prosecute the men: Rosenbaum would explain publicly that the United States understood the difficulties of filing a case at this late date and was confident that the Germans would do an appropriate investigation.[61] Shortly thereafter, the State Department sent a Diplomatic Note to Germany stating that "the United States believes that Germany has a compelling moral obligation to act as the receiving country of last resort."[62] A second diplomatic message was sent in March 2002[63] and a demarche the following summer.

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Germany withstood the pressure. They maintained that although they could accept non-Germans for reasons of international law, political interest or humanitarian concern, practice dictated that there be current links to Germany; typically such links were either to family or property, neither of which applied to Tittjung or Hajda.[64] Ultimately, Germany turned down the U.S. request, emphasizing that the men were not German citizens and there was no "public interest" in Germany to accept the men since there were no criminal charges or investigations pending against them. Germany did not respond to the moral imperative argument.[65]

In January 2003, the State Department proposed importuning Croatia and Poland again before applying renewed pressure on Germany. Meeting with the State Department's Director of Austria, Germany and Swiss Affairs, Rosenbaum and his Principal Deputy Susan Siegal made plain their opposition to this proposal. They deemed it futile and a waste of time.[66] The State Department insisted however, and a demarche was sent to Poland and Croatia. Both countries

rejected the U.S. proposal.

At this point, diplomatic relations between the U.S. and Germany were strained, for reasons unrelated to OSI.[67] The media was reporting that Germany was anxious to improve the situation and Rosenbaum hoped that this might work to OSI's advantage. In May 2003, he contacted the State Department's Special Ambassador on War Crimes issues. Rosenbaum opined that unless the matter were resolved soon, "a major public controversy will soon erupt, and this entire sordid history will come out."[68]

The Ambassador was supportive of the need to press the issue further with Germany. Very soon thereafter, and one day before the U.S. Secretary of State was scheduled to meet with the German Chancellor, the State Department delivered a Diplomatic Note to the Germans. This May 2003 document reviewed the history of the United States' efforts to deport Hadja and Tittjung and renewed the U.S. request that "Germany act as the receiving country of last resort for these individuals on the basis of Germany's compelling moral obligation to accept them." The U.S. added that neither Croatia nor Poland possessed "an equivalent moral obligation."[69]

Rather than offering to accept Tittjung and Hajda, Germany asked the United States to take back Dmytro Sawchuk, an OSI defendant who had fled to Germany in 1999. Having renounced his U.S. citizenship when he reached Germany, Sawchuk, born in Poland, was stateless; the Germans were neither interested in prosecuting him nor in granting him German citizenship.

The United States rejected the German request. The State Department advised that the December 1987 agreement to readmit stateless persons did not control since there was an exception if readmittance was not best for U.S. interests. Sawchuk had guarded Jews who were

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forced to exhume and burn corpses. From the U.S. perspective, that made him the precise type of person for whom the exception was created. Moreover, OSI had timely alerted the German Consulate that Sawchuk might flee to Germany. They therefore should not have been taken unawares when he entered the country.[70]

As anxious as OSI was to have Germany accept OSI deportees, the office was not optimistic that any would face trial in Germany. Murder was the only relevant crime not barred by the German statute of limitations and it was almost impossible to establish the "base motive" called for in the statute. OSI had always understood base motive to mean that one would have to establish that the murder was inspired by something akin to racial hatred or that the perpetrator imposed extra suffering through extreme cruelty.[71]

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In the summer of 2003, however, OSI learned that German courts had long ago upheld findings of base motive in cases of mass shootings or group death in gas chambers. According to one 1971 ruling by the German Federal Court of Justice:

> Waiting for one's own sure death, experiencing the preparations, and being herded into the gas chambers constituted additional mental torture for the victims of mass extermination.[72]

This raised the possibility, for Rosenbaum, that Germany might be persuaded to seek the extradition of Jacob Reimer, an OSI defendant who had been denaturalized in December 2002.[73] Reimer, trained as a camp guard, had been involved in ghetto clearings and a pit execution.

Before broaching the topic of extradition, however, Rosenbaum wanted to pursue the issue of OSI deportees. In October 2003, Rosenbaum met with the Political Minister of the German Embassy. Rosenbaum presented a proposal, approved by the State Department, which would obligate the United States to seek other countries for deportation, but commit Germany to

accept those with German citizenship and those who are not granted admittance elsewhere.[74] Rosenbaum also alerted the Minister that two members of Congress had recently written to the Attorney General asking about OSI's deportation problems.[75] Unless the matter were settled before a response was due, Rosenbaum warned that he would "devote [him]self to doing whatever the Justice Department will permit me to do to fan the flames of controversy."[76]

In December 2003, Germany issued a Note Verbale rejecting again both Hajda and Tittjung. The Note spoke of the lack of legal authority for their admission; again, Germany did not address the moral argument.

The issue took an unexpected turn in January 2004. An OSI defendant who had been ordered deported to Lithuania flew to Germany after all his appeals were exhausted. OSI had been working with Immigration and Customs Enforcement ((ICE) – successor to the INS) to locate the defendant and put him on a plane to Lithuania. He eluded the authorities and, with his still-valid Lithuanian citizenship, flew to Germany where he was admitted without a visa because Germany and Lithuania are both members of the European Union (EU).

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As soon as OSI learned of this, it notified the State Department which passed the information on to Germany. A member of the German Embassy, grateful for the "heads up," acknowledged to Director Rosenbaum that his country had OSI's 1993 information concerning this defendant. However, the information had not been shared with airport security and so the entry was accomplished without incident.[77]

Germany's inadvertent admission of an OSI defendant did not reduce the U.S. government's determination to convince Germany to knowingly accept OSI deportees. In January 2004, Rosenbaum, with State Department approval, met with staff of the two

Congressmen who had written to the Attorney General about the deportation issue. The State Department had a separate meeting with the staff shortly thereafter. The State Department reiterated OSI's message that Germany "has steadfastly refused to address the moral argument." However, State was less critical than OSI had been of Germany's overall actions on the deportee issue over the years.[78]

In February 2004, the two Representatives wrote to the German chancellor asking him to recognize Germany's "moral responsibility" to accept Tittjung and Hajda.[79] The German response, issued by the foreign minister, acknowledged the country's "special historical responsibility." The Minister maintained, however, that the responsibility was met in large part by the payment of "comprehensive compensation" to Holocaust victims over the years. He reiterated Germany's position on deportees. It would only consider accepting people who were not – and never had been – German citizens, if there was a possibility of criminal prosecution in Germany. As he saw no such possibility for Tittjung and Hajda, they would not be admitted. Moreover:

> Admission outside of a legal assistance procedure would send the wrong signal. Since the persons in question cannot be convicted due to a lack of evidence against them, and due to the fact that on the contrary they would even have to be granted state aid, this would give the impression that Germany is providing protection and shelter to persons with a Nazi past. This would not be justifiable for both domestic and foreign policy reasons. The Federal Government sees the responsibility for admission of the persons in question as resting with the states whose citizenship they hold.[80]

In March 2004, Director Rosenbaum advised the Germans that Johann Leprich, another OSI defendant, had been ordered deported to Germany.[81] Leprich, an ethnic German born in Romania, had been a camp guard. He was denaturalized in 1987. Shortly before the ruling, he

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fled the country. His attorney advised the court and OSI that he had gone to Canada.

Years later, a self-styled Canadian "Nazi hunter" began a public search for Leprich, maintaining that he had returned to the United States. Leprich was featured on a May 1997 segment of a popular U.S. television show, "America's Most Wanted." In 2003, he was found hiding in a secret compartment under the basement stairway of his wife's home in Michigan. He claimed that he had recently entered from Canada where he had no legal status. His illegal entry from Canada formed the basis for deportation.[82] He requested Germany as his destination country.

OSI, with the State Department's approval, posited a new theory under which Leprich remained a German citizen and therefore had to be accepted back into the country. As OSI read German law of the era, as an ethnic German Leprich became a German citizen when he joined the Waffen SS. While Leprich renounced his German citizenship when he became a naturalized U.S. citizen, German law allows for renunciation only if one does not become stateless as a result. OSI claimed that Leprich's renunciation was ineffective since the district court which stripped him of his citizenship did so retroactively. Since he never properly became a U.S. citizen, he would be stateless without his German citizenship.[83]

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Germany rejected that analysis outright. It maintained that service in the SS did not automatically confer citizenship. Even if it had, Leprich would have lost citizenship based on lack of residence and/or acquisition of U.S. citizenship. That the U.S. retroactively stripped him of citizenship did not alter their view. Germany added another reason as well, one which applies to all OSI defendants who cannot be prosecuted criminally in Germany: Germany does not want to create the impression that it is "offering protection and shelter to persons with Nazi pasts."[84]

To eliminate that possibility, the State Department offered to issue a statement explaining that Germany had taken Leprich only to accommodate the United States. Germany did not take up the State Department offer.[85]

Both Hajda and Reimer died in the United States in 2005. That same year, a German television news magazine devoted a segment to Germany's refusal to readmit elderly Nazis ordered deported by U.S. courts.[86] A former OSI Deputy Director appeared on the program to argue for revision of the policy. In a letter sent to the program, but not read in its entirety on air, the Federal Ministry of the Interior defended the policy.

> There are no obligations under international law, nor can the Federal Republic of Germany have any interest in accepting people into our country who, although they are suspected of committing Nazi crimes, cannot be proven to have committed them. If we did so, we would be encouraging, and be responsible for, a state of affairs in which these people have been accepted by the very country where the Nazi crimes originated, the people would then be supported here by German social services and could possibly even become active in the extreme right and anti-Semitic social scene. In addition, because we are doing everything possible to encourage the growth of an active Jewish life in Germany again, we cannot hospitably accept people from the Brown circle into our country at the same time. Although we completely understand that the United States would want to send these people out of its country after revoking their citizenship, they should be deported to the countries of their former citizenship, as prescribed by international law.[87]

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As of this writing, Sawchuk is still in Germany while Tittjung and Leprich remain in the United States.[88] In 2005, the United States entered discussions with the Russian government about the possibility of Russia's accepting OSI deportees whose crimes were committed in the Baltics.[89] And in June 2008, a Brussels-based human rights group asked a Spanish court to indict Tittjung and Leprich and to seek their extradition to Spain for crimes against humanity in the persecution of Spanish nationals imprisoned at Mauthausen.[90]

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1. Nov. 14, 1991 memo from Peter Black, OSI Historian, to OSI attorneys, historians and investigators re: "Former Stasi Archives in the Freienwalderstrasse, Berlin-East." One instance in which the East Germans provided assistance involved the Mengele investigation. East Germany provided a needed photograph of Mengele which they had from an old drivers license. Recorded interview with former OSI Chief Investigative Historian David Marwell, July 17, 2003.

2. From July 1945 until Oct. 1953, captured Nazi party records were consolidated at the BDC under the authority of the U.S. Army for use in war crimes and denazification trials. Between Oct. 1953 and July 1994, it was under the jurisdiction of the State Department. In 1988 David Marwell, former Chief Investigative Historian at OSI, was named Director of the BDC. He remained in that position until 1994.

3. Oct. 22, 1992 letter from then Principal Deputy Director Rosenbaum to W. David Straub, Central European Affairs, U.S. State Department.

4. Oct. 18, 1993 Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany Concerning the Transfer of the Berlin Document Center to the Federal Republic of Germany, Arts. 4 and 5.

DAAG Richard testified in favor of the agreement before the House Subctee on International Security and Human Rights, Committee on Foreign Affairs, Apr. 28, 1994.

5. Not all countries have been as flexible. Contrast Germany's approach on this issue with Australia's, discussed at p. 490, and Austria's. In 1982, the Austrian Ministry of the Interior refused to allow OSI access to a Vienna District Court file on Bruno Blach, a former concentration camp guard then a defendant in deportation proceedings initiated by OSI. Austria noted that its treaty covered assistance only in criminal cases and this was "an administrative proceeding." March 22 1982 letter to OSI, from Dr. Zeyringer of the Austrian Ministry of the Interior.

6. Oct. 26, 1987 memorandum from OSI Historian Peter Black to Director Sher re "Issues for Discussion with FRG Officials."

7. Jan. 29, 1982 telegram 023845 from Secretary of State to American Embassy in Bonn.

8. June 1, 1992 letter from the German Federal Ministry of Justice to Director Sher re: Mutual Assistance in Criminal Matters here concerning: U.S. Investigations of Nazi War Criminals. Before the Germans authorized this document sharing, the countries had alerted one another to information each had received from Germany which might be useful to another country. The second country then had to request the material from Bonn. June 12, 1987 memo to OSI staff from Peter Black re: "Release of Documents and Records Obtained from the FRG Through Requests for Judicial Assistance."

9. Another area of frustration is the German government's unwillingness, possibly due to privacy concerns, to allow OSI unrestricted access to German pension information for R&D purposes. *See* July 17, 2000 memo to Rosenbaum from OSI Chief Historian Elizabeth White re:

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"Examination of German Pension List in 1997; Note Verbale No. 68/97 from the German Embassy," Aug. 26, 1997.

The Germans will, however, generally respond to a request for pension information about a specific individual. Indeed, their response to a request for information on Kazys Ciurinskas led to the key document in the case, establishing in Ciurinskas' own words (on his pension application to the German government) where he had served and where the unit had been when he was wounded. It also negated his claim that he was unaware that his unit was working for the Germans. *U.S. v. Ciurinskas*, 976 F. Supp. 1167 (N.D. Ind. 1997), *aff'd*, 148 F.2d 729 (7th Cir. 1998). In 2005, however, the Germans unexpectedly refused to allow OSI access to pension records for an OSI subject. The Germans suddenly claimed that access was permissible only in criminal investigations. Apr. 28, 2005 e-mail from Rosenbaum to Donald Shermanski, Deputy Director State Dep't Office of Austrian, German and Swiss Affairs re "OSI Egner Investigation – German Denial of Access to His Pension Records."

10. American occupation forces prosecuted 1,941 alleged Nazi criminals. 1,517 were convicted, 367 were acquitted, and charges were withdrawn in 57 cases. Adalbert Rueckerl, *The Investigation of Nazi Crimes 1945-1978* (Heidelberg: C.F. Mueller, 1979), pp. 28-29. The Germans themselves have prosecuted thousands of others. 2003 SWC Annual Report, Worldwide Prosecution and Investigation of Nazi War Criminals, p. 27.

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11. In Jan. 2004, Germany arrested a man accused of ordering his unit to round up and shoot 146 civilians (including 51 children) in Czechoslovakia. The condemned group allegedly was composed of partisans and those who supported them. The defendant was also charged with ordering the execution of 18 Jews, some of them children, who had been hiding. He went on trial in Sept. 2004. "Germany Arrests Alleged Nazi, 86," by Andrea Dudikova, *The Chicago Tribune*, Jan. 20, 2004. He was acquitted in Dec. 2005. "Nazi Officer Acquitted of Wartime Mass Murder," by Roger Boyes, *The Australian*, Dec. 21, 2005.

In Feb. 2004, an 88 year old female doctor was charged with murder of one mentally handicapped patient and complicity in the murder of 158 others as part of a Nazi euthanasia program. "East German Doctor Faces Trial Over Nazi Murders," by Tony Paterson, *The Sunday Telegraph* (London), Feb. 1, 2004. A former SS member, charged with killing a Dutch prisoner during the war, went on trial in Sept. 2003. The prosecution was aborted mid-trial, however, because the defendant was adjudged mentally unfit. "Court Says Ex-Nazi Unfit to Stand Trial," *AP*, Feb. 2, 2004.

Germany's investigations and prosecutions have been recognized each year by the SWC in its annual report on world-wide investigations and prosecution of Nazi war criminals. Germany is generally in the second or third tier of the six categories created by the SWC. The United States is consistently sole occupant of the top tier, reserved for countries which have taken all reasonable measures to identify the potential suspected Nazi war criminals in the country in order to maximize investigation and prosecution and have achieved notable results during the period under review. *See* the SWC reports for 2002 - 2006.

12. *E.g.*, Mar. 12, 2003 letter from OSI Chief Investigative Historian Michael MacQueen to Ludwigsburg Chief Kurt Schrimm forwarding a list of collaborators whose names came up in

recent research and who might still be in Germany; Aug. 9, 1989 letter to Reinald Walkemeyr, Ass't to the Amb., GDR, from Rosenbaum, Deputy Director OSI, notifying him of survivor witnesses in the U.S. who might have relevant information for an upcoming East German trial. OSI has even assisted by interviewing witnesses on matters somewhat outside OSI's traditional mandate. Thus, at the request of the Germans, and with the sanction of the State Department, an OSI attorney interviewed witnesses in the U.S. for a German investigation about the 1945 murder of Sudeten Germans in the Czech Republic. Mar. 18, 2003 e-mail from Rosenbaum to Stephen Markard, Assistant Director, Terrorism and Violent Crime Division, USNCB- Interpol Washington, re "WWII era war crimes - 20020303674."

13. *E.g.*, Aug. 12, 2002 letter from Rosenbaum to Schrimm inviting him to visit OSI and examine records. In 2005, as part of its investigation of John Kalymon, OSI learned the whereabouts in Germany of a citizen who had signed "bullet reports" describing the killing of Jews in Poland. OSI sent the Germans 21 relevant wartime documents and the Germans opened an investigation. Sept. 26, 2005 letter from Elizabeth White, OSI Deputy Director and Chief Historian to Criminal Chief Commissioner Manfred Haag, Ludwigsburg, Germany; Nov. 20, 2005 e-mail from White to Director Rosenbaum re "Kalymon: Message from German Prosecutor re Kerestil."

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14. Aug. 9, 1989 letter to Reinald Walkemeyer, Ass't to the Amb., GDR, from Deputy Director Rosenbaum.

15. *E.g.*, Marking the 50th anniversary of Hitler's ascension to power, West German Chancellor Helmut Kohl said that his country "cannot and will not shirk [its] responsibility for the past." "A Hitler Anniversary Recalled at Reichstag," *The New York Times*, Jan. 31, 1983.

16. Oct. 26, 1973 report from German prosecutor in Landau in der Pfalz to Department of Justice, pp. 20-21 (hereafter 1973 Report).

17. A German national (volkszugehőriger) is a person "who has declared himself to be of Germany nationality, as long as this declaration is confirmed by certain characteristics such as ancestry, language, education and culture." Sec. 6 of the Federal Refugee Act of 1993 (BGB1 I, S. 829 ff.) A similar definition existed in 1973.

18. 1973 Report, *supra*, n. 16. *See also*, June 19, 1974 letter from German Consulate General to Samuel Zutty, INS Investigator; Oct. 15, 1974 report from German prosecutor to Department of Justice (hereafter 1974 Report); Sept. 24, 1975 report of District Attorney Landau to Central Office of State Judicial Administrations, Ludwigsburg.

19. 1974 Report, *supra*, n. 18 at p. 7.

20. Jan. 4, 1982 letter from Attorney General Smith to Jűrgen Schmude, German Minister of Justice; Oct. 6, 2000 recorded interview with former OSI Director Ryan. Since there are fewer levels of appeal, and the burden of proof is less, extraditions are generally speedier for the United States than denaturalization trials followed by deportation hearings. *See* pp. 41-42 for a fuller

discussion of extradition.

21. A synopsis of Ryan's trip is set forth in the Jan. 4, 1982 letter from Attorney General Smith to West German Minister of Justice Schmude, *supra*, n. 20.

22. Of the 134 cases which OSI has either litigated or settled pre-filing as of this writing, only 7 involved persons born in Germany.

23. "Proposal to Speed War Crimes Cases Studied," by A. O. Sulzberger, Jr., *The New York Times*, Nov. 15, 1981.

24. Jan. 4, 1982 letter, *supra*, n. 20.

25. Feb. 12, 1982 letter to the Attorney General from the Federal Minister of Justice.

26. Jan. 28, 1983 memorandum from OSI Deputy Director Sher to DAAG Richard re "Meeting with West German Legal Official." OSI was so irate about West Germany's position that it proposed sending Trifa to the United States occupation sector of West Berlin. *See* pp. 218-219.

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27. *See* pp. 271-295, 510-515.

28. Although base motive could be established if the defendant exploited the lack of suspicion or inability of the victim to put up a defense, West Germany advised that "[t]he fact that one of the victims was a four year old child in itself does not suffice to establish a determination of a cruel or underhanded killing according to . . . the Legal Code." Mar. 28, 1983 Note Verbale from German Foreign Office. (Of course, if Koziy were a deportee, Germany would not be obligated to try him in any event.) For a further discussion of base motive, *see* p. 340, n. 17.

29. Oct. 1, 1985 letter from German Embassy to Department of State.

30. Indeed, the U.S.S.R. had wanted to extradite Maikovskis, but in the absence of an extradition treaty between the United States and the U.S.S.R., the U.S. did not honor this request.

31. *JTA*, Feb. 20, 1991 reporting on testimony by Maikovskis' attorney. *See* also Maikovskis' May 10, 1996 obituary in *The Pittsburgh Post-Gazette* reporting that he had "secretly persuaded a German consul to grant him a visa."

32. *See* p. 38.

33. *See* pp. 35, 38.

34. Jan. 28, 1983 memo to DAAG Richard from Dep'ty Dir. Sher re "Meeting with West German Legal Official."

35. Notes Verbale, No. 195-C (May 24, 1995) and 1142-C (June 10, 2005).

36. Note Verbale, Ref. No. 508-516.50 (USA), Nov. 22, 2005.

37. The six were Mathias Denuel, Jakob Denzinger, Stefan Leili, Hans Lipschis, Peter Mueller and Wiatschelaw Rydlinskis. The circumstances of their entry are set forth in notes 41 and 43, *infra*.

38. The two were Kazys Gimzauskas and Aleksandras Lileikis.

39. Albert Ensin, Talivaldis Karklins, Mikelis Kirsteins and Alexander Lehmann.

40. Bruno Blach, an ethnic German from the Sudentenland (now the Czech Republic.) He was tried and acquitted in 1993 of four wartime murders.

41. Anton Bless, Jakob Denzinger, Juris Kauls, Stephan Leili, Peter Mueller, Stephan Reger, Wiatschelsaw Rydlinskis, Dmytro Sawchuk, Josef Wieland, and Chester Wojciehowski. The Germans had notified OSI that they would not accept Rydlinskis as a deportee because they did not have the "original" exchange of notes. Jan. 5, 1995 letter from German Consul General Ulf Hanel to Director Rosenbaum. However, he entered with a U.S. passport shortly after his denaturalization case was filed.

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42. John Avdzej, Arthur Rudolph, Michael Schmidt.

43. Paul Bluemel, Algimantas Dailide, Mathias Denuel, Johann Hahner, Liudas Kairys, Reinhold Kulle, Hans Lipschis, Boleslavs Maikovskis, and Conrad Schellong.

In the case of Kairys, a Treblinka labor camp guard, enormous pressure was brought to bear on Germany by the U.S. government. He was ordered deported to Germany in 1987. After giving formal assurances (through a Note Verbale in 1990; *see* Dep't of State telegram 311711Z, Oct. 31, 1990) that they would issue him a residence permit, Germany later advised that they were reluctant to do so. One cause for their concern was that Kairys might become a ward of the state. OSI assured them that he was the recipient of a sufficient pension from the Crackerjack company, his long-time U.S. employer. Mar. 2, 1993 letter from Rosenbaum to German Consul General Ulf Hanel.

Germany apparently had other reasons for reconsidering their earlier commitment to accept Kairys. In Feb. 1993, a German Foreign Ministry official told officials at the U.S. Embassy in Bonn that the German government was reconsidering its decision because conditions in Eastern Europe had changed and Kairys could now be deported elsewhere. (This was an apparent reference to the collapse of the U.S.S.R. and the end of Communist rule in eastern and central Europe. Had Kairys been deported to a Communist country before the end of the Cold War, he would have faced a judicial system viewed by many as lacking in fundamentals of due process.) May 28, 1993 draft letter from OSI Chief Historian Peter Black to German Justice Ministry official Reinhard Weth (hereafter Black draft). The letter was a followup to a May 11, 1993 telephone conversation between Weth and Black in which they discussed recent problems between Germany and the United States concerning OSI defendants.

Ultimately, the State Department prevailed upon Germany to honor its earlier

commitment concerning Kairys. Apr. 7, 1993 letter to German Ambassador Immo Stabreit from Director Sher. Kairys was admitted in Apr. 1993.

44. Paul Bluemel, Mathias Denuel, Johann Hahner, Reinhold Kulle, Hans Lipschis, and Peter Mueller.

45. By agreement between the United States and the FRG, U.S. citizens in possession of a valid passport did not need a visa to enter Germany.

46. Citizenship renunciations are not valid unless accepted by the State Department. In these cases, the State Department was initially reluctant to do so. The responsible consular officers were concerned that the renunciations might not be voluntary given the impending OSI prosecutions. The State Department requested an opinion from the Justice Department on the matter. The Office of Legal Counsel (OLC) concluded that the renunciations were in fact voluntary. Sept. 27, 1984 memo from Ralph Tarr, DAAG of the OLC to Daniel McGovern, Acting Legal Advisor of the State Department. The State Department accepted the renunciations shortly thereafter.

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47. May 21, 1985 Note from the Embassy of the FRG to the State Department.

48. This is the very argument OSI makes when is seeks to remove persons from the United States, *i*.e., had all the facts been known they would have been denied entry.

49. Diplomatic Note, May 21, 1985. Rudolph and Avdzej were not the only admittees about whom Germany complained. In 1993, they were angry because they believed the DOJ press release announcing Kairys' deportation portrayed Kairys as a major war criminal. They felt this put intense pressure on Germany to bring a prosecution which, under their law, they had scant hope of winning. *See* Black draft, *supra*, n. 43. They were also upset about Michael Schmidt's entering Germany in 1993. (Schmidt voluntarily agreed to leave the U.S. rather than face deportation charges.) The Germans resented that they had not been notified by the U.S. in advance of Schmidt's arrival. In fact, however, the U.S. was not privy to his plans beforehand. And in any event, the German consulate in Chicago had been notified by Schmidt's attorney of Schmidt's intentions. The consulate had apparently failed to pass the information along. *Id.*

50. Interview with DAAG Richard, Apr. 25, 2001.

51. All Diplomatic and Consular Posts (ALDAC) cable (87 State 386507), Dec. 12, 1987.

52. OSI defendants who went to Germany in the 1990s include Michael Schmidt (1990); Liudas Kairys and Johann Hahner (1993); Mathias Denuel and Wiatschelsaw Rydlinskis (1994); and Dmytro Sawchuck (1999). Kairys is discussed *supra*, n. 43.

53. Comment of James I. Gadsden, Deputy Asst. Secretary of State for European Affairs at State Department Meeting Apr. 19, 2001 re Removal of Hajda, Schiffer and Tittjung. Hajda, Schiffer and Tittjung are discussed at pp. 434-437, 440.

54. May 5, 2000 letter from Rosenbaum to Charles Cohen, Deputy Director, EUR/AGS Department of State. It is the case that those sent to the Soviet Union did face serious consequences. Fedorenko who had been deported in 1984 to the Soviet Union had been tried and executed; Linnas, deported in 1987, was awaiting trial when he died of natural causes. And, as noted at p. 430, there is reason to believe the Germans took in Maikovskis to spare him from the Soviet judicial system. However, since Germany continued to accept, albeit sometimes reluctantly, people without German citizenship years after the Soviet collapse, that explanation does not seem sufficient.

55. Aug. 24, Nov. 2, and Dec. 13, 2000 letters to Director Rosenbaum from Austrian Amb. Peter Moser.

56. The legal predicate for this position is murky. In May 1943, the Romanian Government and the German Reich entered into an agreement providing that Romanian citizens of German ethnic origin who joined the Germany Army would preserve their Romanian citizenship. (OSI relied on this when trying to persuade the Romanians to accept Schiffer.) However, in Sept. 1944, when Romania switched sides and joined the Allies, King Michael declared that all those who had served in the German Armed Forces must forego citizenship.

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57. *See e.g.*, May 5, 2000 letter from Rosenbaum to Cohen, *supra*, n. 54; Aug. 27, 2001 letter from Rosenbaum to James Gadsden, Deputy Assistant Secretary of State for European Affairs.

58. In 2000, the United States and Germany approved an agreement that obligated Germany to place approximately $5 billion in a compensation fund for those who had been forced to work in Nazis concentration camps, ghettos and factories. Half the money in the fund came from the German government and half from German industry (including some American subsidiaries of German companies). Payments ranged from $2,200 to those who worked for German companies to $7,500 for those in concentration camps or ghettos that aimed at "death through work."

Although most of the beneficiaries were not in the U.S., the United States helped negotiate the agreement after American lawyers filed class action lawsuits in the United States on behalf of victims from around the world. (Negotiations were handled by then Deputy Treasury Secretary Stuart Eizenstat.) To encourage Germany in the negotiations, the U.S. pledged to do everything it could to block the lawsuits.

The class actions were dismissed in May 2001 and payouts from the fund began shortly thereafter. "Payments Begin for Laborers Forced to Work for the Nazis," by Stephanie Flanders, *The New York Times*, June 29, 2001; "Judge Clears Obstacles to Pay Slaves of the Nazis," by Jane Fritsch, *The New York Times*, May 11, 2001; "Germans Sign Agreement to Pay Forced Laborers of Nazi Era," by Edmund Andrews, *The New York Times*, July 18, 2000.

59. Apr. 19, 2001 meeting, *supra*, n. 53.

60. Government Ordinance No. 194, "Emergency Ordinance on the regime of aliens in Romania," Dec. 2002. In January 2004, the Attorney General of the United States met with the Romanian Minister of Justice and expressed concern about the new statute. The Justice Minister

indicated that decisions would be made on a "case by case" basis. Jan. 28, 2004 e-mail from Rosenbaum re "AG's Luncheon Meeting Today with Romanian Justice Minister: Postscript." (The Justice Minister, before assuming that post, had, coincidently, been an expert witness on Romanian law for OSI in its 1993 denaturalization suit against Nikolaus Schiffer.)

As of this writing, two OSI defendants, Johann Leprich and Michael Negele, were born in Romania. (Two others, Adam Friedrich and Joseph Wittje, died in the U.S. while their cases were pending.) Negele has an outstanding order of deportation to Romania (or, alternatively, Germany). Citing the new statute, the Romanian ambassador informed OSI that Negele would not be admitted. The ambassador described the legislation as an effort "to meet the standards and embrace the values of the Western democracies." June 28, 2004 letter from Romanian Ambassador Sorin Ducaru to Rosenbaum.

In Nov. 2004, an international commission chaired by Elie Wiesel and established by Romanian President Iliescu, called on the government to "accept responsibility for alleged Romanian war criminals." Report of the International Commission on the Holocaust in Romania. (An earlier draft had called on Romania to "accept war criminals expelled from other countries." This language was omitted from the final report.)

In separate meetings with Romanian President Basescu and Foreign Minister Ungureanu, Assistant Sec'y of State Maura Harty raised concern about Romania's unwillingness to accept OSI defendants. May 12, 2005 e-mail from Bob Gilchrist, Political Section Chief, U.S. Embassy Bucharest to OSI Director Rosenbaum re "Nazi Deportees - Romania." Gilchrist himself followed up in Aug. 2005 with his counterparts at the Romanian Embassy. Aug. 30, 2005 e-mail from Gilchrist to Rosenbaum re "Nazi Deportees – Romania (Negele, Leprich, Friedrich, Wittje)."

With the strong support of the State Department, scholars from the USHMM raised the issue again in meetings with Romanian political leaders in Oct. 2005. Oct. 28, 2005 e-mail to Dir. Rosenbaum from Radu Ioanid, Director of International Archival Projects at the USHMM, re "OSI/Romania."

As of this writing, the Romanian position has not changed.

61. Dec. 10, 2001 e-mail from Rosenbaum re "12/5/01 Meeting w/ German Consul General Germann."

62. Jan 31, 2002 telegram (18835) from Secretary of State.

63. U.S. Dip. Note No. 565-C, Mar. 13, 2002.

64. Mar. 17, 2002 telegram 000913 from American Embassy in Berlin to the Secretary of State; Dec. 31, 2002 e-mail from Carol Van Voorst, DOS Director of Austria, Germany and Swiss Affairs re "Germany and Readmission of Nazis Tittjung & Hajda," to Rosenbaum and responsive e-mail of Jan. 2, 2003 from Rosenbaum to Van Voorst.

65. June 24, 2002 Note Verbale from the German Foreign Office, Case No. 200-533.00 USA.

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66. Rosenbaum voiced the view that Germany would accept Tittjung and Hajda only if it believed that by doing so it could save the men from a worse fate – as Germany had accepted Maikovskis when it looked as if he might be sent to the U.S.S.R. Rosenbaum proposed threatening to send the defendants to Israel where they could be locked up as enemy combatants. The State Department was unreceptive to this suggestion. Jan. 13, 2003 meeting at OSI.

67. *See e.g.*, "Germany and U.S. Tentatively Ease Chill in Relationship," by Steven Weisman, *The New York Times*, Oct. 31, 2002. The main points of contention involved Germany's opposition to U.S. policy toward Iraq and the perceived anti-American tone of Chancellor Schroeder's fall 2002 reelection campaign.

68. May 12, 2003 e-mail from Rosenbaum to Amb. Pierre Prosper re "Germany-Nazis." Rosenbaum reiterated that message to Van Voorst. May 12, 2003 e-mail re "Fwd: Re: Germany-Nazis."

69. U.S. Dip. Note No. 1078/03, May 14, 2003.

70. Cable 1981, May 23 from Emb. Berlin to U.S. State Dept; 5/31/03 e-mail from Rosenbaum to Steve Donlon, State Department re "OSI: Cable from Germany re: Sawchuk."

71. *See* p. 340, n. 17.

72. Nov. 1, 2003 e-mail from Rosenbaum re "Reimer Extradition to Germany?" in which he quotes from a German decision reported at 1 StR 110/70 (May 18, 1971). The case was cited to him by Kurt Schrimm, the Director at Ludwigsburg Zentrale Stelle.

73. *U.S. v. Reimer*, 2002 WL 32110197 (S.D.N.Y.), *aff'd*, 356 F.3d 456 (2nd Cir. 2004).

74. The text reads as follows: With respect to the Nazi-era cases handled by the Office of Special Investigations of the Department of Justice, the United States Government agrees that it will always seek initially to remove persons who have retained foreign (i.e., non-U.S.) citizenship to their country of citizenship. This includes persons who formerly held German citizenship but were naturalized by third governments after World War II and have not lost or surrendered such citizenship. Germany will have no obligation to admit such individuals, other than those who have retained German citizenship. The United States Government further agrees that it will seek initially to remove stateless individuals to: 1) the countries in which they formerly held citizenship; 2) the countries of which they were previously nationals, or if such countries do not agree to admit the individuals, 3) the countries from which they immigrated to the United States. If none of these countries agrees to admit the individual, Germany agrees that it will be the receiving country, provided that the decision of the United States Government to seek removal/departure is predicated in whole or in part on the individual's assistance or other participation in persecution while serving during World War II in a military, paramilitary, police, auxiliary police or other unit of, under the direction or control of, or sponsored by, the German Government or the NSDAP. Germany agrees that it will also continue to be the receiving country for persons who immigrated to the United States from Germany under the Refugee

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Relief Act of 1953 through fraud or misrepresentation of material facts.

75. Oct. 27, 2003 letter to Attorney General Ashcroft from Rep. Tom Lantos, Ranking Member of the House International Relations Committee and Sheila Jackson Lee, Ranking Member, House Subcommittee on Immigration, Border Security and Claims.

Rosenbaum had testified before Rep. Jackson's subcommittee on July 11, 2003. The hearing concerned immigration relief under the Convention Against Torture for Serious Criminals and Human Rights Violators. The subcommittee was investigating whether, as an unintended consequence of the Convention, human rights abusers were remaining in the U.S. rather than facing deportation to their own countries. At one point Rosenbaum commented:

> I would not want the Subcommittee to be left with the impression that it is only undemocratic countries, lawless countries even, that refuse to accept these individuals, or countries with which we perhaps don't have diplomatic relations. In our cases – in the Nazi cases – some of the most prominent democracies in the world have refused to accept the return of these individuals as well.

The letter from Reps. Lantos and Lee was a followup to that comment.

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76. Oct. 28, 2003 memo to File from Rosenbaum re "Meeting at German Embassy With Rolf Nikel Regarding OSI Deportees."

77. Jan. 13, 2003 e-mail from Rosenbaum re "Dailide Case: Tel. Call from German Embassy's Christian Germann."

78. Feb. 9, 2004 e-mail from Van Voorst to Rosenbaum re "Meeting with Congressional Staffers."

79. Feb. 25, 2004 letter from Congresswoman Sheila Jackson Lee and Congressman Tom Lantos to German Chancellor Gerhard Schroeder.

80. Apr. 1, 2004 letter from Federal Foreign Minister Joschka Fischer. Germany's position altered somewhat in 2005 when it advised OSI that it would not admit someone "merely because they once possessed German citizenship." Admission would be predicated solely on whether there was admissible evidence to support a criminal prosecution. Aug. 20, 2005 letter to Director Rosenbaum from Chargé d'Affaires Peter Gottwald. The letter was in response to notification from OSI about developments in the Reimer case.

81. Mar. 3, 2004 letter from Rosenbaum to German Ambassador Wolfgang Ischinger re Johann Leprich.

82. The deportation, unlike all others OSI has handled, had nothing to do with his World War II activities. Although that could have been the basis for deportation as well, OSI determined it would be much simpler to rely on Leprich's own admissions about his illegal entry from Canada.

Also unusual in the Leprich case, he was placed in custody upon his arrest in July 2003.

The basis for the detention was that he was a flight risk, as established by his leaving during the denaturalization case. He spent 40 months in custody and was released only after Romania, Hungary and Germany all declined to admit him. "US Frees Ex-Nazi Camp Guard in Michigan," *AP*, Oct. 18, 2006.

83. Mar. 19, 2004 letter to German Amb. Wolfgang Ischinger from Director Rosenbaum.

84. May 13, 2004 letter from Christian Germann, Consul General at the German Embassy in Washington, D.C. to Rosenbaum.

85. The suggestion was made by Don Shamanski, Deputy Director of AGS to German Consul General Hans Jörg Neumann, Oct. 28, 2004 as set forth in Oct. 28, 2004 memo to Leprich file from Rosenbaum re "Fascinating Meeting Today with German Consul General Neumann."

86. WDR-TV news magazine *Monitor*, June 9, 2005, segment "Nazi Crimes: How the Federal Government of Germany Hinders Investigations," reported by John Goetz and Monika Wagener.

87. June 9, 2005 letter to *Monitor* Editorial Staff from Rainer Lingenthal, Federal Ministry of the Interior.

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88. The problem of having no receptive country for a deportee is not limited to OSI defendants. There are many reasons for such problems, *e.g.*, persons from war zones where there are no authorities to issue appropriate documents. *See*, "Refugees in Limbo: Ordered Out of U.S., but With Nowhere to Go," by Jodi Wilgoren, *The New York Times*, June 4, 2005; "82 Inmates Cleared but Still Held at Guantanamo," by Craig Whitlock, *The Washington Post*, Apr. 29, 2007. According to a report by the Inspector General of DHS, as of June 2004, removal orders against more than 133,000 aliens could not be carried out because their countries of origin have blocked their return. *The Detention and Removal of Illegal Aliens*, p. 18. The full report can be found at http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_06-33_Apr06.pdf (last visited Nov. 2008).

89. Nov. 9, 2005 e-mail from Director Rosenbaum re "OSI Deportees, Etc. - Meeting Today with Russian Embassy's Georgiy E. Borisenko."

90. "Alleged Nazis Face Charges in Spanish Court," by Daniel Wools, *AP*, June 24, 2008.

The Baltics

Over one third of OSI defendants come from Estonia, Latvia and Lithuania. These former "captive nations" have a complex political history which affects their perspective on World War II, and consequently their working relationship with OSI.

All three nations were under Russian domination until the end of World War I. They then attained independence, but in 1940, partly as a result of the Soviet/German Molotov-Ribbentrop Pact, the Soviets annexed the three countries. When Germany invaded the U.S.S.R. in June 1941, it overran and occupied the Baltic nations. The invading forces included small mobile killing units (Einsatzkommandos) charged with annihilating Jews and others deemed inimical to the Reich. Indigenous groups within each country assisted the Germans in carrying out their mission.[1] At war's end, the Baltic nations were once again forcibly incorporated into the Soviet Union.

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The three countries saw themselves as victims of both the Nazis and the Communists. Many who assisted the Nazis claimed they were seeking to rout their former Communist oppressors, not Jews; to the extent that there was any overlap, they saw it as incidental. This defense was raised in several OSI cases, once successfully.[2]

While the Baltic nations were part of the Soviet Union, OSI had access to documents in their archives to the same extent that it had access to documents in other Soviet archives: the Soviets would receive requests from OSI and produce documents they deemed responsive.[3] Once the Baltic countries gained independence, they, like the other parts of the former Soviet Union, were generous in allowing OSI access to their archives. However, they have been reluctant to prosecute criminally those who assisted the Nazis.[4]

1. Estonia

About 75% of Estonia's Jewish community fled to the Soviet Union before the German invasion. Of the remaining 950 to 1,000, virtually all were killed by the Nazis. The Nazis also murdered hundreds of Estonian Roma (gypsies).

As a Soviet Socialist Republic, Estonia was prepared to prosecute Karl Linnas.[5] Since it gained independence, Estonia has maintained that it is anxious to find and prosecute those who assisted the Nazis in persecution. In fact, however, independent Estonia has never prosecuted anyone for aiding the Axis powers. Several Estonian collaborators have come to OSI's attention.

a. Evald Mikson

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In 1993, Iceland sought OSI's assistance in investigating former Estonian national and nationalized Icelandic citizen Evald Mikson. Mikson had been head of the Estonian Political Police. That organization, at the behest of the Germans, arrested, interrogated and imprisoned persons whose racial, religious, political, ethnic and social identity was deemed dangerous or undesirable. Iceland shared with OSI a 1993 report about Mikson that it had received from the Estonian Prime Minister's office. While positing that Estonians had "no power to run the country and its society" during the Nazi era, the report nonetheless referenced 28 arrest orders that Mikson had signed. It noted also that he had interviewed an unspecified number of the arrestees. Thirteen of the 28 arrest orders listed no crime; 11 of these 13 arrestees were Jews. The report made no mention of the ultimate fate of any of those arrested and concluded that there was no basis for accusing Mikson of war crimes. Mikson died in late 1993, at which time the Icelandic investigation was closed.[6]

In 1998, the president of Estonia appointed an international commission to investigate

crimes against humanity during World War II. The Commission presented its findings in 2001.[7] It concluded that although Estonian police were formally subordinate to the Germans, they nonetheless "exercised significant independence of action in arresting and interrogating suspects, and determining and carrying out sentences." While reluctant to assign personal responsibility to most members of the Estonian police, the Commission made an exception for the Political Police, *all* of whose members it held accountable. Within this culpable group, the Commission named those *most* responsible, including Mikson, who had "signed numerous death warrants."

b. Harry Männil

Although Mikson was dead by the time the Commission issued its report, Harry Männil, one of his chief deputies, was alive and well in Venezuela.[8] In March 2001, the SWC appealed to the Estonian Prime Minister to investigate Männil,[9] and shortly thereafter the Estonian Security Police asked the United States for any documents relating to Männil's World War II activities.[10] OSI responded with a report, along with supporting documents, most of which came from the Estonian State Archives. The documents established that Männil had interrogated individuals in Political Police custody, including Jews and suspected Jews, and that the Germans had murdered at least one of the Jews interrogated.[11] After receiving the documents, the Estonian Security Police announced that there was no basis for accusing Männil of Nazi crimes and that Männil's interrogations were "a legal, procedural act" that could not be considered a crime against humanity.[12]

In June 2002, OSI's Principal Deputy Director and its Chief Historian went to Estonia to discuss, among other things, whether Estonia might seek Männil's extradition from Venezuela. This trip came in the wake of a controversial Op-Ed piece about the Holocaust written by the

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U.S. Ambassador to Estonia and published in one of that country's prominent newspapers. The article suggested that membership in NATO (which the Estonians were then seeking) depended in part upon eliminating resurgent anti-Semitism. It urged the Estonians to pursue those involved with the Holocaust "with the same vigor with which the state still pursues those suspected of Soviet crimes," and recommended national commemorations and education about the atrocities committed during that era.[13] The piece created a furor in Estonia, where some viewed it as interfering with the internal affairs of a foreign country.[14]

OSI's discussions with the Estonian prosecutors were tense. Although the Estonians reluctantly acknowledged that Männil might be culpable under Estonian law,[15] they changed their position shortly after the meetings concluded. In July 2002, the government announced that it could not prosecute Männil without evidence that he had actually issued (or carried out) the execution orders.[16] The Estonians never confronted Männil with the documents sent by OSI nor interviewed potential witnesses in the United States. The investigation was officially closed in December 2005, with the Estonians announcing that the 85-year-old Männil was not guilty of crimes against humanity.[17]

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A philanthropist and avid art collector, Männil was invited to Estonia in February 2006 to attend the opening of the country's new art museum. The U.S. ambassador boycotted the event because of Männil's presence.[18] As of this writing, Männil still resides in Venezuela.

c. [ ]

[ ], an [ ]-born Canadian citizen, was placed on the Watchlist and barred 66
from entering the United States in [ ]. The basis for his exclusion was a handwritten and signed statement he wrote as an officer candidate for the Waffen SS. In that document, he

reported serving as a criminal police official in the German Security Police and SD (Security Service) from [redacted] after which he joined the [redacted] SS.

In support of [redacted] unsuccessful effort to have his name removed from the Watchlist, the [redacted] Consul General in Toronto wrote letters stating that he did not believe [redacted] was a proper subject for investigation. The Consul General also certified a translation of [redacted] autobiographical statement which OSI deemed "so far from the original as to be unquestionably fraudulent."[19]

d. Michael Gorshkow

OSI filed a denaturalization lawsuit against Michael Gorshkow in May 2002. The complaint alleged that Estonian-born Gorshkow had been a Gestapo interpreter/interrogator at the headquarters of the German security police in Minsk, Poland (now Belarus). The complaint detailed Gorshkow's participation in a Nazi killing action at the Jewish ghetto in nearby Slutsk in February 1943. Some 3,000 Jewish men, women and children were shot to death at pits or burned alive when Nazi-led forces set fire to the ghetto and blocked Jews from leaving. The Nazi's advance order for the action identified Gorshkow by name as one of the men deployed to carry out the massacre; a fellow interpreter, questioned by the West German authorities in 1960, recalled Gorshkow's participation in the executions.

A month after the complaint was filed, OSI's Principal Deputy and its Chief Historian shared with the Estonians OSI's information on Gorshkow. Gorshkow fled to Estonia shortly thereafter and in July 2002, the district court entered a default judgment revoking Gorshkow's U.S. citizenship. A year later, Representative Tom Lantos asked the Estonian government for an update on their investigation of Gorshkow.[20] The Estonian reply professed commitment to the

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investigation but noted that material from OSI was "great and labor consuming, which makes it difficult for us at the moment to complete the case rapidly."[21]

Given that OSI had turned over only 36 pages of written material (plus 50 post-war interviews on a CD-ROM), OSI saw this as yet another example of Estonia's "bad faith in dealing with the Nazi cases."[22] In December 2003, Estonia formally opened an investigation into Gorshkow. The Prime Minister assured Representative Lantos that he would "personally follow" the investigation.[23] Several months later, the Estonians concluded that there was insufficient basis for an indictment.[24]

2. Lithuania

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Over the years, Lithuania has sent mixed messages about its commitment to prosecuting alleged war criminals. After gaining independence, Lithuania seemed committed to prosecuting those who had persecuted civilians on behalf of the Nazis. In 1991, the government established an office to investigate "crimes against humanity" committed during the Nazi and/or Soviet eras; its mandate included determining whether the country had wrongly "rehabilitated" any Nazi collaborators.[25] Lithuania also signed an agreement to assist Australia in its efforts to prosecute former Lithuanian war criminals now resident in Australia, and offered to enter into a similar pact with both Israel and the United States.[26] The following year, Lithuania adopted a statute punishing Nazis and Nazi collaborators for crimes committed against the Lithuanian people during World War II. There is no statute of limitations and punishments range from five years imprisonment to death.[27] Lithuania also negotiated a Memorandum of Understanding (MOU) with the United States, whereby each country agrees to assist the other in the investigation of alleged war criminals.

Despite these intentions, by September 1994, when OSI filed a denaturalization suit against Lithuanian-born Aleksandras Lileikas, Lithuania had not yet prosecuted any Nazi collaborators.[28] OSI saw the Lileikis prosecution as "one of the most important Nazi cases brought anywhere in the world in recent history."[29] As such, Lithuania's handling of Lileikas issues became, for OSI, the litmus test of Lithuania's commitment to prosecute those who had assisted the Nazis.

Lileikis had been chief of the Lithuanian Security Police (Saugumas) in Vilnius. On behalf of the Nazis, the Saugumas arrested Jews, suspected Jews, and those who aided, hid or did business with Jews. Tens of thousands of those incarcerated in Vilnius were marched or trucked to an excavation site at Paneriai, six miles away.

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Not all those incarcerated in Vilnius were arrested there, nor were all those arrested in Vilnius rounded up by the Saugumas. Nonetheless, even with very incomplete records available, it is certain that at least several hundred of those sent to Paneriai were arrested by the Saugumas during Lileikis' tenure. Once at Paneriai, the victims were stripped of their clothing and any remaining possessions, and then shot in groups of ten at the rim of pits by a Lithuainian volunteer unit. Vilnius had been home to 60,000 Jews before the war; at war's end, only 5,000 were alive.[30]

As chief of the Saugumas in Vilnius, Lileikis was the highest ranking Lithuanian prosecuted by OSI. The case, based on documents found by an OSI historian in the Lithuanian archives, included dozens of orders signed by Lileikis. There were arrest warrants as well as orders transferring many arrestees to the German Security Police, where they were "treated according to orders," *i.e.*, murdered. The documents also showed that, during Lileikis' tenure,

the Saugumas conducted a series of sting operations, in the course of which 38 Jews, including a ten year old boy, were lured out of the ghetto with a false promise of escape. The Saugumas then arrested the victims.[31]

Lileikis did not contest that he had been chief of the Saugumas and that as such he had ordered his men to arrest thousands of Jews and turn them over to the Nazis. Rather, he maintained that this was a "ministerial and custodial" position and did not amount to the "personal advocacy or assistance of persecution" necessary to revoke his admission to the United States under the RRA.[32]

Almost immediately after the case was filed, the Lithuanian ambassador to the United States made clear that it would be "very difficult" to prosecute Lileikis in Lithuania, no matter what the documentary evidence. He suggested that Lileikis would have a viable defense if he simply claimed he did not know that those he had arrested and turned over would be killed.[33] Yet barely two weeks later, the Lithuanian premier, in Israel to sign a cultural and scientific cooperation agreement, apologized for his country's persecution of Jews during the Nazi era and indicated that Lithuania would seek Lileikis' extradition.[34] The Department of Justice forwarded copies of pertinent documents to Lithuania. U.S. officials made clear that they hoped Lithuania would request extradition even before the district court ruled on denaturalization, as an extradition request would expedite Lileikis' departure.[35]

In February 1995, shortly before the Lithuanian president was due to visit Israel, his government claimed that there was insufficient evidence to warrant an investigation of Lileikis. The World Jewish Congress expressed outrage and warned that the upcoming trip might be "a diplomatic disaster."[36] On the eve of the visit, Lithuania opened an investigation.[37]

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A few months later, Lithuania again warned of pending problems. It suggested that since its 1924 extradition treaty with the United States did not cover genocide, it did not apply to Lileikis' alleged crimes.[38] Moreover, the Lithuanians indicated that the documentary evidence was insufficient; they wanted eyewitnesses.[39]

Forty-nine U.S. Congressmen urged Lithuania to reconsider its extradition analysis and to file charges against Lileikis.[40] Jewish groups argued the same.[41] Ninety-two members of the Israeli Knesset wrote to the Lithuanian president, prodding him to take action against Lileikis as well as against Kazys Gimzauskas, Lileikis' second in command, who had fled to Lithuania after OSI filed a denaturalization action against him in 1995.[42]

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In May 1996, a U.S. court stripped Lileikis of his citizenship and adopted OSI's analysis of the case.

> [A]s the government nicely put it at oral argument, Lileikis is attempting to stand the classic Nuremburg defense on its head by arguing that "I was only *issuing* orders.[43]

Within days of the denaturalization, Poland (which shares a border with Lithuania and lost tens of thousands of Polish Jews at Paneriai), announced that it had opened its own criminal investigation and might seek extradition.[44] The SWC asked Israel to do the same.[45]

Lithuania made clear that Lileikis was welcome to return home and suggested that he would not be prosecuted since there were no eyewitnesses.[46] Lileikis returned voluntarily within three weeks of this news. He was 89 years old and the first OSI defendant to return to one of the new republics formed after the dissolution of the Soviet Union.

The SWC demanded that Lithuania follow through on its promise to prosecute war criminals.[47] The United States too weighed in. At the time, all the Baltic states were seeking

admission to NATO. The United States asserted that prosecution of Lileikis and other war criminals would be strong evidence of adherence to "western values," a prerequisite to joining the alliance. Vice President Al Gore made this point when meeting with the president of Lithuania's parliament in April 1997,[48] and thirty members of Congress reiterated the message in a November 1997 letter to the Lithuanian president.[49]

Finally, in 1998, Lithuania charged Lileikis with genocide.[50] It was the first Nazi war crimes prosecution in post-Soviet Eastern Europe. Trial was suspended after a day, however, due to Lileikis' health. The State Department expressed "deep disappointment" and called on Lithuania to take "whatever steps are necessary" to ensure that Lileikis and others involved in war crimes during the Nazi era were brought to justice.[51] Three months later, trial not having resumed, Director Rosenbaum and a representative from the State Department's Office of War Crimes met with the Lithuanian Ambassador. They proposed having Lileikis examined by an international panel of doctors, including one U.S. physician, with the United States covering all costs. Lithuanian prosecutors presented the proposal to the court, but it was rejected by the judge.

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Lithuania's admittance into NATO was on the agenda for an April 1999 NATO summit meeting. In a meeting with the U.S. Attorney General just one month before the scheduled summit, Lithuania's Prime Minister asked for assistance in drafting a law allowing for the prosecution of war criminals *in absentia*. The Department of Justice forwarded material prepared by both OSI (concerning the standards for *in absentia* hearings) and OIA (concerning videoconferencing).

In January 2000, the State Department reiterated its call for Lithuania to prosecute Nazi

war criminals.[52] Two months later, Lithuania amended its criminal code to provide that those charged with war crimes, genocide, and crimes against humanity can participate in court proceedings via closed circuit television if they are mentally competent but physically unable to appear in court. While no punishment may be imposed unless the defendant is subsequently deemed healthy enough to withstand a jail sentence, a verdict is rendered for purposes of "historical judgment."

Lileikis' trial resumed in June 2000 and was the first case to proceed under the new statute. Thirty minutes into the hearing, Lileikis complained of difficulty in breathing and was taken to the hospital. Trial was suspended indefinitely; he died two months later, at age 93.

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Although the case had not proceeded to verdict, the Lithuanian Procurator General issued a press release stating that his office had enough evidence to substantiate Lileikis' role in the commission of genocide. He promised to seek "historic justice" in other cases of war crimes and genocide.[53]

He did so in the case of Lileikis' wartime deputy, Kazys Gimzauskas. Relying largely on documents pointed out by OSI, Lithuania had originally charged Gimzauskas with genocide in 1998, shortly after Lileikis' trial was first suspended. Gimzauskas' case was repeatedly delayed and ultimately suspended due to his deteriorating mental condition. Despite the court's finding that Gimzauskas was incapacitated from Alzheimer's disease, the trial resumed via closed circuit television after Lileikis' death.[54] Gimzauskas was convicted in 2001, at age 93, with the court finding that he had handed over at least three Jews to Lithuanian killing squads. The State Department and Director Rosenbaum lavished praise on Lithuania.[55]

Gimzauskas' conviction was the first Holocaust-related conviction in any of the successor

states to the former Soviet Union.

In June 2000, Lithuania's Procurator General met with the Deputy Attorney General and Director Rosenbaum. The Procurator General asked for DOJ's assistance in investigating Nazi-era war crimes. In response to that request, an OSI historian and an OSI attorney went to Lithuania in early 2001 to discuss several cases. The significance of the meetings was underscored by the fact that they were attended also by the U.S. Ambassador.

Lithuania has since asked for information about some subjects under investigation, although it has also declined to file charges against a Lithuanian ordered deported to Lithuania in May 2002.[56] Lithuania also initiated an extradition request to Scotland, although the subject died before court proceedings were completed.[57]

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In July 2004, Lithuania filed criminal charges against Algimantas Dailide, an OSI defendant who left for Germany during appeal of a court ruling ordering him deported to Lithuania. Lithuania did not seek his extradition, but expressed the hope that he would return voluntarily. He did, and was found guilty in March 2006 of collaborating with the Nazis and persecuting Jews. However, due to his advanced age, no sentence was imposed. The U.S. government praised Lithuania for the prosecution but expressed disappointment that Dailide was "not . . . punished for his crimes."[58] As of this writing, the case is on appeal.

Lithuania has also cancelled the rehabilitation of several dozen Nazi collaborators.[59] In 2002, Lithuania's parliament ratified a new extradition treaty with the United States. It covers genocide directly.

3. Latvia

As with Lithuania, Latvia has sent mixed signals about its perspective on its role in the

Second World War. The Supreme Council of the newly-independent Republic of Latvia issued a Proclamation Against Genocide and Anti-Semitism in September 1990. "In the name of the people of Latvia," the document:

> unequivocally condemns the occurrence of genocide against the Hebrew Nation, during the years of Hitler's occupation, which resulted in the killing of more than 80,000 Latvian Hebrews. . .
>
> With deep regret we acknowledge that among those who helped carry out the terror of the occupiers, there were also Latvian citizens. There is not now, nor can there ever be justification, nor a statute of limitations, for the bloody genocide against he Hebrew Nation – a crime against humanity.

In 1992, the Latvian Procurator's Office signed a MOU with the Department of Justice. The parties agreed to provide legal assistance on a reciprocal basis in the investigation of individuals who are suspected of having engaged in Nazi-sponsored acts of persecution or of having assisted in the commission of such acts. And in February 1998, the Latvian president went to Israel and apologized for the role his country had played in the murder of Jews.[60]

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Yet barely one month later, the Latvian Army commander, the head of the Navy, and five members of parliament joined a parade of more than 500 former members of a Latvian SS unit to mark the unit's 55th anniversary. (The Army commander was fired for his participation.)[61]

OSI's dealings with Latvia were most intense in the case of Konrads Kalejs. Kalejs was a company commander in the Latvian Auxiliary Security Police (eponymously known as Arajs Kommando (AK) for its leader Viktors Arajs).[62] The AK was an execution squad composed of Latvian volunteers who worked with German forces to murder "racially undesirable" persons and/or political enemies of Nazi Germany. After the war, Kalejs settled in Australia and became a naturalized citizen. He emigrated to the United States in 1959 but never sought U.S.

citizenship.

OSI serendipitously learned of his presence. When searching for another member of the AK, they learned that he was dead but that his widow was in the country. She was living with Kalejs, a name OSI recognized from the AK roster.

In October 1984, OSI filed suit to deport Kalejs on the ground that he had assisted in the persecution of civilians based on race, religion, national origin or political opinion and had concealed these material facts when he applied for a visa. The complaint pointed to the AK's role in liquidating Jews, shooting gypsies, and guarding prisoners at various camps. OSI presented testimony from an historian, three camp survivors, and Latvians who knew or served with Kalejs during World War II. (The latter group testified through depositions taken in the Soviet Union). There was also documentary evidence, including the text of an interview with Arajs himself. Kalejs' main defense was that the evidence was unreliable because it largely came from the Soviet Union. The court agreed that the deposition testimony was of limited value but relied heavily on the archival records in ordering Kalejs' deportation. The ruling was affirmed and he was deported to Australia in April 1994.[63]

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Kalejs' long-time companion lived in Winnetka, Illinois, and OSI suspected Kalejs might go to Canada to be near her. OSI alerted Canadian officials to be on the watch.

OSI's forebodings proved correct. Kalejs was arrested when he entered Canada in December 1994. In June 1995, a month before his Canadian deportation proceeding was to commence, he voluntarily returned to Australia. Three months later, he was caught again attempting to enter Canada. This time he did not depart before the hearing, which was held intermittently between February 1996 and March 1997. Most of the Canadian evidence was

material from OSI which had been used in the U.S. proceedings. The Canadians also introduced a report written by an OSI historian on the background of the AK.[64]

Kalejs' defense, once again, was that he was framed by doctored Soviet evidence. The magistrate disagreed, concluding that as a guard commandant Kalejs was "a party to the offences of murder and kidnaping and failed to provide for the necessaries of life." Such acts and omissions constituted war crimes or crimes against humanity. The Canadian magistrate stressed that there was no evidence to suggest that Kalejs "hated Jews or that he was a cruel, perverse sadistic monster with a blackened soul." That, as the magistrate saw it, was part of the ultimate tragedy.

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> Given the glorification of war and the manipulation of emotions and thoughts by regimes and society, creating a climate of hate and arrogance and intolerance, it may be that society asks too much of the individual, but often the individual does not ask enough of himself.

Kalejs was deported to Australia.

Jewish groups were outraged that he was returning to a life of ease.[65] Effraim Zuroff, Director of the SWC in Israel, urged the Australians either to prosecute Kalejs under the Australian War Crimes Act or to deport him.[66] Zuroff also met with the Latvian Ambassador to Israel to urge that he cooperate with the Australians in an endeavor to extradite Kalejs to Latvia.[67]

OSI had, in due course after Kalejs' deportation, had him placed on the Watchlist. On December 6, 1997, INS got a "hit" and stopped Kalejs at Los Angeles International Airport. He had flown from Melbourne and was *en route* to Mexico. He was sent back to Australia that day.

In June 1999, Zuroff advised OSI that an investigator was working on a segment about Nazis in Australia for the ABC newsmagazine 20/20. The investigator discovered that Kalejs

had left Australia a year earlier. No one knew where he was now though Zuroff opined to ABC that he had likely snuck into the United States to be with his companion. Director Rosenbaum was very concerned that if he were in the U.S., the public would – unfairly – hold OSI responsible for not preventing his reentry. (OSI is not responsible for border security.)

OSI asked INS to contact the local mail carrier to determine if an elderly man was at the Detroit residence and/or whether mail had been addressed to him. The answer to both was no. An examination of his companion's phone records showed one, and sometimes two or three calls a day to Rugby, England. When ABC contacted Rosenbaum about its upcoming piece, he suggested the reporters might find Kalejs in Rugby. They did. He was living under an assumed name in a Latvian old age home.

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OSI worked to keep the spotlight on Kalejs. Rosenbaum spoke with various members of the British media and encouraged Lord Greville Janner, chair of Britain's Holocaust Education Trust, to do the same.[68] On December 29, British Home Secretary Jack Straw called for an investigation into how Kalejs had been allowed into the country. The following month, he ordered Kalejs deported because his presence was detrimental to "the public good." Rather than face a hearing, Kalejs returned to Australia.[69]

On January 26, 2000 the Latvian Minister of Justice came to the United States and met with Director Rosenbaum.[70] The discussion was very frank. Once the opening formalities were aside, Rosenbaum posited, and the Minister conceded, that the Latvians had requested the meeting in the wake of negative publicity about Kalejs. Rosenbaum voiced extreme disappointment that the Latvians had not prosecuted anyone involved in persecution on behalf of the Nazis. He reminded the Minister that although Arajs himself had been prosecuted by the

Germans, none of Arajs' three lieutenants still alive, Konrads Kalejs and Karlis Ozols (both in Australia) and Harijs Svikeris (in Great Britain) had been prosecuted by the Latvians. Yet in the ten years since they obtained independence from the Soviet Union, the Latvians had prosecuted several Soviets involved in *anti*-Nazi activities during World War II.[71] Given those prosecutions, the Nazi cases could not be "too old" to pursue. Rosenbaum also contrasted the Latvians' inertia with that of the Croats, who in 1999 convicted the commandant of a Nazi concentration camp of "systemic" mass killings, torture and maltreatment of inmates.[72] Rosenbaum pointed out that this had been "politically difficult" and "courageous," since it necessitated Croatia's working with Serbia.

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Rosenbaum warned the Minister that now was the "last chance" to erase the impression that his country was intentionally delaying until all the Nazi defendants were either dead or too incapacitated to prosecute. Rosenbaum also suggested that prosecution of Nazis would be viewed "as a commitment to western values" – a not so subtle reference to Latvia's desire to join the European community.

The Minister blamed Latvian intransigence on years of operating under the Soviet paradigm. He offered to host an international meeting to discuss the Kalejs case and Rosenbaum agreed to send an OSI representative. Rosenbaum urged, however, that the meeting cover other Latvian persecutors as well as Kalejs. Rosenbaum also offered a carrot to the Latvians: if they knew of anyone in the United States who they believed was involved in crimes of persecution during the early Soviet occupation of Latvia (1940-41), OSI would assist in the investigation.[73]

Four days after this meeting, Latvia issued formal invitations to prosecutors from Australia, Canada, Germany, the UK, Israel and the United States to meet in Riga on February

16-17, 2000. Principal Deputy Director Susan Siegal and historian Michael MacQueen, a Latvian speaker and OSI's Chief of Investigative Research, represented the office. At the Minister's suggestion, they arrived two days before the international session began. They met first with the Latvian Deputy Chief Prosecutor. According to MacQueen, "[t]he most charitable and accurate manner of summarizing the meeting is to term it a hideous failure."[74] The Latvians claimed there was not sufficient evidence against Kalejs.

Siegal and MacQueen were particularly frustrated that Latvia denied having the original Kalejs documents which OSI said it had forwarded years earlier. Moreover, the Latvians had not done any independent research within their own archives in preparation for this international convocation.

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The next day, Siegal and MacQueen, accompanied by U.S. Ambassador James Holmes, met with the Latvian Prosecutor General to express their "distress over the unmitigated disaster our two days of bilateral meetings had been." OSI complained about Latvia's public stance that there was "no evidence" against Kalejs and reiterated its offer to assist the Latvian government. They told the Prosecutor General that "we felt insulted and abused by our experiences of the past days."

The international conference fared much better from OSI's perspective than had the preliminaries.[75] There was discussion of where additional archival material might be found and OSI offered "the hands-on assistance of OSI's historical staff." The discussion even spilled over into potential prosecutions other than Kalejs.

By the end of the conference there was some structure to the proposed investigation. The participants had ranked the Kalejs evidence in terms of most likely avenues of success under

Latvian law;[76] the Prosecutor General's office committed to hiring a historian to work on the case; Latvian prosecutors planned to go to Britain to review material collected in a related investigation; MacQueen agreed to return to Riga to assist Latvian investigators; Siegal promised to send case records from OSI prosecutions similar to Kalejs'; the Latvian Prosecutor General agreed to contact his Russian counterpart and arrange for review of KGB files and other pertinent material in Russian possession; the Israelis promised assistance in finding eyewitnesses; and all parties agreed to reconvene in a few months to review progress.

Expectations were still guarded however. As the American Embassy in Riga reported:

> Neither we nor anyone else should be under the illusion that the road to the extradition of Konrads Kalejs from Australia to Latvia nor his eventual arraignment before a Latvian court will be straight or smooth. The deeply entrenched Soviet era inclinations toward obstruction and evasion of forthright prosecutions among working level prosecutors, their lack of experience or competence in formulating sensitive cases of this nature, and their apparent residual sympathies towards Latvians who fought the Russians, albeit under a Nazi banner, foretell of numerous difficulties . . .[77]

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The international conference was scheduled to reconvene at the end of June. In May, Latvia's Acting Prosecutor General announced that a trial was unlikely because no strong evidence had been found.

John Withers, the Deputy in Charge of Mission (DCM) in Latvia, was a strong supporter of OSI's quest to make Latvia more responsive to the Nazi war crimes issue.[78] Among other things, he suggested some groundwork be done before the international meeting reconvened. Specifically, he recommended having Ivars Kreivans, a former DOJ Resident Legal Advisor to the Baltics, return to Latvia to discuss the legal issues with Latvian prosecutors. Siegal and Rosenbaum agreed, proposing that he be accompanied by OSI attorney Steven Paskey who was

familiar with details of the Kalejs case.[79]

Before Paskey and Krievans arrived, the State Department kept pressure on the Latvians. Secretary of State Madeleine Albright spoke with the Latvian president and "again reiterated that it is imperative for Latvia to bring Nazi war criminals to justice; the Ambassador [Holmes] said the same thing in his initial call on the new Latvian Prime Minister." Withers assured OSI that:

> [W]e will press the Latvians to get to [the newly appointed Prosecutor General] and have him issue a statement repudiating [the Acting Prosecutor General's] comments. . . . Second, as soon as we can make the appointment next week, the Ambassador will see him and lay out in no uncertain terms what's at stake here. . . . Third, we need to get Krievans and Paskey out here as soon as possible. It is clear to me that the Latvians can't or won't put together a case, so we'll have to do it for them. . . . They still believe that this will somehow go away. We've got to keep hammering on them until they realize that it won't. I still think that as long as we keep our grip tight and our nerves steady, we're still on track.[80]

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In early June, Krievens and Paskey spent ten intense days in Latvia meeting with the new Prosecutor General and his Deputy as well as with the chief of the unit responsible for dealing with crimes involving totalitarian regimes. They discussed the Kalejs evidence, international war crimes laws and conventions, and the use of historians as experts in war crimes prosecutions.

At the close of the meetings, a joint statement issued by the United States and Latvia stressed the cooperation and coordination between the two governments. Latvia reaffirmed its commitment to investigate "actively and thoroughly" all Nazi-sponsored war crimes. Shortly after the Americans left, the Procurator General announced that Latvia would request Kalejs' extradition to stand trial for war crimes and genocide. The Latvians credited the Americans with having played a crucial role in the decision to prosecute.[81]

The following month, Latvia sent a list of questions to Australia which they wanted the authorities to pose to Kalejs. In addition, a Latvian prosecutor went to Moscow to examine

Kalejs-related documents.

MacQueen, who had offered at the international conference to assist the Latvians, made good on his promise. From August 20 to September 3, he worked with the Latvians in Riga on Kalejs and related matters. MacQueen sensed that the Latvians were not fully committed to indicting Kalejs and he so informed Ambassador Holmes. In response, Holmes met with the President, Foreign Minister and Procurator General to encourage them to go forward.

Fortuitously for OSI, at the same time that pressure to proceed was emanating from the United States, Russia too was bearing down on the Latvians. Russia protested Latvia's prosecution of partisans who aided Russia during World War II while Nazis like Kalejs were left alone.[82] Russia went so far as to threaten economic sanctions against its former Republic.[83]

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The Latvians of course were only one part of the equation. The Australians had to extradite and there was some concern in this regard. In August 2000, Australia's Justice Ministry notified the Latvian Procurator General that it was difficult to extradite for war crimes under Australian law.[84] When the United States learned about this, Ambassador Holmes urged the Australians to send an extradition expert to the upcoming multilateral conference (part II) now scheduled for mid-September. They agreed to do so.

Outside events here too were working in OSI's favor. Australia was scheduled to host the International Olympics in Sydney from Sept. 15 - Oct. 1, 2000. They were therefore particularly sensitive to negative press coverage. On the eve of the event, then-U.S. Senate candidate and First Lady Hillary Clinton urged the Australian government to help bring Kalejs to justice. Her letter drew banner headlines.[85]

On September 28 (shortly after the second – and largely collegial – international

conference concluded), the Latvians indicted Kalejs. Still OSI did not rest, fearing that Kalejs would flee unless an extradition request were on file. OSI prodded the State Department to urge the Australians to send Latvia a formal request for a warrant. A few days later, Latvia announced it would seek both an arrest warrant and extradition. The arrest warrant was issued in November and a formal extradition request soon followed. Kalejs was arrested in Melbourne, Australia on December 13, 2000.

He attended his deportation hearings in a wheelchair but did not actively participate. His attorneys advised the court that he was suffering from dementia and prostate cancer.

On May 29, 2001 an Australian magistrate ordered his deportation. The ruling was on appeal when he died on November 8, 2001.

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1. For a discussion of how indigenous groups within each country assisted Germany, *see U.S. v. Linnas*, 527 F. Supp. 426, 430-31 (E.D.N.Y. 1981) *aff'd*, 685 F.2d 427 (2nd Cir. 1982) (Estonia); *U.S. v. Lileikis*, 929 F. Supp. 31, 33 (D. Mass. 1996) (Lithuania); *Maikovskis v. INS*, 773 F.2d 435, 437 (2nd Cir. 1985) and *Kalejs v. INS*, 10 F3d 441, 442 (7th Cir. 1993) (Latvia).

2. *Laipenieks v. INS*, 750 F.2d 1427 (9th Cir. 1985), discussed at pp. 117-126.

3. *See* pp. 12, 537.

4. Frustrated by the dearth of prosecutions, in 2002 a wealthy U.S. businessman underwrote Operation Last Chance, a project launched by the SWC and the Targum Shlishi Foundation of Miami. The project offered $10,000 to anyone with tips leading to prosecution of Nazi war criminals in the Baltic states; it was later expanded to include Poland, Romania, Austria, Croatia, Hungary and Germany. As of this writing, several investigations have been opened as a result of the project and one extradition has been ordered (Charles Zendai, from Australia to Hungary. *See* p. 491. No prosecutions originating from Operation Last Chance have yet been filed. SWC 2005 Annual Report, "Worldwide Investigation and Prosecution of Nazi War Criminals," p.15; "Nazi Hunter Solicits Germans for Leads," by Elinor Brecher, *The Miami Herald*, Jan. 18, 2005; "Florida Man Funds War Crimes Project," by Elinor Brecher, *The Miami Herald*, July 8, 2002.

5. Indeed, the Soviets had sought his extradition. *See* p. 288, n. 7.

6. June 19, 2001 letter to Delores Brown, DCM [Deputy Counsel to Mission], U.S. Embassy, Tallinn from Director Rosenbaum.

7. *See* www.historycommission.ee/temp/conclusions (last visited Nov. 2005).

8. Männil's inclusion on the Watchlist is discussed at pp. 300-301.

9. "Estonia Seeks Help in Nazi Case," *The Jerusalem Post*, July 25, 2001.

10. Request for legal assistance from Jüri Pihl, Director General of the Estonian Security Police Board. The request was sent to the Department of Justice from the Estonian Ministry of Justice. Ironically, in 1995, Pihl, as Director General of the Estonian Security Police Board, had written a letter stating that "Harry Mannil has not been involved in any war crimes in Estonia during World War II, not has [sic] been involved in any criminal activity in Estonia at all. Allegations made to this effect are completely groundless." Männil submitted that letter to the State and Justice Departments when he sought to have his name removed from the Watchlist.

11. July 25, 2002 memorandum to Director Rosenbaum from Susan Siegal, Principal Deputy Director and Elizabeth White, Chief Historian, re "Meetings with Estonian Government and U.S. Embassy Officials in Tallinn, June 11-13, 2002" (hereafter Siegal/White memo).

12. *Eesti Päevaleht*, Aug. 23, 2001. *See also*, *BNS*, Aug. 22, 2001 in which the Security Police said there was "no proof of [Männil's] participation in the persecution of Jews during World War

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II."

13. "Past, Present and Future," by Amb. Joseph De Thomas, *Eesti Päevaleht*, May 28, 2002. The Estonians have prosecuted several people for crimes against humanity based on their helping the Soviets deport Estonians shortly after World War II ended. At least one defendant has been sentenced to confinement in a mental hospital and two others received eight year suspended sentences. "Mass Deportation Case Pending," *The Baltic Times*, Mar. 14, 2002.

14. "Estonia Downplays U.S. Complaint about Holocaust," *ETA News Agency*, Tallinn, May 29, 2002; "U.S. Ambassador's Holocaust Statement Seen as Warning About NATO to Estonia," *BNS*, May, 29, 2002.

When meeting with the OSI representatives, the Ambassador described himself as "the most hated man in Estonia." Siegal/White memo, *supra*, n. 11, at p. 2. Whatever the Estonian immediate reaction, however, in Aug. 2002 the government instituted Holocaust Day. "Estonia for the First Time Marks Holocaust Day," *BNS*, Jan. 27, 2003.

15. Siegal/White memo, *supra*, n. 11, at p. 10. The Estonian law at the time of the meeting allowed prosecution for war crimes, genocide and crimes against humanity, but only if the defendant had had direct knowledge of the crime. An amendment had recently passed, to go into effect Sept. 1, 2002. It allowed prosecution based on indirect intent, but only for genocide and crimes against humanity. OSI and the Estonians discussed whether either version of the code would apply to Männil.

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16. "Cursory Nazi Probe Rejected," by Sara Toth, *The Baltic Times*, July 25, 2002.

17. "Harry Männil's Criminal Case Closed," *BNS*, Jan. 2, 2006; "Estonia Drops Case Against Ex-Pat Suspected of Nazi War Crimes," *Agence France Presse*, Dec. 30, 2005.

18. "U.S. Ambassador Boycotts Estonia's Mannil," *BNS*, Feb. 27, 2006.

19. June 19, 2001 letter from Rosenbaum to Delores Brown, DCM, U.S. Embassy, [ ] b6

The original German text reads as follows:

Von [ ] als Stafsoff [ ] Selbstschutz und nach dem als Freiwillige [ ] b6
[ ] Selbstschutz. [ ] diente ich als Kriminalist in der Deutsche
Sicherheitspolizei u. S.D. In [ ] SS-Legion bin ich am [ ] eingerückt.

The OSI-commissioned translation: From [ ] I served as staff [ ] b6
officer in the [ ] Selbstschutz [Omakaitse] and afterwards as a volunteer in the [ ]
Selbstschutz. From [ ], I served as a criminal police official in the
German Security Police and SD. I joined the [ ] SS Legion on [ ].

Translation bearing the seal of the Consulate in Toronto and signed by the Consul General under the typed words: "This is to certify that the above text is a correct and factual translation from the German language into the English language from the original document produced."

I was registered in the Omakaitse papers as a Stabsofficer [staff officer] from From , I served in Criminal Police which was later incorporated into the German Police. I was drafted to the SS-Legion on

20. Aug. 1, 2003 letter from Rep. Lantos to Ken-Marti Vaher, Estonian Minister of Justice.

21. Oct. 22, 2003 e-mail from Director Rosenbaum to Susan Siegal, Elizabeth White, Stephen Paskey, Jonathan Drimmer and Michael MacQueen re "Amazing Gorshkow Reply by the GOE to Rep. Lantos."

22. *Id.*

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23. Feb. 18, 2004 letter to Rep. Lantos from Prime Minister Juhan Parts.

24. Notes from SWC representative in Israel, Effriam Zuroff of his May 5, 2004 meeting with Estonian Ambassador to Israel, H.E. Marina Kaljurand.

25. Oct. 25, 1991 Press Release from the Lithuanian Information Center, New York, New York; "Lithuania to Prove 'Rehabilitations,'" *The Chicago Tribune*, Oct. 26, 1991. In 1990, the Lithuanian government had announced an official rehabilitation for 50,000 Lithuanians whom the Soviets had charged with Nazi collaboration. "Nazi-Hunter Dismayed Over Secrecy of Derehabilitation of Nazi Suspects in Lithuania," *BNS*, Nov. 17, 2000.

26. Oct. 25, 1991 Lithuanian press release, *supra*, n. 25.

27. Law Concerning Responsibility for Genocide of the People of Lithuania, Num. 1-2477 (1992).

28. Of course, OSI itself often took years, and sometimes decades, to develop a case. That was in part due to the fact that OSI had limited access to archival material during the Soviet era. While access was easier for the Lithuanians, they (and other Eastern bloc countries) had serious resource issues. Recorded interview with former OSI Chief Historian Peter Black, Dec. 26, 2000. *See also* p. 12.

29. "OSI Vows to Pursue Deportation Despite Setback from Lithuania," by Jennifer Batog, *JTA*, Feb. 15, 1995.

30. This was roughly in proportion to the percentage of Jews throughout Lithuania who died during the war. Over 90% of the 220,000 Jews in the country did not survive.

31. Lukiškis Prison records, LCVA Collection R 730, apy. 1, nos. 827, 1002, 1753, 2248, 2437; execution file cards of the Vilnius Sonderkommando, LCVA collection R 1673, opis 1, nos. 1425, 1426, 1606, 2494, 2676, 3330, 3715. Lukiškis Prison records, LCVA, R 681, apy. 2, folder 1, pp. 17-59.

In 1983, when OSI conducted an interview with Lileikis, they showed him an order requiring 52 Jews in Saugumas custody to be turned over to the Germans. Lileikis' name, but not signature, was on the order. He noted that it could have been issued without his knowledge and challenged his interviewers to find a document with his signature. It was not until the Cold War ended, and OSI's own historian could rummage through the Archives in Vilnius, that the "smoking gun" documents were found.

32. Lileikis had originally been denied a visa under the DPA. A 1947 CIC report references persecution of Poles by the men under his command. It goes on to state that "It has not been ascertained whether Lileikis was connected with the shooting of thousands of Jews in Vilna."

33. "Few Predict Swift Punishment for Alleged Collaborator," by Jon Auerbach, *The Boston Globe*, Sept. 23, 1994.

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34. "Among Lithuanians, Confusion on Alleged Nazi Collaborator," by Ethan Bronner, *The Boston Globe*, Oct. 5, 1994; RFE/RL Daily Report, Oct. 4, 1994; Oct. 2, 1994 *AP* release by Heather Smith.

35. "Lithuania Gets Evidence for War Crimes Decision," by Ed Stoddard, *Reuters*, Apr. 12, 1995; "OSI Vows to Pursue Deportation Despite Setback from Lithuania," by Jennifer Batog *JTA*, Feb. 15, 1995; "Lithuania Decides Against Charging U.S. Citizen with Nazi Crimes," by Michael Sniffen, *AP*, Feb. 9, 1995. For an explanation of why extradition is speedier, see pp. 41-42.

36. "Accused Norwood Nazi Won't be Prosecuted: Lithuania Drops Charges Against Lileikis but U.S. Still Pushes Deportation," by Jennifer Batog and Michael Sinert, *The Jewish Advocate*, Feb. 23, 1995.

37. "Man Faces War Crime Inquiry," by Judy Rakowsky, *The Boston Globe*, Feb. 28, 1995.

38. "Extradition Canceled," by C.F. Scott, *Washington Jewish Week*, Oct. 12, 1995; "Lithuania Wants New War Treaty," *Reuters*, Oct. 4, 1995; "Lithuania Says It Will Not Extradite Norwood Man," by Judy Rakowsky, *The Boston Globe*, Oct. 3, 1995. The U.S. maintained that since murder was covered, there was no need for a separate genocide listing in order to extradite Lileikis.

39. "Nazi Hunter Says Lithuania Stalls on Extraditions, by Ed Stoddard, *Reuters*, May 22, 1996.

40. "Nazi Hunter Says Lithuania Stalls on Extraditions," *supra*, n. 39.

41. *E.g.*, The WJC accused Lithuania of "betray[ing] the memories of tens of thousands of innocent people." *JTA Daily News Bulletin*, Feb. 15, 1995; the International Association of Jewish Lawyers and Jurists (IAJLJ), American Section, along with the SWC, met with the Lithuanian ambassador, and a followup meeting was held between the IAJLJ and officials at the Lithuanian Embassy. The group urged Lithuania to extradite and prosecute Lileikis. Feb. 27, 1995 IAJLJ press release.

42. "Israeli Knesset Letter to Lithuanian President," *ELTA* [Lithuanian News Agency], Feb. 28, 1996.

43. *U.S. v. Lileikis*, 929 F. Supp. 31, 39 (D. Mass. 1996).

44. "Poland Probes Nazi Collaborator," by David Talbot, *The Boston Herald*, May 30, 1996; "Alleged Lithuanian War Criminal Returns Home," by Ed Stoddard, *The Baltic Times*, July 3, 1996.

45. "Alleged Lithuanian War Criminal Returns Home," *supra*, n. 44.

46. "Lithuania Welcomes Lileikis to Return," by Ann Donlan, *The Boston Herald*, May 28, 1996.

47. "Accused World War II Criminal Flees to Lithuania," by Judy Rakowsky, *The Boston Globe*, June 20, 1996. The issue was complicated by the fact that the Lithuanians wanted to prosecute two former NKVD officers of Jewish origin, accused of torturing and murdering Lithuanians during the Soviet era. One was in Israel and the other in West Germany. Neither country was willing to extradite. "Ghosts from the Gulag, Lithuania Tries to Remember Stalin and Forget Hitler," by Christian Caryl, *U.S. News and World Report*, Oct. 20, 1997; "Germany Refuses to Hand Over Former KGB Agent, Accused of Genocide," *Draugas*, Apr. 23, 1997. (*Draugas* is a Lithuanian language daily published in Chicago.)

48. "Reno: Lithuania to Prosecute Nazi," by Michael Sniffen, *AP*, Feb. 9, 1998; "US Vice-President Meets Chairman of Lithuanian Parliament," *Draugas*, Apr. 10, 1997.

49. "Vilnius Turns Blind Eye to Its Nazi Past," by Richard Paddock, *The Los Angeles Times*, Jan. 4, 1998.

50. In Feb. 1998, Lithuania inaugurated a new president. Valdus Adamkus had fled the country as a teenager and spent 50 years in the U.S., most of it as an engineer employed by the U.S. government. The impact of this, if any, on the Lileikis filing is unknown.

51. Sept. 15, 1998 statement posted at www.secretary.state.gov/www/briefings/statements/1998 (last visited July 2005).

Director Rosenbaum publicly voiced skepticism that Lileikis was ill. "Lithuania War Crimes Suspect Said Ill," *AP*, Feb. 2, 1999.

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52. Jan. 8, 2000 statement posted at www.secretary.state.gov/www/briefings/statements/2000 (last visited Nov. 2005).

53. Sept. 27, 2000 Press Release of the Procurator General's Office of the Republic of Lithuania.

54. "Nazi War Crimes Trial to Resume in September Without the Suspect," *AP*, July 4, 2000. It is unclear how, under the statute, the hearing could proceed given the court's determination that Gimzauskas was mentally incompetent.

55. "U.S. State Department Hails Conviction of War-Crimes Suspect in Lithuania," *BNS*, Feb. 21, 2001. Rosenbaum gave an interview which was printed on the front page of Lithuania's largest circulation daily newspaper. He termed the conviction "historic" and credited the Lithuanian ambassador to the U.S. with helping improve relations between the two countries. Rosenbaum went on to discuss the difficulty countries face in acknowledging past misdeeds.

> I have told Lithuanian and other European officials more than once that this is not a situation where the United States comes as highest moral authority. Every country has its own problems with facing their past. The U.S. is no exception from the rule, because it was the USA who turned an entire race into slaves. More than 140 years after the abolition of slavery, we are still struggling with certain aspects of the inheritance of slavery.

"Nazi Hunter Praises Lithuania," by Gintautas Alksinis, *Lietuvos Rytas*, Feb. 19, 2001.

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56. "Nazi Hunter Urges Lithuania to Address US for Extradition of War Criminal," *BNS*, June 13, 2002.

57. *See* p. 493.

58. "U.S. Disappointed Over Non-Sentence Conviction of Lithuanian Nazi Collaborator," *BNS*, Mar. 28, 2006.

59. "Nazi-Hunter Dismayed Over Secrecy of Derehabilitation of Nazi Suspects in Lithuania," *supra*, n. 25; "Prosecutors Strip 76 Persons of Rehabilitation Status," *ELTA*, Sept. 25, 2001.

60. "Ulmanis Apologizes in Israel for Latvian War Crimes," *Deutsche Presse-Agentur*, Feb. 24, 1998.

61. "Old Ethnic Rifts Run Deep in Latvia," by Richard Paddock, *The Los Angeles Times*, Apr. 6, 1998.

62. Viktors Arajs was convicted by a West German court in 1978 for his role in causing over 13,000 murders. He was sentenced to life imprisonment and died in custody in 1988.

63. *Matter of Kalejs*, A11 655 361 (Imm. Ct., Chicago, Ill. 1988), *aff'd*, (BIA 1992), *aff'd*, *Kalejs v. INS*, 10 F.3d 441 (7th Cir. 1993).

64. The report, "'Reliable Local Residents': Collaboration in Latvia, 1941 - 1945" by Robert Waite was cited by the Canadian magistrate. *In the Matter of the Immigration Act and Konrad Kalejs*, p. 6, n. 23. All references hereafter to the Canadian ruling are to this citation.

65. "Outcry as Alleged Nazi War Criminal Returns," by Rachel Bridge, *South China Morning Post*, Aug. 21, 1997.

66. "Zuroff Asks Australia to Act against Ex-Nazi," by Aryeh Dean Cohen, *The Jerusalem Post*, Aug. 20, 1997. Although Kalejs could theoretically have been charged under the War Crimes Amendment Act of 1988, the Australian Special Investigations Unit, responsible for prosecutions under that Act, had disbanded in June 1992. *See* p. 490.

67. "Wiesenthal Center Demands Actions Against Nazi Suspects in Australia," *Agence France-Presse*, Oct. 20, 1997.

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68. In addition to speaking with the press, Lord Jenner, the only Jewish member of the House of Lords, met with Home Secretary Jack Straw and the Governor General of Australia.

69. OSI learned that Kalejs had first bought an airline ticket for Mexico. They advised Zuroff who alerted the Mexicans. Rosenbaum discussion, Dec. 12, 2001. The Mexicans made it clear that Kalejs was not welcome. "I Still Call Australia Home," by Martin Daly and Simon Mann, *Sydney Morning Herald*, Jan. 8, 2000.

70. Details of the meeting come from a Jan. 26, 2000 memorandum to Rosenbaum from MacQueen, re "Conversation with Latvian Minister of Justice Valdis Birkavs; Meeting of Birkavs with Attorney General Reno," and my own notes of the meetings at which I was an observer. The Minister's meeting with the Attorney General covered a range of issues, with Kalejs only a very small portion.

71. At least 10 cases related to war crimes were filed against Soviets, many of whom had been Red Army partisans. As of this writing, there have been at least three convictions: Alfreds Noviks (sentenced in 1996 to life imprisonment for his role in deporting Latvians to Siberia during the 1940s), Mikhail Farbtukh (sentenced in 1999 to seven years for the same crime) and Vasilij Kononov (sentenced in 2000 to six years imprisonment for his role in the death of nine Latvian civilians during military operations in Latvia in 1944.)

72. "Croat Convicted of Crimes at WWII Camp," *Reuters*, *The New York Times*, Oct. 5, 1999.

73. The Holtzman Amendment covers persecution by the Nazis and their allies from March 3, 1933 to May 8, 1945. The Hitler-Stalin pact was in effect from Aug. 23, 1939 to June 22, 1941, making the Soviet Union a Nazi ally during that period. Thus, it would be within OSI's mandate to prosecute a Soviet citizen who collaborated with the Nazis during this period; OSI has never

done so, however.

74. Undated memorandum to Rosenbaum, Siegal and OSI Chief Historian Barry White from MacQueen re "U.S. -Latvian Bilateral Talks in the Kalejs and Related Cases, Held at Riga, 14-15 February 2000." All references to the pre-conference meetings come from this memo unless otherwise noted.

75. Undated memorandum to Rosenbaum and Siegal from MacQueen re "International Conference on Konrads Kalejs and Related Cases, Riga, Latvia, February 16-17, 2000." All references to the international meeting come from this memo unless otherwise noted.

76. The first was his role as guard commandant, followed by his possible role in a gypsy massacre, and lastly, any part he played in the massacre of Jews in the Riga ghetto.

77. Feb. 22, 2000 cable, ICNbr TED0597, from AmEmb Riga to Sec'y State and the American Embassies in Canberra, London, Berlin, Tel Aviv, The Hague and Ottowa re "Konrads Kalejs: Latvian Prosecutors Agree on Investigation Follow-up."

78. Both Rosenbaum and Siegal believe that the Kalejs case could not have achieved the ultimate resolution it did without Withers' unstinting help. He advised OSI at all stages of the Latvian negotiations, often telling them who needed to be contacted, arranging for the meetings, and advising how best to deal with the various players. He went so far as to offer the guest room in his home to DOJ representatives coming to Latvia to work on the investigation if the Department would not provide sufficient funding for the trip.

Ambassador Holmes too was very much interested and involved. That may have happened in any event, or been prompted by Withers, but it should be noted that during this period, the son of former OSI Director Neal Sher married the Ambassador's daughter. Thus, there was a familial link to OSI.

79. Kreivans was no longer with the Department of Justice. He took leave from his position as a city prosecutor in St. Paul, Minn. to make the trip.

80. May 12, 2000 e-mail from Withers to Siegal re "Idea & call from Alvis Ronis."

81. Joint Statement issued in Riga, June 14, 2000.

82. *See e.g.*, Diplomatic Panoramas for April 20 and May 19, 2000, *World News Connection*; "Russians Feel the Brunt of Harsh Regime," by Graham Oglivy, *Scotland on Sunday*, Mar. 19, 2000; "Latvia Convicts War Criminal on Murder of Nine," by J. Michael Lynne, *The Baltic Times*, Jan. 27, 2000.

83. "Kononov to Appear before Latvia's High Court as Russian Citizen," by Philippa D'Arcy, *Agence France-Presse*, Apr. 13, 2000.

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84. Letters of Aug. 24 and 31, 2000 as quoted in Sept. 8, 2000 memorandum from Rosenbaum to DAAG Bruce Swartz re "Chronology of Konrads KALEJS Case." Discussion of the events leading up to the multinational conference comes from this memo unless otherwise noted.

85. "Hillary Joins Shaming of Oz," by Michael Cameron, *The Mercury* (Australia), Sept. 14, 2000. *See also*, "Hillary's Crash Pad - Sometimes Stays at Spielberg Condo," by R. Hardt Jr. and G. Birnbaum, *The New York Post*, Sept. 19, 2000 reporting that "The First Lady has raised eyebrows Down Under by writing to Australian officials last week demanding they take action against several suspected ex-Nazis living in the country." According to *The Post*, the lead paragraph in the Australian *Herald Sun* read "Hillary Clinton has become involved in a campaign to embarrass Australia during the Olympics."

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The Commonwealth Nations

While OSI has offered assistance to every foreign country willing to prosecute Nazi war criminals, it has coordinated most closely with prosecutors in Canada, Great Britain and Australia. In 1989, OSI hosted a meeting with representatives of each of these countries and a delegation from the Soviet Union. The outcome of that meeting was that the Soviet Union agreed to allow each of the participating countries to share with the others copies of material received from the Soviet archives as a result of Nazi war crimes inquiries. Original documents cannot be shared, however, and each western country still needs to obtain its own certified copies of the documents for use in court proceedings.[1] Nonetheless, the agreement – which still operates in the post-Soviet era – reduced significantly in many cases the amount of time needed to obtain pertinent material.

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Canada

Shortly after OSI's founding, Canadian officials met with Director Ryan to discuss establishing an office similar to OSI.[2] In 1982, before any action was taken on the proposal, the Canadians arrested and extradited a naturalized Canadian citizen to West Germany to face charges of having murdered thousands of Lithuanian Jews.[3] OSI was working on its own investigations of Lithuanian massacres at the time, and OSI and the Canadians shared information.

It was not until 1985, however, that the proposal for a separate prosecutorial office for Nazi war crime cases gained momentum. The impetus for this was an SWC report that Dr. Mengele might be in Canada. The publicity surrounding this announcement led the Canadians to appoint a commission to determine whether there were Nazi war criminals in the country who

could be prosecuted, extradited or deported.[4] Although the commission found no evidence that Mengele had emigrated to Canada, it believed other war criminals might have. It therefore recommended laws providing for criminal prosecution as well as denaturalization and/or deportation of persons involved in the wartime persecution of civilians.[5] Canada enacted such statutes in 1987.[6]

Over the next five years, the government filed four criminal cases. Three were aborted before verdict;[7] the fourth defendant was acquitted after an eight month trial. Upholding the acquittal on appeal, the Canadian high court ruled that a defendant could refute the allegations by establishing that he was merely "following orders" (unless the order was "manifestly illegal.") In addition, he could not be convicted unless it was proven that he knew his activities constituted a war crime and that they would have been a crime in Canada.[8] Because this ruling substantially increased the difficulty of establishing the government's case, the Canadians abandoned criminal prosecution in favor of denaturalization and deportation cases, similar to those prosecuted by OSI.[9] Unlike the U.S. procedure, however, a final determination on denaturalization is not made by the court. Rather, the Cabinet considers the matter after a court rules that there is a legal basis for action.

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In 1997, the Canadian government hired former OSI Director Neal Sher as a consultant on its war crimes prosecutions. He worked with the Canadians until March 2001. Sher is credited by some with having helped bring about a significant increase in Canadian case filings.[10]

The Canadians have filed twenty-three denaturalization/deportation cases to date. However, only one defendant has been deported. In 1992, he was sent to the Netherlands where he was imprisoned pursuant to a life sentence imposed *in absentia* in 1948. He was released

after twenty-eight months due to his advanced age.[11]

OSI played a role in five Canadian cases. Two were against former OSI defendants, Arthur Rudolph and Konrad Kalejs. As discussed earlier, OSI provided material used by the Canadians to win judgments forcing both men to leave the country.[12]

Two other cases were brought to the attention of the Canadian authorities by OSI when the men were stopped by INS after a Watchlist hit. One had been changing planes in Detroit on his way back to Canada from a trip abroad; the other was stopped by INS during a pre-flight inspection in Vancouver as he was about to board a plane for the U.S. The Canadian courts dismissed charges against one of the men[13] and revoked the citizenship of the other.[14]

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The fifth case concerned a defendant who fled to the United States after the Canadians filed a denaturalization action. As described elsewhere in this report, he was returned to Canada by OSI and his citizenship was revoked in 2001.[15] Deportation proceedings were halted in 2004 for investigation of the defendant's claim that his denaturalization had been tainted by a conflict of interest.[16] The Canadian Federal Court restored his citizenship shortly thereafter. The court did so both because of the defendant's "50 years of irreproachable life in Canada" and because there was no evidence that he had personally participated in war crimes. (He served as an interpreter assigned to a mobile killing unit in Ukraine.)[17]

OSI has worked well over the years with the Canadian Justice Department. They have shared information and assisted one another on interviews and other matters. OSI has had less success with the Royal Canadian Mounted Police (RCMP), which has often been reluctant to share information.[18]

In early 2005, the Canadian government returned in kind the assistance OSI had provided

to the Canadians 25 years earlier. With OSI's mandate just expanded to cover "modern war criminals,"[19] the office was struggling to determine how to develop and handle a new and potentially enormous investigative caseload. Five years earlier, the Canadians had also expanded their mandate.[20] OSI Director Rosenbaum and Deputy Director and Chief Historian Elizabeth White spent several days in January 2005 meeting with officials of the Canadian Border Services Agency, the Canadian Department of Justice and the RCMP. The Canadians shared their experiences and provided OSI with a database of information.

Australia

Australia's attitude toward Nazi persecutors has been ambivalent. In 1961, Australia's Attorney General and Acting Minister for External Affairs addressed the Parliament on his government's denial of an extradition request from the Soviet Union for an alleged Nazi war criminal. He described conflicting considerations.

> On the one hand, there is the utter abhorrence felt by Australians for those offenses against humanity to which we give the generic name of war crimes. On the other hand, there is the right of this nation, by receiving people into its country, to enable men to turn their backs on past bitternesses and to make a new life for themselves and for their families in a happier community.

Believing the second factor to be weightier, he announced that "the time has come to close the chapter."[21]

It remained closed until 1986. That year Australian television ran a series (based on research by two Australians and a former OSI attorney) called "Nazis in Australia." This series, as well as another program aired that year, suggested that there were numerous Nazi war criminals in the country, and that they had been able to enter because American and British intelligence agencies had either deceived Australian officials or intentionally withheld relevant

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information about the men.[22]

In response to these allegations, the government called for a comprehensive review of the matter. The resulting report, concluding that there were likely a significant number of war criminals in Australia, led to establishment of a Special Investigations Unit (SIU) in 1987. Its staff was composed of lawyers, investigators and police – but no historians. The country's War Crimes Act was amended the following year to allow criminal prosecution for war crimes committed during World War II. A conviction subjects the defendant to possible incarceration but not deportation.

Over the years, OSI forwarded to the SIU the names of six persons OSI believed to be in Australia and worthy of investigation. Five were never located; the Australians had insufficient evidence to prosecute the sixth.[23] The SIU did, however, file three other cases, though only one was tried to conclusion. The jury acquitted in less than an hour, after the judge opined that the charges might have been better defended had they been more timely filed.[24] The other two filings were dismissed, one because several key witnesses had died, and the other because the defendant had suffered a heart attack from which he was not expected to recover. He died seven years later.

To help the Australians determine whether suspected persecutors were already in the country and to preclude the entry of persecutors seeking admission, OSI in 1989 sent the Australian government a list of approximately 30,000 names. These were culled from the OSI research and development database as well as its list of persons rejected for entry into the United States under the DPA. Contrary to OSI's hope, the Australians did not use the material as the starting point for their own research and development system.[25]

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The SIU was disbanded in 1992, apparently due to budgetary constraints.[26] At the time, there were 27 investigations still under way, at least one of which was "extremely promising," according to the former head of the unit.[27] After the unit closed, the Australians shared with OSI some material from their archived files. A roster so obtained led to one OSI prosecution.[28]

In 1999, OSI Director Rosenbaum created a furor in Australia when he stated during a television interview that "Any Nazi criminal who lives in Australia, and there must be hundreds there, knows he is home free, so to speak."[29] Australia's Justice Minister found the accusation offensive. "Nobody in Australia wants war criminals to sleep here comfortably, but equally no one wants the Australian government to engage in show trials."[30] Just weeks after the broadcast, Konrad Kalejs, a naturalized Australian citizen, returned to his adopted country to avoid facing a deportation hearing in England.[31] Under the terms of Australia's citizenship laws, his naturalized citizenship could not be revoked.[32] He could, however, be extradited. As discussed elsewhere in this report, Australia ultimately did order his extradition in the face of intense international pressure to do so.[33] Kalejs died in Australia while the order was on appeal.[34]

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In 2001, the Australians accepted Director Rosenbaum's offer of an updated listing of names on the U.S. Watchlist.[35] To date, they have not used those names to establish a Watchlist of their own nor have any prosecutions been filed since the SIU was disbanded. Moroever, they have denied OSI the right to interview witnesses in Australia, on the ground that the mutual assistance treaty between the U.S. and Australia covers assistance only in criminal cases.[36] In 2003 and 2004, the SWC, reviewing the efforts of countries worldwide to investigate and prosecute Nazi war criminals, placed Australia among a group of nations which "made at least a minimal effort to investigate Nazi war criminals but which failed to achieve any practical results

or . . . in which the issue had no practical dimension during the period under review."[37] The SWC attributed this to "a lack of the requisite political will."[38] The 2005 report is more positive. It places Australia among those nations which failed to obtain any convictions or file an indictment, but have nevertheless "either advanced ongoing cases currently in litigation or have opened new investigations which have serious potential for prosecution." That assessment is apparently due to Australia's approval of a Hungarian request for extradition of Charles Zendai, a naturalized Australian citizen involved in the murder of a Jewish teenager in Budapest in 1944.[39] At the request of the SWC, OSI provided the Australian government with documents located at the National Archives concerning Hungary's postwar request to U.S. occupation authorities for Zendai's extradition.

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Great Britain

In 1988, the British government appointed a committee to examine well-publicized allegations, from the SWC and a Scottish television show, that there were Nazis responsible for wartime atrocities living in the United Kingdom.[40] The committee concluded that there was a basis for the allegations and recommended legislation authorizing criminal prosecution. The resulting 1991 War Crimes Act allowed for trial of British citizens and U.K. residents on charges of murder and homicide committed between 1933 and 1945 in Germany and German-occupied territory. However, the government must prove the defendant's personal responsibility and present eyewitness testimony. Scotland Yard established a War Crimes Unit which, at its peak, employed 11 police officers, two historians and support staff.

In 1988, OSI historians, doing research in West German archives, came across several documents incriminating a former Latvian Arajs Kommando officer who, according to an OSI

source, had settled in England. The British opened an investigation after receiving the documents and information from OSI.[41] However, the subject died before the investigation was completed.[42]

The British did file two cases, the first of which was brought to their attention by OSI. It was dismissed, however, after a jury found the defendant mentally unfit to stand trial.[43] The second was prosecuted, and in 1999 the defendant was sentenced to two life terms for gunning down 18 Jews in Belarus.[44] Shortly after he was convicted, the British investigative unit was scaled down and then disbanded for lack of additional viable cases. The law, however, remains on the books and there have been several related inquiries, all of which have involved OSI to some extent.

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As detailed elsewhere,[45] in 1999 a television reporter, acting on a tip from OSI Director Rosenbaum, located Konrad Kalejs in Rugby, England. The story received worldwide publicity and the British government came under considerable criticism for allowing Kalejs to leave the country without prosecution.[46] Some of that criticism came from OSI.[47]

In the wake of the Kalejs affair, a British newspaper reminded its readers that Alexander Schweidler, earlier prosecuted by OSI and deported to England, was still in the country.[48] Schweidler, by his own admission, had murdered two Russian prisoners of war at the Mauthausen concentration camp. Four days after the story surfaced, Schweidler died of a heart attack.

Just as the Kalejs affair awakened British interest in Schweidler, Schweidler's death renewed Scottish interest in a Nazi persecutor in their midst.[49] Antanas Gecas first came to the attention of the Scots when OSI Director Sher interviewed him in 1982 in connection with an

OSI investigation of someone in Gecas' unit. In 1987, he gained local notoriety when a Scottish television show charged that he had commanded a platoon which had massacred Jews and Soviet citizens in Lithuania and Belarus. Gecas sued the station for libel. In ruling against him, a Scottish judge said he was "clearly satisfied" that Gecas had taken part in atrocities, including the slaughter of more than 1,000 civilians over two days.[50] Despite this finding, the government concluded that there was not sufficient evidence to sustain a criminal prosecution.[51]

Lithuania, however, was willing to consider the matter. The Department of Justice, responding to a request for assistance from Lithuania's Prosecutor General, sent an OSI attorney and an historian to Lithuania to help them assess this case and others on their docket. OSI's team made various suggestions to modify a proposed Gecas indictment.[52] Lithuania requested his extradition but Gecas died in Scotland before the proceedings were complete.[53]

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Lastly, in 2003, a British television producer, checking names from rosters which OSI had used in court proceedings and forwarded to him at his request, made a "hit." He discovered in England a concentration camp guard who allegedly had participated in the liquidation of both the Warsaw and Bialystok ghettos. In response to the publicity generated by this story, the British government agreed to investigate the case.[54] OSI forwarded copies of several pertinent German documents as well as an historian's report used in a related case. In April 2003, two detectives from the Anti-Terrorist Branch of Scotland Yard came to OSI to discuss the case. They met with several historians in the office as well as with OSI's director and former chief historian, now working at the U.S. Holocaust Memorial Museum. Whether charges would have been filed will never be known; the subject died in a car accident before a prosecutorial determination had been made.[55]

In 2003, Scotland Yard began a search for survivors of one SS unit, many of whose members had settled in England. Approximately 7,100 Ukrainians serving in the unit had gone to Britain in 1947 after spending two years as prisoners of war; 1,200 of the men were still alive when the British began their search.[56] OSI was not optimistic that the investigations would be productive because OSI had never found any "credible/usable evidence . . . persuasively linking the . . . Division to the perpetration of nazi crimes."[57] As of this writing, no cases have been filed.

However, a new avenue of case development may be in the offing. After years of rejecting OSI's offer to share its Watchlist names, in June 2005 UK officials told Director Rosenbaum they would be interested in obtaining the information for use in the research and development of cases.[58]

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1. Feb. 10, 1989 memorandum to file from Bruce Einhorn, Deputy Director re "Minutes of Meetings Held at OSI on Feb. 8, 1989."

2. Apr. 21, 1980 memo from Ryan to Neal Sher and Arthur Sinai, OSI Deputy Directors, re "Witnesses and Possible War Criminals in Canada."

3. Helmut Rauca was arrested by the Royal Canadian Mounted Police in June 1982 and extradited to West Germany in May 1983. On Sept. 28, 1983, the Germans charged him with murdering more than 11,500 Lithuanian Jews. Rauca died one month later.

4. "Canada Plans Panel on Nazis," *The New York Times*, Feb. 8, 1985.

5. "War Criminals: The Deschênes Commission," www.parl.gc.ca/information/library/PRBpubs/873-e.htm (last visited Dec. 2008)

6. Under the Canadian statutes, war crimes and crimes against humanity committed outside of Canada which would have constituted an offense under Canadian law are deemed to have been committed in Canada as long as: the perpetrator or any victim was, at the time, a Canadian citizen, employed by Canada in a military or civilian capacity, or later became a Canadian citizen. The same result holds if the person who committed the crime is, after the fact, present in Canada.

The Canadian constitution's Charter of Rights and Freedoms (adopted in 1982) has an Ex Post Facto Clause. However, the Clause excludes any act or failure to act that, at the time of its perpetration, constituted an offense under Canadian or international law, or was criminal under the general principles of law recognized by the community of nations. Thus, the Clause does not apply to Nazi war criminal activity.

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7. The government dropped charges against two defendants, in one instance because the court would not allow the taking of testimony on videotape in the Soviet Union, in the other because important witnesses either died or refused to testify; the third case was dismissed because of the defendant's ill health.

8. "Supreme Court Upholds War-Crimes Law; but Lawyers Say Ruling Will Make it Harder to Prosecute Suspected Nazis," by Stephen Bindman, *The Gazette* (Montreal), Mar. 25, 1994.

9. "Canada Shifts Legal Tactics on War Crimes," *The New York Times*, Feb. 1, 1995. Although the Canadians left open the possibility of additional criminal prosecutions, in fact there have been none since then.

10. "The Making of a Nazi Hunter," by Monique Beaudin, *The Gazette* (Montreal), Aug. 24, 1998.

11. "War Criminal Can't Come Back," *The Ottawa Citizen*, Mar. 30, 1995.

12. *See* pp. 336-337, 467-468.

13. *Minister of Citizenship and Immigration and Eduards Podins*, No. T-1093-97.

14. *Minister of Citizenship and Immigration and Michael Baumgartner*, No. T-2701-97.

15. The ruling was reversed but the case may be retried. *See* pp. 305, 308, n. 22.

16. "Deportation of Accused Nazi Halted," by Adrian Humphreys, *The National Post* (Canada), Jan. 10, 2004.

17. "Ruling Elates Oberlander," by Brian Cladwell, *The Record* (Kitchener-Waterloo, Ontario), June 2, 2004.

18. Indeed, in one instance OSI interviewed an Estonian-born naturalized Canadian citizen who was visiting Miami. He told OSI that he had been interviewed more than once by the RCMP. OSI had been unaware of this fact, but, more importantly, so too was the Canadian Justice Department, with whom OSI had coordinated prior to the interview. The Canadian Justice Department is responsible for handling the country's war criminal cases.

The one notable exception in terms of cooperation by the RCMP occurred during the time of the Rauca extradition, discussed *supra*, n. 3. There was a lively exchange of information between OSI and the RCMP at that point. Some of this is covered in a book written by a Canadian journalist: Sol Littman, *War Criminal on Trial: The Rauca Case* (Toronto: Lester & Orpen Dennys, 1983).

19. *See* pp. 562-563.

20. Under the Crimes Against Humanity and War Crimes Act, the Canadians have several options for dealing with war criminals, including: denial of visas abroad, exclusion from refugee protection, criminal prosecution, denaturalization, deportation, extradition and/or surrender to an international tribunal.

The Canadians began their first prosecution under the Act in Oct. 2005, charging a Hutu with genocide, crimes against humanity and war crimes for his role in the 1994 genocide in Rwanda; he had been denied refugee status in 2000. "Accused Hutu Appears in Court," by Bill Curry and Tu Thanh Ha, *The Globe and Mail* (Toronto), Oct. 20, 2005.

21. Report of the Investigations of War Criminals in Australia, Attorney-General's Department, Australian Gov't Publishing Service, 1993, p. 215.

22. *Id.*, p. 14.

23. *Id.*, pp. 490-493.

24. "Jews in Australia Upset by Acquittal in 1942 War Crimes," by Bob Drogin, *The Los Angeles Times*, May 23, 1993; "First War Crimes Trial in Australia Ends in Acquittal," *The Toronto Star*, May 18, 1993.

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25. Barry Turner, Counsellor (Police Liaison) and Barry Welsby, Counsellor (Immigration), both of the Australian Embassy, conceded as much, at an Aug. 1, 2000 meeting at OSI.

26. "Accused Nazi Too Costly to Pursue," by J. Swanwick, *The Courier-Mail* (Queensland, Australia), Dec. 6, 1997.

27. "Living with Demons from the Past," by Kay Dibben, *Sunday Mail* (Queensland), Jan. 9, 2000; "Call for Team to Track Down Kalejs Evidence," *The Age* (Melbourne), Jan. 11, 2000. The most promising case concerned Karlens Ozols, commander of a Latvian unit which murdered thousands of Jews at killing pits outside Minsk, Belarus. Ozols, who became an Australian chess champion, died in March 2001.

28. OSI filed the case in January 2002. Pursuant to standard Justice Department procedure, the defendant had been advised ten days before that the case would be filed. After receiving this notification, the defendant, Peter Bernes, returned to his native Lithuania. The U.S. court entered a default judgment, revoking his citizenship, in May 2002.

29. ABC newsmagazine *20/20*, Dec. 3, 1999. This program is discussed also at pp. 468-469.

30. "Australia's Nazi-Hunting Defended," *The Jerusalem Post*, Jan. 10, 2000.

31. *See* p. 469. Asked if Kalejs would be welcome in Australia, the Justice Minister responded, "Would you expect a situation where any Australian citizen would not be?" "Nazi Suspect Would be Allowed to Settle in Australia," *Agence France-Presse*, Jan. 3, 2000.

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32. The Australian Citizenship Act of 1948 included a ten-year statute of limitations on the revocation of nationality. Kalejs, who became a naturalized Australian citizen in 1957, could not be denaturalized when evidence of his wartime activities was developed by OSI in the 1980s. Although Australia ultimately eliminated the 10-year provision in the late 1990s, a grandfather clause protected those who, like Kalejs, had passed the ten-year mark before the amendment.

33. *See* pp. 474-475.

34. *The Los Angeles Times* referred to Kalejs as "the poster child for Australian tolerance of suspected Nazi war criminals." "Nazis Find an Aussie Sanctuary," by Richard Paddock, Jan. 10, 2001.

35. Apr. 5, 2001 letter from Rosenbaum to Barry Welsby, Counsellor (Immigration), Australian Embassy.

36. May 5, 2000 letter to Department of Justice Senior Trial Attorney Betsy Burke, Office of International Affairs, from Shannon Cuthbertson, Attorney General's Department, International Branch. As discussed earlier, the Germans, faced with the same legal issue, adopted a much more flexible approach. *See* p. 425.

37. SWC 2003 and 2004 Annual Reports, "Worldwide Investigation and Prosecution of Nazi War Criminals."

38. SWC Press Release #1884, Apr. 27, 2003.

39. "War Crime Accused's Warrant Unearthed," by Paige Taylor, *The Australian*, June 9, 2005.

40. "Inquiry into 'Britain's Nazi Criminals:' Senior Prosecutors May Recommend Atrocity Trials in the UK," by Philip Webster, *The Times* (London), Feb. 9, 1988.

41. May 23, 1988 memorandum to United Kingdom's War Crimes Inquiry, re "Harijs Svikeris." *See also*, statement by Rosenbaum in "Straw Demands Inquiry into How Alleged Nazi War Criminal Entered UK," by Linus Gregoriadis, *The Guardian* (London), Dec. 30, 1999.

OSI historians found the subject's name on a list of persons in the Arajs Kommando who had received weapons permits. The same lists led OSI to two people in the U.S. who the office later prosecuted (Valdis Didrichsons and Edgars Inde).

42. "War Crimes Suspect Dies During Inquiry," by Stephen Ward, *The Independent* (London), Aug. 8, 1995.

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43. "Criminal Waste of our £14m," by Ian Gallagher, *The Express* (London), Jan. 18, 1997. The defendant, Semion Serafirmovich, had been brought to the attention of British authorities by OSI in the early 1980s. However, the British were unable to locate him at that time, apparently due to a variance in the transliteration of his name from Cyrillic. Jan. 28, 2003 e-mail from Rosenbaum to Judy Feigin, re "Assistance to United Kingdom Authorities."

In order to assist the British prosecutors, OSI promised a subject in the United States that they would not seek to denaturalize or deport him if he cooperated in the investigation of Serafirmovich. He was an essential witness for the British but had been reluctant to cooperate. OSI surmised that his reluctance stemmed from fear that the U.S. would seek to denaturalize and deport him because of information he might reveal about his own wartime activities. OSI assessed its prospects of developing enough evidence against him as "quite slim," whereas Serafirmovich was "a major perpetrator of Nazi crimes, including mass murder." Moreover, since it was Britain's first war crimes trial, OSI worried that "the entire British effort to investigate and prosecute Nazi criminals" might depend on this prosecution being successful. Oct. 6, 1995 memo to DAAG Richard from Rosenbaum re "Proposed OSI Immunity to Wolczek (OSI #528) for His Cooperation in British Prosecution of Serafimovich." After receiving assurances from OSI, the subject did cooperate fully with the British.

44. "Justice . . . 57 Years Too Late," by Don Mackay, *Scottish Daily Record & Sunday Mail*, Apr. 2, 1999. The defendant died in prison in 2005. "War Criminal Jailed in Britain Dies at 84," by Owen Bowcott, *The Guardian* (London), Nov. 8, 2005.

45. *See* pp. 468-469.

46. *See, e.g.*, "I Can Still Call Australia Home," *The Sydney Morning Herald*, Jan. 8, 2000.

47. Director Rosenbaum accused the British of failing to investigate Kalejs. "European Nations Shirking War Crimes Duties," by Ilsa Colson, *AAP Newsfeed*, Mar. 6, 2000. He made clear that the Department of Justice had given the British pertinent information about the case. "Straw Demands Inquiry into How Alleged Nazi War Criminal Entered UK," by Linus Gregoriadis, *The Guardian* (London), Dec. 30, 1999.

48. "Nazi War Criminal, Expelled from US, is Living in UK," *The Guardian* (London), Jan. 20, 2000.

49. "Time Running Out to Prosecute Gecas, Says War Crimes Investigator," *The Herald* (Glasgow), Jan. 26, 2000.

50. "Defamation Verdict Clears Way for War Crimes Trials," by James Grylls, *Daily Mail* (London), July 18, 1992.

51. "War Crimes Trial Ends in Pounds 5m Fiasco," by Ian Dow, *Scottish Daily Record and Sunday Mail*, Jan. 18, 1997.

52. Jan. 24, 2001 memo from OSI attorney Jeffrey Menkin and Chief of Investigative Research Michael MacQueen to Director Rosenbaum re. "Meetings in Vilnius with Lithuanaian War Crimes Prosecutors (January 8-17, 2001)."

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53. "Anger as Nazi Gecas Dies Without Trial," by Frank O'Donnell and Kizzy Taylor, *The Scotsman*, Sept. 13, 2001.

54. "'Wimbledon Academic' in Nazi War Crimes Inquiry," by Daniel Foggo, *The Sunday Telegraph* (London), Feb. 9, 2003; "London Man Denies Role in SS Massacres," by Daniel Foggo, *The Sunday Telegraph* (London), Jan. 26, 2003.

55. "Former SS Guard Killed in Crash," *The Sunday Telegraph* (London), Aug. 1, 2004.

56. "Police to Use NHS Records to Find Nazi War Criminals," by Daniel Foggo, *The London Telegraph*, June 22, 2003.

57. June 22, 2003 e-mail from Director Rosenbaum to OSI Staff re "Telegraph Reports That UK is Launching Major Probe of Nazi Collaborators."

58. That the offer had been previously rejected is evident from a Jan. 27, 2003 e-mail from Director Rosenbaum to Fiona Ferguson in the British Home Office re "Deportation Action Commenced Against V. Gecas." *See also*, "Straw Considering UK Entry Ban on Suspected Nazi War Criminals," by B. Josephs, *The Jewish Chronicle*, May 31, 2000.

Japan

From the early 1930s until the end of World War II, Japan persecuted civilians in a variety of ways. Among them: (1) the Japanese Imperial Army kidnaped approximately 200,000 girls (most of whom were from Korea) and imprisoned them in so-called "comfort stations," where they were forced to serve as prostitutes to the military; (2) conquering Japanese armies brutally slaughtered civilians in their wake; (3) non-Japanese were used as slave laborers by Japanese conglomerates; and (4) non-Japanese prisoners were unwillingly made subjects of gruesome and often lethal medical experiments by the Imperial Army.[1]

OSI, as the SLU before it, was created to investigate and prosecute persons who, in association with the Nazi government *or its allies*, ordered, incited, assisted or somehow participated in the persecution of any person because of race, religion, national origin or political opinion. Despite this broad mandate, neither the SLU, nor OSI at its founding, gave any thought to investigating or prosecuting Japanese perpetrators who might be in the United States.[2]

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There were many reasons for this, perhaps the most important being that nothing indicated that a large number of Japanese persecutors ever came to the United States. Operation Paperclip had no counterpart for Japanese scientists. Nor was there a DPA or RRA allowing an extraordinary number of immigrants from Japan to enter.

Furthermore, Japan's victims were not calling for prosecutions. This may be due to the fact that many were culturally reticent to speak out. The shame of victimization, especially among the women who had been raped, beaten and tortured, was acute. Many were shunned even by their families at war's end.

Even if the victims had been calling for action, however, their demands could not have

been easily met. The most serious impediment was the United States' inability to determine the names of Japanese persecutors. In August 1945, the Japanese Imperial Army and Navy ordered the destruction of incriminating or sensitive documents by field and headquarters units; in response, as much as 70% of wartime military and government records were likely purged. The United States retrieved what it could (approximately 18,000,000 pages).[3] However, the Japanese pressed for return of these documents and the United States acceded. Most of the material was returned in 1958, although some was as late as 1962. Before the return, a group of private scholars arranged for the microfilming of a portion of the records by the Library of Congress under a grant from the Ford Foundation. Due to time and financial limitations, however, only about 3 per cent of the available documents were copied. The United States made no provision for future access to the returned records.[4]

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Neither OSI nor the National Archives has fully reviewed the records the U.S. does have.[5] Although belated efforts are being made to do so, OSI also wants access to the material in Japan. This will provide more names of those who served in units known to have committed persecutory acts. OSI can then compare those names with INS records of those who came to the United States, just as it does with Nazi persecutors. Even if *no* Japanese persecutors settled in the United States (an unlikely possibility), some may have visited at one time or another. OSI wants to place the names of all those who served in units involved in persecution on the Watchlist to prevent their entering even on a short-term basis.

OSI has been stymied in this effort by Japan's unwillingness to grant access to their files or to provide relevant information. This is based on privacy concerns as well as Japan's view that it has no right to place "ordinary citizens" at "a disadvantage by providing information about them

to foreign governments.[6] Accordingly, Japan has consistently refused to release the names of persons in particular units; they have also refused to provide date and place of birth information for persons who the United States has independently determined were involved in acts of persecution. The United States has been granted access only to the public archives. According to a researcher hired by the Interagency Working Group (on which the Director of OSI sits as a public member), the documents relating to war crimes are not accessible.[7]

The effect of these strictures on OSI's work is dramatic. Tens of thousands of possible persecutors from the war in Europe have been placed on the Watchlist,[8] yet as of this writing, only 31 Japanese are listed. Their names were added in 1996.[9] Twenty of those listed were from Unit 731, an Imperial Army biological warfare unit that conducted gruesome wartime experiments on prisoners of war, most of whom were Chinese. Two worked at a camp which transferred inmates to Unit 731 for punishment, and three were involved in the establishment, operation or utilization of comfort stations. One was connected to both comfort stations and Unit 731.

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Due to Japan's sensitivity on the war crimes issue, OSI, at the State Department's suggestion, gave the Japanese government the names of the men – something that is not typically done for Watchlist entries. The alleged persecutors, forewarned about their listing, can now avoid travel to the United States. This eliminates the public embarrassment attendant on being stopped by the authorities – something the Japanese indicated was a matter of particular concern. Although the Japanese offered to release more birthdate and place information in return for this notice, to date they have not done so.

In further deference to Japan's sensitivity about alleged war crimes, the Justice Department worked closely with the State Department about whether, and how, to announce the

new Watchlist entries. The State Department was concerned that public disclosure might embarrass the Japanese government. OSI argued that failure to issue a press release would reward the Japanese for not confronting their past. Moreover, it would unfairly discriminate against the Germans whose crimes were routinely highlighted in press releases about OSI's activities. Tangentially, OSI also believed that recognition of rape as a crime warranting inclusion on the Watchlist might bolster the Bosnia war crimes tribunal in the Hague, then proceeding with the first war crimes trial for rape.[10] Ultimately, the State Department agreed that a statement could be issued, though they toned down considerably the draft originally prepared by OSI. The press release references "inhumane and frequently lethal pseudo-medical experiments – including vivisection" as well as the beating, torture and rape of women. However, it omitted some of the horrific and graphic details which OSI wanted to include.[11]

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In 1998, a coalition of Asian-American human rights groups sought to bring to the United States two men who had been involved in persecution of civilians on behalf of the Japanese. One worked in Unit 731; the other admitted raping and murdering Chinese women during Japan's 1937 invasion of Nanking. The visitors were to speak at a conference on war crimes where they intended to explain their wartime activities and to apologize for the work they had done. The goal of the conference was to build pressure on the Japanese government to make formal apologies to its war victims and to pay reparations.

Ironically, it was through media coverage of the event that OSI got sufficient background information about the two speakers to have their names added to the Watchlist. The men requested that the Attorney General, in the exercise of her discretion, allow them into the country despite the Watchlist entry.[12]

Both OSI and DOJ's Violence Against Women Office recommended against making a discretionary exception. The Acting AAG agreed.[13] Although commending the Japanese for their willingness "in the face of considerable public disapproval in Japan, to testify about crimes committed by the Japanese Army," he noted that neither man had been prosecuted nor brought to justice. Moreover, the United States had previously denied Nazi persecution suspects entry despite humanitarian bases for their requests, *e.g.*, medical care and family visitations. There were also political considerations.

> Allowing the two Japanese suspects to enter the United States would set a precedent that might be difficult to limit. Furthermore, should [they] be permitted to enter the United States, the media attention that they can be expected to attract might elicit a request from the Chinese Government that the United States surrender the men for trial in China or a demand that the United States try the individuals. Since the U.S. has no extradition treaty with China and there is no statute that would confer criminal jurisdiction on U.S. courts, the U.S. would likely be powerless to do anything but permit the men to return to Japan where there is no appreciable likelihood of prosecution. This could prove particularly awkward, all the more so because the visit of the two suspects would be occurring during a scheduled visit to China by the President. A U.S. grant of permission for the two men to enter this country would look worse still if Ottawa, as expected, bars them from entering Canada. On balance, this would seem to be a situation tailor-made for utilization of satellite technology or other electronic means that would enable the men to interact with domestic media without physically entering the United States.

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While the Attorney General was still considering the issue, one of the men flew to the United States. INS matched his name to the Watchlist and he was sent back to Japan. The Attorney General declined to intervene.

Public opinion was divided on use of the Watchlist to deter a penitent from entering. Many felt if ever an exception should be made to Watchlist exclusion, this was the time.[14] OSI Director Rosenbaum acknowledged that the applicants' intention to apologize and to explain what they had

done was laudable. Nonetheless, he feared that their admission would open the floodgates to World War II persecutors who suddenly claimed to be remorseful.

> Is the Government supposed to evaluate their sincerity? What happens if they come here and refuse to leave, or fall ill and we can't remove them? And I wonder whether people are prepared for the spectacle on their evening news of Nazi and Japanese war criminals dining at the best restaurants in Manhattan and Los Angeles. I doubt it.[15]

In the end, the Japanese participated in the symposium via videoconferencing provided by the SWC.[16] It may well be that the act of exclusion garnered more press for the issue than would have been the case had the men been allowed to enter.

With approval from the Department, Director Rosenbaum has spoken out about Japan's intransigence[17] and has taken up the issue of the comfort women. As Rosenbaum notes, the story of these women "has everything – sex, violence, children," and yet it has not caught hold of the public's imagination. He has met and corresponded with representatives for the women. He also helped arrange, and presented the opening remarks at, a symposium on comfort women sponsored by the U.S. Holocaust Memorial Museum in September 2000. He spoke as well at a ceremony on Capitol Hill sponsored by the Washington Coalition for Comfort Women Issues in honor of ten surviving victims.

By allowing OSI to take up this issue, the Department of Justice has reconfirmed the broad scope of OSI's mission. To the extent that some justice or remuneration to World War II victims may result – even if it is by governments other than our own – OSI does all it can to assist. The comfort women symposium, intended to educate the public as well as to bring pressure on the Japanese government to acknowledge its responsibility to make reparations, was a perfect forum for OSI to pursue the public education and extraterritorial components of its mandate.

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1. *See e.g.*, U.N. Economic and Social Council, Comm. on Human Rights, Sub-Comm. on Prevention of Discrimination and Protection of Minorities, "Systematic rape, sexual slavery and slavery-like practices during armed conflict" (June 1998) for information on comfort women; Iris Chang, *The Rape of Nanking* (New York, Basic Books, 1997) for discussion of slaughtered civilians; "Fund for Wartime Slaves Set up in Japan," by Stephanie Strom, *The New York Times*, Nov. 30, 2000 and "Lawyers Target Japanese Abuses," by Michael Dobbs, *The Washington Post*, Mar. 5, 2000 for discussion of corporate exploitation; and "Japan Keeps Stonewalling on WWII Bio-Research Atrocities," by R. Blumenthal and J. Miller, *The New York Times*, Mar. 7, 1999 for discussion of medical experiments.

As late as March 2007, the Japanese government denied that the Japanese military was involved in abducting girls as sex slaves. However, Japan's highest court, while denying compensation for the kidnaping, has acknowledged the military's role. "Japan's Court Rules Against Sex Slaves and Laborers," by Norimitsu Onishi, *The New York Times*, Apr. 28, 2007. As of this writing, a U.S. congressmen is seeking support for a congressional resolution calling on the Japanese government to admit its history of wartime sex slaves and to apologize for it. "A Congressman Faces Foes in Japan as He Seeks an Apology," by Norimitsu Onishi, *The New York Times*, May 12, 2007.

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2. Recorded interviews with David Crosland (Apr. 10, 2001), INS General Counsel during the SLU era; Allan Ryan (Oct. 6, 2000), OSI Director 1981-1983; Walter Rockler (May 10, 2000), OSI Director May 1979-March 1980; Robin Boylan (Sept. 27, 2000), an SLU attorney who transitioned to OSI; Art Sinai (Oct. 1, 2001), Deputy Director of OSI from 1979-1981. *Accord*, Apr. 2000 discussion with DAAG Richard.

3. This figure includes many documents that pre-date World War II.

4. Sept. 6, 2001 Report to the Interagency Working Group (IWG) of Marc Susser, Historian of the Department of State, re "The Disposition of Captured World War II-Era Japanese Records, 1945-1962; Apr. 20, 2000 "Brief Survey of the Disposition of Captured Japanese Records 1945-1962" by Greg Bradsher, National Archives and Records Administration. According to Bradsher, the failure to provide access was probably an oversight; the agencies had intended otherwise.

5. In Oct., 2002, NARA historian Greg Bradsher disclosed at an IWG meeting that he had just discovered 4 boxes containing Japanese war criminal wanted lists prepared by various foreign governments. Some of the listings had date of birth information. Oct. 25, 2002 e-mail from Rosenbaum re "Leads for OSI's Japanese Project from Today's IWG Meetings."

6. Statement of Kazuhiro Fujimura, spokesman for the Japanese Embassy in Washington, D.C. as quoted in *The Washington Post*, "Lawyers Target Japanese Abuses," by Michael Dobbs, March 5, 2000. An alternative cultural explanation was offered to OSI by an FBI language specialist. He opined that in the Japanese culture everyone is responsible and therefore no one is responsible. Everyone repents and one therefore cannot point to any one person for inclusion on the Watchlist. *Accord*, Nov. 30, 1999 letter from Japanese Ambassador Shunji Yanai to Rep.

Tom Lantos.

7. Statement of Naotaka Ikeda at IWG meeting of June 6, 2002. In 2001, OSI offered to share with the State Department the cost of hiring a researcher to survey the publicly available records in Japan. Ultimately, however, the State Department bore the entire cost in connection with the IWG's Disclosure Act implementation effort.

8. *See* p. 297.

9. OSI had been working on the matter for a while. It helped that in 1996 OSI had its first (and to this date still the only) Japanese speaker in the office. He was a summer intern.

10. May 14, 1996 Memorandum to DAAG Richard from Director Rosenbaum re "Barring the Entry of World War II-Era Japanese War Criminals ("Unit 731" Medical Atrocities; Mass Rape Cases.)"

11. Oct. 11, 1996 memorandum to DAAG Richard from Director Rosenbaum re "Exclusion of Suspected World War II Japanese War Criminals: Recommendation to Accept State Department Changes to Draft DOJ Press Release;" Dec. 3, 1996 DOJ Press Release, "Suspected Japanese War Criminals Placed on 'Watch List' of Excludable Aliens."

12. The Attorney General can allow in any alien "for reasons deemed strictly in the public interest."

13. June 10, 1998 memorandum from John C. Keeney, Acting AAG to the Deputy Attorney General re "Planned Visit of World War II - Era Japanese War Criminals to U.S.A." The Keeney memorandum was initialed also by DAAG Richard.

14. This view was expressed by the Executive Director of Center for Internee Rights in Miami Beach, a man whose father died while a prisoner of the Japanese. *See* "U.S. Bars Japanese Who Admits War Crime," by James Dao, *The New York Times*, June 27, 1998 (hereafter "Dao article").

15. Dao article, *supra*, n. 14.

16. One of the speakers acknowledged culturing bacteria used in lethal experiments and participating in five live autopsies. In 2001, he wanted to attend another conference along the lines of the earlier one. OSI again opposed the request and no waiver was granted. June 25, 2001 memo from Rosenbaum to DAAG Swartz re "Simon Wiesenthal Center Request to Waive Exclusion of Japanese War Criminal."

17. *See e.g.*, "Japan Keeps Stonewalling on WWII Bio-Research Atrocities," by Ralph Blumenthal and Judith Miller, *The New York Times*, Mar.7, 1999; "Lawyers Target Japanese Abuses," by Michael Dobbs, *The Washington Post*, Mar. 5, 2000; "Japan Blocking Probe of War Criminals, U.S. Says," by Teresa Watanabe, *The Los Angeles Times*, Dec. 9, 1998.

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Tracking Persecutors Outside the U.S.: Case Studies of Bohdan Koziy and Harry Männil

The Justice Department's main concern has always been to ensure that no persecutors are in the United States. At times, it seemed that this was the only concern. Thus, at an August 14, 1984 press conference to announce Bishop Valerian Trifa's departure to Portugal, AAG Trott was asked whether it would have been better to send Trifa to a country where he could be tried for his wartime activities. He responded that the government's mission was simply to remove Trifa from the U.S. Trott's predecessor, AAG Jensen, was of a similar mind. In a memorandum to the Deputy Attorney General about finding a country to accept Trifa, AAG Jensen wrote: "As far as the Department of Justice is concerned, our interest is in removing him from the country; it matters little where he goes."[1]

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Yet even before these statements were made, the Department had evidenced interest in some matters beyond the country's borders. As early as 1983, when the Department asked OSI Director Ryan to prepare a report on Klaus Barbie, it knew that Barbie was not in the United States. There was a question as to whether he had entered the country years earlier, but he was already in France when the report was commissioned.

Since at least the mid 1980s, OSI has sought to ensure that persecutors do not settle in a country willing to provide a too-comfortable safe haven. Konrad Kalejs, discussed elsewhere, is one such example.[2] Bohdan Koziy and Harry Männil are two others. Männil, unlike Kalejs and Koziy, was never prosecuted by OSI. But for one change of planes, he is not known to have ever been in the country.

Bohdan Koziy

Koziy was one of the first cases filed by OSI. As a Ukrainian policeman during World War II, he had helped round up Jews and forcibly relocate them to a ghetto. At his denaturalization proceeding, witnesses testified that he had murdered a four-year-old Jewish child by shooting her at point blank range as she pled for her life; they also had seen him murder an entire Jewish family.

His citizenship was revoked in 1982.[3] While the case was on appeal, the Justice Department hoped to persuade Poland to seek Koziy's extradition and to try him for war crimes.[4] The Poles were uninterested.[5] In 1985, after his citizenship had been revoked, and while deportation proceedings were pending, Koziy fled to Costa Rica.

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The deportation hearing continued in his absence, and the court ordered him deported to the Soviet Union.[6] Since he was outside the United States, however, there was no way to enforce the court's order. From OSI's vantage point, Koziy had "escape[d] from justice."[7]

The Soviets were of the same view. A year after Koziy arrived in Costa Rica, the Soviet Union sought to have him extradited to stand trial for treason. Costa Rica initially agreed. However, Koziy generated public support in Costa Rica by holding a gun to his head and saying, "I want to die in a free country." In addition, the Catholic church, both in Ukraine and Costa Rica, came to his aid. According to the Ukrainian Cardinal, Koziy was being "falsely accused by the communists and the Jews."[8] In 1987, the Costa Rican government reversed its earlier ruling and rejected the Soviet request for extradition. The stated reason for this change was concern that Koziy faced the death penalty in the Soviet Union.[9]

After the fall of the Soviet Union, the WJC announced a global campaign to expel Koziy

from Costa Rica.[10] Dozens of congressmen, including Tom Lantos, the only Holocaust survivor in Congress, petitioned the Costa Rican government.[11] In February 2000, Costa Rica's president ordered Koziy's expulsion. It was unclear, however, where he should be sent. Prior to the war, the scene of Koziy's activity was part of Poland. It became part of the Soviet Union as a result of that nation's 1939 pact with Hitler. It is now located in Ukraine.

Jewish organizations and members of Congress urged Ukraine to admit Koziy and to prosecute him.[12] By this time, however, only one of the eyewitnesses who had testified to Koziy's atrocities was still alive, and she had recanted.[13] The chance of a successful prosecution in Ukraine was therefore significantly diminished. (He could possibly still be convicted of lesser charges.) Nonetheless, Director Rosenbaum supported the effort to send Koziy to Ukraine, as did the Department of State. Rosenbaum was of the view that if Koziy "end[ed] up in a country where at least he knows he *might* be prosecuted, we would consider that a positive outcome."[14]

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The Ukrainians were sending mixed messages about prosecuting Koziy. Although they expressed an interest in investigating the matter, they never took up OSI's offer to review the files – even after OSI offered to provide an interpreter, along with copies and translations of all pertinent documents.[15] Similarly confusing was the fact that they advised Koziy by letter that he would be arrested if he set foot on Ukrainian soil – even as they conceded to OSI that they were no longer sure they could mount a viable case.[16]

They were also sending mixed messages about his returning to their country. While they had originally indicated they would grant him a visa if he applied,[17] they in fact waited months to respond to his request and then denied it on the ground that he had asked for the wrong type of visa. Under Ukrainian law, he would have to wait at least one year before he could reapply for

the type they now claimed was appropriate.[18]

A Catch-22 situation was developing. Under Costa Rican law, Koziy had to choose a country of destination before the expulsion could be effected. He had chosen Ukraine, yet Ukraine would not have him – at least not in the near future. Moreover, the very validity of the expulsion order was put in question when Ukraine notified Koziy that he would be arrested. Costa Rican law distinguishes expulsion, which is simply a removal process, from extradition, a means to secure prosecution. Ukraine's statement allowed Koziy to argue that his expulsion was a "disguised extradition, and as such, illegal.[19] Both Director Rosenbaum and Steve Donlon, a Consular Affairs officer at the Department of State who was working with OSI on the Koziy matter, were suspicious that Koziy and the Ukrainians were working together – each pretending that the goal was to have him return to Ukraine when in fact, each for their own reason, wanted him to remain in Costa Rica.[20]

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It is easy to understand Koziy's motivation. He had a comfortable lifestyle and faced no prospect of prosecution in Costa Rica. The Ukrainian position is more complex. Rosenbaum surmised that the Ukrainians wanted Koziy to remain in Costa Rica because there was insufficient evidence to prosecute him in Ukraine; they feared they would be castigated by the United States and Jewish groups for failing to prosecute someone the United States had branded a Nazi murderer. Rosenbaum believed the Ukrainians were particularly sensitive about negative publicity because they were receiving much of it on other unrelated issues: they were in a battle with the International Monetary Fund concerning overdue payments, and the Ukrainian president was in the midst of a scandal linking him to the beheading of a muckraking journalist.[21]

In a series of meetings and phone calls with the Ukrainians, Rosenbaum, in coordination

with the State Department, played on this fear to encourage the Ukrainians to pursue the case. At a meeting with Ukraine's Consul General, Rosenbaum opined that the matter could well become "big news" which would embarrass the Ukrainian government.[22] At a later meeting with Ukrainian officials and representatives from the U.S. State Department, Rosenbaum commented that one of the leading human rights advocates in Congress was anxious to raise the Koziy matter.[23] At every meeting, and during every phone call, Rosenbaum balanced the implicit threat of exposure with an offer to assist the Ukrainians in investigating the case. He also gave his word that if it turned out there was insufficient evidence to sustain a prosecution, he would issue a statement praising the Ukrainians for their efforts and blaming the problems on the death of crucial witnesses while Koziy remained in Costa Rica. Rosenbaum assured the Ukrainians that his explanation would be accepted by those who might otherwise criticize the Ukrainians.[24] His reference – though he did not say so explicitly – was to Jewish organizations.

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In June 2002, Rosenbaum and several State Department representatives met with various Ukrainian officials, including the Deputy Procurator General (equivalent to the Deputy Attorney General of the United States) to discuss the matter yet again. During the course of the meeting, Rosenbaum and the Deputy Procurator General debated the goal to be achieved in the Koziy matter. For Rosenbaum, it was removing Koziy from Costa Rica and placing him in the part of the world which bore responsibility for his crimes. As long as Koziy lived in fear of prosecution, Rosenbaum believed there would be a measure of justice.

The Ukrainians disagreed with the premise that life in Ukraine was punishment in and of itself. On the contrary, they noted that many in Ukraine would treat him as a hero simply because he fought against the Russians during World War II. The Ukrainian goal was

prosecution; if they did not have the evidence to prosecute, it did not matter to them where Koziy resided.

The U.S. participants left the meeting believing that no progress had been made. They were therefore quite surprised to learn in December 2002 that a Ukrainian court had ruled there was sufficient evidence to seek Koziy's extradition on charges of treason.[25] Shortly thereafter, in response to a request from Ukraine, the Department of Justice sent videotaped interviews of seven witnesses and a transcript (on microfilm) of the entire U.S. trial record.

Around the same time, Poland asked OSI and Ukraine to forward evidence on Koziy. (The SWC had been pressing Poland to take action.)[26] OSI complied with the request. Ukraine, however, refused, contending that the crimes were committed in Ukrainian territory and should be handled by that country alone.[27] In June 2003, at Poland's request, an OSI attorney interviewed in the United States a witness who had testified for the government in the 1985 denaturalization proceeding.

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Unsure whether a Polish indictment would ever be issued, OSI and the State Department determined to press Ukraine to accept Koziy.[28] Poland, however, did follow up. In November 2003, Poland obtained a provisional arrest warrant for Koziy – a prerequisite to an extradition request. Working with OSI's evidence as well as additional material they developed on their own, they alleged Koziy was responsible for 15 murders. Two weeks later, Ukraine too obtained a warrant.[29] The question then became which country would be first to formally present an extradition request to the Costa Rican government.

The answer was Poland, which did so on November 21, 2003. Shortly after receiving notification of the request, Koziy suffered a stroke. He died in Costa Rica nine days after the

request was filed.[30]

Harry Männil

Harry Männil spent three months with the Estonian Self Defense Unit (Omakaitse) and a like period with the Estonian Political Police. Both organizations worked with the Nazis to rid Estonia of those whom the Nazis deemed undesirable because of their racial, religious, political, ethnic and social identity.

During the period when Männil was with the Omakaitse (the summer of 1941), the German focus was almost entirely on suspected Communists. By the time he joined the Estonian Political Police, in the fall of 1941, the Germans were actively routing out Jews as well.[31]

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Germans determined the fate of arrestees based largely on reports and recommendations from the Political Police.[32] Reports of seven interrogations conducted by Männil while with the Political Police are available in the Estonian State Archives; six of those interrogated were Jewish or were questioned about the whereabouts of Jews. One of the six was murdered by the Germans shortly after his interrogation; four were sent to concentration camps.[33]

After the war, Männil emigrated to Venezuela where he became a citizen and successful businessman.[34] In 1949 he obtained a visa to visit the United States, which he did many times throughout the years.

Männil was brought to OSI's attention by the SWC in December 1993. Since he was neither a U.S. citizen nor living in the United States, there was no suit to be filed. He was, however, placed on the Watchlist in January 1994. Although he was two weeks later allowed to change planes in Miami *en route* to Costa Rica, he has not since been permitted into the U.S.

Nonetheless, because of his significant and direct role in persecution, OSI has maintained a keen interest in him.

As discussed earlier,[35] OSI tried, unsuccessfully, to persuade the Estonians to launch a full-scale investigation of Männil. OSI hoped that he could be extradited to Estonia if charges were filed. While showing some interest in the investigation, Estonia never filed charges.

In January 2003, Venezuela was in political and economic turmoil. Männil, interviewed by an Estonian weekly, stated that he had moved to Costa Rica a month earlier.[36] The American Embassy in Estonia informed OSI of the interview, and Director Rosenbaum immediately notified the Costa Rican ambassador to the United States.[37] The Ambassador, who had worked closely with OSI on the Koziy matter, asked for any documentation which would support expelling Männil from the country. OSI sent him a report detailing Männil's history. Shortly thereafter, the Costa Ricans learned that Männil was planning a trip to Venezuela to settle some business matters. Costa Rica's Director of Immigration boarded Männil's plane and handed him a letter stating that he would not be allowed to return to Costa Rica. The letter explained that this decision was based on "information received from the Justice Department of the Government of the United States concerning your participation in activities of political persecution of Jews which you carried out while a member of the Political Police of Tallinn, Estonia." Once Männil was out of the country, the Costa Ricans held a press conference to announce his expulsion; the event received news coverage worldwide.[38]

OSI had coordinated its Costa Rican contacts with the State Department. Although OSI had hoped that the information forwarded to Costa Rica would be made public, the State Department precluded release of the documents. The Estonians were in the midst of an election

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campaign in which one of the contentious issues had a Nazi twist. The Minister of the Interior was being attacked for having sentenced several teenagers to prison during the Soviet era; he defended the sentence on the ground that the teenagers were "fascists" fascinated with Nazi memorabilia. Given this backdrop, the State Department feared that release of OSI's underlying information (even if it were done through the Costa Ricans) would be seen as the U.S. intervening to assist the minister.[39]

Ironically, although OSI's report was not released, the issue became a *cause célèbre* in Estonia before their election took place. In February 2003, Joseph De Thomas, the U.S. Ambassador to Estonia, was asked about Männil after he gave a speech on an unrelated topic in Tallinn. The questioner accused the U.S. of "discriminating" against Männil. The ambassador defended the U.S. actions, noting that some of Männil's victims had been children and old women. His comments created a furor in Estonia.[40]

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Meanwhile, Männil's attorneys (one of whom was Martin Mendelsohn) successfully petitioned the Costa Rican government to reconsider its position. In early 2004, Costa Rica dropped its opposition to Männil's reentry. The government did so on the grounds that Männil was not facing charges abroad and had earlier spent extended time in Costa Rica without incident.[41]

The Männil and Koziy cases illustrate OSI's effort in the hunt for World War II persecutors worldwide. Although the United States lacks jurisdiction to prosecute criminally those who committed crimes abroad on behalf of the Nazis, it has taken on the task of sharing information it has on Nazis with like-minded countries throughout the world. It has also sought to raise the awareness of countries abroad so that they are more sensitive of the need to rid

themselves of Nazis in their midst and to prosecute if possible.

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1 1. Feb. 13, 1983 memorandum re: "Deportation of Nazi War Criminals."

2. *See* pp. 466-475.

3. *United States v. Koziy*, 540 F. Supp. 25 (S.D. Fl. 1982), *aff'd*, 728 F.2d 1314 (11th Cir. 1984).

4. Aug. 17, 1983 memo to T. Michael Peay, State Dep't from Director Sher; Aug. 17 routing slip from DAAG Richard to Sher re DAAG Richard's discussion of the matter with the State Department.

5. Oct. 16, 1984 routing ship to Sher from DAAG Richard noting the lack of interest when he discussed the case informally with Polish officials in Warsaw.

6. *Matter of Koziy*, A07 347 878 (Imm. Ct., Miami, Fl. 1985).

7. Mar. 1, 2002 note from Rosenbaum to Koziy case file. In response to prompting from the United States, the Costa Ricans arrested Koziy while they investigated the circumstances of his admission into the country. He was in custody for three days before a court determined that he had entered legally. "Alleged War Criminal Ordered Freed by Court," *AP*, Aug. 23, 1985.

8. "Pressure Grows to Expel Accused War Criminal," by Brian Harris, *The Tico Times*, [Costa Rican English language daily], June 3, 1994. As late as 2000, the Costa Rican archbishop was proclaiming Koziy the victim of mistaken identity. "Let Me Die in Peace in Costa Rica, Pleads Ex-Nazi," *Reuters*, June 14, 2000.

9. Although the Soviet Ambassador sent a letter assuring that Koziy would not be executed, the Costa Rican Foreign Minister held this an insufficient guarantee against the use of capital punishment. "Pressure Grows to Expel Accused War Criminal," *supra*, n. 8.

10. "Costa Rica Harbors Nazi Killer," WJC International Report, Oct./Nov. 1994.

11. June 22, 1994 letter to Costa Rican Ambassador Sonia Picado from Congressman Lantos; Aug. 2, 1995 letter to H.E. Jose Maria Figureres, president of Costa Rica signed by 64 U.S. Congressmen. In March, 2000, 22 Congressmen signed a letter urging the Ukrainian government to take Koziy back and to hold him accountable. "Ex-Nazi Loses Expulsion Appeal from Costa Rica," *Reuters*, Nov. 20, 2000.

12. "Costa Rica Court OK's Nazi Expulsion," *The Jerusalem Post*, Dec. 6, 2000; "Top Costa Rican Court to Rule on Nazi in Days," *Reuters*, May 1, 2000.

13. "Digging into the Past," by Mary Mycio, *The Los Angeles Times*, Oct. 18. 1994; "War Criminal Charges Case Falling Apart," by Brian Harris, *The Tico Times*, Sept. 30, 1994. For a discussion of the impact of this recantation, *see* p. 548, n. 22.

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14. Statement made by Rosenbaum to Ukrainian Consul General at March 7, 2001 meeting. The Germans had long before refused to extradite or prosecute Koziy. *See* pp. 429-430.

15. Jan. 16, 2001 letter from Rosenbaum to V.V. Kudriavtsev, Deputy Prosecutor General of Ukraine.

16. Jan. 23, 2001 e-mail from Rosenbaum re: "Koziy: Telcons w/ Costa Rican & Ukrainian Ambassadors."

17. May 15, 2000 telegram No. 151511Z from American Embassy, Kiev to Secretary of State.

18. June 5, 2002 e-mail from Rosenbaum re: "Koziy: Bad News – Kiev Sandbags Us, Probably Permanently."

19. Mar. 30, 2000 e-mail from Janet Weber [Consul General, US Embassy, San Jose] to Steve Donlon, Citizen Service Specialist, Consular Affairs Office, State Department.

20. June 5, 2002 e-mail from Rosenbaum, *supra*, n. 18.

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21. *See e.g.*, "A Grisly Mystery in Ukraine Leads to a Government Crisis," by Patrick Tyler, *The New York Times*, Jan. 30. 2001; "Headaches Pile Up on Ukraine Leader," by Patrick Tyler, *The New York Times*, Dec. 6, 2000.

22. Notes taken by the author at Mar. 7, 2001 meeting between OSI representatives and the Ukrainian Consul General and Embassy First Secretary; Mar. 27, 2001 memorandum from OSI historian Michael MacQueen to files concerning the same meeting.

23. June 26, 2002 memorandum to file prepared by Jonathan Drimmer, OSI attorney, concerning meeting with Deputy Procurator General, a vice consul from the Ukrainian Embassy, and a representative from the Ukrainian MFA.

24. *See e.g.*, Jan. 23, 2001 e-mail from Rosenbaum re "Koziy: Telcons w/ Costa Rican & Ukrainian Ambassadors."

25. The U.S.S.R. had sought his extradition from Costa Rica years earlier. A new ruling was necessary however, since Ukraine adopted a new criminal code in 2001. The old arrest warrant, issued by the Soviet Union, was therefore no longer valid. Nov. 8, 2002 Cable 04410 0815312 from the AmEmb Kiev to Sec'y of State.

26. "Costa Rica Praised for Expelling Ex-Nazi," [Harry Männil], by Elli Wohlgelernter, *The Jerusalem Post*, Feb. 12, 2003.

27. May 29, 2003 e-mail from Evgeniy Suborov (AmEmb Kiev) to Donlon re "Koziy and other OSI Matters."

28. July 23, 2003 e-mail from Rosenbaum to Feigin re "Corrected Text: Summary Account of Today's Meeting with US Amb. To Ukraine John Herbst."

29. Oct. 16, 2003 Cable No. 003875 from AmEmb Kiev to Sec'y State.

30. "Alleged Ex-Nazi Dies in Hospital While Awaiting Extradition," *AP*, Dec. 1, 2003.

31. According to Dr. Martin Sandberger, head of the mobile killing unit whose area of operation included Estonia, the order to arrest Jews was given in early Sept. 1941. He so testified at the Nuremberg trial of *U.S. v. Otto Ohlendorf et al.*

32. *Id.*

33. Aug. 7, 1996 Memorandum to OSI Director Eli Rosenbaum from Elizabeth White, OSI Chief of Investigative Research, re "Harry Männil – Admissibility under Title 8, U.S. Code."

34. The circles in which he traveled are suggested by the persons who filed affidavits on his behalf when he challenged the U.S. government's decision to place him on the Watchlist. *See* p. 301. In addition to former President Gerald Ford, they included Robert D. Stuart, Jr., former CEO of Quaker Oats (1966-1980) and U.S. Ambassador to Norway (1984-1989); George W. Landau, U.S. Ambassador to Venezuela (1982 to 1985) and President of the Americas Society (1985-1993); and John E. Avery, retired Group Chairman of Johnson & Johnson and Chairman of the Americas Society and the Council of the Americas.

35. *See* pp. 456-457.

36. *Eesti Ekspress*, Jan. 16, 2003.

37. Jan. 17, 2003 e-mail to Ambassador Jaime Daremblum from Rosenbaum re "2nd Nazi in Costa Rica?"

38. *See e.g.*, "Costa Rica Asks Estonian-Born Businessman to Keep Out Over Alleged Nazi Past;" *BNS*, Feb. 6, 2003; "Costa Rica Praised for Expelling Ex-Nazi," by Elli Wohlgelernter, *The Jerusalem Post*, Feb. 13, 2003; "Venezuela Asked to Take Action Against Nazi Collaborator," *Voice of America Press Release*, Feb. 7, 2003; "A Latin American Roundup," *The Miami Herald*, Feb. 6, 2003.

39. Feb. 4, 2003 e-mail from State Department Baltic Affairs Officer Maria Germano, to Eli Rosenbaum, re "Mannil: Costa Rica, Estonia and OSI's Report."

40. "In Estonia, U.S. Ambassador Says He's Seen Proof Alleged Nazi Männil Committed War Crimes," by Michael Tarm, *AP*, Feb. 12, 2003, referring to an article in the Estonian newspaper *Posttimees* of the same date. (The *Posttimees* is the leading daily paper of record in Estonia.) *See* pp. 456-457, concerning an article Amb. Thomas wrote about Nazi persecutors in 2002.

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41. Aug. 8, 2004 e-mail from Rosenbaum re "Suspected Nazi Criminal Harry Mannil Has Been Readmitted to Costa Rica." The e-mail recounts a telephone conversation Rosenbaum had with Ms. Villalobos, the DCM at the U.S. Embassy in Costa Rica.

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Chapter Seven: Reaction to OSI

Introduction

Although the founding of OSI came about after wide media coverage of "war criminals" in America, the spotlight dimmed over the years. A few matters drew extensive media attention – Demjanjuk, Barbie and Mengele being notable examples. But in general, aside from some local attention paid to an OSI trial, the cases now go unreported. At this point – more than 25 years after OSI's founding – it is unlikely that most members of the public at large are aware of the office.

The big exception, of course, has always been those who have reason to follow OSI's cases and activity. The groups that fall most obviously into that category are two: (1) those who see closure in OSI's work (generally Jewish groups and Holocaust survivors); and (2) those who fear they have been unfairly targeted by OSI (generally emigré groups, largely from Estonia, Latvia and Lithuania, whose constituents make up the bulk of OSI defendants). Of course the lines are not so simply drawn. Within the Jewish community, there has been occasional criticism, and within the emigré community there has been some support. Moreover, there are others, independent of each of these groups, who have taken stands on some aspect of OSI's work. How OSI has responded to both the support and criticism is key to understanding the office and its legacy.

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The Jewish Community

The Department of Justice represents Americans as a whole. However, it is not uncommon for segments of the public, including non-governmental organizations, to be particularly interested in certain areas of the Department's work. These groups sometimes prod the Department to pursue matters of concern; at other times they may monitor, support or criticize the Department's efforts. Such, for example, is the case with environmental groups and the Environmental and Natural Resources Division, advocates for the minority and disabled community with the Civil Rights Division, and Jewish organizations with OSI.

From the SLU era to the present day, the office has kept Jewish groups apprised of significant matters. It has also shown particular concern for Holocaust survivors. When the government moved to dismiss the case against Frank Walus, it did so because it believed he had not committed the persecutory acts about which the survivors had testified.[1] Nonetheless, the government issued a statement saying it had "no doubt that the witnesses who testified on behalf of the government – the survivors of the Nazi persecutions of Czestochowa and Kielce – testified sincerely and honestly." The Department showed similar deference to the sensitivity of the survivors who identified John Demjanjuk as Ivan the Terrible. Although most within the Department ultimately came to believe that Demjanjuk was not in fact Ivan (based in part of evidence which became available only after Demjanjuk's extradition), there was never an official acknowledgment of this change in viewpoint. This is so despite the fact that the Department ultimately dropped all charges relating to Treblinka and reprosecuted Demjanjuk on other grounds.

OSI's first Director, Walter Rockler, viewed the directorship in traditional prosecutorial

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terms, which meant that he did not seek community input into the process. Nevertheless, because of his Nuremburg experience, the Jewish community knew and trusted him. His successor, Allan Ryan, was unknown to them.

Ryan saw public relations as a large component of the job, and believed that support of the Jewish community was essential.[2] Accordingly, he met with as many Jewish groups as possible, asking for their confidence and encouraging them to tell their constituencies that this new office was here to "do business." As a non-Jew, he had a special point to convey.

> When I came along, people said "Boy, this guy's not even Jewish. How do you like that?" It gave me the opportunity to say "This is not a Jewish prosecution. This is not a Jewish issue exclusively. This is an American issue. And as much as Jews obviously are deeply involved in this and have a special relationship to it, I am here as a representative of the Department of Justice to pursue an issue that is important on the American agenda. This should not be seen as something that is exclusively the concern of the Jews."[3]

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There was assistance which Jewish groups in particular could provide, however. Especially in the early years, before the Justice Department had its own databank or research and development system, outside help was crucial. Jewish groups provided information concerning possible subjects and connected OSI to survivor organizations whose members were potential witnesses.[4] During trials, they attended to the religious needs of out-of-town witnesses.[5] They sometimes filed briefs in support of OSI's position.[6]

Throughout the years, Jewish groups or leaders have spoken out on issues of moment to OSI. In doing so, they often serve as a surrogate for the office. They have publicized Germany's refusal to accept OSI defendants as deportees;[7] convinced the Panamanian Ambassador to rescind his country's offer to accept Karl Linnas;[8] launched a global campaign to pressure Costa Rica into expelling Bohdan Koziy and sending him to Ukraine to be tried for war crimes;[9] and

urged Japan to furnish OSI with biographical data on possible persecutors.[10] On the legislative front, the WJC and ADL prevailed upon Congress to craft legislation which would exempt records "related to or supporting any active or inactive investigation, inquiry, or prosecution" from release under the Nazi War Crimes Disclosure Act.[11] The exclusion, which affects fewer than 1% of documents covered by the Act, is designed to preclude the release of material that would jeopardize ongoing OSI investigations.

Jewish groups have also defended OSI from criticism. During the 1980s, defendants repeatedly challenged the reliability of evidence from Soviet and East European archives.[12] The ADL issued a well-publicized report lambasting various emigré groups for using this issue to "hamper and frustrate the OSI – and eventually to kill it."[13] The WJC released a similar analysis.[14] In 1993, after the Sixth Circuit excoriated OSI in *Demjanjuk* for having a "mindset" that required it to "try to please and maintain very close relationships with various interest groups because their continued existence depended upon it," Jewish organizations attacked the decision.[15] They also lobbied against Judge Gilbert Merritt, one of the judges in both *Demjanjuk* and *Petkiewytsch*, when his name surfaced on a short list to fill a Supreme Court vacancy.[16]

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This type of activity leads to a perception of symbiosis between OSI and the Jewish community. That perception is enhanced by the fact that Director Rosenbaum spent two years as General Counsel to the WJC and Director Sher left OSI to join a prominent Jewish lobbying group.[17] The perception sometimes works to OSI's advantage, as others fear that OSI can arouse a powerful Jewish lobby if need be.[18]

Yet the symbiosis is not perfect. At times, OSI defendants have been represented by Jewish lawyers. They have generally defended their decision to represent alleged Nazi

persecutors on the ground that refusing to represent a class of persons *per se* is reminiscent of the treatment Jews received in Nazi Germany.

The dismissal of the *Walus* and *Soobzokov* cases, the prosecution of Jacob Tannenbaum, and the negotiated settlement of some OSI cases, were all controversial decisions which aroused mixed reactions among Jews.[19] And in the case of André Bettencourt, OSI did not place him on the Watchlist despite public pressure from renowned Nazi hunter Serge Klarsfeld.[20]

Given the overall strength of the relationship between OSI and the established Jewish leadership, disagreements of this sort have no long-term effects. There are, however, fringe Jewish organizations whose activities are much more problematic for OSI. Indeed, some of their activities have been counterproductive to OSI's mission. The most serious by far is their apparent involvement in the death of Tscherim Soobzokov, discussed elsewhere in this report.[21]

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There have been other problems as well. Jewish groups have disrupted trials,[22] harassed defense counsel,[23] and assaulted defendants. On the very day of Soobzokov's death, a fire broke out in front of the home of Elmars Sprogis, whose order of denaturalization had been reversed four months earlier. When the front door was opened to a passerby seeking to alert the occupants of the fire, a bomb exploded. Although Sprogis was not harmed, the samaritan's lower leg had to be amputated. Shortly after the incident, a call came to the local newspaper: "Listen carefully. Jewish Defense League. Nazi war criminal. Bomb. Never again."[24] In 1980, a bomb went off at an apartment building owned by an OSI defendant. The day prior, a man identifying himself as a Holocaust survivor warned a local news agency that he would kill the defendant.[25] Frank Walus, prosecuted before OSI's founding, was sprayed in the face with mace by a man identifying himself as the head of the JDL in Chicago.[26]

The most repeatedly victimized OSI defendant was Boleslavs Maikovskis, a Latvian chief of police during World War II.[27] The INS filed suit against him in 1976. In 1978, with the litigation still pending, several shots were fired into Maikovskis' home, wounding him seriously. Although the JDL disclaimed responsibility, the national director of the group stated that the organization was:

> ecstatic that it happened. We're only unhappy the man is still alive. . . . We don't go around shooting and killing people, but we hope to serve as an inspiration to those who do.[28]

The following year, a man representing himself as a reporter stabbed a guest in the Maikovskis home and then fled. The anonymous assailant later identified himself to the media as a member of a group called Jewish Executioners With Silence (JEWS) and said that Maikovskis had been the target.[29] Gasoline bombs and flammable fluids were aimed at the Maikovskis home several times in the succeeding years, although no one was injured. After one such incident, a caller said the firebombing was "revenge for crimes [Maikovskis] committed."[30] Even during his deportation hearing in a public courtroom, Maikovskis was not safe. OSI attorney Jeffrey Mausner blocked a would-be assailant from reaching the defendant.

Save the attempted courtroom assault, no arrests were made in any of the cases involving violent acts against OSI defendants.[31] As of this writing, FBI investigations into the crimes remain open.

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1. *See* pp. 83-86.

2. *See* p. 10.

3. Ryan recorded interview, Oct. 6, 2000.

4. *E.g.*, in 1976, Dr. Oscar Karbach of the WJC provided INS with a list of 61 names of alleged persecutors culled from media accounts. That same year, the WJC sent the SLU the names of Treblinka survivors to interview for the Fedorenko investigation. In 1980, the WJC contacted Yiddish newspapers worldwide in a search for survivors from a camp in Estonia headed by then OSI subject Karl Linnas.

Over the years, Jewish publications printed notices about OSI's need for witnesses from particular camps or regions. *E.g.*, ADL notice in Spring, 1991 issue of *Briefings*, published by the Union of American Hebrew Congregations; item in June 27, 1991 issue of *Washington Jewish Week* and June 1991 issue of *One Generation After* re OSI seeking survivors of the Mauthausen camp.

5. *E.g.*, if a witness wanted to attend services or dine in a kosher restaurant, Jewish groups assisted. Ryan interview, *supra*, n. 3.

6. *E.g.*, the WJC filed an *amicus curiae* brief in the Second Circuit for the *Linnas* case and one in the Supreme Court for *Kungys*. At the time each of these was filed, Eli Rosenbaum was General Counsel for the WJC. The ADL, American Jewish Congress, Hadassah, United Synagogues of Conservative Judaism and Jewish War Veterans filed a joint brief supporting the Justice Department's request for rehearing in *Demjanjuk*. The Holocaust Survivors in Pursuit of Justice, the WJC, the International Association of Jewish Lawyers and Jurists (American Section), the American Jewish Committee, the American Jewish Congress, the ADL, the National Jewish Commission on Law and Public Affairs, the SWC, the Society of Survivors of the Riga Ghetto, the Union of Orthodox Jewish Congregations of America, and the WJC all filed in support of the government's petition for certiorari in that case.

7. *E.g.*, June 9, 2005 press release from the SWC, "Wiesenthal Center Calls Upon German Gov't to Admit and Prosecute Nazi Collaborators Ordered Deported from the United States;" "Jewish Group: Germany Not Taking War Criminals," *AP*, June 5, 1985.

8. *See* p. 284.

9. *See* pp. 510-511.

10. Congressman Lantos wrote to the Japanese Prime Minister and met with the Japanese Ambassador in a futile effort to ameliorate the problem. Oct. 27, 1999 letter from Rep. Lantos to Prime Minister Keizo Obuchi; Apr. 11, 2000 letter from Ambassador Shunji Yanai to Rep. Lantos discussing their meeting and the Ambassador's response.

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11. Discussion with Director Rosenbaum.

Even documents in closed OSI investigations are covered under the exemption because they may have information (including subject or witness names) relevant to ongoing investigations. However, the exclusion is not rigid. It can be waived, and indeed, OSI has done so many times.

12. *See* pp. 537-540.

13. "An ADL Special Report, The Campaign Against the U.S. Justice Department's Prosecution of Suspected Nazi War Criminals," June 1985.

14. "East European Emigres Are Accused of Impeding Hunt for Nazis in U.S.," by Mary Thornton, *The Washington Post*, Apr. 6, 1985.

15. *E.g.,* the ADL found the court's accusation "absolutely mindboggling." "Appellate Panel Rebukes Justice Dept on Demjanjuk," by Michael Isikoff, *The Washington Post*, Nov. 18, 1993.

16. *See e.g.*, "Latest Version of Supreme Court List: Babbitt in Lead, 2 Judges Close Behind," by Thomas Friedman, *The New York Times*, June 8, 1993; "Grumbling Grows as Babbitt Considered for High Court," by Paul Richter, *The Los Angeles Times*, June 9, 1993.

At the time Jewish groups were lobbying against Merritt, the *Demjanjuk* ruling had not yet been issued. However, Chief Judge Merritt had already been instrumental in reopening the case and allowing Demjanjuk to return to the U.S. (When the opinion was issued, it was authored by Judge Lively, with Judges Merritt and Keith in full agreement.)

Whether Merritt would have been the nominee absent Jewish lobbying is unknown. He, however, believed that to be the case. "Demjanjuk Judge: Jews Torpedoed Bid for Top Court," *The Forward*, Feb. 10, 1995.

17. Sher joined AIPAC, the American Israel Public Affairs Committee. In 1994, when writing to the Attorney General to urge the Department to investigate Allan Ryan (*see* p. 168), Judge Merritt made pointed reference to this move.

> [Jewish special interest] groups, no matter how powerful politically, should no longer be permitted to influence the administration of justice in the Department. I call to your attention the fact that in the past few months the head of OSI went over to run the most important of these groups, APAC [sic].

Oct. 20, 1994 letter from Chief Judge Merritt to Attorney General Janet Reno.

After leaving AIPAC, Sher joined the International Commission on Holocaust Era Insurance Claims. He resigned in 2002 amid allegations that he had misappropriated $136,000. He was disbarred in the District of Columbia in August 2003.

18. Director Rosenbaum sometimes used this subtle suggestion to prod various parties to action. *E.g.*, in a May 3, 2000 phonecall with the State Department's Romanian Desk, Rosenbaum

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opined that the Jewish community would be very upset if Romania did not agree to accept Nikolaus Schiffer as a deportee. That same month he wrote to the State Department, noting that Congress and the public would be critical if Germany did not accept two other deportees. He made a similar argument to the State Department's Special Ambassador on War Crimes. When speaking with the German Political Minister about Germany's refusal to take in OSI deportees, Rosenbaum suggested that he was able to fan the flames of controversy. *See* p. 439.

19. *Tannenbaum* – editorial opposing the prosecution: *Washington Jewish Week*, June 18, 1987; statements of support by Jewish leaders: "Haunting Issues Surround Jewish Nazi Camp Overseer," by Samuel Freedman, *The New York Times*, May 26, 1987.

Walus – The Jewish United Fund of Metropolitan Chicago, The American Jewish Congress and the Anti-Defamation League all urged the government to pursue the case. Mar. 4, 1980 letter from Joel Sprayregen to U.S. District Attorney [sic] Thomas P. Sullivan; "Analysis of the Seventh Circuit Opinion in *U.S. v. Frank Walus*," by the ADL and the American Jewish Congress, Mar. 1980. The Israelis made public their displeasure with the government's decision: "Israeli Assails Justice Dept. Decision on Accused Nazi," *The New York Times*, Jan. 26, 1981; "Data Against Walus Ignored – 2 Israelis," *The Chicago Sun-Times*, Jan. 25, 1981.

Soobzokov – Although not angry at OSI, Rep. Holtzman was "angered by the implications" of government wrongdoing which allowed Soobzokov to enter the country. "CIA 1952 Files Save Ex-Nazi in Deportation Case," by Thomas O'Toole, *The Washington Post*, July 10, 1980.

Re settlement of cases, *see e.g.*, "Echoes from the Holocaust Sound for 2 Neighbors," by Sean P. Murphy, *The Boston Globe*, June 25, 1990, in which the ADL expressed disappointment that OSI was not seeking a defendant's deportation. (Due to the defendant's poor health, OSI accepted his forfeiture of citizenship in return for the government's commitment not to seek deportation.)

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20. *See* pp. 301-302. In March 1995, Abraham Foxman, National Director of the ADL, told the French daily *Le Monde* that he opposed the efforts to bar Bettencourt's entry into the United States, both because Bettencourt's writings constitute insufficient grounds (in ADL's view) for placing him on the Watchlist and because Bettencourt "has publicly apologized to the Jewish people."

21. *See* pp. 349-350.

22. *E.g.*, During the 1998 trial of Jacob Reimer, Jewish spectators screamed at the defendant. In 2000, during the Fedir Kwoczak trial, a lone Jewish protestor, wearing a skullcap and an armband imprinted with a Star of David and the word "Justice," stood menacingly behind the defendant and his family. He rejected the marshals' request to move and was persuaded to do so only after the judge spoke to him directly. In 1981, a Jewish spectator was barred from the trial of Bohdan Koziy after shouting at a defense witness outside the courtroom. During the 1985 extradition hearing of Andrija Artukovic, jeers and threats were exchanged between Croatian and Jewish groups attending the proceeding. A JDL member was arrested for disorderly conduct and failure to vacate federal property. "Artukovic Ruled Mentally Fit to Assist in Defense," by

William Overend, *The Los Angeles Times*, Jan. 31, 1985.

23. *See e.g.*, "Artukovic's Attorney Tells of Threats," by William Overend, *The Los Angeles Times*, Jan. 28, 1985.

24. "Bomb Explodes at LI [Long Island] Home of Figure in Nazi Hearing," by Phil Mintz and Peter Marks, *Long Island Newsday*, Sept. 7, 1985. The injured samaritin later sued the U.S., claiming that, because of previous death threats to Sprogis, the government should have known and protected against the impending danger. A judge dismissed the lawsuit, ruling that the federal government was not responsible for the injuries. "Don't Blame U.S., Samaritan Told," by Edna Negron, *Long Island Newsday*, July 7, 1987.

25. "Threatening Letter Writer," *AP*, Jan. 30, 1980.

26. "Man Hurls Mace at Suspected Nazi, Seized," by Jim Casey, *The Chicago Sun-Times*, Feb. 2, 1977.

27. *See* pp. 427, 430-431 for a discussion of Maikovskis and his prosecution both in the U. S. and Germany.

28. *AP* Release by Arthur Everett, Aug. 4, 1978.

29. "Alleged Nazi's Guest Knifed on L.I." [Long Island], by Shawn G. Kennedy, *The New York Times*, June 14, 1979.

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30. "More Violence on Tense Street," by Richard Firstman, *Long Island Newsday*, May 1980.

31. There was no prosecution as a result of the courtroom incident. It is unknown whether the assailant was Jewish or affiliated with any particular group.

The Coalition for the Protection of Constitutional Rights and Security, an organization of emigré groups opposed to OSI's methods and practices in the 1980s, held the Justice Department accountable for all the violence; they argued that the Department should have spoken out on the issue. "The Justice Department is Not Concerned About Justice," *Draugas*, Oct. 8, 1985.

Critics

OSI is not without its critics. They include a wide range of people whose objections vary from procedural to substantive. Some of the criticism is directed at specific cases; some applies to OSI prosecutions generally, and some to OSI officials in particular.

At the outset, many questioned the need for the office at all. Some felt that these defendants, now elderly, were not a sufficiently high priority matter to warrant a separate unit devoted to their prosecution.[1] Even some Jews were skeptical. They worried that if the effort failed it would suggest impotence of the Jewish people, thereby furthering a stereotype that lingered from World War II. Moreover, they were concerned that prosecutions, with attendant media coverage, would bring increased pain to some Holocaust survivors.[2]

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Once the office was established, some emigrés from the Soviet Union and the "captive nations" of Latvia, Estonia and Lithuania feared that OSI was on a massive and unjustifiable witchhunt. They suspected that political considerations led OSI to focus on those who emigrated from Eastern Europe, while people from Japan and Nazi-occupied western Europe escaped scrutiny.[3] OSI sought to allay these concerns, explaining that since the DPA and RRA favored those fleeing Communism, the concentration of Eastern European defendants was a function of immigration patterns and not political agenda. Moreover, the East European community as a whole was not targeted; very few were suspected of having assisted in persecution.[4]

Not everyone was convinced. Some emigré publications warned their readers that they were in danger of being deported, and urged them not to cooperate with the Department of Justice.[5] This stymied OSI from developing sources of information or witnesses within the local Baltic communities.

To the extent that OSI learned of possible subjects from Communist publications,[6] and relied on documents and witnesses from behind the Iron Curtain, defendants and critics argued that the evidence was not credible. They posited that the Soviet Union (or its satellite countries) fabricated charges and evidence in order to discredit activist emigrés in the United States.[7] Various Department officials met with emigré leaders throughout the years to discuss the issue;[8] there was also at least one meeting between emigrés and White House personnel.[9] Nonetheless, the alleged unreliability of Soviet-sourced evidence remained the most common defense to OSI prosecutions for over a decade.

In fact, however, very few OSI defendants were active in the anti-Communist movement.[10] Moreover, there was no correlation between activism and tips from Soviet sources. Their tips involved some who were active, as well as some who were politically quiescent. In many instances, the Soviets had no information about an OSI subject; in one case, OSI dismissed proceedings after a Soviet witness provided *exculpatory* evidence.[11] In any event, even if the Soviet motivation for naming a person was suspect, that did not necessarily render the accusation false. The case ultimately depended on the reliability of the witnesses and documents used to support the charge, as tested by U.S. judicial standards for admissibility.

At first, the U.S. government itself sent mixed messages about the reliability of Soviet witnesses in Nazi war crimes investigations. In the pre-OSI era, the Department of State (DOS) routinely ignored requests from INS for assistance in working with the Soviets on Nazi investigations. The DOS feared that it could not "verify the credibility or, indeed, the identity of the witnesses provided us by the Soviet authorities."[12] Moreover, to the extent that the Soviets themselves had war crimes charges pending against some INS subjects, the State Department

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feared that the Soviets would not make available any witnesses whose positions did not support the Soviet prosecutions.[13]

The State Department's intransigence, in the face of repeated requests for assistance from INS, aroused the ire of Congressman Joshua Eilberg, Chair of the House Subcommittee on Immigration Citizenship and International Law. It was only after Eilberg complained to the Secretary of State, and to the President, that DOS requested information from the Soviets about several INS subjects.[14]

As noted earlier, American officials made several trips to the U.S.S.R. to seek access to witnesses in Nazi war crimes cases.[15] Among them, Chairman Eilberg and Congresswoman Holtzman went in 1975, SLU Director Martin Mendelsohn in 1978, and OSI Director Walter Rockler and his then-deputy Allan Ryan in 1980. In addition, Attorney General Civiletti discussed the issue with the Soviet Chief Justice in 1979. As a result of these meetings, the Soviets agreed to allow questioning of their citizens in accordance with procedures acceptable in U.S. courts of law. Although a Soviet procurator (prosecutor) had to be present, (s)he would have no prior notice of the questions. OSI attorneys and defense counsel could question and cross examine the witnesses. Most importantly, the depositions would be videotaped. If a witness were later unable to travel to the United States to testify, a judge could view the tape to assess witness demeanor and credibility as well as the format of the deposition.[16] In October 1989, Attorney General Richard Thornburgh, the first Attorney General to visit the Soviet Union, signed a memorandum of understanding with his counterpart in which both countries agreed to continue these practices and to further their cooperation in the pursuit of Nazi persecutors.

The Department of Justice maintained that these procedures assured the reliability of the

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proceedings.[17] OSI's critics and defendants were not as sanguine. They argued that the mere presence of a Soviet procurator (and there were sometimes more than one representative from the procurator's office) rendered the proceeding intimidating and coercive.[18]

There was support for both sides of the argument. In some cases, Soviet witnesses assisted and even exonerated the defendant;[19] in others, witnesses may have been inhibited from giving exculpatory testimony by the procurator's derogatory comments about the defendant. Some procurators referred to the defendant as a "war criminal"[20] and restricted cross examination.[21] In one case, years after OSI's proceedings were complete, a witness recanted, saying she had been forced by the Soviet authorities to testify falsely.[22]

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The depositions were also very cumbersome. Many of the witnesses (*e.g.*, Latvians and Lithuanians) were not Russian speakers. Questions and answers were presented in their native tongue, then translated into Russian (for the procurator) and then into English. These multiple translations trebled the duration of the proceeding, making the videotape much more tedious to watch. Critics feared that the courts would rely instead on the transcript, thereby losing the benefit of demeanor evidence, which videotaping was designed to secure.[23] Such concerns were especially important since – despite Soviet assurances to the contrary – none of the Soviet witnesses was ever allowed to travel to the United States to testify.

Courts had mixed reactions to the depositions. Some accepted them at face value,[24] while others rejected them entirely;[25] some relied on them only to the extent that they were corroborated by documentary evidence.[26]

The documents were of two types: historical documents and protocols. The historical documents were contemporaneous records made during the war; the protocols were interviews of

defendants and witnesses taken after the war and used in overseas war crimes trials.

Critics challenged the historical documents on the grounds that they were out of context and/or Soviet fabrications. The context argument was based on the fact that for the duration of the Cold War, neither OSI nor defense counsel had direct access to Soviet archives.[27] As noted earlier, one could only request information and hope the authorities would respond.[28] If a party worded its request poorly, related and relevant documents might be overlooked. There was no opportunity for the litigating parties to sort through the files and serendipitously find supporting material. Moreover, the Soviets searching for documents on behalf of the United States were sometimes prosecutors rather than trained historians. They often had to rely on name-linked indices which referenced only documents bearing a given subject's name. They therefore might overlook documents detailing the activities of a unit and records pertaining to the setting of a particular event.[29] These difficulties were compounded by the fact that not all Soviet archivists knew German or had sufficient knowledge of the captured records held by their institutions.

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Such ineffective research was more likely to stymy OSI's investigation than to hamper the defense, but it could arguably impact negatively on both sides. The more forceful argument for the defense, however, and one it raised in case after case, was that documents from the Soviet Union were forgeries.[30] OSI relied on forensics, including handwriting, fingerprint, paper, ink, glue, stamp and typewriter analysis to refute such allegations.

In a few instances, critical records had fingerprint identification which made it possible to connect a document to the defendant.[31] Some records had the defendant's signature or handwriting. Matching the signature on a World War II document to current handwriting samples is more complex than routine signature comparisons. There are complicating factors,

including the natural evolution of handwriting over time, the additional changes to handwriting when poorly educated people become more educated, and the difficulty of matching Latinate alphabet letters with the cyrillic lettering on many of the earlier documents.[32] Despite these hurdles, some matches were made.[33]

In most cases, however, there are no relevant documents with the defendant's handwriting or fingerprints. There are rosters, transfer rolls, military strength records, disciplinary reports and medical records that contain the defendant's name, but these were signed by commanding officers, military clerks, hospital officials and the like.

OSI uses various means to authenticate such documents. First, historians testify that the Soviets had collected and stored the material at war's end and that finding the documents in expected locations in and of itself gave them credibility.[34] Even more importantly, OSI compares documents about the defendant to records of other soldiers and to information about the defendant from a variety of sources. OSI searches for, and often finds, relevant records scattered in archives throughout Europe and the United States. Birthdate, place of birth, lineage, religion and other information in the defendants' hometowns (from baptismal certificates, school records, employment applications, etc.) are matched with military records elsewhere. OSI also compares military and police records for their internal consistency, *e.g.*, matching a promotion form in one archive with records in another archive indicating the defendant's new rank. Likewise, records of others promoted on or about the same date are examined to determine whether the promoting officer was the same. Post-war pension requests are examined to determine dates and places of wartime service.[35] Hospital records are reviewed to compare the personal histories therein with identifying information in military records. Wounds and scars are

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noted and compared with those on the defendant in the courtroom.[36] Hometown European newspapers, copies of which might be in the Library of Congress as well as overseas, are examined for stories corroborating information from the Soviet-sourced evidence.[37]

OSI also calls upon forensic chemists to determine the age of the paper and ink on the relevant documents.[38] Inks have varying chemical profiles, and many inks manufactured during the war years are no longer in use. The International Ink Library maintained by the U.S. Secret Service has thousands of ink formulas from around the world, with their dates of manufacture recorded. By removing several small plugs (1 - 2 mm) from the ink on OSI documents, forensic chemists compare ink profiles (by visual examination as well as by ultraviolet and infrared techniques) with those in the library. If there is no match (perhaps because a particular ink was not in the library), plugs are taken for comparison from documents in the U.S. Archives written during the same era and in the same region.[39]

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Chemists determine the age of the paper by analyzing those characteristics that vary over time – color, the solubility and migration of ink components, fold endurance, tensile and tear strength. Although the defense occasionally argued that the Soviets might have stockpiled old ink and old paper, and recently created a document, the stylistic characteristics of handwriting on the documents helped refute this contention.[40]

Every court found the Soviet-sourced historical documents genuine.[41] To the extent that the forensic evidence establishes that the documents are of the proper vintage, and the various documents are corroborative, it is hard to sustain the argument that they were Soviet fabrications. One would have to believe that an extraordinarily elaborate scheme had been hatched which involved fabricating documents from baptismal certificates to military and hospital records and

storing them around the world. Moreover, because some of the comparative records were of persons *not* prosecuted by OSI, the Soviets would have had to have had the foresight to forge documents of unrelated people and to keep them stored for decades before OSI sought them. Courts concluded that such an elaborate conspiracy was implausible.[42]

The protocols do not have the same inherent legitimacy. It is impossible to ascertain the conditions under which these often decades-old interviews and interrogations had been taken. OSI therefore uses them only if their details are corroborated in some respects. OSI looks for such corroboration in the historical documents, other Soviet interrogations, and interrogations from witnesses and subjects in Germany, Poland, Israel, Canada, the U.S., and post-Soviet Russia and Ukraine. Some courts found the protocols reliable;[43] others were skeptical.[44]

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While Soviet-sourced evidence has been the most sustained criticism of OSI, critics also decry the lack of procedural rights accorded OSI defendants. Because denaturalization and deportation cases are civil proceedings, courts have held that the defendants have no Fifth Amendment privilege against self-incrimination and no right to counsel or trial by jury. For the same reason, neither a statute of limitations nor incompetency shields a defendant from prosecution.[45] Moreover, the courts have ruled that the Holtzman Amendment violates neither the *ex post facto* nor the bill of attainder provisions in the Constitution. These procedural safeguards preclude punishment imposed retroactively or without a trial; however, deportation is not deemed to be punishment.[46]

Such rulings have led some critics to suggest legislation authorizing OSI to prosecute defendants in the United States as war criminals. The rationale for this proposal is that it would at least guarantee the panoply of procedural rights associated with criminal cases and protect

defendants from being deported and tried overseas.[47] However, the proposal never took hold, probably for a variety of reasons. Among them are: (1) the *ex post facto* clause would almost certainly prevent imposing criminal sanctions for activities abroad which violated no U.S. statutes at the time the defendants emigrated; and (2) expanding rights in OSI cases would necessitate a similar expansion in all deportations. While there are relatively few OSI prosecutions, there are thousands of deportations annually; the cost, in both time and money, would be enormous.

In addition to being denied some protections applicable in criminal proceedings, OSI defendants cannot avail themselves of a defense generally applicable in civil matters. Laches is a doctrine which allows cases to be dismissed if there is a lack of diligence in filing and the delay prejudices the defendant. Although OSI cases involve events decades old, and in some cases the government's investigation has spanned a decade or more, courts have uniformly rejected defense requests to dismiss based on laches. Some have held that laches can never apply in a denaturalization case;[48] others have simply concluded that there was insufficient evidence of prejudice to consider the doctrine in a particular case.[49]

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Failing to win their cases in court, some defendants sought moral support from the United Nations.[50] Between 1992 and 1996, these defendants, with emigré groups championing their cause, filed a series of petitions to the U.N. Commission on Human Rights (UNCHR). They raised many of the same arguments rejected by the courts. They also alleged that the government had violated the Universal Declaration of Human Rights by rendering men stateless, subjecting them to arbitrary exile, and leaving them destitute.[51] Both the State and Justice Departments feared that this might become a political issue at the U.N. In 1995, Director Rosenbaum and a

member of the State Department's Office of Human Rights and Refugees flew to Cyprus to discuss some of these issues with one of the UNCHR staffers most troubled by the OSI prosecutions. On August 28, 1996, the UNCHR subcommission voted to dismiss the complaints without bringing them to the attention of the full committee.

Criticism of OSI is not always so issue-oriented. It is sometimes case-driven. The prosecutions which generated the most criticism were *Demjanjuk*, *Artukovic*, and *Linnas*, each of which is discussed elsewhere in this report.[52]

There is also an overriding philosophical debate. Was there anything one could do in the United States to expiate a past of persecution on behalf of the Nazis? Those who defended rocket scientist Arthur Rudolph, Yale instructor Vladimir Sokolov, and Austrian president Kurt Waldheim certainly thought so. And much the same argument was made on behalf of many less prominent OSI defendants, *to wit*, their decades-long quiet and law-abiding lives in the United States should outweigh anything done during their youth.

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The *Demjanjuk* case raised a unique philosophical issue: he had already spent seven years in solitary confinement in Israel on the erroneous adjudication that he was Ivan the Terrible. Should he be retried, even if (as was proven) he had served as a guard at the Sobibor death camp?[53] And what of Jacob Tannenbaum? His prosecution raised the issue of whether an incarcerated Jew, facing almost certain extinction, should also be viewed as a persecutor.

Looking back at the criticism of OSI, it is evident that the bulk of it came from emigré groups, although not all such groups were critical.[54] Criticism also came from other sources, however. The Veterans of Foreign Wars (VFW) passed a resolution critical of OSI at their national convention in August 1984.[55] The following year, 28 co-sponsors introduced a

resolution in the Michigan Senate condemning OSI for working with the Soviet authorities, although the Senate adjourned without voting on the measure. Neither the VFW nor the Michigan legislature ever referenced OSI before or since. Congressman James Traficant was also often critical of OSI.[56] He accused the office of using evidence doctored by the Eastern bloc in both the Demjanjuk and Artukovic prosecutions[57] and of inappropriately intimidating Rudolph into leaving the country.[58]

While the vast majority of OSI's detractors are well motivated, it is impossible to ignore the fact that a small percentage of the criticism is redolent of anti-Semitism and Holocaust revisionist history. Some critics questioned whether there had ever been gassings in concentration camps;[59] some saw Jews as persecutors, rather than victims, blaming them for tyranny and atrocities committed in the name of Communism.[60] Patrick Buchanan – whose criticisms often focused on substance, procedure and political philosophy[61] – doubted the value of survivor testimony. He referred to it as "Holocaust Survivor Syndrome" replete with "group fantasies of martyrdom and heroics."[62] Karl Linnas' daughters, appealing to the Estonian community for funds, implied that the "injustice" done to their father had been brought about by Jewish judges, and opined that judges and prosecutors of Jewish origin should be required to disqualify themselves from these cases. As they saw it, "These trials are a part of the overall effort to use the holocaust as propaganda in order to gain further political and financial support for the state of Israel."[63] A board member of the Captive Nations Committee suggested that OSI personnel showed greater loyalty to Israel than to the United States.[64]

The criticism was greatest during the Cold War years, when the emigré groups were most active and when Buchanan, the most prominent single critic, had a highly visible platform as a

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syndicated columnist, television commentator and White House staffer.[65] On his last day in the White House, Buchanan gave a wide-ranging interview. Among the many questions he was asked, there was one about OSI. He explained his motivation. "I see these people as undefended. Someone is called a Nazi war criminal, and there is an automatic presumption of guilt, not of innocence."[66]

At the time of this writing, the greatest remaining criticism is that OSI has outlived its usefulness as a Nazi-hunting unit. According to this view, OSI may have prosecuted some significant Nazi persecutors in the early years (*e.g.*, Otto von Bolschwing, Arthur Rudolph, Karl Linnas and Andrija Artukovic), but since then the defendants have been "merely" camp guards or members of auxiliary police units. These foot soldiers are too old, ill and insignificant to prosecute at this late date.[67] Perhaps the most poignant articulation of the view was made by a Holocaust survivor who was contacted by OSI in 1997 as a potential witness. He opined that it was now:

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> too long a period for effective implementation of sanctions against these individuals, even if they are correctly identified and accused with valid evidence. These criminals must now be in their eighties and on their way out. Let God deal with them, if He hasn't already. Men's action in the service of Justice after 50 years must necessarily be feeble at this stage. Accordingly, I respectfully suggest that your formidable resources and energies be used for more current causes, where they can do some good.[68]

As the Department of Justice views it, however, allowing someone to remain in the U.S. because his wartime activity was not discovered sooner, is to reward those who were most successful in concealing the truth. While the decision to file a case is always discretionary, the Holtzman Amendment – which in large measure parallels OSI's mandate – precludes any discretionary relief for those whom the courts deem deportable because of their activities during

World War II. This suggests that Congress has closed the door to any "sympathy" argument on behalf of those who persecuted in the name of the Nazis. And while guards may have been simply cogs in the war machine, their role was nonetheless vital. As one appellate court noted:

> If the operation of such a camp were treated as an ordinary criminal conspiracy, the armed guards, like the lookouts for a gang of robbers, would be deemed coconspirators, or if not, certainly aiders and abettors of the conspiracy; no more should be required to satisfy the noncriminal provision of the Holtzman Amendment that makes assisting in persecution a ground for deportation.[69]

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1. *E.g.*, Patrick Buchanan, on *After Hours*, Jan. 7, 1982, a locally-aired CBS television broadcast in Washington, D.C. referred to OSI defendants as:

> a bunch of bums who are nearing 60, 70, 80 years old, who probably should have gone to prison, some of whom probably should have been shot. But if you've got a certain amount of law enforcement resources, and the problems you've got in this country, it just seems to me that allocating them to running down aggressively these people is just not proper use of resources.

2. July 15, 2005 e-mail from Mark Richard to Judy Feigin re "Critics of OSI." Some Jewish concern persisted even after the office won cases. In 1984, *The New York Times* referenced – without naming them – "[s]ome people, including some Jews, [who] question whether the . . . effort to round up such relatively minor figures before old age claims them is worth the bother." "The Hunt for Nazis Shifts Into High Gear," by Stuart Taylor, Jr., Sept. 23, 1984.

3. *See* p.10. *See also*, S. Paul Zumbakis, *Soviet Evidence in North American Courts – An Analysis of Problems and Concerns with Reliance on Communist Source Evidence in Alleged War Criminal Trials* (Americans for Due Process, 1986), pp. 96, 107 (hereafter Zumbakis). (This treatise was commissioned by the Ukrainian Canadian Committee and Americans for Due Process, a coalition of East European emigré groups); "The Lithuanian, Latvian and Estonian Declaration Regarding the OSI," *Draugas*, Nov. 13, 1985.

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4. *See* p. 10. In 1980, Director Ryan sent letters to members of the Estonian community who might have information about a concentration camp in that country. The letter included the statement: "Please be assured that this investigation focuses upon the acts of individuals; it in no way reflects upon Estonian-born Americans as a whole." Similarly, Ryan's Feb. 23, 1981 letter to Pedro Mirchuck, President of the Ukrainian Society of Political Prisoners, Inc., and his Sept. 17, 1982 letter to Ihor Rakowsky, Esq., Ukrainian American Bar Ass'n stated: "I am well aware that many Eastern Europeans, Ukrainians among them, immigrated to the United States because they detested Soviet rule. And I need hardly add that only a very small minority of immigrants under the Displaced Persons Act had in fact been Nazi collaborators."

Ryan also spoke to various ethnic groups, such as the Ukrainian-American Bar Association in Newark, New Jersey.

5. *E.g.*, "If You Fought Communism You Must be Deported Says 1979 U.S. Law," *Latvian News Digest*, Jan. 1985. *See also*, "How to Defend Oneself from Attacks by OSI," *Darbinikas* [a Brooklyn-based Lithuanian language weekly], Sept. 23, 1983. *But see*, "The Lithuanian, Latvian and Estonian Declaration Regarding the OSI," *supra*, n. 3, which, though excoriating OSI's practices, urged cooperation with the office in the search for "real war criminals."

6. *E.g.*, Soviet publications first reported that Yale instructor Vladimir Sokolov had collaborated with the Nazis during World War II (*see* p. 194); a KGB publication was the first to identify Serge Kowulchuk, (*see U.S. v. Kowalchuk*, 571 F. Supp. 72, 77 (E.D. Pa. 1983), *aff'd en banc*, 773 F.2d 488 (3rd Cir. 1985)); and a Soviet newspaper identified Karl Linnas as chief of a

concentration camp in Estonia. "Reds Accuse Ller [Long Islander] of Nazi War Crimes," by Maurice Swift and Lou Schwartz, *Long Island Newsday*, May 23, 1961.

7. *See e.g.*, *U.S. v. Kungys*, 571 F. Supp. 1104, 1124 (D.N.J. 1983), *rev'd on other grnds*, 793 F.2d 516 (3rd Cir. 1986), *rev'd*, 485 U.S. 759 (1988). *See also*, "Proclamation from the Leaders of Lithuanian Action," *Draugas*, Dec. 29, 1984; "Nazi-Hunt Methods Protested; Ethnic Coalition Objects to Soviet Evidence," by Jay Mathews, *The Washington Post*, Mar. 23, 1985.

While today such concerns may seem hyperbolic, they appeared less so during the Cold War, when tensions and distrust between the two superpowers were enormous. The Soviet judicial system, which had banished such well-known dissidents as Andre Sakharov and Anatoly Scharansky, was routinely criticized in the western media for its sham political trials.

8. *E.g.*, Jan. 1982 meeting with AAG Jensen; Nov. 1983 and Sept. 1985 meetings with AAG Trott; March 1987 meeting with Attorney General Meese and AAG Weld.

9. Representatives from Americans for Due Process met with White House personnel from the National Security Counsel, Office of the General Counsel and Office of Public Liaison on Oct. 14, 1983.

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10. Those who were included Archbishop Trifa, Vladimir Sokolov (arrested in 1957 for protesting outside the Soviet embassy in New York), and Ferenc Koreh, discussed at pp. 192-238. However, the vast majority of OSI defendants were "quiet neighbors," as described by former OSI Director Allan Ryan in his 1984 book of the same name.

11. The case against Mykola Kowalchuk had been filed before OSI was founded. OSI dismissed the suit in 1981.

12. July 5, 1974 letter to Joshua Eilberg, Chair of the House Subcommittee on Imm., Citizenship and Internat'l Law, from Linwood Holton, Ass't Sec'y for Congressional Relations, DOS. 1977 Hearing on Alleged Nazi War Criminals bef. the Subctee on Imm., Citizenship and Internat'l Law of the House Judiciary Committee, 95th Cong., 1st Sess., Aug. 3, 1977, pp. 69-70 (hereafter 1977 Hearings).

13. Aug. 1, 1974 letter from Holton to Eilberg, 1977 Hearings, *supra*, n. 12, at p. 71.

14. July 13, 1976 letter to Eilberg from Lawrence Eagleburger, Deputy Under Secretary of State, 1977 Hearings, *supra*, n. 12, at p. 80.

15. *See* p. 11.

16. *See e.g.*, "Moscow Pledges Help in War Crimes Cases in U.S.," by David Shipler, *The New York Times*, Feb. 6, 1980.

None of the agreements prior to the memorandum of understanding was written. This led some critics of OSI to speculate that nefarious quid pro quos had been given. *See e.g.*, Zumbakis, *supra*, n. 3, at pp. 29-33; "The Justice Department is Not Concerned About Justice,"

Draugas, Oct. 8, 1985. DOJ officials denied any quid pro quo.

17. *See e.g.*, Nov. 23, 1983 letter from DAAG Richard to Congressman Bill McCollum, responding to questions raised by the Americans Against Defamation of Ukrainians.

18. *See*, "Soviet Proof Key in U.S. Nazi Cases," by Robert Gillette, *The Los Angeles Times*, Apr. 27, 1986. Moreover, according to one newspaper account, an unnamed Soviet official "confided to an American diplomat" that some witnesses were coached for days before being allowed to give depositions. "Soviet Aide Warned U.S. on War Crime Evidence," by Robert Gillette, *The Los Angeles Times*, Apr. 28, 1986.

19. The Mykola Kowalchak case, in which Soviet evidence led to the dismissal of charges, is the most conspicuous. The *Soobzokov* matter is also telling. If the Soviets were going to embellish or fabricate, one would expect this in Soobzokov's case since there were allegations that he had worked with the CIA. Yet the Soviet witnesses, interviewed after these allegations were made public, did not provide sufficient information to justify charges based on persecution. *See* p. 349.

20. *E.g.*, *U.S. v. Linnas*, 527 F. Supp. 426, 433 (E.D.N.Y. 1981), *aff'd*, 685 F. 2d 427 (2nd Cir.); *Matter of Laipenieks*, A11 937 435 (Imm. Ct., San Diego, Cal. 1982), p. 58, *rev'd*, 18 I.&N. Dec. 433 (BIA 1984), *rev'd*, 750 F.2d 1427 (9th Cir. 1985).

21. *E.g.*, *Matter of Laipenieks*, *supra*, n. 20, *U.S. v. Kungys*, *supra*, n. 7, 571 F. Supp. at 1126-27.

22. "Digging Into the Past," by Mary Mycio, *The Los Angeles Times*, Oct. 18, 1994. The defendant was Bohdan Koziy. The witness' testimony would not have altered the outcome of the U.S. proceeding. Documentary evidence established that Koziy had been a member of the Ukrainian police force, a movement hostile to the United States. The recanted testimony accused Koziy of murdering a four year old Jewish child; other Soviet witnesses (who did not recant but who have since died), also testified about the murder.

23. *See* Zumbakis, *supra*, n. 3, at p. 21. While it is impossible to know how often judges resorted to the written text rather than the videotape, at least one judge acknowledged doing so. *U.S. v. Linnas*, *supra*, n. 20, 527 F. Supp. at 433, n.15. Another noted the difficulty of assessing demeanor from a videotape and through an interpreter. *U.S. v. Kowalchuk*, *supra*, n. 6, 571 F. Supp. at 79.

24. *E.g.*, *Kalejs v. INS*, 10 F.3d 441, 447 (7th Cir. 1993); *U.S. v. Koziy*, 540 F. Supp. 25 (S.D. Fla. 1982), *aff'd*, 728 F.2d 1314 (11th Cir.); *U.S. v. Palciauskas*, 559 F. Supp. 1294 (M.D. Fl. 1983), *aff'd*, 734 F.2d 625 (11th Cir. 1984). In both *Koziy* and *Palciauskas*, the defense, protesting the taking of depositions in the U.S.S.R., refused to attend.

25. *United States v. Kungys*, *supra*, n. 7, 571 F. Supp. at 1123-1126; *United States v. Sprogis*, No. CV-82-1804 (E.D.N.Y. 1984), *aff'd*, 763 F.2d 115 (2nd Cir.); *U.S. v. Kowalchuk*, *supra*, n. 6, 571 F. Supp. at 79; *Laipenieks v. INS*, 750 F.2d 1427, 1432 (9th Cir.); *Matter of Maikovskis*,

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A08 194 566 (Imm. Ct., N.Y., N.Y. 1983), *rev'd on other grnds* (BIA 1984), *aff'd*, 773 F.2d 435 (2nd Cir. 1985).

26. *U.S. v. Linnas*, *supra*, n. 20, 527 F. Supp. at 434, n.16; *Matter of Laipenieks*, *supra*, n. 20; *U.S. v. Osidach*, 513 F. Supp. 51, 90 (E.D. Pa. 1981).

27. *See e.g.*, Zumbakis, *supra*, n. 3, at p.16. A similar problem derived from the inability to travel at will within the Soviet Union during the Cold War. This sometimes precluded the parties from visiting places where persons familiar with the crucial events still resided. At least one court expressed some concern about this issue. *U.S. v. Kowalchuk*, *supra*, n. 6, 571 F. Supp. at 79.

28. *See* p. 12. When informed of defense concerns that the Soviets would favor requests from OSI over requests from the defense, the Justice Department agreed to pass along all requests; the Soviets were not told which party sought the information. Nov. 23, 1983 letter to defense counsel David Springer from AAG Trott.

29. "OSI and the Archives of the FSU [former Soviet Union]," Apr. 1994 address of OSI Senior Historian Michael MacQueen to the Association of Historians in the Federal Government, delivered at the U.S. Holocaust Memorial Museum.

Of course OSI historians routinely searched the National Archives' collection of captured German records, the Berlin Document Center, and records of associated investigations and/or trials conducted by the Germans in the early post-war years.

30. *E.g.*, *U.S. Ciurinskas*, 976 F. Supp. 1176 (N.D. Ind. 1997), *aff'd*, 148 F.3d 729 (7th Cir. 1998); *U.S. v. Demjanjuk*, 2002 WL 544622 (N.D. Ohio 2002), *aff'd*, 367 F.3d 623 (6th Cir. 2004) ; *U.S. v. Hajda*, 963 F. Supp. 1452 (N.D. Ill. 1997), *aff'd*, 135 439 (7th Cir. 1998); *U.S. v. Kairys*, 600 F. Supp. 1254 (N.D. Ill. 1984), *aff'd*, 782 F.2d 1374 (7th Cir.); *Matter of Kalejs*, A11 655 361 (Imm. Ct., Chicago, Ill. 1988), *aff'd*, (BIA 1992), *aff'd sub nom. Kalejs v. INS*, 10 F.3d 441 (7th Cir. 1993); *U.S. v. Koreh*, 856 F. Supp. 891 (D.N.J. 1994), *aff'd*, 59 F.3d 431 (3rd Cir.); *U.S. v. Koziy*, *supra*, n. 24, 540 F. Supp. 25; *Matter of Laipenieks*, *supra*, n. 20; *U.S. v. Lileikis*, 929 F. Supp. 31 (D. Mass. May 24, 1996); *U.S. v. Linnas*, *supra*, n. 20, 527 F. Supp. 426; *Matter of Maikovskis*, *supra*, n. 25; *U.S. v. Sokolov*, No. N-82-56-TFM (D. Conn. 1986), *aff'd*, 814 F.2d 864 (2nd Cir. 1987); *U.S. v. Stelmolkas*, 1995 WL 464264 (E.D. Pa. 1995), *aff'd*, 100 F.3d 302 (3rd Cir. 1996).

The two cases in which the issue of authenticity was most exhaustively litigated were *Demjanjuk* and *Kairys*. Not all defendants raised authenticity questions of course. OSI defendant George Theodorovich conceded the authenticity of some of the most damaging documents OSI ever gathered – two reports signed by him relaying the number of Jews he killed in "Jewish action[s]." (He denied the veracity of the reports however, contending in an interview with OSI attorneys that he had written the reports to cover up his anti-Nazi activities.)

Adalbert Ruckerl, the head of West Germany's War Crimes Unit in West Germany, met with OSI's director and deputy director in 1982. He told them that West Germany had been using evidence from the Soviet Union in war crimes trials since 1963, yet the fabrication

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argument had never been raised. Apr. 19, 1982 memo to Kairys files from Sher re "Testimony of Dr. Ruckerl, OSI #97."

31. *E.g.*, *U.S. v. Kairys*, *supra*, n. 30, 600 F. Supp. at 1260. The most dramatic fingerprint evidence in an OSI case came in the *Trifa* prosecution. *See* p. 216.

32. Recorded interview with handwriting analyst Gideon Epstein, Dec. 6, 2000 (hereafter Epstein interview.) Epstein testified successfully for the government in the *Kairys*, *Kalejs*, *Sokolov*, and *Demjanjuk* cases. He was deposed in *Kalymon*. However, his credibility was called into question in two non-OSI cases. *Pasha v. Gonzales*, 433 F.3d 530, 535 (7th Cir. 2005) and *Wolf v. Ramsey*, 253 F. Supp. 2d 1323, 1347-1348 (N.D. Ga., 2003).

33. *E.g.*, *Matter of Kalejs*, *supra*, n. 30, at p.10; *U.S. v. Koziy*, *supra*, n. 24, 540 F. Supp. at 31; *U.S. v. Lileikis*, *supra*, n. 30. 929 F. Supp. at 38, n. 12. *See also*, *U.S. v. Linnas*, *supra*, n. 20, 527 F. Supp. at 434, where the court found "strong indications" that incriminating documents were authored by the defendant.

34. *E.g.*, *U.S. v. Demjanjuk*, *supra*, n. 30, 2002 WL 544622; *U.S. v. Stelmokas*, *supra*, n. 30, 100 F.3d at 312 (3rd Cir. 1996); *U.S. v. Kairys*, *supra*, n. 30, 782 F.2d at 1382.

35. As discussed at p. 444, n. 9, the pension application gave OSI crucial service information for the prosecution of Kazys Ciurinskas.

36. *E.g.*, Liudas Kairys had a scar on his hip.

37. In *Kairys,* for example, a document from the Soviet archives stated that the granting of Lithuanian citizenship would be announced in a local newspaper. A copy of that newspaper was found in the Library of Congress.

38. Information about ink and paper forensic techniques comes from a recorded interview on Jan. 21, 2003 with Antonio Cantu, forensic ink specialist with the U.S. Secret Service, as well as from "Analytical Methods for Detecting Fraudulent Documents," an article by Dr. Cantu published in the Sept. 1991 issue of *American Chemical Society*.

39. Some documents have multiple ink samples. In *Demjanjuk*, for example, the key document contained fountain pen ink, stamp pad ink, typewriter ribbon ink and printing ink. All were analyzed and dated. The stamp pad ink was not only dated, but a defect in the stamp was matched with the same defect on other unrelated documents prepared at about the same time.

40. Handwriting analyst Gideon Epstein studied the features common among those who learned to write in the same country during the same era. To do so, he requested handwriting exemplars from members of ethnic organizations, language teachers and language students who learned to write in the place and time of OSI subjects. Epstein interview.

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41. This is not to say that OSI never doubted any forensic evidence from the Eastern bloc. However, OSI did not use evidence of which it was uncertain. The author is aware of two cases in which OSI had concerns about the evidence. Both were highly political matters caught up in Cold War intrigue, as contrasted with the more typical apolitical OSI defendant.

The authenticity of a photograph which surfaced during the *Trifa* investigation is discussed at p. 212. The second instance concerned an OSI investigation that was aborted due to the subject's death. It involved a U.S. diplomat, born in the U.S.S.R. In 1977, while attending a UNESCO meeting in the Soviet Union, he was approached by Soviet agents who threatened to expose him as a war criminal unless he began working for Soviet intelligence. He refused to do so, and reported the attempted blackmail to the State Department when he returned. The incident received wide publicity, with the U.S. lodging a protest and the Secretary of State raising the issue with the Soviet Ambassador to the U.S. *See e.g.*, "U.S. and Soviet Dispute Blackmail Incident," *The New York Times*, Nov. 2, 1977.

Two months after the diplomat returned to the U.S., the Soviets sent the State Department a packet of evidentiary material to bolster their assertion that the diplomat was a war criminal. The diplomat denied the allegations and a State Department inquiry exonerated him in October 1978. Because of the nature of the charges, OSI looked into the matter. An OSI memorandum referred to one Soviet document on which "the line spacing looks irregular, which suggests the possibility that the document has been altered" and another on which "many of the items next to his name are not aligned with the other entries." Apr. 25, 1980 memorandum from OSI attorney Robin Boylan to Neal Sher re "Status Report: Warvariv, Constantine." (The diplomat's name was reported in the press.) The documents had not undergone forensic testing before Warvariv's death in 1982.

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42. *E.g., U.S. v. Szehinskyj*, 104 F. Supp. 2d 480, 500 (E.D. Pa. 2000), *aff'd*, 277 F.3d 331 (3rd Cir. 2002). *See also, U.S. v. Stelmolkas*, *supra*, n. 30, 100 F. 3rd at 313; *U.S. v. Lileikis*, *supra*, n. 30, 929 F. Supp. at 37.

This conclusion was supported by Vladimir Grachev, Second Secretary from 1979 to 1986 to Anatoly Dobrynin, Soviet Ambassador to the United States. In that position, and in the two years following when he was stationed in Moscow, Dr. Grachev's responsibilities included overseeing the Soviet response to OSI's requests for evidence. During a January 16, 2003 meeting with OSI Director Rosenbaum, Dr. Grachev, then serving as Principal Officer, Executive Office of the Secretary General of the United Nations, was adamant that there had never been any fabrication of documents by the Soviets in OSI cases, nor was there ever an attempt to frame anyone. According to Grachev, the Soviets took cooperation on this issue "very, very seriously." None of the cases presented a threat to national security; therefore they were not "vital" from the Soviet viewpoint. "What was vital was to keep the bridge open, which this did."

43. *E.g.*, *U.S. v. Hajda*, 135 F.3d 439 (7th Cir. 1998).

44. *E.g.*, *U.S. v. Reimer*, 2002 WL 32101927 (S.D.N.Y. 2002).

45. *U.S. v. Balsys,* 524 U.S. 666 (1998) (self-incrimination); *U.S. v. Schiffer*, 836 F. Supp. 1164, 1172 (E.D. Pa. 1993, *aff'd*, 31 F.3d 1175 (3rd Cir. 1994) (right to counsel); *U.S. v. Ciurinskas*,

supra, n. 30, 148 F.3d at 735 (jury trial); *U.S. v. Kowalchuk*, *supra*, n. 6, 571 F. Supp. at 78 (statute of limitations); *U.S. v. Mandycz*, 447 F.3d 951, 962 (6th Cir. 2006) (competency).

46. *Schellong v. INS*, 805 F.2d 655, 662 (7th Cir. 1986) (*ex post facto* and bill of attainder); *Linnas v. INS*, 790 F.2d 1024, 1029-30 (2nd Cir. 1985).

47. *E.g.*, "The Lithuanian, Latvian and Estonian Declaration Regarding the OSI," *supra*, n. 3. *See also* discussion of the Mar. 5, 1987 meeting of six Baltic leaders with the Attorney General and several senior officials in the Justice Department at pp. 280-281. Patrick Buchanan made the same argument in a televised debate with Eli Rosenbaum, who was then serving in the private sector as General Counsel to the WJC. *CrossFire*, Apr. 15, 1987.

48. *U.S. v. Schuk*, 565 F. Supp. 613, 615 (E.D. Pa. 1983). The basis for this view is that *Fedorenko* barred all equitable defenses in denaturalization proceedings. *See also*, *U.S. v. Mandycz*, *supra*, n. 45.

49. *U.S. v. Kairys*, *supra*, n. 30, 782 F.2d at 1383; *U.S. v. Schmidt*, 1990 WL 6667 (N.D. Ill. 1990), *aff'd*, 923 F.2d 1253 (7th Cir.); *U.S. v. Koreh*, 59 F.3d 431, 445(3rd Cir. 1995); *U.S. v. Demjanjuk*, *supra*, n. 30, 2002 WL 544622.

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50. Martin Bartesch, Johann Breyer, John Demjanjuk, Nikolaus Schiffer, Anton Tittjung, Ferdinand Hammer.

51. Defendants who have been ordered deported lose their right to collect Social Security benefits. This is why some defendants leave the country voluntarily, either as part of a settlement agreement or by simply fleeing before proceedings are concluded. Whether a non-citizen can receive social security benefits when living overseas is determined on a country by country basis, depending on U.S. reciprocity agreements with the various nations.

52. *See* pp. 150-174, 239-258, 271-295.

53. *E.g.,* comments of Patrick Buchanan quoted in "The Edge," *New Times*, June 10, 1999.

54. In 1985, many East European ethnic groups formed the Coalition for Constitutional Justice, a political action group dedicated to OSI issues. The coalition's membership included the Estonian American National Council; the Lithuanian American Community of the U.S.; the Ukrainian National Information Service; the Byelorussian Anti-Defamation Federation; Americans Against Defamation of Ukrainians, the Joint Baltic American National Committee; Ban Coalition of Costa Mesa (formerly Ban the Soviets Coalition); and the Coalition Against Soviet Aggression, Los Angeles.

The coalition had three objectives: (1) the investigation of OSI by a congressional committee; (2) amendment of the laws under which OSI operates; and (3) preventing the deportation of any Baltic national to his country of origin. "Let's Not Close Our Eyes to Danger, A Conversation with Antanas Mazeika," *Draugas*, Mar. 15, 1985.

Some emigré organizations expressed confidence in the ability of the American judicial

system to evaluate Soviet sourced evidence. *See e.g.*, Jan. 9, 1985 letter to OSI Director from Aloysius Mazewski, President of the Polish American Congress, Inc.; Mar. 22, 1984 letter to the Attorney General and the Chairs of the House and Senate Judiciary Committees from self-described "Polish ethnic leaders:" Rev. Leonard Chrobot, Polish American Congress, Jan Nowak, Former Director, Polish Section, Radio Free Europe, Rev. John Pawlikowski, Professor, Catholic Theological Union, Dr. Thaddeus Gromada, Secretary-General, Polish Institute of Arts & Science.

55. Resolution 448, introduced by James MacDonald, was adopted by blanket motion (passed unless objected to). It described OSI as "the willing and subservient official American Government tool of the Russian Empire strategically placed in the offices of the U.S. Department of Justice" and called upon the President and the Senate to investigate the office. Nothing ever came of this request.

56. In 1984, Traficant, an Ohio county sheriff, had been prosecuted by the Department of Justice for bribery. He was elected to Congress following his acquittal. One of his major themes in office was alleged prosecutorial misconduct by the Justice Department.

Traficant proposed various remedies for OSI's alleged perfidies. These included the appointment of a special prosecutor to handle the Demjanjuk case, Congressional review of OSI's handling of the Rudolph matter, and having the House investigate the "practices and patterns of behavior" of OSI. "Traficant: Justice, Heal Thyself and Leave Demjanjuk Alone," by Michael Hedges, *The Washington Times*, Jan. 5, 1994; H. Res. 404, 101st Cong., 2d Sess., May 24, 1990; "Traficant Says Memos Show 'Ivan the Terrible' Witness Lied," by C. Harvey, *The Washington Times*, Aug. 3, 1989. Traficant cited OSI's conduct in Demjanjuk as one justification for an independent federal agency to investigate allegations of wrongdoing by Justice Department personnel. Testimony before the House Judiciary Subcommittee on Commercial and Administrative Law on H.R. 4105, the "Fair Justice Act," July 27, 2000. None of Traficant's proposals was adopted.

In 2002, Traficant was convicted of corruption, bribery, racketeering and tax evasion. He was sentenced to eight years in prison and expelled from Congress.

57. *E.g.*, Feb. 5, 1990 letter to the Attorney General.

58. As set forth on p. 340, n. 19, the Congressman contended that OSI played on Rudolph's ill health and fear of losing his NASA retirement benefits. "Traficant Supports Rudolph," by Mike Paludan, *The Huntsville Times*, May 13, 1990.

59. *E.g.*, Jan. 5, 1985 letter to Attorney General Meese from The Council of the Latvian Officers' Ass'n in Australia and New Zealand; Patrick Buchanan, "Deadly, Dubious I.D. Card," *Washington Times*, Mar. 19, 1990. The American Latvian Ass'n repudiated the Australian letter, condemning its "contents, tone and implications." May 15, 1985 letter to Attorney General Meese from Ojars Kalnins, Public Relations Director, American Latvian Ass'n.

Buchanan received much criticism for his alleged anti-Semitism. "U.S. Media Should Shun Buchanan," by Alan Dershowitz, *The Jerusalem Post*, Oct. 16, 1990; "The Heresies of Pat

Buchanan: Cruising for a Bruising; Antisemitism and Conservatism," by Jacob Weisberg, *The New Republic*, Oct. 22, 1990; "Forgive Them Not," by A.M. Rosenthal, *The New York Times*, Sept. 14, 1990; "Anger on the Right: Pat Buchanan's Venomous Crusade," issued by the ADL 1991; "Pat Buchanan & the Jewish Question," by Howard Kurtz, *The Washington Post*, Sept. 20, 1990; "Conservatism Gets Soiled," by George Will, *Newsweek*, Mar. 4, 1996. *See also*, the Dec. 30, 1991 issue of *The National Review* wherein William F. Buckley, Jr. raises the issue.

One of the newspapers in which Buchanan was syndicated took the extraordinary step of distancing itself from him because it deemed anti-Semitism to be the root of too many of his columns. "Pat Buchanan and the Jews," *New York Post*, Sept. 19, 1990.

60. Dec. 4, 1984 letter from [redacted], a member of the Board of Directors of the Captive Nations Committee, to Secretary of State George Shultz; Latvian Officers' Ass'n letter, *supra*, n. 59. b6

61. *See* pp. 95, n. 1, 174, n. 46, 277, 279-281, 337, 378, 552, notes 47 and 53.

62. "Deadly, Dubious I.D. Card," *supra*, n. 59.

63. June 14, 1983 letter from Anu, Tiina and Epp Linnas to "Estonians and friends of Estonians."

64. Dec. 4, 1984 letter from [redacted], *supra*, n. 60. b6

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65. Over the years, Buchanan was a presidential counselor and communications director (in the Reagan administration), speech writer (for both presidents Nixon and Reagan), syndicated columnist, television pundit, host of a nationally televised talk show (*Crossfire*), and presidential aspirant (1992 and 1996 in the Republican primaries and 2000 as the Reform Party candidate).

In addition to the columns and television appearance referenced in n. 61, *supra*, *see* "Nazi Criminal or U.S. Hero," *The New York Post*, July 16, 1989 (arguing against OSI's investigation of Arthur Rudolph); "Of Nazis and NASA: The Case of Arthur Rudolph," *CrossFire*, July 11, 1990; and "We Condemn Waldheim – but Embrace the Real Bad Guy," *The Chicago Sun-Times*, Mar. 3, 1988.

66. "Crucial Tests Confront Nazi-Hunting Bureau; Critics Question Use of Soviet-Supplied Evidence and Call for War-Crime Trials in U.S.," by Michael Dobbs, *The Washington Post*, Mar. 24, 1987.

67. *E.g.*, Brian Gildea, a defense attorney who has handled several OSI cases, described the defendants as insignificant nobodys forced into uniform by Nazi conquerors. "Nazi Hunters Race the Grim Reaper for Aging Prey," by Frank Murray, *The Washington Times*, Sept. 7, 1997.

Defense attorney Robert Murtha, describing his client as "a crippled old man in a wheelchair, in dialysis," accused OSI of "persecuting old men in the interest of keeping their own jobs." "Nazi Hunter Battles Time to Ferret Out Hitler's Foot Soldiers," by Stephen Koff, 2002 *Newhouse News Service*.

Art Sinai, a deputy director for one year at OSI's founding, was interviewed about the office

in 2001. He felt it had "degenerate[d]" into prosecution of people who had volunteered or been drafted into some ethnic group, people who were simply Nazi sympathizers, had no high profile, were not involved in specific atrocities, and who "just served," as opposed to the high level people OSI had expected to find at the outset. "They are doing God's work but it is a bureaucracy that just won't let go, and it is too sensitive a thing for anyone to stop." Sinai opined that prosecuting a guard who is now in his 80s squandered "Jewish credibility." Recorded interview, Oct. 1, 2001.

68. Oct. 13, 1997 letter to OSI attorney Ellen Chubin from Alexander Rosner, a survivor of Plaszow, Gross Rosen, Auschwitz and Dachau. Mr. Rosner sent a copy of this letter to the Director of Registry of Holocaust Survivors at the United States Holocaust Memorial Museum in Washington, D.C.

69. *Kairys v. INS*, 981 F.2d 937, 942 (7th Cir. 1992).

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Conclusion

OSI evolved from an office focused solely on Nazi persecutors in the United States to an office concerned with Nazis world-wide and with Holocaust issues that transcend any litigative agenda. This evolution is due to a confluence of disparate factors. Some were foreseeable and others not.

Most unexpected, perhaps, were geopolitical changes, including changes in the world's thinking about genocide. Given a spate of world courts and tribunals examining modern war crimes, it became more awkward for countries to ignore those who persecuted with, or on behalf of, the Nazis. Moreover, the end of the Cold War – unthinkable at the time OSI was founded – resulted in some former Eastern bloc countries seeking to join western economic and political unions. Since some of these countries were the very ones most complicit in aiding the Nazis during World War II, the U.S. suddenly had leverage over them which it had previously lacked. Aided by the State Department, OSI made the most of such changing circumstances by suggesting that prosecution of Nazi persecutors was one way to establish that a country shared the values necessary for membership in these organizations.

OSI's role as a resource for resolution of World War II-related issues was arguably more predictable than its role as an exhorter to other countries to pursue Nazi persecutors in their midst. As courts issued rulings in OSI cases, the office scholarship and research gained the imprimatur of jurisprudential approval. The publicity of the early cases, and the government's determination to keep Congress and the public informed of OSI's work, kept these matters in the public eye. It was natural, therefore, for Congressional and public pressure to build on OSI to become involved in other World War II issues. The positive response to the Justice

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Department's handling of the first of these issues, the role of the United States in Barbie's escape from justice, led to subsequent assignments.[1]

Because of OSI's enhanced role and responsibilities, the office legacy will be far greater than could have been foreseen originally. Although it is too early to make a definitive determination of that legacy, some of the components are clear.

The office prevailed in almost all its litigation and helped make groundbreaking law in three Supreme Court decisions. Since its founding, it has filed more cases of its kind than any country in the world.[2] Indeed, nine new defendants were charged as late as 2002 – more than in any year since OSI's founding.[3] That is an astonishing statistic, given that the pool of potential defendants is steadily dwindling with the death of subjects. That the litigation continues is a testament to the perseverance of OSI and the continuing commitment of the government through successive administrations and Congresses.[4]

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The prosecutions have added to the objective judicial record of World War II which was begun at Nuremberg. The cases stand as a permanent and irrefutable response to those who would deny the Holocaust and its horrors. Camp conditions, the role played by indigenous groups, the means used by the Nazis to train people to perform dehumanizing acts, all are outlined in case after case. The underlying documentation, some based on groundbreaking scholarship by OSI historians, is accessible in court files. In addition, complete records (including exhibits) of several early OSI trials were microfilmed and donated to the archives of the Yad Vashem museum in Jerusalem.[5] In December 2008, OSI turned over to the USHMM the transcripts of all its trials and extraditions as well as copies of all its court decisions (both published and unpublished). The material was also given to Yad Vashem in Jerusalem.

The cases give meaning to the term "assistance in persecution," and the way they do so is significant. They focus on the *impact* rather than on the *intent* of the perpetrators. It matters not whether the perpetrator intended or even *wanted* to victimize. The message resonating from OSI's cases is that the United States does not choose to add to its populace persons whose actions victimized innocent civilians – even if the perpetrator was himself a victim of circumstances.

That is a powerful message that many hope will have a prophylactic impact on future persecutors. Whether that hope will be realized is problematical. It may well be that "[n]o punishment can affect the calculations of the genocidal, who are not careful calculators of cost-benefit ratios."[6] Even if that is the case, however, the prosecutions serve an affirming purpose by holding people accountable and endorsing the higher aspirations of the body politic.[7]

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In preparing its reports, working on World War II related issues, and investigating and litigating cases, OSI has gathered copies of many historical documents. A significant number have been made public in OSI's court filings. Some have been disclosed as part of the underlying documentation for OSI reports. And an enormous amount, held by other government agencies, has been released under the Nazi War Crimes Disclosure Act, which OSI, as the Justice Department's representative on the Interagency Working Group, helps administer. The Department of Justice is committed to making its remaining historical material available – as far as possible consistent with privacy and national security concerns – so that others may use it for their own scholarly and educational pursuits.

Once OSI has completed its Nazi-era work, the Department also hopes to disclose much of the office's litigative material. This, unlike captured historical documents, cannot be accessed

elsewhere.[8] It includes OSI's massive collection of investigative records – suspect interrogation and witness interviews by OSI personnel, historians' reports, prosecution memos, depositions, and the like. The material sheds light on many important aspects of the Nazi era and will help put captured historical documents in context.

While the import of OSI's work may not be fully appreciated before this material is made public, the written record is not the only means of documenting the work of the office. OSI's work has set standards not only for other countries pursuing Nazi persecutors but for prosecutions unrelated to World War II. In December 2003, the International Criminal Tribunal for Rwanda cited both the *Koreh* and *Trifa* decisions in its conviction of three propagandists for inciting genocide.[9]

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Some of OSI's influence is less tangible but no less significant. The Department of Justice has always considered education to be part of OSI's mission. With the Department's encouragement, OSI historians have often participated in symposia at museums, universities and scholarly institutions.[10] OSI's Directors and staff have been guest speakers at public and civic events including commencements and Holocaust remembrance programs. They have also spoken to Jewish organizations, youth and survivor groups, students, residents in old age homes and military personnel.

There is also a much less public aspect to OSI's work. It is a poignant footnote to the office history. Presumably due to the publicity the office has received over the years, private citizens have asked the office for help in resolving family issues relating to World War II. They write to the office with shreds of information and want to know how to find out more. Was their parent perhaps a Nazi collaborator? How can they find out? Although OSI does not do

independent research on their behalf, it routinely directs them to the appropriate archive or government organization.

OSI's work has had a significant and personal impact on its own employees, on the men investigated and prosecuted, and the families of those men. It is draining to work constantly on an issue as overwhelming and depressing as the Holocaust. Within the office, some become inured and black humor abounds. Many who leave speak of emotional burnout.

For those investigated and prosecuted, it is devastating to be charged with complicity in some of the most heinous crimes in world history. The publicity of the charge itself brands the defendants in a way more damaging than would most criminal allegations. In some cases, the prosecution tears the family apart. Most spouses were unaware of the scope of the defendant's wartime activities. The defendant's children – almost all born in the U.S. – are even more likely to be ignorant of the past. Some have turned against their parents as a result of OSI's revelations.

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Although the men do not face penal incarceration in the U.S., loss of citizenship and expulsion from the country are not insignificant consequences. U.S. citizenship for these men was a prize; it was not something they casually received as a birthright. Its loss means "an expulsion from society. It's a defrocking, if you will. Day to day, [their] life is not going to change. But it represents a very solemn judgment. . . that we as a society refuse to allow [them] to live among us as . . . citizen[s]."[11]

Leaving the country in the twilight of their lives is, of course, even more dire. A defendant sent abroad at the end of his life is generally going to a country he no longer knows. Even more significantly, his children and grandchildren (and sometimes even his spouse) usually remain in the United States – a country to which the defendant can never return. If the defendant

was ordered deported, his Social Security benefits are terminated. Most OSI defendants are not wealthy; loss of Social Security may therefore have a serious impact on their standard of living abroad.[12] As the Supreme Court has noted, deportation may "result in loss of . . . all that makes life worth living."[13]

In the 1980s, at least seven men facing investigation or prosecution committed suicide.[14] An eighth died from surgical complications after a shootout with the police. (The authorities were called to his home because he was brandishing a gun at reporters seeking a comment after OSI filed its complaint.)[15]

As discussed earlier in this report, some argue that the government should not continue to pursue these cases; the defendants are too old and their acts of persecution too long past.[16] However, such a blanket immunity would give Nazi-era persecutors protection that this country denies other human rights violators from a bygone era. In 2005, the government convicted an 80-year old wheelchair-bound man of manslaughter for his role in the deaths of three civil rights workers forty-one years earlier.[17] Like most OSI subjects, he had led an unobtrusive and law-abiding life after his perfidious behavior. His conviction may not be the last from the civil rights era. In 2005, legislation was introduced to establish a civil rights prosecution unit, modeled in part on OSI, to pursue other unsolved pre-1970 murders.[18] That proposal is still pending as of this writing.

Of course the civil rights cases differ from those handled by OSI in that the civil rights subjects have generally played a more direct role in murder than the subjects now pursued by OSI. As this report is being written, no one at OSI believes that there are any high-level or even mid-level Nazis still to be found in the United States. Some see this as reason enough to end the

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quest at this point. Others, including OSI, would argue, however, that one's role in the hierarchy is not dispositive; indeed, it is not even relevant.

> At the lower level, the guards, those were the people who the victims encountered. They didn't see Himmler. But the nameless guard, who kept them in that camp, knowing full well what was being done to them, that's the person they saw.[19]

Those who fled to the United States have had decades of benefits, including the opportunity to live and raise their families in this country. In the view of the government, they should not be allowed to benefit in perpetuity because the Justice Department was not able to uncover their background earlier. The government was stymied largely by circumstances beyond its control, especially the inaccessibility of crucial documents in Communist-controlled archives during the Cold War.

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There is, inevitably, the question of whether more could have been done. Director Rosenbaum is haunted by the belief that additional prosecutions could have been brought had there been more resources – both financial and manpower – available.[20]

At the time this report was begun, OSI's demise appeared inevitable. Because the office was created by order of the Attorney General, its existence was at the pleasure of the Justice Department. It seemed likely that OSI would quietly close its doors when there were no longer any Nazi persecutors to pursue.

In 2004, however, the office got a new lease on life. The Intelligence Reform and Terrorism Prevention Act gave OSI statutory recognition and purpose, expanding its mandate to include modern war criminals.[21] In addition to Nazi persecutors, the office is to detect, investigate, and denaturalize those who took part at any time in genocide,[22] torture,[23] or, under color of law of a foreign nation, extrajudicial killings.[24] Deportations will be handled by the

Department of Homeland Security. Thus, the office, which no one expected to last more than five years beyond its founding, will become a permanent unit within the Department of Justice.

It will likely be a somewhat different office from the one which investigated Nazi persecutors. Although its new mandate covers only denaturalization, many of the modern war criminals may also be subject to criminal prosecution. Since they entered recently, they may have committed crimes which are not yet barred by the statute of limitations.[25] In such instances, OSI will likely work with U.S. Attorneys offices to prosecute crimes.

Whether the office is working on a criminal matter or a denaturalization, there will not likely be treasure troves of documents upon which to base a case. Very few governments are as meticulous in their record keeping as were the Nazis. The irony is, therefore, that the office may return in some measure to its earliest practices, relying on eyewitnesses to help the government present its case and on investigators to find corroborative witnesses overseas. Some of the eyewitnesses will be testifying about events in the recent past, however, and to that extent, the office should avoid some of the problems presented by witnesses in early Nazi cases such as *Walus* and *Demjanjuk*. Even the modern war crimes can go back an extended period, however. For example, crimes committed in the 1970s in Cambodia are as far distant from the present as were the World War II crimes when OSI was first founded.

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The office has learned much from its Holocaust work which will be of benefit in its investigations of modern war criminals. At OSI's founding – and for years thereafter – no one foresaw its permanence. In part because of that short-timer mentality, there was insufficient attention paid to creating a paper trail. The office was founded in the pre-computer era and there was a blind assumption that the institutional history of the office would always be available from

those who worked there. As time went on, of course, employees left, and too often newcomers were forced to reconstruct work done by their predecessors. A tremendous amount of effort is directed toward avoiding this pitfall with the modern crimes.

Whatever OSI's achievements in modern war crimes cases, it will be largely due to the work of its formative years. The office's groundbreaking Holocaust work is a lasting testament to the U.S. government's commitment to accountability and historical truth. The significance of the Holocaust in modern history, and the unfortunate but inevitable recurrence of other atrocities throughout the world, assures that OSI's work will have continuing resonance and impact.

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1. There was, however, a certain element of chance to this as well. At the time of the Barbie, Verbelen, Mengele and Waldheim reports, no other governmental entity was devoted exclusively to Holocaust matters. OSI, therefore, ably filled a vacuum.

When the United States Holocaust Memorial Museum (USHMM) was dedicated in 1993, another extraordinary resource was suddenly available. But because OSI had by then attained stature as a national --indeed international -- repository of Holocaust scholarship, there was no question of its being supplanted by the Museum. Instead, OSI and the USHMM have together provided expertise and manpower on a variety of Holocaust matters, including the Nazi gold report and the Interagency Working Group which oversees the Nazi War Crimes Disclosure Act.

2. Of course several countries, Germany and the U.S.S.R. foremost among them, dealt with Nazi persecutors in their midst much sooner than did the United States. The number of cases they filed before OSI's founding far exceeds the number of cases filed by OSI. Also, at this late date, it is difficult to compare case filings. To the extent that statutes of limitations preclude countries of origin from filing anything other than murder charges, it is very difficult for these countries to prosecute. The evidence needed to establish an individual act of murder in a court of law is much greater than that needed in OSI's World War II cases, where membership in a specific persecutory unit can alone be enough.

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3. Bernes, Bilaniuk, Bucmys, Friedrich, Gorshkow, Kuras, Miling, Palij and Zajankauskas. Two others, Gecas and Szehinskyj, faced new court proceedings, but litigation against them had begun earlier.

4. Four new cases (charging new defendants and therefore not including deportations following earlier denaturalizations) were brought in 2003 and three in 2004. None commenced in 2005. Two were pursued in 2006. The SWC, which began in 2000 to rank countries annually on the basis of their efforts to find and prosecute Nazi war criminals, has for five years placed the United States alone in the category of countries which have a "highly successful investigation and prosecution program."

That is not to suggest that other countries are not still involved in these cases, however. Some of them are discussed elsewhere in this report. *See* pp. 444, n. 11 (Germany), 486 (Canada), 465 and 493 (Lithuania), and 494 (Great Britain). One of the more active nations of late has been Italy. In 1996, 2 former SS officers were given life sentences for their role in a 1944 massacre wherein the Nazis killed 335 Italian civilians (approximately 10 for every German slain in a partisan attack). One of the SS men convicted was allowed to serve his sentence in a rest home, where he died, at age 92, in 2004. "Karl Hass, 92, Nazi Convicted of Mass Killing in Occupied Italy," *AP*, *The New York Times*, Apr. 22, 2004. The other was removed from a military prison in 1999 and placed under house arrest for health reasons. In 2005, at age 92, he was allowed to go on a police-supervised holiday as a reward for good conduct. However, his vacation was cut short because of protests over the event. "Former Nazi Officer's Temporary Release Sparks Protests in Italy," *AP*, Aug. 11, 2005; "Eric Priebke Returns to Rome House Arrest After Protests," *ANSA English Media Service*, Aug. 12, 2005.

In 2000, Italy convicted a naturalized Canadian citizen *in absentia* of war crimes for torturing and murdering 11 people at a Nazi prison camp in Italy. He too was sentenced to life

imprisonment. "Ex-Nazi Gets Bail," *The Toronto Sun*, Nov. 29, 2003. He was ordered extradited to Italy in Aug. 2003; as of this writing, that order is on appeal. And in 2005, Italy convicted 10 former SS men living in Germany for the massacre of 560 men, women and children (the youngest of whom was 21 days old) in a Tuscan village. These men also received life sentences. However, because of their advanced age, Italy decided against seeking extradition. "Ten Former Nazis Convicted of Tuscan Massacre," by Barbara McMahon, *The Guardian* (London), June 23, 2005. OSI played a role in this last prosecution. The office helped locate some witnesses and provided prosecutors with a sworn statement by one of the defendants that he had been a member of a particular SS Division. The statement had been given to INS when the defendant was refused entry to the U.S. in 1997. His name had been placed on the Watchlist at OSI's behest.

5. Attorney General Smith presented the material to the Israeli Ambassador to the United States on May 15, 1984.

6. "So Mengele Can Know Fear," by George Will, *The Washington Post*, Feb. 14, 1985.

7. *See*, S. Massey, "Individual Responsibility for Assisting the Nazis in Persecuting Civilians," 71 Minn. L. Rev. 97, 150 (1986).

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8. Most of OSI's historical documents, including wartime records and post-war interviews, came from archives in the Soviet Union and Germany. These are now open to outside scholars. Although others may therefore gather the same material as has OSI, OSI's release of the documents will still be of some intrinsic value. The manner in which OSI organized the material (on various databases), will likely assist researchers, as it does OSI personnel, in connecting certain groups, organizations and people.

9. *Prosecutor v. Ferdinand Nahimana, et al.*, Judgment and Sentence, ICTR-99-52-T (2003), para.1010, fn. 1113.

10. In many instances, papers prepared for these occasions have been published, enhancing further OSI's contribution to Holocaust scholarship.

11. Allan Ryan, quoted in "Norwood Man Loses Rights as a Citizen," by Lyndsey Layton, *The Patriot Ledger* (South Boston), May 25-26, 1996.

12. Those who leave the country without a final order of deportation (*e.g.*, as a result of settlement) may be able to receive benefits abroad if the United States has an agreement with the country that allows for such payments. Among the countries which allow residents to receive U.S. Social Security payments (and have been the destination for OSI defendants) are Australia, Canada, the United Kingdom and Germany. Lithuania allows such payments only if the recipient is a Lithuanian citizen. *See* www.socialsecurity.gov

13. *Ng Fung Ho v. White*, 259 U.S. 276, 282 (1922).

14. One did so the day before a scheduled interview, another on the day an interview was to be held, and two within days after being interviewed. Three committed suicide days after OSI filed its case.

15. "Suspected Nazi May Have Suffered Brain Injury from Surgery," *AP*, Jan. 5, 1997; "Suspected Nazi Dies Months after Shootout," *AP*, Mar. 11, 1997. According to a police report, the defendant asked the police "Why for you shoot me, I not Jew." He also called the police "Jew bastard[s]." "Nazi Suspect Used Slurs Report Says," *The Kansas City Star*, Jan. 15, 1997.

16. *See* p. 544.

17. "41 Years Later, Ex Klansman Gets 60 Years in Civil Rights Deaths," by Ariel Hart, *The New York Times*, June 24, 2005.

18. "Senate Approves New Justice Department Unit to Probe Old Civil Rights Cases," by Sam Hananel, *AP*, Sept. 15, 2005. Even without the legislation, some prosecutions are possible. In Jan. 2007, federal authorities arrested a 71 year old man for the kidnaping and murder two black teenagers in 1964. Trial is scheduled for May 2007. Also in May 2007, Alabama charged a former state trooper with the 1965 killing of a young black farmer. "Indictment in '65 Killing that Inspired Rights March," by Adam Nossiter, *The New York Times*, May 10, 2007.

In a similar vein, governments in South America have recently shown "surprising vigor" in prosecuting human rights violations that occurred decades earlier. "After Decades, Nations Focus on Rights Abuses," by Larry Richter, *The New York Times*, Sept. 1, 2005.

19. Recorded interview with Director Rosenbaum, Dec. 9, 2003.

Three of the guards prosecuted by OSI did serve at death camps: Fedorenko at Treblinka, Demjanjuk at Sobibor and Sawchuk at Belzec. Sawchuk, however, was sent there after the killing operations were completed.

20. OSI's expenditure of funds has been comparatively modest. The office was allocated c. $2,000,000 in earmarked funds at its founding. Its expenses now come from the overall Criminal Division budget. In Fiscal Year (FY) 2004, the last year for which figures are available, OSI's expenditures were c. $5,869,000. (There have, occasionally, been additional infusions of funds, e.g. $2,000,000 appropriated in FY 1999, to cover costs associated with the Nazi War Crimes Disclosure Act and $300,000 in 1997 for research into German pension records. "Seeking Funds to Find Nazis," by Elaine Povich, *Newsday* (New York), Oct. 5, 1997; "Waffen Search a Huge Job," by Michael Shapiro, *Washington Jewish Week*, Oct. 9, 1997 The pension research was aborted by the German embassy, apparently on privacy grounds.)

Other countries have spent much more, though none has approached OSI's level of success. As one example, Australia's expenditures for the Fiscal Year ending June 30, 1991 were $8.8 million (in U.S. dollars). "Report on the Operations of the War Crimes Act of 1945, to June 1991" (Canberra: Attorney-General's Dep't 1991).

21. P.L. 108-408, §§ 5501-26, 118 Stat. 3638 (2004).

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22. The definition of genocide is taken from 18 U.S. C. § 1091(a):

> (a) Basic offense. – Whoever, whether in time of peace or in time of war . . . and with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such --
>
> (1) kills members of that group;
>
> (2) causes serious bodily injury to members of that group;
>
> (3) causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques;
>
> (4) subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;
>
> (5) imposes measures intended to prevent births within the group; or
>
> (6) transfers by force children of the group to another group;
>
> or attempts to do so

23. The definition of torture is taken from 18 U.S.C. § 2340, enacted to complement the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which the U.S. is a signatory. According to the statute, torture is:

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(1) an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

(2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from –

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality

24. The definition of extrajudicial killing comes from the Torture Victims Protection Act, 28 U.S.C. § 1350, note:

> a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation

25. One of the most likely bases for criminal prosecution will be 18 U.S. C. 1425, which bars illegal procurement of citizenship. The crime has a 10 year statute of limitations.

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Appendix

Below is a listing of the 134 Nazi persecutors OSI sought to have removed from the United States. Date of death is not always ascertainable, especially if the person died outside the U.S. Citations, when available, are listed for litigation determining citizenship, deportability and extraditability. Related litigation, generally involving discovery matters, is not included. Cases filed before OSI's founding are marked with an asterisk (*).

Artishenko, Basil **Born:** 1923, Byelorussia
Died: 1989, U.S.
Alleged Persecutory Activity: As a Nazi-recruited policeman in Byelorussia, Artishenko participated in several "actions" which resulted in the murder of approximately 100 Soviet Gypsy noncombatants, mostly women and children.
Legal History: Denaturalization action filed in Nov. 1982. The case settled in Oct. 1984. Artishenko relinquished his citizenship and acknowledged that he had served with the local police. The U.S. agreed not to file a deportation action as long as Artishenko cooperated with the government in its investigation of others.

United States v. Artishenko, No. 82-3822 (JWB) (D.N.J. 1984)

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Artukovic, Andrija* **Born:** 1899, Yugoslavia
Died: 1988, Yugoslavia
Alleged Persecutory Activity: As a Cabinet minister in Croatia, Artukovic was responsible for issuing decrees which resulted in the incarceration and death of tens of thousands of non-Aryan citizens.
Legal History: Artukovic never became a U.S. citizen. Deportation and extradition cases were filed in 1951. He was extradited to Yugoslavia in 1986 where he was convicted of war crimes. *See* pp. 241-260.

Extraditability: *Artukovic v. Boyle*, 140 F. Supp. 245 (S.D. Cal. 1956), *aff'd sub nom. Karadzole v. Artukovic*, 247 F.2d 198 (9th Cir. 1957), *vacated and remanded*, 355 U.S. 393 (1958), *decision on remand, United States v. Artukovic*, 170 F. Supp. 383 (S.D. Cal. 1959)

Extradition: *Matter of the Extradition of Artukovic*, 628 F. Supp. 1370 (C.D. Cal.), *stay denied sub nom. Artukovic v. Rison*, 784F.2d 1354 (9th Cir. 1986)

Avdzej, John **Born:** 1905, Poland (now Belarus)
Died: 1998, Germany
Alleged Persecutory Activity: Collaborated with the Nazis while serving as a regional mayor in Beylorussia. His work included arranging for the construction of a Jewish ghetto, helping Germans select Jews to execute, and disseminating German decrees, including one which prohibited giving food to those in the ghetto.
Legal History: Notified that OSI was about to file a

denaturalization action, Avdzej agreed to leave the country. He went to Germany in 1984 and renounced his U.S. citizenship, conceding that he "carried out the orders of the Nazi occupation authorities."

Balsys, Aloyzas **Born:** 1913, Lithuania

Alleged Persecutory Activity: Member of a secret police organization that liquidated a Jewish ghetto

Legal History: Balsys never became a U.S. citizen. When OSI sought to question him, Balsys invoked the Fifth Amendment on the ground that he might face criminal prosecution abroad. The question of whether the Fifth Amendment applies in such circumstances was litigated up to the Supreme Court. The Court ruled that the Amendment could not be invoked. Rather than submit to questioning, Balsys left for Lithuania in May 1999. He acknowledged that he had misrepresented his wartime activities when he entered the U.S. *See* pp. 141-144.

U.S. v. Balsys, 918 F. Supp. 588 (E.D.N.Y. 1996), *vacated and remanded*, 119 F.3d 122 (2nd Cir. 1997), *rev'd and remanded*, 524 U.S. 666 (1998)

DRAFT

Bartesch, Martin **Born:** 1926, Romania

Died: 1989, Austria

Alleged Persecutory Activity: Guard at Mauthausen concentration camp in Austria and one of its subcamps

Legal History: Denaturalization case filed in April 1986. The district court revoked Bartesch's citizenship in May 1987 pursuant to a settlement agreement. Under the terms of the settlement, Bartesch relinquished his certificate of naturalization and agreed to leave the U.S. He went to Austria.

United States v. Bartesch, No. 86 C 2375 (N.D. Ill. 1987)

Baumann, Anton **Born:** 1911, Yugoslavia

Died: 1993, U.S.

Alleged Persecutory Activity: Guard at the Stutthof concentration camp in Poland and Buchenwald concentration camp in Germany

Legal History: Denaturalization case filed in Mar. 1989. Baumann's citizenship was revoked in May 1991 and he exhausted his appeals in Oct. 1992. A deportation action was filed in two months later. The case settled in June 1993 with Baumann agreeing to the entry of a deportation order for Germany. Based on Baumann's ill health, the United States agreed not to enforce the order of deportation.

Denaturalization: *United States v. Baumann*, 764 F. Supp. 1335 (E.D. Wis. 1991), *aff'd*, 958 F.2d 374 (7th Cir.), *cert. denied*, 506 U.S. 831 (1992)

Deportation: *Matter of Baumann*, A7 811 295 (Imm. Ct., Milwaukee, Wis. 1993)

Bauzys, Jonas **Born:** 1918, Lithuania
Died: 1998, U.S.
Alleged Persecutory Activity: Member of the 15th Lithuanian Schutzmannschaft, a Nazi-directed paramilitary group which persecuted and murdered civilians
Legal History: Bauzys became a U.S. citizen in 1991. Because a motion to reopen a naturalization can be filed within one year, in 1992 OSI filed such a motion rather than a denaturalization action. The motion was denied. OSI did not file a denaturalization case because it did not think its evidence could meet the higher standard of proof called for in such cases.

Benkunskas, Henrikas **Born:** 1920, Lithuania
Died: 1986, U.S.
Alleged Persecutory Activity: Served in a Nazi-collaborationist Lithuanian police battalion which participated in several massacres in Kaunas, Lithuania and in Slutsk, a suburb of Minsk, Byelorussia. Thousands of Lithuanian Jews, approximately 15,000 Byelorussian Jews, and 1,200 Soviet prisoners of war were murdered.

Operations by the battalion (the 2nd Lithuanian Schutzmannschaft, later renamed the 12th Lithuanian Schutzmannschaft) were particularly brutal. According to a Nazi report introduced into evidence during the Nuremberg trials, the Nazi civilian administrator of Byelorussia complained about the brutality of the Slutsk slaughter. The police not only looted the bodies of murdered Jews and broke into Jewish houses, but also beat the Byelorussian population in general and stole indiscriminately. When the slaughter at the pits was over, the police did not bury their victims deeply enough and some of the wounded worked their way out of the graves and returned to Slutsk looking for help. According to the Nazis, the executions at Slutsk were carried out "with indescribable brutality . . . bordering on sadism . . . on the part of both the German police officers and particularly the Lithuanian partisans."

Legal History: Benkunskas never became a U.S. citizen. A deportation case was filed in 1984. Benkunskas died before the case was resolved.

Berezowskyj, Walter **Born:** 1924, Poland (now Ukraine)
Alleged Persecutory Activity: Camp guard at Trawniki and Poniatowa labor camps in Poland, Sachsenhausen concentration camp in Germany and a Mauthausen subcamp in Austria.
Legal History: Denaturalization proceedings commenced in July 1997. Pursuant to a settlement agreement in Sept. 1998, Berezowskyj forfeited his citizenship. The U.S. agreed not to pursue deportation unless there was a substantial improvement in Berezowskyj's medical condition.

United States v. Berezowskyj, No. 3:97CV1450 (JBA) (D. Conn. 1998)

Bernes, Peter **Born:** 1922, Lithuania
Alleged Persecutory Activity: Adjutant to the Nazi-appointed commandant in Kupiskes, Lithuania. During Bernes' tenure, more than 1,000 Jewish

DRAFT

men, women and children and some 300 to 500 alleged communists were arrested, jailed, and shot to death by a detachment of Lithuanians acting on the commandant's orders. No Jews are known to have survived. On multiple occasions, Bernes went with the commandant to the local jail and called out the names of prisoners who were then taken from their cells, kicked and beaten. The victims were murdered a short distance from the jail.

Legal History: After being notified that OSI was about to file a denaturalization case, Bernes left for Lithuania in Jan. 2002. His citizenship was revoked in May 2002 pursuant to a default judgment order.

United States v. Bernes, 2002 WL 1067254 (W.D. Ill. 2002)

Bernotas, Antanas

Born: 1908, Lithuania

Died: 1998, U.S.

Alleged Persecutory Activity: Served as a guard in a Jewish ghetto where he beat Jews and helped select some for execution. He also arrested, interrogated and beat anti-Nazi partisans and members of the underground.

Legal History: Bernotas never became a U.S. citizen. Deportation proceedings began in July 1983. In July 1989, the case settled. Bernotas conceded his deportability and designated Germany as the recipient country. Because Bernotas was in ill health, the U.S. agreed not to carry out the order of deportation.

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Matter of Bernotas, A7 255 565 (Imm. Ct., Hartford, Conn. 1983)

Bilaniuk, Jaroslaw

Born: 1923, Poland (now Ukraine)

Died: 2007, U.S.

Alleged Persecutory Activity: Guard at Trawniki Labor camp in Poland, member of the Trawniki Training Camp's anti-partisan "Deployment Company." After the evacuation of Trawniki in the face of Soviet advances in July 1944, Bilaniuk served as a member of SS "Streibel Battalion," composed of men from Trawniki. One of the primary functions of the Streibel Battalion was to round up and guard Polish forced laborers.

Legal History: A denaturalization case was filed in Dec. 2002. Bilaniuk died while it was pending.

Blach, Bruno

Born: 1919, Czechoslovakia

Alleged Persecutory Activity: Guard and dog handler at Dachau concentration camp in Germany and at Wiener Neudorf concentration camp in Austria.

Legal History: Blach never became a U.S. citizen. Deportation proceedings were begun in 1985; he was ordered deported to West Germany in Apr. 1987. While that order was on appeal, W. Germany requested his extradition. Blach did not contest the matter and was extradited in Jan. 1990. He was tried in Germany for murdering three prisoners during a forced march to the Mauthausen concentration camp in Austria. He was acquitted in 1993.

Matter of Blach, A10 629 292 (Imm. Ct, Los Angeles, Cal. 1987), *appeal dismissed* (BIA 1990)

Bless, Anton

Born: 1924, Yugoslavia

Alleged Persecutory Activity: Guard at the Auschwitz concentration camp in Poland

Legal History: After being notified that a denaturalization case was about to be filed, Bless went to Germany in Aug. 1992. The court entered a default judgment revoking his citizenship in Dec. 1992.

United States v. Bless, No. 92-2075-JHG (D.D.C. 1992)

Bluemel, Paul

Born: 1902, Germany

Alleged Persecutory Activity: As Senior Mayor of the German city of Hirschberg from 1934 to 1938, Bleumel helped enforce the Nuremberg Decrees. After the Nazi invasion of the U.S.S.R., Bluemel served as a District Kommissar in various Ukrainian cities, including Tschudnow and Retschitza. The District Kommissar was the highest civilian authority over both the German police and indigenous Ukrainian auxiliary police.

During Bluemel's tenure in Tschudnow, several thousand Jews were murdered by the German and Ukrainian police. In Retschitza, Bluemel was in charge of anti-partisan operations, gave orders to the German and Ukrainian police to shoot any members of the anti-Nazi partisans who were captured, and oversaw the roundup of forced laborers to work in Germany.

Legal History: Bluemel never became a U.S. citizen. He agreed to leave the country in Mar. 1985 before OSI filed a deportation case. He settled in West Germany.

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Bogdanovs, Boleslavs

Born: 1917, Russia

Died: 1984, U.S.

Alleged Persecutory Activity: Member of the "Arajs Kommando," a Latvian death squad responsible for mass execution of thousands of civilians in Nazi-occupied Latvia. The victims of the mass shootings were mostly Jewish, but also included political enemies (those believed to be Communists), gypsies and the mentally ill. The leader of the organization, Viktor Arajs, was convicted in West Germany for leading the unit in murdering more than 13,000 people.

Legal History: Denaturalization proceedings commenced in Nov. 1983. Bogdanovs died before the case was resolved.

Bojcun, Michael

Born: 1918, Poland (now Ukraine)

Alleged Persecutory Activity: Member of the Nazi-sponsored Ukrainian Auxiliary Police (UAP) in L'vov. During his service, the UAP was involved in the murder of over 100,000 Jewish residents in the city. The UAP also escorted Jews to forced labor sites and enforced persecutory measures including the arrest of Jews for document violations or failure to wear the prescribed armband with the Star of David.

Legal History: A denaturalization case was filed in Dec. 2004. It is pending as of this writing.

Breyer, Johann

Born: 1925, Czechoslovakia

Alleged Persecutory Activity: Guard at Buchenwald concentration camp in Germany and Auschwitz Death Camp in Poland

Legal History: Denaturalization proceedings commenced in Apr. 1992; shortly thereafter Breyer began administrative proceedings to establish derivative citizenship because his mother had been born in the U.S. The court ruled in Breyer's favor and that decision was affirmed on appeal. He was therefore able to remain in the U.S. *See* pp. 175-191.

Breyer v. Meissner, 2002 WL 31086985 (E.D. Pa. 2002), *aff'd*, 350 F.3d 327 (3rd Cir. 2003)

Bucmys, Ildefonsas

Born: 1920, Lithuania

Alleged Persecutory Activity: Served in an indigenous police force organized by the Germans in occupied Lithuania and later as a guard at the Majdanek concentration camp in Poland.

Legal History: Denaturalization proceedings were begun in Sept. 2002. Because Bucmys entered under the INA (the DPA and RRA having since expired), no assistance in persecution count could be filed. He was charged with lack of good moral character (based on failure to answer truthfully at his naturalization interview) and misrepresentation (based on failure to say on his naturalization application that he had assisted in persecution). He was also charged with failure to submit a written naturalization application containing all material facts (a charge, based in 8 U.S.C. § 1445(a), which OSI had never previously filed). The case settled in Feb. 2005. Bucmys consented to an order revoking his naturalized citizenship, admitted that he had not provided a correct answer when he stated on his naturalization application that he had not assisted in persecution, and agreed to comply with any future government request for testimony involving anyone who served at Majdanek during the period when Bucmys did so. The government agreed that it would not file a deportation action.

Budreika, Juozas

Born: 1916, Lithuania

Died: 1996, Lithuania

Alleged Persecutory Activity: Member of the 2nd/12th Schutzmannschaft during the Slutsk massacre. *See* Benkunskas

Legal History: A denaturalization action was filed in Sept. 1994. In Jan. 1996, Budreika agreed to forfeit his citizenship and to leave the country. He died two weeks later, the day after arriving in Lithuania.

Ciurinskas, Kazys

Born: 1918, Lithuania

Died: 2001, Lithuania

Alleged Persecutory Activity: Member of the

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2nd/12th Schutzmannschaft during the Slutsk massacre (*see* Benkunskas)

Legal History: Denaturalization proceedings were begun in Mar. 1993. Ciurinskas' citizenship was revoked in June 1997 and his appeals were exhausted in June 1998. Deportation proceedings were begun in Oct. 1998. The case settled in Apr. 1999 with Ciurinskas agreeing to leave within a month. He settled in Lithuania.

Denaturalization: *U.S. v. Ciurinskas*, 976 F. Supp. 1167 (N.D. Ind. 1997), *aff'd*, 148 F.3d 729 (7th Cir. 1998)

Deportation: *Matter of Ciurinskas*, A07 262 096 (Imm. Ct., Chicago, Ill. 1999)

Dailide, Algimantas **Born:** 1921, Lithuania

Alleged Persecutory Activity: Member of the Nazi-sponsored Lithuanian Security Police (the Saugumas), where he served in the "Communist-Jews" section. The Saugumas arrested and turned over for punishment and execution those Jews who attempted to escape the Vilnius ghetto, as well as any person who tried to help them. Jews arrested by the Saugumas were generally shot under the direction of the Germans at execution pits at Paneriai, a wooded area outside Vilnius. Approximately 50,000 Jews were murdered at Paneriai.

Legal History: Denaturalization proceedings were begun in Dec. 1994 and Dailide's citizenship was revoked in Jan. 1997. His appeals were exhausted in Sept. 2000. The government began deportation proceedings in July 2001 and Dailide was ordered deported to Lithuania in 2002. In 2003, while appeal of his deportation order was pending, he left for Germany.

In July 2004, the Lithuanian government charged him with persecution of civilians protected by international humanitarian law. He was convicted in March 2006. *See* p. 465.

Denaturalization: *U.S. v. Dailide*, 953 F. Supp. 192 (N.D. Ohio, 1997), *aff'd*, 227 F.3d 385 (6th Cir. 2000)

Deportation: *Matter of Dailide*, A7-412-330 (Imm. Ct., Bradenton, Fl. 2002), *appeal dismissed* (BIA 2003), *aff'd, Dailide v. Ashcroft*, 387 F.3d 1335 (11th Cir. 2004)

Demjanjuk, John* **Born:** 1920, Ukraine

Alleged Persecutory Activity: Guard at Sobibor death camp in Poland, the Majdanek and Flossenbürg concentration camps (in Poland and Germany respectively) and Trawniki training camp in Poland.

Legal History: The U.S. Attorney's Office filed a denaturalization action in Aug. 1977. Demjanjuk's citizenship was revoked in June 1981 after the court concluded that he was "Ivan the Terrible" who had operated the gas chamber at the Treblinka death camp. His appeals were exhausted in Nov. 1982. A deportation action was filed in July 1982 and Demanjuk was ordered deported to the U.S.S.R. in May 1984. Two years later, while that ruling was on appeal, he was extradited to Israel. He returned to the U.S. in 1993 after Israel concluded that he was not Ivan the Terrible, but that he had been a guard at other camps, including Sobibor. The 1981 order of denaturalization was vacated in 1998 and a new

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denaturalization lawsuit was filed in 1999 based on his guard service at Sobibor, Majdanek and Flossenbűrg. He was denaturalized in Feb. 2002. The ruling was affirmed in Apr. 2004, and the Supreme Court denied review in Nov. 2004. Deportation proceedings were begun in Dec. 2004. He was ordered deported in June 2005. Demjanjuk moved to preclude designation of Ukraine, claiming that sending him there would violate the Convention Against Torture (CAT). He argued that Ukraine would likely prosecute and torture him. His motion was denied in Dec. 2005 and he was ordered deported to Ukraine. That ruling was affirmed in Dec. 2006. *See* pp. 150-174. In June 2008, Equipo Kizkor, a Brussels-based human rights group asked a Spanish court to indict Demjanjuk and seek his extradition to Sprain for crimes against humanity in the persecution of Spanish nationals at Flossenbürg.

First Denaturalization: *U.S. v. Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio 1981), *aff'd per curiam*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982)

Deportation: *Matter of Demjanjuk*, A08 237 417 (Imm. Ct., Cleveland, Ohio 1984), *aff'd* (BIA 1985), *aff'd per curiam* (unpub'd), *U.S. v. Demjanjuk* 767 F.2d 922 (6th Cir.), *cert. denied*, 474 U.S. 1034 (1985)

Extradition: *Matter of Extradition of Demjanjuk*, 612 F. Supp. 544 (N.D. Ohio 1985), *petition for writ of habeas corpus denied sub nom. Demjanjuk v. Petrovsky*, 612 F. Supp. 571 (N.D. Ohio), *aff'd*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986), *reopened sua sponte*, No. 85-3435 (6th Cir. 1992), referred to special master, (6th Cir.1992), report of special master, (6th Cir. 1993), *extradition vacated, Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993), *cert. denied sub nom. Rison v. Demjanjuk*, 513 U.S. 914 (1994)

Second Denaturalization: *United States v. Demjanjuk*, 2002 WL 544622 (N.D. Ohio 2002), *aff'd*, 367 F.3d 623 (6th Cir.), *cert. denied*, 125 S.Ct. 429 (2004)

Second Deportation: *Matter of Demjanjuk*, A08 237 417 (Imm. Ct., Cleveland, Ohio June 16, 2005 and Dec. 28, 2005), *aff'd* (BIA 2006), *aff'd*, ___ F.3d ___ (6th Cir. 2008), *cert. denied*, ___ (6/19/08). **GET CITES**

Deneul, Mathias

Born: 1920, Romania

Died: 2000, Germany

Alleged Persecutory Activity: Guard at Gusen concentration camp in Austria. Also guarded prisoners on a transport from a camp in Poland to Mauthausen concentration camp in Austria.

Legal History: Deneul never became a U.S. citizen. A deportation action was filed in Aug. 1993. In Dec. 1993, Deneul agreed to leave the country. He went to Germany in 1994.

Denzinger, Jakob

Born: 1924, Yugoslavia

Alleged Persecutory Activity: Guard at Auschwitz death camp in Poland, Mauthausen concentration camp in Austria and one of its subcamps, Sachsenhausen concentration camp in Germany, a subcamp of Buchenwald in Germany, and the Plaszow concentration camp in Poland.

Legal History: Denzinger left for West Germany in

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Aug. 1989 shortly after learning that the government planned to file a denaturalization complaint. A default judgment revoking Denzinger's citizenship was filed in Nov. 1989. As of this writing, he is in Croatia.

United States v. Denzinger, No. 89-2176-JNP (D.D.C. 1989)

Dercacz, Michael

Born: 1909, Ukraine
Died: 1983, U.S.
Alleged Persecutory Activity: As a member of the Ukranian Police, he assisted the Germans in keeping 2000 Jews deprived of necessities and confined to a ghetto. The Jews were later murdered by the Germans.
Legal History: Denaturalization proceedings commenced in July 1980. Dercacz' citizenship was revoked in Feb. 1982. A deportation proceeding was filed later that year. Dercacz died before the case was fully litigated.

U.S. v. Dercacz, 530 F. Supp. 1328 (E.D.N.Y. 1982)

Detlavs, Karlis*

Born: 1911, Latvia
Died: 1983, U.S.
Alleged Persecutory Activity: As a member of the Latvian Auxiliary Security Police, he executed Jews in the Riga ghetto and chose Jews for execution in the Dwinsk ghetto.
Legal History: Detlavs never became a U.S. citizen. INS filed a deportation action in Oct. 1976. An immigration judge rejected the government's case in 1980 and that decision was affirmed on appeal the following year.

Matter of Detlavs, A07 925 159 (Imm. Ct., Baltimore, Md. 1980), *aff'd*, (BIA 1981)

Deutscher, Albert

Born: 1920, Ukraine
Died: 1981, U.S.
Alleged Persecutory Activity: As a member of the Selbstschutz, a Nazi paramilitary organization, Deutscher participated in the mass execution of hundreds of Jews in Ukraine.
Legal History: The government filed a denaturalization action in Dec. 1981. Deutscher committed suicide the following day.

Didrichsons, Valdis

Born: 1913, Latvia
Died: 1995, U.S.
Alleged Persecutory Activity: Member of the Arajs Kommando (*see* Bogdanovs)
Legal History: The government filed a denaturalization suit in May 1988. The case settled in Feb. 1990 with Didrichsons agreeing to relinquish his citizenship. Because he was ill, the U.S. agreed not to institute deportation

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proceedings.

Dorth, Johann **Born:** 1924, Yugoslavia
Died: 1990, U.S.
Alleged Persecutory Activity: Guard at Auschwitz concentration camp
Legal History: Dorth never became a U.S. citizen. The government filed a deportation action in Jan. 1989. Dorth died while the case was in litigation.

Eckert, Josef **Born:** 1914, Austria-Hungary
Died: 1991, Austria
Alleged Persecutory Activity: Guard at Auschwitz concentration camp and two Auschwitz subcamps in Poland
Legal History: Eckert never became a U.S. citizen. The government filed a deportation action in Dec. 1987. In Sept. 1988, Eckert agreed to the entry of an order of deportation and stipulated that he would leave the country within six months. He settled in Austria.

Matter of Eckert, A10 631 698 (Imm. Ct., Los Angeles, Cal. 1988)

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Egner, Peter **Born:** 1922, Yugoslavia
Alleged Persecutory Activity: Guard and interpreter with the Nazi-controlled Security Police and Security Service while the group acted as a Nazi mobile killing unit in German-occupied Belgrade, Serbia
Legal History: A denaturalization case was filed in July 2008.

Ensin, Albert **Born:** 1922, Lithuania
Died: 1994, U.S.
Alleged Persecutory Activity: Guard at Auschwitz death camp
Legal History: Ensin never became a U.S. citizen. The government filed a deportation action in Feb. 1987. In June 1990, Eckert agreed to the entry of a deportation order to West Germany. Due to Ensin's ill health, the U.S. agreed that it would not have him removed from the United States.

Matter of Ensin, A10 226 043 (Imm. Ct., Boston, Mass. 1990)

Fedorenko, Feodor* **Born:** 1907, Ukraine
Died: 1987, U.S.S.R.
Alleged Persecutory Activity: Guard in the Jewish ghetto of Lublin, Poland and at the Treblinka death camp

Legal History: The U.S. Attorney's Office filed a denaturalization case in Aug. 1977. The district court rejected the government's case in July 1978. That decision was reversed a year later and the appellate decision was affirmed by the Supreme Court in Jan. 1981. The government filed deportation proceedings in Mar. 1981 and Fedorenko was ordered deported in Feb. 1983. The ruling was affirmed in Apr. 1984 and Fedorenko was deported to the Soviet Union in Dec. 1984. The Soviets convicted him of war crimes in 1986. He was executed the following year. *See* pp. 48-63.

Denaturalization: *U.S. v. Fedorenko*, 455 F. Supp. 893 (S.D. Fl. 1978), *rev'd and remanded*, 597 F.2d 946 (5th Cir. 1979), *aff'd*, 499 U.S. 490 (1981)
Deportation: *Matter of Fedorenko*, A07 333 468 (Imm. Ct., Hartford, Conn. 1983), *aff'd*, 19 I. & N., Dec. 57 (BIA 1984)

Firishchak, Osyp

Born: 1919, Czechoslovakia (now Ukraine)
Alleged Persecutory Activity: Served in the 1st Commissariat of the Ukrainian [Auxiliary] Police Lemberg in L'vov, Ukraine. During Firishchak's service, the 1st Commissariat rounded up and transported more than 100,000 Jews to killing centers or labor camps. Jews who attempted to flee these roundups were shot.
Legal History: A denaturalization case was filed in Dec. 2003. Firischak's citizenship was revoked in Aug. 2005. That ruling was affirmed in Nov. 2006. Deportation proceedings were begun in March 2007. He was ordered deported to Ukraine in Nov. 2007. **IS IT ON APPEAL?**

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Denaturalization: *U.S. v. Firishchak*, 426 F. Supp. 2d 780 (N.D. Ill. 2005), *aff'd*, 468 F.3d 1015 (7th Cir. 2006)
Deportation: **GET CITE**

Friedrich, Adam

Born: 1921, Romania
Died: 2006, U.S.
Alleged Persecutory Activity: Camp guard at Gross Rosen concentration camp in Germany (present-day Poland) and Flossenbürg concentration camp in Germany. Among his responsibilities, Friedrich twice guarded prisoners on forced marches when camps were evacuated.
Legal History: A denaturalization case was filed in July 2002 and Friedrich's citizenship was revoked in Feb. 2004. The ruling was affirmed in Mar. 2005 and the Supreme Court denied review in Oct. 2005. *See* pp. 67-68.

U.S. v. Friedrich, 305 F. Supp. 2d 1101 (E.D. Mo. 2004), *aff'd*, 402 F.3d 842 (8th Cir.), *cert. denied*, 126 S. Ct. 495 (2005)

Galan, Orest

Born: 1921, Poland (now Ukraine)
Alleged Persecutory Activity: Member of the

Nazi-sponsored Ukrainian Auxiliary Police (UAP) in L'vov.during the time in which it provided forces for the final liquidation of the Jewish ghetto (*see* Bojcun).

Legal History: The case settled in Nov. 2006, with the U.S. filing a denaturalization suit and Galan agreeing to an order revoking his citizenship. Pursuant to the terms of the agreement, he left for Ukraine that same month.

Gecas, Vytautas **Born:** 1922, Lithuania

Alleged Persecutory Activity: Member of the 2nd/ 12th Lithuanian Schutamannscaft (*see* Benkunskas)

Legal History: Gecas never became a U.S. citizen. In May 1999, the district court held him in contempt for defying its order to respond to an OSI subpoena. Gecas spent 18 months in jail. In Dec. 2002, after his release, OSI filed a deportation action. The case settled in May 2003 with Gecas admitting that he had served in the 2nd /12th Lithuanian Schutzmannschaft and agreeing to leave the U.S. permanently. He settled in Lithuania in Aug. 2003. *See* pp. 144-146.

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Geiser, Anton **Born:** 1924, Yugoslavia (now Croatia)

Alleged Persecutory Activity: Guard at Sachsenhausen and Buchenwald concentration camps in Germany

Legal History: A denaturalization case was filed in Aug. 2004. It is pending as of this writing. His citizenship was revoked in Sept. 2006 and the ruling was affirmed by the Third Circuit in June 2008.

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Gimzauskas, Kazys **Born:** 1908, Lithuania

Alleged Persecutory Activity: Chief of the interrogations/investigations division of the Saugumas (*see* Dailide) and thereafter Deputy Chief for the entire Vilnius region.

Legal History: Gimzauskas left for Lithuania in Oct. 1995, shortly before OSI filed suit to revoke his citizenship. The U.S. obtained a default judgment of denaturalization in 1996. Gimzauskas was convicted in Lithuania of genocide in 2001. The court found that he had handed over at least three Jews to killing squads. *See* pp. 464-465.

U.S. v. Gimzauskas, No. 1:95CV02033 (D.D.C. 1996)

Gorshkow, Michael **Born:** 1923, Estonia

Alleged Persecutory Activity: Served as a Gestapo

interpreter/interrogator at the headquarters of the German security police in Minsk, Poland (now Belarus). He also participated in the Nazi killing action at the Jewish ghetto in Slutsk (see Benkunskas).

Legal History: OSI filed a denaturalization lawsuit in May 2002 and Gorshkow departed for Estonia shortly thereafter. A default judgment was entered revoking his citizenship. *See* pp. 461-462.

U.S. v. Gorshkow, No. 5:02CV186/LAC/MD (N.D. Fla. 2002)

Grabauskas, Juozas

Born: 1918, Lithuania

Died: 2002, Lithuania

Alleged Persecutory Activity: Officer in the 2nd /12th Lithuanian Schutzmannschaft (*see* Benkunskas).

Legal History: OSI filed a denaturalization suit in Jan. 1993. The case settled nine months later when Grabauskas forfeited his citizenship and agreed to leave the country within three weeks. He settled in Lithuania.

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U.S. v. Grabauskas, No. 93 C 374 (E.D. Ill. 1993)

Gruber, Michael

Born: 1915, Croatia

Died: 2002, Austria

Alleged Persecutory Activity: Guard at Sachsenhausen concentration camp in Germany

Legal History: Gruber never became a U.S. citizen. OSI filed a deportation case in Aug. 1999. Gruber was ordered deported to Austria in Aug. 2000 and in May 2002 the BIA concluded that it lacked jurisdiction to hear the appeal. Gruber left for Austria in June 2002 and died there two months later.

Matter of Gruber, A10-270-346 (Imm. Ct., N.Y., N.Y. 2000), *appeal dismissed* (BIA 2002)

Gudauskas, Vytautas

Born: 1918, Lithuania

Died: 1997, U.S.

Alleged Persecutory Activity: Member of the 2nd/ 12th Lithuanian Schutamannscaft (*see* Benkunskas)

Legal History: OSI brought a denaturalization action in June 1984. With the case still in its discovery stage ten years later, the government settled. Gudauskas forfeited his citizenship and the U.S. agreed not to file a deportation action.

U.S. v. Gudauskas, No. 84-000215-T (D. Mass. 1994)

Guzulaitis, Juozas

Born: 1924, Lithuania

Died: 2003, U.S.

Alleged Persecutory Activity: Member of the 252nd Lithuanian Schutamannscaft battalion, guard at the Majdanek concentration camp and the Hersbruck Forced Labor Camp (both in Poland), and guard on the death march from Hersbruck to the Dachau concentration camp in Germany

Legal History: A denaturalization action was filed in Nov. 2001. Guzulaitis died while the case was pending.

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Habich, Jakob

Born: 1913, Romania

Died: 1995, U.S.

Alleged Persecutory Activity: Guard in the Lublin and Auschwitz concentration camp systems in Poland. His duties included guarding prisoners on work details. He also transferred prisoners from an Auschwitz subcamp to the Mauthausen concentration camp in Austria.

Legal History: A denaturalization suit was filed in Oct. 1987. It settled in Mar. 1990. Habich relinquished his citizenship and conceded that he was subject to deportation. The U.S. agreed not to institute deportation proceedings due to Habich's ill health.

U.S. v. Habich, No. 87 C 9546 (N.D. Ill. 1990)

Hahner, Johann

Born: 1920, Yugoslavia

Died: 2001, Germany

Alleged Persecutory Activity: Guard at the Auschwitz death camp

Legal History: Hahner never became a U.S. citizen. The government filed a deportation action in Sept. 1991. The case settled in Oct. 1992 when Hahner admitted he had served at Auschwitz and agreed to leave the country permanently. He went to Germany in June 1993.

Hajda, Bronislaw **Born:** 1924, Poland

Died: 2005, U.S.

Alleged Persecutory Activity: Guard at the Treblinka labor camp where he participated in the massacre of hundreds of Jews. After the liquidation of Treblinka, Hajda joined the Streibel Battalion (*see* Bilaniuk).

Legal History: The government filed a denaturalization suit in Aug. 1994 and Hajda's citizenship was revoked in Apr. 1997. His appeals were exhausted in Mar. 1998. The government filed a deportation suit in Aug. 1998. Hajda was ordered deported to Poland in Oct. 1998 and that ruling was affirmed in Jan. 2001. Neither Poland nor any other country would accept him. *See* pp. 437-444.

Denaturalization: *U.S. v. Hajda*, 963 F. Supp. 1452 (N.D. Ill. 1997), *aff'd*, 135 F.3d 439 (7th Cir. 1998)

Deportation: *Matter of Hajda*, A07 804 583 (Imm. Ct., Chicago, Ill. 1998), *aff'd*, (BIA 2001)

DRAFT

Hammer, Ferdinand **Born:** 1921, Croatia (now Yugoslavia)

Alleged Persecutory Activity: Guard at the Auschwitz concentration camp in Germany and Sachsenhausen concentration camp in Austria. Guarded inmates being transported from Auschwitz to Sachsenhausen and from Sachsenhausen to the Mauthausen concentration camp in Austria.

Legal History: The U.S. filed a denaturalization lawsuit in Dec. 1994. Hammer's citizenship was revoked in June 1996 and the government began deportation proceedings in Oct. 1996. Hammer was ordered deported in Apr. 1997. His appeals were exhausted in Feb. 2000; he was deported to Austria the following month.

Denaturalization: *U.S. v. Hammer*, No. 94-Cv-74985-DT (E.D. Mich. 1996)

Deportation: *Matter of Hammer*, A08 865 516 (Imm. Ct., Detroit, Mich. 1997), *aff'd*, (BIA 1998), *aff'd*, *Hammer v. INS*, 195 F.3d 836 (6th Cir. 1999), *cert. denied*, 528 U.S. 1191 (2000)

Hansl, John **Born:** 1925, Yugoslavia (now Croatia)

Died: 2007, United States

Alleged Persecutory Activity: Guard at Sachsenhausen concentration camp in Germany.

Legal History: A denaturalization lawsuit was filed in July 2003. Hansl's citizenship was revoked in Apr. 2005. That ruling was affirmed in Mar. 2006.

U.S. v. Hansl, 364 F.Supp.2d 966 (S.D. Iowa 2005), *aff'd*, 439 F.3d 850 (8th Cir. 2006)

Hartmann, Martin **Born:** 1918, Romania

Alleged Persecutory Activity: Guard at Sachsenhausen concentration camp in Germany.

Legal History: Pursuant to a settlement agreement, a denaturalization lawsuit was filed and a consent judgment entered in Sept. 2007, stripping Hartmann of his citizenship. He voluntarily left the U.S. for Germany in Aug. 2007.

Hausberger, Franz **Born:** 1919, Austria

Alleged Persecutory Activity: Member of the 1st SS Infantry Brigade which participated in mopping-up operations on the Eastern Front that resulted in the death of thousands of Jews, gypsies, communists and other unarmed civilians

Legal History: Hausberger, the mayor of a ski village in the Austrian Alps, came to the U.S. for a two week visit to promote tourism in 1984. His visit received media attention and a local B'nai B'rith chapter asked that he be ordered to leave. OSI concluded that his entry violated the Holtzman amendment and INS ordered him to leave before his visit was complete.

DRAFT

Hazners, Vilis* **Born:** 1905, Latvia

Died: 1989, U.S.

Alleged Persecutory Activity: Selected Latvian Jews in the Dwinsk ghetto for execution

Legal History: Hazners never became a U.S. citizen. A denaturalization action was filed by INS in Jan. 1977. The government's claims were rejected in 1980 and OSI handled the appeal. The immigration judge's decision was affirmed in 1981.

Matter of Hazners, A10 305 336 (Imm. Ct., Albany, N.Y. 1980), *aff'd*, (BIA 1981)

Henss, Paul **Born:** 1922, Germany

Alleged Persecutory Activity: Handler of attack dogs and a guard at Dachau and Buchenwald concentration camps.

Legal History: Henss never became a U.S. citizen. The government filed a deportation action in Sept. 2007. Henss left for Germany in Nov. 2007, prior to his court hearing.

Hrusitsky, Anatoly

Born: 1917, Russia

Died: 1992, Venezuela

Alleged Persecutory Activity: Participation in atrocities, including murder and torture of Jews, as a member of a regional police force in Ukraine

Legal History: The government filed a denaturalization case in Aug. 1983. Shortly thereafter, Hrusitsky renounced his citizenship and went to Venezuela.

Hutyrczyk, Serge

Born: 1922, Poland

Died: 1993, U.S.

Alleged Persecutory Activity: Guard at the Koldyczewo concentration camp in Byelorussia. His assignments included drill instructor and supervisory guard. He was also a member of "the hunters," a group of guards who volunteered to participate in the execution of Jews in the forests surrounding the camp.

Legal History: The government filed a denaturalization action in Aug. 1990. Hutyrczyk's citizenship was revoked in Oct. 1992. He died while the ruling was on appeal.

DRAFT

U.S. v. Hutyrczyk, 803 F. Supp. 1001 (D.N.J. 1992)

Inde, Edgars

Born: 1909, Latvia

Died: 1980, U.S.

Alleged Persecutory Activity: Member of the Arajs Kommando (*see* Bogdanovs)

Legal History: The government filed a denaturalization suit in Aug. 1988. Inde died before the court issued a ruling.

Juodis, Jurgis

Born: 1911, Lithuania

Died: 1986, U.S.

Alleged Persecutory Activity: Officer in the 2nd/12th Schutzmannschaft (*see* Benkunskas)

Legal History: A denaturalization case was filed in Oct. 1981. It was pending when Juodis died.

Kairys, Liudas

Born: 1920, Lithuania

Alleged Persecutory Activity: Guard and platoon leader at the Treblinka Labor Camp in Poland. Also served as a guard at the Trawniki SS Training Camp in Poland and its detachment in Lublin.

Legal History: A denaturalization case was filed in Aug. 1980. Kairys' citizenship was revoked in Dec. 1984. He exhausted his appeals in May 1986. Deportation proceedings began in Mar. 1986. He was ordered deported to Germany in July 1987. His appeals were exhausted in Apr. 1993 and he was deported later that month. *See* p. 450, n. 43.

Denaturalization: *U.S. v. Kairys*, 600 F. Supp. 1254 (N.D. Ill. 1984), *aff'd*, 782 F.2d 1374 (7th Cir.), *cert. denied*, 476 U.S. 1153 (1986)

Deportation: *Matter of Kairys*, A07 161 811 (Imm. Ct., Chicago, Ill. 1987), *aff'd in part and remanded*, (BIA 1989), *decision on remand* (Imm. Ct., Chicago, Ill. 1990), *aff'd*, (BIA 1991), *aff'd*, *Kairys v. INS*, 981 F.2d 937 (7th Cir. 1992), *cert. denied*, 507 U.S. 1024 (1993)

Kalejs, Konrads **Born:** 1913, Latvia

Died: 2001, Australia

Alleged Persecutory Activity: Officer in the Arajs Kommando (see Bogdanovs) and a guard supervisor at the Salaspils concentration camp near Riga, Latvia.

Legal History: Kalejs never became a U.S. citizen. A deportation action was filed in Nov. 1984 and he was ordered deported to Australia in Nov. 1988. His appeals were exhausted in Mar. 1994 and he was deported the following month. *See* pp. 469-478, 493.

Matter of Kalejs, A11 655 361 (Imm. Ct., Chicago, Ill. 1988), *aff'd*, (BIA 1992), *aff'd*, *Kalejs v. INS*, 10 F.3d 441 (7th Cir., 1993), *cert. denied*, 510 U.S. 1196 (1994)

Kalymon, John **Born:** 1921, Poland

Alleged Persecutory Activity: Member of the Nazi-sponsored Ukrainian Auxiliary Police in L'vov. His unit rounded up Jews, imprisoned them in a ghetto, oversaw their forced labor, killed those attempting to escape, and delivered others to killing sites for mass execution. Captured wartime reports include one in which Kalymon acknowledged shooting Jews.

Legal History: A denaturalization action was filed in Jan. 2004. Kalymon's citizenship was revoked in March 2007. That ruling was affirmed by the Sixth Circuit in Sept. 2008.

CITES

DRAFT

Kaminskas, Bronius* **Born:** 1903, Lithuania

Died: 1988, U.S.

Alleged Persecutory Activity: Participated in the shooting of approximately 600 Jews in Lithuania.

Legal History: Kaminskas never became a U.S. citizen. INS commenced deportation proceedings in Oct. 1976. A physician chosen by the government deemed him incompetent shortly thereafter. By agreement of all parties, the case was continued with periodic examinations to monitor his condition. The case was dismissed after his death.

Karklins, Talivaldis **Born:** 1914, Latvia

Died: 1983, U.S.

Alleged Persecutory Activity: Member of Latvian District Police and director of the Madona concentration camp in Latvia. As a member of the District Police, he participated in two mass executions of hundreds of Jews and Soviet activists.

Legal History: A denaturalization case was filed in 1981. It was pending when he died.

DRAFT

Katin, Matthew **Born:** 1914, Lithuania

Died: 1991, U.S.

Alleged Persecutory Activity: Member of the 2nd/ 12th Schutzmannschaft (*see* Benkunskas)

Legal History: A denaturalization case was filed in 1984. It was pending when he died.

Kauls, Juris **Born:** 1912, Latvia

Alleged Persecutory Activity: Deputy chief and commander of the guards at a Nazi concentration camp near Riga, Latvia

Legal History: A denaturalization case was filed in 1984. Kauls left for Germany in 1988 while the case was still pending. The court entered a default judgment of denaturalization.

No citation available

Kirsteins, Mikelis **Born:** 1916, Russia

Died: 1994, U.S.

Alleged Persecutory Activity: Member of the Arajs Kommando (*see* Bogdanovs)

Legal History: A denaturalization case was filed in July 1987. The case settled in Dec. 1991, with Kirsteins relinquishing his citizenship and the U.S. agreeing not to file a deportation action unless the defendant's medical condition improved.

Kisielaitis, Juozas **Born:** 1920, Lithuania

Alleged Persecutory Activity: Member of the 2nd/ 12th Schutzmannschaft (*see* Benkunskas)

Legal History: Kisielaitis never became a U.S. citizen. OSI filed a deportation action in May 1984. Kisielaitis voluntarily left for Canada later that year while the case was still in litigation.

Klimavicius, Jonas **Born:** 1907, Lithuania

Alleged Persecutory Activity: Member of the 2nd/ 12th Schutzmannschaft (*see* Benkunskas)

Legal History: OSI filed a denaturalization action in May 1984. The case settled in Nov. 1988. The defendant relinquished his citizenship and the U.S. agreed not to file a deportation action.

DRAFT

No citation available.

Kolnhofer, Michael **Born:** 1917, Croatia (now Yugoslavia)

Died: 1997, U.S.

Alleged Persecutory Activity: Guard at Sachsenhausen and Buchenwald concentration camps in Germany

Legal History: OSI filed a denaturalization action in Dec. 1996. Kolnhofer began shooting at reporters who sought to interview him after the case was filed. Kolnhofer was shot by the police in the ensuing melee; he died two weeks later. *See* p. 565.

Koreh, Ferenc **Born:** 1909, Hungary

Died: 1996, U.S.

Alleged Persecutory Activity: Propagandist who served as editor of a newspaper which published anti-Semitic articles advocating persecution of Jews

Legal History: The government filed a denaturalization action in June 1989 and the court revoked his citizenship in June 1994. He exhausted his appeals in Aug. 1995. The government filed a deportation action in Apr. 1996 but settled the case shortly

thereafter because of Koreh's failing health. He admitted responsibility for publishing anti-Semitic articles, conceded his deportability, and designated Hungary as the country to which he should be sent. The court entered an order of deportation and the government agreed not to effect the order unless Koreh's health improved. He died three months later. *See* pp. 231-240.

Denaturalization: *U.S. v. Koreh*, 856 F. Supp. 891 (D.N.J. 1994), *aff'd*, 59 F.3d 431 (3rd Cir. 1995)

Deportation: *Matter of Koreh*, A7 903 601 (Imm. Ct., Newark, N.J. 1997)

Kowalchuk, Mykola* **Born:** 1925, Poland

Alleged Persecutory Activity: Served with the Ukrainian police and participated in the liquidation of a Jewish ghetto in the Ukraine

Legal History: INS filed a denaturalization action in Jan. 1977, before the SLU was established. The prosecution relied essentially on eyewitness testimony. The case ultimately passed on to OSI which dismissed it in 1981 for lack of evidence. (The key witness had died and the only other eyewitness recanted most of his original claims. The only documentary evidence – an ID card issued in the defendant's name – existed only as a reproduction, which would be inadmissible in court. The Soviets could not find the original.)

DRAFT

Kowalchuk, Serge* **Born:** 1920, Poland (brother of Mykola)

Died: 1998, Paraguay

Alleged Persecutory Activity: As a member of the Ukrainian militia, he participated in the liquidation of a Jewish ghetto.

Legal History: INS filed a denaturalization action in Jan. 1977 and the case was taken over by OSI at its founding. Kowalchuck's citizenship was revoked in July1983 (the court concluding only that he occupied a clerical position in a Persecutory unit). Deportation proceedings began in Feb. 1986. Kowalchuk left for Paraguay in May 1987, before the case was fully litigated. The court thereafter ordered his deportation to Paraguay.

Denaturalization: *U.S. v. Kowalchuk*, 571 F. Supp. 72 (E.D. Pa. 1983), *aff'd en banc*, 773 F.2d 488 (3rd Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986)

Deportation: *Matter of Kowalchuk*, A07 408 669 (Imm. Ct., Phila., Pa. 1988)

Koziy, Bohdan **Born:** 1923, Ukraine

Died: 2003, Costa Rica

Alleged Persecutory Activity: Ukrainian policeman who helped round up Jews and forcibly relocate them to a ghetto. He murdered a four year old Jewish

child and a Jewish family.

Legal History: A denaturalization case was filed in Oct. 1979. Koziy's citizenship was revoked in Mar. 1982 and the appeals concluded in 1984. Deportation proceedings began in June 1984. Koziy fled to Costa Rica in 1985, while the case was pending. The proceedings concluded in his absence with the court ordering him deported to the Soviet Union. Poland asked Costa Rica to extradite Koziy in Nov. 2003. He died in Costa Rica nine days thereafter. *See* pp. 514-519.

Denaturalization: *U.S. v. Koziy*, 540 F. Supp. 25 (S.D. Fla. 1982), *aff'd*, 728 F.2d 1314 (11th Cir.), *cert. denied*, 469 U.S. 835 (1984)

Deportation: *Matter of Koziy*, A07 347 878 (Imm. Ct., Miami, Fl. 1985)

Krysa, Wasyl

Born: 1925, Poland

Died: 2004, U.S.

Alleged Persecutory Activity: Guard at the SS labor camp Poniatowa in Poland and at a subcamp of the Mauthausen concentration camp in Austria

Legal History: A denaturalization case was filed in Nov. 1999 and the court revoked Krysa's citizenship in Oct. 2001. He died while the order was on appeal.

DRAFT

U.S. v. Krysa, 1:99CV-2736 (N.D. Ohio 2001)

Kulle, Reinhold

Born: 1921, Germany

Alleged Persecutory Activity: Guard at the Gross-Rosen concentration camp in Germany (present-day Poland)

Legal History: Kulle never became a U.S. citizen. A deportation action was filed in Dec. 1982. He was ordered deported to West Germany in Nov. 1984. He went there in 1987 while the ruling was on appeal.

Matter of Kulle, A10 857 195 (Imm. Ct., Chicago, Ill. 1984), *aff'd*, 19 I. & N. Dec. 319 (BIA 1985), *aff'd*, *Kulle v. INS*, 825 F.2d 1188 (7th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988)

Kumpf, Josias

Born: 1925, Yugoslavia (now within Serbia & Montenegro)

Alleged Persecutory Activity: Guard at Sachsenhausen, Buchenwald and Mittelbau concentration camps in Germany and the Majdanek concentration camp in Poland. He also served at the Trawniki training camp in Poland. During a one-day

massacre there of some 7,000 Jews, Kumpf stood guard to prevent the Jews from escaping.

Legal History: A denaturalization action was filed in Sept. 2003; Kumpf's citizenship was revoked in May 2005. That ruling was affirmed in Feb. 2006. Deportation proceedings were begun in June 2006. In Jan. 2007, Kumpf was ordered deported to Germany, Austria or Serbia. The ruling was upheld by the BIA in May 2008. In June 2008, Equipo Kizkor, a Brussels-based human rights organization, asked a Spanish court to indict Kumpf and seek his extradition from the U.S. The suit alleges that he committed crimes against humanity in the persecution of Spanish nationals at Sachsenhausen.

Denaturalization: *U.S. v. Kumpf*, 2005 WL 1198893 (E.D. Wis. 2005), *aff'd*, 438 F.3d 785 (7th Cir. 2006)

Deportation: *Matter of Kumpf*, A10 455 476 (Imm. Ct., Chicago, Ill. 2007)

Kungys, Juozas **Born:** 1915, Lithuania

Alleged Persecutory Activity: Member of a locally-formed Lithuanian group involved in the murder of approximately 2,000 Jews. Kungys helped round up and transport Jews to an execution site, distributed firearms and ammunition to an execution squad, forced victims into a mass grave, fired into the pit and exhorted others to do the same.

Legal History: A denaturalization action was filed in July 1981. The case, which went up to the Supreme Court to determine what constitutes a "material" misrepresentation, settled in Oct. 1988. Kungys agreed to forfeit his citizenship and the U.S. agreed not to file a deportation action. *See* pp. 127-133.

U.S. v. Kungys, 571 F. Supp. 1104 (D.N.J. 1983), *rev'd and remanded*, 793 F.2d 516 (3rd Cir. 1986), *rev'd and remanded*, 485 U.S. 759 (1988)

Kuras, Andres **Born:** 1922, Poland (now Ukraine)

Alleged Persecutory Activity: Guard at the Trawniki, Poniatowa and Dorohucza labor camps (all in Poland). At Trawniki and Poniatowa, all of the prisoners – some 20,000 men, women and children – were shot to death within a 36-hour period during Nov. 3-4, 1943. Although there is no evidence that Kuras was involved in the massacre, he served as a guard at Trawniki during that time. He later served in the Streibel Battalion (*see* Bilaniuk).

Legal History: OSI filed a denaturalization case in Sept. 2002. The court stripped Kuras of his citizenship in Mar. 2004. An appeal is pending as of this writing.

U.S. v. Kuras, No. 02-4312 (D.N.J. 2004)

DRAFT

Kwoczak, Fedir **Born:** 1921, Poland (now Ukraine)

Died: 2003, U.S.

Alleged Persecutory Activity: Guard at Trawniki and Poniatowa labor camps in Poland, took part in the liquidation of Jewish ghettos in Warsaw and Bialystok, Poland and later served in the Streibel Battalion (*see* Bilaniuk)

Legal History: OSI filed a denaturalization complaint in Sept. 1997; Kwoczak was denaturalized in June 2002. He died while the ruling was on appeal.

U.S. v. Kwoczak, 210 F. Supp.2d 638 (E.D. Pa. 2002)

Laipenieks, Edgars **Born:** 1913, Latvia

Died: 1998, U.S.

Alleged Persecutory Activity: Member of the Latvian Political Police which pursued Jews and Communists.

Legal History: Laipenieks never became a U.S. citizen. A deportation case was filed in June 1981. The government lost; the decision was reversed on appeal, and then reversed again. *See* pp. 117-126.

DRAFT

Matter of Laipenieks, A11 937 435 (Imm. Ct., San Diego, Cal. 1982), *rev'd*, 18 I. & N. Dec. 433 (BIA 1983), 1983 WL 183255, *rev'd sub nom. Laipenieks v. INS*, 750 F.2d 1427 (9th Cir. 1985)

Lehmann, Alexander **Born:** 1919, Ukraine

Died: 1997, U.S.

Alleged Persecutory Activity: As deputy chief of police in a Ukrainian town, he ordered, directed and participated in the mass execution of about 350 Jewish men, women and children.

Legal History: Lehmann never became a U.S. citizen. Deportation proceedings commenced in Nov. 1981. The case settled in Feb. 1984 with the defendant conceding his deportability and the U.S. agreeing not to have him deported unless his health improved.

Matter of Lehmann, A11 218 851 (Imm. Ct., Cleveland, Ohio 1984)

Leili, Stefan **Born:** 1909, Austria-Hungary

Died: 1995, Germany

Alleged Persecutory Activity: Guard at Mauthausen concentration camp in Austria where he killed a Jewish prisoner by shooting him in the back.

Legal History: Denaturalization proceedings commenced in Apr. 1986. Leili left for West Germany shortly thereafter and the court issued a default order of denaturalization.

U.S. v. Leili, No. 86-1370 (D.N.J. 1986)

Leprich, Johann **Born:** 1925, Romania

Alleged Persecutory Activity: Guard at Mauthausen concentration camp in Austria

Legal History: Denaturalization proceedings commenced in June 1986. The following year, while the case was pending, Leprich left for Canada. The court then revoked his citizenship. In July 2003, Leprich was found hiding in a specially built compartment beneath a basement staircase in his wife's home in Michigan. He was arrested and taken into custody. OSI instituted deportation proceedings that month (based on his illegal entry from Canada rather than his World War II activity.) In Nov. 2003, the court ordered Leprich deported to Romania, Germany or Hungary. That ruling was affirmed by the Sixth Circuit in Jan. 2006. *See* pp. 149, n.12, 440-441. In June 2008, Equipo Nizkor, a Brussels-based human rights organization, asked a Spanish court to indict Leprich and to seek his extradition from the United States. The case alleges that he was involved in crimes against humanity in the persecution of Spanish nationals imprisoned at Mauthausen.

Denaturalization: *U.S. v. Leprich*, 666 F. Supp. 967 (E.D. Mich. 1987)

Deportation: *Matter of Leprich*, A08 272 762 (Imm. Ct., Detroit, Mich. 2003), *aff'd* (BIA 2004), *aff'd*, *U.S. v. Leprich*, 2006 WL 69258 (6th Cir. 2006)

Lileikis, Aleksandras **Born:** 1907, Lithuania

Died: 2000, Lithuania

Alleged Persecutory Activity: As Chief of the Saugumus for Vilnius Province, Lileikis signed orders consigning Jewish men, women and children to death by gunfire at Paneriai. *See* Dailide.

Legal History: Denaturalization proceedings commenced in Sept. 1994. The court revoked Lileikis' citizenship in May 1996. He left for Lithuania the following month, before OSI filed a deportation action. In 1998, Lithuania charged him with genocide. The trial was suspended due to Lileikis' ill health; it resumed in 2000 but was suspended again for health reasons. He died two months later. *See* pp. 463-467.

U.S. v. Lileikis, 929 F. Supp. 31 (D. Mass. 1996)

DRAFT

Lindert, George **Born:** 1923, Romania

Alleged Persecutory Activity: Guard at Mauthausen concentration camp in Austria and one of its subcamps

Legal History: Denaturalization proceedings commenced in July 1992. The district court ruled against the government in Sept. 1995. *See* pp. 64-70.

U.S. v. Lindert, 907 F. Supp. 1114 (N.D. Ohio 1995)

Linnas, Karl **Born:** 1919, Estonia

Died: 1987, U.S.S.R.

Alleged Persecutory Activity: Chief of concentration camp in Tartu, Estonia

Legal History: Denaturalization proceedings commenced in Nov. 1979. Linnas' citizenship was revoked in June 1981 and his appeals were exhausted in Oct. 1982. A deportation action was filed in June 1982 and Linnas was ordered deported in May 1983. Appeals were exhausted in Apr. 1987 at which time he was deported to the U.S.S.R. *See* pp. 273-297.

DRAFT

Denaturalization: *U.S. v. Linnas*, 527 F. Supp 426 (E.D.N.Y. 1981), *aff'd*, 685 F.2d 427 (2nd Cir.), *cert. denied*, 459 U.S. 883 (1982)

Deportation: *Matter of Linnas*, A08 085 626 (Imm. Ct., N.Y., N.Y. 1983), *aff'd in part and remanded* (BIA 1984), *decision on remand* (Imm. Ct., N.Y., N.Y. 1985), *aff'd*, 19 I. & N. Dec. 302 (BIA 1985), *aff'd*, *Linnas v. INS*, 790 F.2d 1024 (2nd Cir.), *cert. denied*, 479 U.S. 995 1986), *reh'g denied*, 479 U.S. 1070 (1987)

Lipschis, Hans **Born:** 1919, Lithuania

Alleged Persecutory Activity: Guard at Auschwitz and Birkenau concentration camps in Poland

Legal History: Lipschis never became a U.S. citizen. Deportation proceedings commenced in June 1982. The case settled in December of that year, with Lipschis agreeing to leave for West Germany within 120 days of the court entering an order of deportation. The court entered its order on Dec. 23, 1982 and Lipschis departed in Apr. 1983 – the first OSI defendant to leave the country under court order.

Matter of Lipschis, A10 682 861 (Imm. Ct., Chicago, Ill. 1982)

Lytwyn, Wasyl **Born:** 1921, Poland (now Ukraine)

Alleged Persecutory Activity: Guard at the Trawniki training camp in Poland. Participated in the liquidation of the Warsaw ghetto and later served in the Streibel Battalion (*see* Bilaniuk).

Legal History: The case settled in Sept. 1995 prior to the commencement of proceedings. Lytwyn agreed to leave the U.S. within three months. The agreement called for OSI to file a denaturalization complaint at the time of his departure and for a consent order of denaturalization to be entered. The complaint was filed on Dec. 15, after Lytwyn had departed for Ukraine.

U.S. v. Lytwyn, No. 95 C 7538 (N.D. Ill. 1995)

Maikovskis, Boleslavs* **Born:** 1904, Latvia

Died: 1996, Germany

Alleged Persecutory Activity: Latvian chief of police who participated in the arrest of civilians and the burning of their dwellings.

Legal History: Maikovskis never became a U.S. citizen. INS filed a deportation case in Oct. 1976. Maikovskis was ordered deported to Switzerland in Aug. 1984. Switzerland would not allow him entry and OSI asked the court to modify its order to designate the U.S.S.R. In Oct. 1987, while that request was pending, Maikovskis left for West Germany. In 1988, Germany charged him with war crimes. His trial was suspended due to the defendant's ill health. *See* pp. 430, 433-434.

Matter of Maikovskis, A08 194 566 (Imm. Ct., N.Y., N.Y. 1983), *rev'd*, (BIA 1984), *aff'd*, *Maikovskis v. INS*, 773 F.2d 435 (2nd Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986)

Mandycz, Iwan **Born:** 1920 in contested territory which became part of Poland in 1921 (now Ukraine)

Alleged Persecutory Activity: Guard at Trawniki and Poniatowa labor camps (both in Poland); guard at Sachsenhausen concentration camp in Germany. He served at Poniatowa during the liquidation of the camp's remaining 14,000 prisoners in Nov. 1943 and during the burning of their bodies.

Legal History: Denaturalization proceedings commenced in Apr. 2000. His citizenship was revoked in Feb. 2005. The ruling was affirmed in May 2006.

United States v. Mandycz, 359 F. Supp.2d 601 (E.D. Mich. 2005), *aff'd*, 447 F.3d 951 (6th Cir. 2006)

DRAFT

Miling, Jakob **Born:** 1924, Yugoslavia (now Serbia)

Alleged Persecutory Activity: Guard at Gross Rosen concentration camp in Germany (present-day Poland) and the Sachsenhausen concentration camp in Germany.

Legal History: In Sept. 2002, after learning that OSI was about to file a denaturalization complaint, Miling left for Serbia. OSI filed the complaint the following month. The suit was dismissed in Aug. 2003 after Miling voluntarily renounced his citizenship.

Milius, Adolph **Born:** 1918, Lithuania

Died: 1999, Lithuania

Alleged Persecutory Activity: Member of the Saugumas (*see* Dailide). In Oct. 1941, Milius participated in the arrest of twelve Jews, including two children, who were lured into attempting to escape from the ghetto in a truck driven by a Saugumas informant. Milius also signed an inventory listing items (including wedding rings and gold tooth crowns) seized from another group of Jews arrested for attempting to escape from the ghetto.

Legal History: Denaturalization proceedings commenced in Dec. 1996. Milius left for Lithuania while the case was pending; the court thereafter issued an order of denaturalization.

U.S. v. Milius, No. 96-2534-CIV-T-25(A) (M.D. Fla. 1998)

DRAFT

Mineikis, Antanas **Born:** 1918, Lithuania

Died: 1997, Lithuania

Alleged Persecutory Activity: As a member of the 2nd / 12th Schutzmannschaft (*see* Benkunskas), Mineikis drove victims to the site of their execution.

Legal History: Denaturalization proceedings commenced in Oct. 1991. Mineikis' citizenship was revoked in Jan. 1992 and OSI filed a deportation action in June 1992. Mineikis was ordered deported to Lithuania in Aug. 1992 and was sent there the following month.

Mueller, Peter **Born:** 1923, Yugoslavia

Alleged Persecutory Activity: Guard at Natzweiler concentration camp in Alsace, France and at Schorzingen subcamp of Natzweiler in Germany.

Legal History: Mueller never became a U.S. citizen. When advised in Mar. 1994 that the Justice Department was about to file a deportation action, Mueller left for Germany.

Naujalis, Juozas **Born:** 1919, Lithuania

Alleged Persecutory Activity: Member of the 2nd/ 12th Lithuanian Schutzmannschaft (*see* Benkunskas)

Legal History: Naujalis never became a U.S. citizen. Deportation proceedings commenced in Oct. 1995. Naujalis was ordered deported to Lithuania in Sept. 1997. Once the ruling was affirmed by the Seventh Circuit, Naujalis left for Lithuania rather than seeking review from the Supreme Court.

Matter of Naujalis, A07 258 120 (Imm. Ct., Chicago, Ill. 1997), *aff'd*, (BIA 2000), *aff'd*, *Naujalis v. INS*, 240 F.3d 642 (7th Cir. 2001)

Negele, Michael **Born:** 1920, Romania

Alleged Persecutory Activity: Guard and dog handler at the Sachsenhausen concentration camp in Germany and later at the Theresienstadt Jewish ghetto in what is now the Czech Republic.

Legal History: Denaturalization proceedings commenced in Sept. 1997. The court revoked Negele's citizenship in July 1999. His appeals were exhausted in Feb. 2001 and OSI filed a deportation case two weeks later. He was ordered deported to Romania, or alternatively Germany, in July 2003 and the decision was affirmed in June 2004. The Supreme Court denied review. To date, no country is willing to accept him.

DRAFT

Denaturalization: *U.S. v. Negele*, No. 4:97CV0181OERW (E.D. Mo. 1999), *aff'd*, 222 F.3d 443 (9th Cir. 2000), *cert. denied*, 531 U.S. 1153 (2001)

Deportation; *Matter of Negele*, A7 443 824 (Imm. Ct., St. Louis, Mo. 2002), *aff'd* (BIA 2003), *aff'd*, *Negele v. Ashcroft*, 368 F.3d 981 (8th Cir. 2004), *cert. denied*, 125 S.Ct. 815 (2004)

Oberlander, Helmut **Born:** 1924, Ukraine

Alleged Persecutory Activity: Interpreter assigned to a mobile killing unit

Legal History: A naturalized Canadian citizen, Oberlander entered the U.S. in 1995, the day after Canada commenced denaturalization proceedings. OSI learned of his entry shortly after his arrival and interviewed him. He returned to Canada rather than face a hearing on his admissibility into the U.S. *See* p. 490.

Osidach, Wolodymir **Born:** 1904, Poland

Died: 1981, U.S.

Alleged Persecutory Activity: Member of a Ukrainian police unit which placed Jews in ghettos and forced labor battalions.

Legal History: Denaturalization proceedings commenced in Nov. 1979. (This was OSI's first trial.) The court revoked Osidach's citizenship in Mar. 1981. He died two months later.

U.S. v. Osidach, 513 F. Supp. 51 (E.D. Pa. 1981)

Palciauskas, Kazys **Born:** 1907, Lithuania

Died: 1992, U.S.

Alleged Persecutory Activity: As mayor of Nazi-occupied Kaunas, then the capital of Lithuania, Palciauskas helped implement a Nazi directive ordering all Jews into a ghetto. He also set up a special housing subcommittee which gave Lithuanians homes formerly owned by Jews.

Legal History: Denaturalization proceedings commenced in June 1981. The court revoked Palciauskas' citizenship in Mar. 1983. Appeals were completed in June 1984 and OSI filed a deportation action that September. Palciauskas was ordered deported to the Soviet Union in July 1986. On appeal, the Circuit sent the case back to immigration court for additional findings. Palciauskas died before the findings were made.

Denaturalization: *U.S. v. Palciauskas*, 559 F. Supp. 1294 (M.D. Fla. 1983), *aff'd*, 734 F.2d 625 (11th Cir. 1984)

Deportation: *Matter of Palciauskas*, A7 149 053 (Imm. Ct., Atlanta, Ga. 1986), *aff'd* (BIA 1990), *rev'd in part and remanded, Palciauskas v. INS*, 939 F2d 963 (11th Cir. 1991)

Palij, Jakiw

Born: 1923, Poland (now Ukraine)

Alleged Persecutory Activity: Guard at Trawniki labor camp in Poland; later served in the Streibel Battalion (*see* Bilaniuk)

Legal History: Denaturalization proceedings commenced in May 2002. The court revoked Palij's citizenship in July 2003. OSI filed a deportation action in Nov. 2003 and the court ordered him deported to Ukraine in June 2004. In Sept. 2004, the order was amended to allow deportation to Germany, Poland or any other country willing to accept him. The BIA dismissed his appeal in Dec. 2006.

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Denaturalization: *U.S. v. Palij*, No. CV 02-2802 (E.D.N.Y. 2002)

Deportation: *Matter of Palij*, A7 230 771 (Imm. Ct., N.Y., N.Y. 2004), *aff'd* (BIA 2006)

Paskevicius, Mecis*
(aka Mike Pasker)

Born: 1901, Lithuania

Died: 1993, U.S.

Alleged Persecutory Activity: Member of the Lithuanian Security Police

Legal History: INS filed a denaturalization case in Jan. 1977. Paskevicius' citizenship was revoked in Aug. 1979. OSI filed a deportation action in June 1980. In Dec. 1980, a court adjudged Paskevicius mentally incompetent and the case was discontinued.

Petkiewytsch, Leonid

Born: 1923, Poland

Alleged Persecutory Activity: Civilian guard at a labor education camp in Germany

Legal History: Petkiewytsch never became a U. S. citizen. OSI filed a deportation action in 1985. In Mar. 1987 an immigration judge rejected OSI's claim.

The government appealed and the decision was reversed in May 1990. That decision, in turn, was reversed in Sept. 1991. *See* pp. 134-140.

Matter of Petkiewytsch, A08 857 812 (Imm. Ct., Cincinnati, Ohio 1987), *rev'd*, (BIA 1990), *rev'd, U.S. v. Petkiewytsch*, 945 F.2d 871 (6th Cir. 1991)

Popczuk, Michael **Born:** 1919, Ukraine
Died: 1983, U.S.
Alleged Persecutory Activity: Ukrainian policeman involved in a roundup and forced march of Jews. Witnesses reported that Popczuk harnessed Jews to carts as if they were horses and forced them to haul loads between villages.
Legal History: OSI filed a denaturalization action in June 1983. Popczuk committed suicide six days later.

Quintus, Peter **Born:** 1915, Yugoslavia
Died: 1997, U.S.
Alleged Persecutory Activity: Guard at Majdanak concentration camp in Poland
Legal History: OSI filed a denaturalization action in Mar. 1987. A consent decree revoking Quintus' citizenship was entered in June 1988. Due to Quintus' ill health, the U.S. agreed not to file a deportation action.

U.S. v. Quintus, No. 87-CV-70950-DT (E.D. Mich. 1988)

DRAFT

Reger, Stefan **Born:** 1925, Yugoslavia
Died: 2003, Germany
Alleged Persecutory Activity: Guard at Auschwitz death camp in Poland
Legal History: A denaturalization action was filed in Dec. 1987. Reger left for Germany while the case was pending. The court revoked his citizenship in Sept. 1988.

U.S. v. Reger, No. 87-4906 (CSF) (D.N.J. 1988)

Reimer, Jakob **Born:** 1918, Ukraine
Died: 2005, U.S.
Alleged Persecutory Activity: Trainer and non-commissioned officer at the training camp in Trawniki, Poland; participated in the liquidation of the Jewish ghettos in Lublin, Warsaw and Czestochowa, Poland. Later served in the Streibel Battalion (*see* Bilaniuk)
Legal History: OSI filed a denaturalization case in June 1992. The court revoked Reimer's citizenship in Sept. 2002. The appellate court affirmed in Jan.

2004. Deportation proceedings were begun in May 2005; Reimer died before the case was adjudicated.

U.S. v. Reimer, 2002 WL 32101927 (S.D.N.Y. 2002), *aff'd*, 356 F.3d 456 (2nd Cir. 2004)

Rinkel, Elfriede **Born:** 1922, Germany

Alleged Persecutory Activity: Guard at Rabensbrück concentration camp in Germany. The camp housed only females. Rinkel never became a U.S. citizen. OSI filed a deporation action in May 2006. The case settled, and in June 2006 the court issued an order of deportation to Germany. Pursuant to the terms of the settlement, Rinkel left for Germany in Aug. 2006.

Rudolph, Arthur **Born:** 1906, Germany

Died: 1996, Germany

Alleged Persecutory Activity: Operations Director of the Mittelwerk underground V-2 missile plant, part of the Dora-Nordhausen concentration camp complex in central Germany. The plant used slave labor.

Legal History: The case settled prior to OSI's filing suit. Rudolph went to Germany in Mar.1984 and surrendered his U.S. citizenship two months later. *See* pp. 333-343.

DRAFT

Rydlinskis, Wiatschelaw **Born:** 1924, Lithuania

Alleged Persecutory Activity: Guard and dog handler in the Auschwitz and Buchenwald concentration camps; guard during the evacuation of prisoners from a Buchenwald subcamp to the Dachau concentration camp in Mar. 1945.

Legal History: OSI filed a denaturalization action in Dec. 1994. Rydlinskis left for Germany shortly thereafter and renounced his U.S. citizenship in June 1995. The court entered a default judgment of denaturalization the following month.

U.S. v. Rydlinskis, No. 94C-7341 (N.D. Ill. 1995)

Sawchuk, Dmytro **Born:** 1924, Ukraine

Alleged Persecutory Activity: Armed guard at the Trawniki and Poniatowa labor camps (both in Poland); participated in the 1943 liquidation of the Jewish ghetto in Bialystok, Poland; served at Belzec where he guarded Jews who were forced to exhume and burn corpses; served in the Streibel Battalion (*see* Bilaniuk).

Legal History: OSI filed a denaturalization action in June 1998. Within days, Sawchuck left for Germany and renounced his U.S. citizenship.

Schellong, Conrad **Born:** 1910, Germany

Alleged Persecutory Activity: Served at the Sachsenburg and Dachau concentration camps in Germany. He began as a platoon leader at Sachsenburg and was subsequently given command over approximately 30 of the 100 to 120 guards.

Legal History: OSI filed a denaturalization case in Mar. 1981. The court revoked Schellong's citizenship in Sept. 1982. His appeals were exhausted in Jan. 1984. OSI filed a deportation action Dec. 1983. In Sept. 1984, the court found him deportable to the Federal Republic of Germany. He exhausted his appeals in Apr. 1987. Germany agreed to accept him in Sept. 1988 and he was flown there immediately.

Denaturalization: *U.S. v. Schellong*, 547 F. Supp. 568 (N.D. Ill. 1982), *aff'd*, 717 F.2d 329 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984)

Deportation: *Matter of Schellong*, A10 695 922 (Imm. Ct., Chicago, Ill. 1984), *aff'd*, (BIA 1985), *aff'd, sub nom. Schellong v. INS*, 805 F.2d 655 (7th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987)

Schiffer, Nikolaus **Born:** 1919, U.S

Alleged Persecutory Activity: Guard at the Sachsenhausen, Majdanek and Hersbrueck concentration camps in Germany; served at the SS training and base camp in Trawniki, Poland

Legal History: OSI filed a denaturalization complaint in Sept. 1991. The court revoked Schiffer's citizenship in Aug. 1993 and his appeals were exhausted in July 1994. A deportation action was filed in Feb. 1995. He was ordered deported to Romania in May 1997. Romania agreed to admit him in May 2002 at which time he was deported. *See* pp. 434-435.

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Denaturalization: *U.S. v. Schiffer*, 831 F. Supp. 1166 (E.D. Pa. 1993), *aff'd*, 31 F.3d 1175 (3rd Cir. 1994) (Table)

Deportation: *Matter of Schiffer*, A08 483 627 (Imm. Ct., Philadelphia, Pa. 1997), *aff'd*, (BIA 1998), *aff'd*, (3rd Cir. December 28, 1999)

Schmidt, Michael **Born:** 1923, Romania

Alleged Persecutory Activity: Armed guard at the Sachsenhausen concentration camp in Germany.

Legal History: OSI filed a denaturalization case in Nov. 1988. The court revoked his citizenship in Jan. 1990 and his appeals were exhausted in Oct. 1991. A deportation action was filed the following month. The case settled in May 1992 with Schmidt agreeing to depart by the end of the year. He left for Germany in Jan. 1993. *See* p. 451, n. 49.

Denaturalization: *U.S. v. Schmidt*, 1990 WL 6667 (N.D. Ill. 1990), *aff'd*, 923 F.2d 1253 (7th Cir.), *cert. denied*, 502 U.S. 921 (1991)

Schuk, Mykola **Born:** 1909, Poland

Died: 1986, U.S.

Alleged Persecutory Activity: Served first as deputy and then as interim chief of a Nazi-affiliated police force in Ukraine. One eyewitness accused him of participating in a mass execution of Jews by machine gun fire before an open trench.

Legal History: OSI filed a denaturalization complaint in Feb. 1983. The case settled in Oct. 1985 with the court revoking Schuk's citizenship and the U.S. agreeing not to file deportation proceedings. Schuk agreed to assist the government in its investigations.

Schweidler, Alexander

Born: 1922, Slovakia
Died: 2000, England

Alleged Persecutory Activity: Armed guard at Mauthausen concentration camp in Austria where he murdered two Russian prisoners of war.

Legal History: Schweidler never became a U.S. citizen. OSI filed a deportation action in July 1993. The case settled in Oct. 1993 with Schweidler agreeing to leave the country by Feb. 1994. He went to England. *See* p. 495.

Sokolov, Vladimir

Born: 1913, Russia
Died: 1991, Canada

Alleged Persecutory Activity: Propagandist for a Nazi-run newspaper in the occupied region of the U.S.S.R.

Legal History: OSI filed a denaturalization action in Jan. 1982. Sokolov's citizenship was revoked in June 1986 and he exhausted his appeals in May 1988. OSI filed a deportation action that same month. Shortly thereafter, Sokolov left for Canada. *See* pp. 192-204.

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Denaturalization: *U.S. v. Sokolov*, No. N-92-56-TFM (D. Conn. 1986), *aff'd*, 814 F.2d 864 (2nd Cir. 1987), *cert. denied*, 486 U.S. 1005 (1988)
Deportation: *Matter of Sokolov*, A08 049 043 (Imm. Ct., Hartford, Conn. 1989)

Soobzokov, Tscherim

Born: 1918, Russia
Died: 1985, U.S.

Alleged Persecutory Activity: Soobzokov was not charged with any persecutory activity, but rather with having failed to disclose his complete military and criminal activity at the time of his visa application.

Legal History: A denaturalization complaint was filed in Dec. 1979. The government dismissed the complaint in July 1980 when new information indicated that Soobzokov had made full disclosure. Soobzokov was murdered in Aug. 1985 by someone who believed he was involved in Nazi atrocities. *See* pp. 344-357.

Sprogis, Elmars

Born: 1914, Latvia
Died: 1991, U.S.

Alleged Persecutory Activity: Assistant Chief of Police in Gulbene, Latvia. He was involved in the arrest, transportation, and confiscation of property from nine Jews, the transportation of 100 to 150 Jews to the site of their execution, and the appropriation of furniture from the homes of arrested Jews.

Legal History: A denaturalization complaint was filed in June 1982. The government lost the case both in the district court and on appeal. *See* pp. 101-105.

U.S. v. Sprogis, No. CV-82-1804 (E.D.N.Y. 1984), *aff'd*, 763 F.2d 115 (2nd Cir. 1985)

Stelmokas, Jonas

Born: 1916, Russia

Died: 1998, U.S.

Alleged Persecutory Activity: Platoon commander in the 3rd / 11th Schutzmannschaft, based in Kaunas (Kovno), Lithuania; commander of the guards at the Jewish ghetto in Kaunas. His battalion took part in the massacre of 9,200 Jews in the ghetto.

Legal History: The government filed a denaturalization complaint in June 1992. Stelmokas' citizenship was revoked in Aug. 1995. He exhausted his appeals in May 1997. The government filed a deportation action two months later. Stelmokas was ordered deported to Lithuania in Apr. 1998. He died while that order was on appeal.

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Denaturalization: *U.S. v. Stelmokas*, 1995 WL 464264 (E.D. Pa. 1995), *aff'd*, 100 F.3d 302 (3rd Cir. 1996), *cert. denied*, 520 U.S. 1242 (1997)

Deportation: *Matter of Stelmokas*, A07 272 603 (Imm. Ct., Phila., Pa. 1998)

Szehinskyj, Theodor

Born: 1924, Poland (now Ukraine)

Alleged Persecutory Activity: Guard at the Gross Rosen concentration camp in Germany (now Poland), Sachsenhausen concentration camp in Germany and the Warsaw concentration camp in Poland.

Legal History: OSI commenced denaturalization proceedings in Oct. 1999. Szehinskyj's citizenship was revoked in July 2000 and his appeals were exhausted in Oct. 2002. A deportation action was filed in Sept. 2002 and in Apr. 2003 he was ordered deported to Ukraine, Poland or Germany. That order was affirmed by the BIA in Aug. 2004 and by the Third Circuit in Dec. 2005.

Denaturalization: *U.S. v. Szehinskyj*, 104 F. Supp.2d 480 (E.D. Pa. 2000), *aff'd*, 277 F.3d 331 (3rd Cir.), *cert. denied*, 537 U.S. 880 (2002)

Deportation: *Matter of Szehinskyj*, A8-900-159 (Imm. Ct., Phila., Pa. 2003), *aff'd* (BIA 2004), *aff'd sub nom. Szehinskyj v. Attorney General*, 432 F.3d 253 (3rd Cir. 2005)

Szendi, Jozsef

Born: 1915, Hungary

Died: 2004, Hungary

Alleged Persecutory Activity: As a member of the Royal Hungarian Gendarmerie, Szendi participated in searching for, arresting and transporting Jews to annihilation sites in Poland. In one incident, Szendi participated in a raid on a Swedish facility in search of Jews being hidden in the rescue effort directed by Swedish diplomat Raoul Wallenberg. Finding a group of Jews, Szendi ordered them, at gunpoint, to surrender to his comrades who were massed outside the building and armed with sub-machine guns.

Legal History: The government filed a denaturalization action in Sept. 1992. The case was settled in Feb. 1993. Szendi agreed to leave the U.S. within four months at which time his citizenship would be revoked. He went to Slovakia in June 1993 and later moved to Hungary.

Tannenbaum, Jakob

Born: 1915, Poland

Died: 1989, U.S.

Alleged Persecutory Activity: Supervisory Jewish kapo at the Goerlitz concentration camp in Poland.

Legal History: The government commenced denaturalization proceedings in May 1987. The case settled in Feb. 1988. Tannenbaum relinquished his citizenship and the U.S. agreed not to file a deportation action unless Tannenbaum's health improved. *See* pp. 106-116.

U.S. v. Tannenbaum, No. CV-87-15-5 (E.D.N.Y. 1988)

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Theodorovich, George

Born: 1922, Poland

Alleged Persecutory Activity: As a member of the Ukrainian police, he filed a report acknowledging that he had fired six rounds at Jews who were hiding during a "Jewish action."

Legal History: The government commenced denaturalization proceedings in Aug. 1983. Theodorovich failed to appear for his deposition and the district court entered a default judgment, revoking his citizenship in Jan. 1984. The government began deportation proceedings in Mar. 1984 and Theodorovich was ordered deported to Argentina or the U.S.S.R. in Oct. 1987. He left for Paraguay in Dec. 1988 while the case was on appeal.

Denaturalization: *U.S. v. Theodorovich*, 102 F.R.D. 587 (D.D.C. 1984), *aff'd per curiam*, 764 F.2d 926 (D.C. Cir. 1985)

Deportation: *Matter of Theodorovich*, A06 871 262 (Imm. Ct., Baltimore, Md. 1987), *aff'd*, (BIA 1989)

Tittjung, Anton

Born: 1924, Yugoslavia

Alleged Persecutory Activity: Guard at Mauthausen concentration camp in Austria and one of its subcamps

Legal History: The government commenced

denaturalization proceedings in Sept. 1989. The district court revoked citizenship in Dec. 1990. Tittjung's appeals were exhausted in June 1992. Deportation proceedings were begun the following month. He was ordered deported to Croatia in Mar. 1994. His appeals and collateral attacks were exhausted in June 2001. As of this writing, he remains in the U.S. *See* pp. 437-447. In June 2008, Equipo Nizkor, a Brussels-based human rights organization, asked a Spanish court to indict Tittjung and to seek his extradition from the United States. The case alleges that he was involved in crimes against humanity in the persecution of Spanish nationals imprisoned at Mauthausen.

Trifa, Valerian*

Born: 1914, Romania
Died: 1987, Portugal
Alleged Persecutory Activity: Leader of a fascist student movement and editor of an anti-Semitic weekly newspaper
Legal History: The U.S. Attorney's office commenced denaturalization proceedings in May 1975. OSI assumed responsibility in 1979. The case settled in Aug. 1980 with Trifa agreeing to forfeit his citizenship. Deportation proceedings began in Oct. 1980. Trifa consented to the entry of an order of deportation to Switzerland in Oct. 1982. Switzerland refused to accept him. He went to Portugal in Aug. 1984. *See* pp. 205-230.

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Trucis, Arnolds

Born: 1909, Latvia
Died: 1981, U.S.
Alleged Persecutory Activity: Member of the Latvian Auxiliary Police and the Security Service of the SS which guarded and beat Jewish civilians.
Legal History: A denaturalization action was filed in June 1980. Trucis died before the matter was resolved.

Valkavickas, Vincas

Born: 1920, Lithuania
Alleged Persecutory Activity: Member of Nazi-sponsored Lithuanian auxiliary police who guarded Jews at a former Polish military training area. While he served as a guard, 3,726 Jews were shot to death over a two-day period.
Legal History: Valkavickas entered the U.S. in 1950 but did not apply for citizenship until 1994. Based on information provided by OSI (including information given by Valkavickas himself during an OSI interview), his application for citizenship was denied. The government filed a deportation action in Sept. 1998. Pursuant to the terms of a settlement agreement, Valkavickas left the U.S. for Lithuania in June 1999.

Matter of Valkavickas, A07 900 398 (Imm. Ct., Chicago, Ill. 1999)

Virkutis, Antanas

Born: 1913, Lithuania
Died: 1993, U.S.
Alleged Persecutory Activity: Warden of Siauliai Prison, Lithuania from 1941 to 1944. The prison was used by the Germans as a detention center

for Jews and others, many of whom were brutalized and executed with the cooperation and assistance of prison employees under Virkutis' command.

Legal History: OSI filed a denaturalization action in Mar. 1983. The case settled in Apr. 1988. Virkutis relinquished his citizenship and, due to his deteriorating health, the U.S. agreed not to file a deportation action.

U.S. v. Virkutis, No. 83 C 1758 (N.D. Ill. 1988)

Von Bolschwing, Otto

Born: 1909, Germany
Died: 1982, U.S.
Alleged Persecutory Activity: Working under Adolf Eichmann in the Jewish Affairs Office of the Allgemeine SS, von Bolschwing proposed various repressive measures against the Jews. As chief of Nazi intelligence agents in Romania he provided sanctuary to several fascist leaders and helped arrange their escape to Germany.
Legal History: Denaturalization proceedings commenced in May 1981. The case settled in Dec. 1981. Von Bolschwing forfeited his citizenship and the U.S. agreed not to seek deportation unless von Bolschwing's health improved. *See* pp. 261-272.

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Walus, Frank*

Born: 1922, Germany
Died: 1994, U.S.
Alleged Persecutory Activity: Member of the Gestapo who turned Jews in and, in some cases, murdered them
Legal History: A denaturalization case was filed by the U.S. Attorney's office in Jan. 1977. The district court revoked Walus' citizenship in May 1978. In Feb.1980 the court of appeals remanded for a new trial based on newly-discovered exculpating evidence. Because the evidence did not support the prosecution, the government dismissed the case. *See* pp. 71-100.

U.S. v. Walus, 453 F. Supp. 699 (N.D. Ill. 1978), *remanded*, 616 F.2d 283 (7th Cir. 1980)

Wasylyk, Mykola

Born: 1923, Poland (now Ukraine)
Alleged Persecutory Activity: Guard at Trawniki and Budzyn labor camps in Poland. Later served in the Streibel Battalion (*see* Bilaniuk)
Legal History: OSI commenced denaturalization proceedings in Nov. 1999. The district court revoked his citizenship in July 2001. OSI filed a deportation action in Dec. 2001. In Oct. 2002, the court ordered Wasylyk deported to Switzerland, or, if Switzerland would not accept him, Ukraine. The ruling was affirmed in Mar. 2004. In Sept. 2004, ICE arrested him (without any discussion with, or encouragement from, OSI) for failing to do everything he could to effect his deportation. He was released in August 2005 because the law does not allow unlimited detention.

Denaturalization: *U.S. v. Wasylyk*, 162 F. Supp.2d 86 (N.D.N.Y. 2001)
Deportation: *Matter of Wasylyk*, A07 167 648 (Imm. Ct., N.Y., N.Y. 2002), *aff'd* (BIA 2004)

Wieland, Joseph

Born: 1908, Austria-Hungary (now Yugoslavia)
Alleged Persecutory Activity: Guard at Mauthausen and one of its subcamps
Legal History: OSI commenced denaturalization proceedings in Apr. 1986. Wieland left for West Germany shortly thereafter. In June 1986, the district court entered a default judgment revoking Wieland's citizenship.

U.S. v. Wieland, No. C-86-1750 MHP (N.D. Cal. 1986)

Wittje, Joseph

Born: 1920, Romania
Died: 2006, U.S.
Alleged Persecutory Activity: Guard at the Sachsenhausen concentration camp in Germany
Legal History: OSI commenced denaturalization proceedings in Sept. 2003. In Aug. 2004, the district court revoked Wittje's citizenship. The ruling was affirmed in Sept. 2005 and a deportation case was filed in Apr. 2006.

U.S. v. Wittje, 333 F. Supp.2d 737 (N.D. Ill. 2004), *aff'd* 422 F.3d 479 (7th Cir. 2005)

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Wojciechowski, Chester

Born: 1920, Germany
Alleged Persecutory Activity: Guard at Majdanek concentration camp in Poland
Legal History: OSI commenced denaturalization proceedings in July 1985. Wojciechowski moved to West Germany two years later, before litigation was complete. A consent order of denaturalization was issued in Oct. 1987. *See* p. 307.

Zajanckauskas, Vladas

Born: 1915, Lithuania
Alleged Persecutory Activity: Trained men at Trawniki and participated in the final liquidation of the Warsaw ghetto; he later served in the Streibel Battalion (*see* Bilaniuk)
Legal History: OSI began denaturalization proceedings in June 2002. The district court revoked Zajanckauskas' citizenship in Jan. 2005. The ruling was affirmed in Mar. 2006. Deportation proceedings were begun in July 2006. He was ordered deported to Lithuania in Aug. 2007.

Denaturalization: *United States v. Zajanckauskas*, 353 F. Supp.2d 196 (D. Mass. 2005), *aff'd*, 441 F.3d 32(1st Cir. 2006)
Deportation: **CITE**

Ziegler, Johann **Born:** 1907, Yugoslavia

Alleged Persecutory Activity: Guard at the Kaunas concentration camp in Lithuania and at the Stutthof and Gotenhafen concentration camps in Poland.

Legal History: OSI commenced denaturalization proceedings in June 1990. Ziegler left for Austria in early 1991. A default judgment of denaturalization was entered shortly thereafter.

U.S. v. Ziegler, No. 90-3064-CBM (C.D. Cal. 1991)

Zultner, Martin **Born:** 1912, Romania

Alleged Persecutory Activity: Guard at three Mauthausen subcamps in Austria

Legal History: Zultner was a naturalized U.S. citizen living in Austria when OSI commenced denaturalization proceedings in Aug. 1990. Two weeks later Zultner renounced his citizenship at the American consulate in Salzburg. His renunciation was approved by the State Department in Oct. 1990, at which point the government withdrew its complaint.

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Glossary of Acronyms and Foreign Terms

AAG	Assistant Attorney General
Abwehr	German military intelligence
ADL	Anti-Defamation League
AK	Arajs Kommando – the Latvian Auxiliary Security Police
BDC	Berlin Document Center
BIA	Board of Immigration Appeals
CAT	Convention Against Torture
DAAG	Deputy Assistant Attorney General
DCM	Deputy in Charge of Mission (at U.S. embassy)
DHS	Department of Homeland Security
DOD	Department of Defense
DOJ	Department of Justice
DOS	Department of State
DPA	Displaced Persons Act
DPC	Displaced Persons Commission
DHS	Department of Homeland Security
EU	European Union
FOIA	Freedom of Information Act
FRG	Federal Republic of Germany (West Germany)
GDR	German Democratic Republic (East Germany)
ICE	Immigration and Customs Enforcement

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INA	Immigration and Nationality Act
INS	Immigration and Naturalization Service
IRO	International Refugee Organization
IWG	Interagency Working Group
JCR	Commission on European Jewish Cultural Reconstruction
JDL	Jewish Defense League
JDO	Jewish Defense Organization
LPP	Latvian Political Police
Ludwigsburg Zentrale Stelle	repository for records from war crimes trials held in Germany
MFN	Most Favored Nation
MOU	Memorandum of Understanding
NSC	National Security Council
NSDAP	Nazi Party
NYO	New York office
OIA	Office of International Affairs
OIL	Office of Immigration Litigation (DOJ)
Omakaitse	Estonian Self Defense Unit which worked with the Nazis
OPC	Office of Policy Coordination (CIA)
OPR	Office of Professional Responsibility (Department of Justice)
OSI	Office of Special Investigations
OSS	Office of Strategic Services (predecessor to the CIA)

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RCMP	Royal Canadian Mounted Police
Rech	Russian-language newspaper published by the Germans after they invaded the U.S.S.R.
RFE	Radio Free Europe
RIS	Romanian Intelligence Service
RRA	Refugee Relief Act
RSHA	Reich Security Main Office
SA	Nazi storm trooper
SD	Intelligence gathering arm for the Nazis
SIU	Special Investigations Unit (Australia)
SLU	Special Litigation Unit, predecessor of OSI
Saugumas	Lithuanian Security Police
Stasi	East German secret police
SWC	Simon Wiesenthal Center
TGC	Tripartite Gold Commission

Totenkopf (Death's Head) battalion – organization whose members served as guards at Nazi concentration and death camps

UNCHR	United Nations Commission on Human Rights
UNWCC	United Nations War Crimes Commission
USAO	United States Attorney's Office
VFW	Veterans of Foreign Wars
Wehrmacht	German Army
WJC	World Jewish Congress

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