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An Introduction to the Work of the Office of Special Investigations

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I. Introduction

I am pleased and grateful that the editors of *USA Bulletin* have solicited a series of articles on the work of the Criminal Division's Office of Special Investigations (OSI). For some readers, much of this material will be familiar. For most, however, it will no doubt represent a first encounter with OSI's work.

The 20th Century has been termed "The Age of Atrocity" and also "The Age of Impunity." It surely is not hard to see why. Between 1900 and 1987 alone, it is estimated that governments and government-like organizations murdered 169 million civilians. Yehuda Bauer, *Rethinking the Holocaust*, 262 YALE U. PRESS (2001). That deeply shocking statistic, to say nothing of the continuation of the slaughter into the current century, speaks volumes about the need for systematic and aggressive law enforcement action to identify and bring to justice the perpetrators of crimes against humanity.

Throughout the quarter-century of its existence, OSI, which was created in 1979 by Attorney General Order, has been taking just such action and, I believe, securing a significant measure of justice in cases of egregious human rights violations–specifically, Nazi and Imperial Japanese crimes of persecution. *See* Order No. 851-79. Although the United States Constitution precludes the institution of criminal prosecutions based on the underlying offenses committed abroad during and before World War II, it has been possible to bring civil denaturalization and deportation/removal actions, and, in the few instances in which foreign governments have requested extradition, to commence extradition proceedings. The goal has been to remove the perpetrators to countries that possess criminal jurisdiction.

During the past twenty-five years, OSI and its United States Attorneys' Offices partners have won cases against 101 participants in Nazi crimes against humanity–a total that exceeds the number of such cases won during that period by all other governments of the world combined. To date, sixty of these individuals have been removed from the United States, helping to vindicate the principle that the United States, which has long provided haven to the victims of persecution, will grant no sanctuary to the perpetrators of such cruelties. The defendants have included senior level perpetrators such as Andrija Artukovic (Justice Minister and Interior Minister of Axis Croatia), Figures 1 and 2 (found on page 35), and Otto Albrecht von Bolschwing (an advisor to Adolf Eichmann, the SS official entrusted with carrying out the mass murder of Europe's Jews), Figure 3 (found on page 35), as well as mid-level offenders such as Conrad Schellong (an SS guard supervisor at the Dachau concentration camp). Figures 4 and 5 (found on page 35).

Other defendants have included what might be termed the trigger-pullers of the Holocaust, such as George Theodorovich (who admitted under questioning by OSI attorneys that he was indeed the author of the wartime handwritten "bullet reports" obtained from archives in the then-Soviet Union, reports in which he accounted to his superiors for ammunition he had used shooting Jews in Nazi-occupied L'viv, Ukraine). Interview with George Theodorovich, by then-OSI Director Neal M. Sher and the author, Philadelphia, Pa. (Dec 17, 1982). Another such defendant, Alexander Schweidler, was a Mauthausen SS concentration camp guard and dog handler who, as captured SS documentation reflected, shot Allied prisoners of war to death there in 1942. Figure 6 (found on page 35). *See* SS report dated April 29, 1942, signed by Schweidler; source: German *Bundesarchiv* [Federal Archives].

Despite the lateness of the date, OSI's World War II-era caseload remains a relatively heavy one, with nearly twenty of these uniquely challenging matters still in litigation throughout the United States and dozens of suspects

remaining under active investigation by our small office (eight prosecutors, ten investigative historians/country analysts, and eleven support personnel).

With the recent expansion of OSI's denaturalization responsibilities to encompass naturalized U.S. citizens who participated in certain postwar human rights violations abroad, we look forward to being able to continue to count on the women and men of the U.S. Attorneys' Offices for the wise counsel, steadfast dedication to mission, and stellar prosecutorial skills that have so often proved invaluable in our joint pursuit of justice on behalf of the victims of Nazi inhumanity. In these human rights violator cases, which concern some of the most tragic and horrific events of modern history, OSI is eager to receive referrals from U.S. Attorneys' Offices, and we encourage the active participation of Assistant United States Attorneys (AUSAs) in both the development and prosecution of these challenging cases.

This article is intended to provide a brief introduction to OSI's history, functions, updated mission, and the results that have been obtained in the World War II cases. Other articles in this issue will expand on some of the topics introduced here.

II. Background

Prior to OSI's 1979 creation, the federal government's efforts in the Nazi cases were handled principally by the former Immigration and Naturalization Service (INS). However, in large part because the government did not marshal the historical and other highly specialized expertise necessary for successful investigation of these complex cases, its efforts met mostly with failure. In the thirty-four years between the end of World War II and the establishment of OSI, just one Nazi persecutor was denaturalized (Hermine Braunsteiner-Ryan), and she and just one other Nazi persecutor (Ferenc Vajta) were removed from the United States. Numerous other cases were lost. Congressional hearings in 1977-78 and two General Accounting Office studies documented this history and also established that several federal agencies had even employed Nazi suspects and provided immigration assistance to some of them. In a May 1978 report, the GAO stated that federal "investigations of most cases before 1973 were deficient or perfunctory" and that "[i]n some, no investigation was conducted." The report added, "There have been no successful prosecutions since 1973." Report by the Comptroller General of the United States, WIDESPREAD CONSPIRACY TO OBSTRUCT PROBES OF ALLEGED NAZI WAR CRIMINALS NOT SUPPORTED BY AVAILABLE EVIDENCE -- CONTROVERSY MAY CONTINUE 40 (GAO, May 15, 1978).

In 1979, Associate Attorney General Michael J. Egan announced that the INS unit set up in July 1977 to pursue the Nazi cases (the Special Litigation Unit, or SLU) would be transferred to the Justice Department's Criminal Division. In testimony before the House Immigration Subcommittee in March 1979, Egan stated that the SLU had been created "[a]fter at least 25 years of inaction and indifference by prior administrations, the Immigration and Naturalization Service, and the Congress." Nevertheless, he acknowledged that the SLU had "not worked out as we had hoped." Prepared Statement of Associate Attorney General Michael J. Egan before the Subcommittee on Immigration, Refugee and International Law, House Committee on the Judiciary, Concerning INS Authorization, Mar. 28, 1979. In subsequent testimony before that subcommittee in 1980, Assistant Attorney General Philip Heymann acknowledged that the Nazi cases had been mishandled in the past by the executive branch, adding that the matter had become "something of a national scandal." Testimony quoted in *Request for Money to Hunt Nazis Defended*, by Michael J. Sniffen, The Associated Press, Mar. 19, 1980.

The SLU's transfer to the Criminal Division of the Department of Justice (Department) was accomplished through Attorney General Order No. 851-79. Pursuant to that Order, OSI was created and it was assigned responsibility for carrying out all of the investigative and prosecutorial activities of the Department involving individuals who, in association with the Nazi Government of Germany and its allies, ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion between 1933 and 1945. Since 1979, OSI has been responsible for detecting, investigating, and taking legal action to denaturalize and deport/remove such individuals or prevent them from entering the United States. In 1979, these were already the ultimate "cold cases." Despite enormous initial skepticism–within and without the federal

government–that it was possible to prove these complex cases decades after the events in question, and to do so in U.S. courts located thousands of miles from the scenes of the crimes, the Department has been able to prevail in the vast majority of these prosecutions. The program's success has consistently won the U.S. Government an "A" rating in the annual report on worldwide law enforcement activity in the Nazi cases issued by the Simon Wiesenthal Center (named after the famed Vienna-based Nazi-hunter)–the only government in the world ever to achieve this rating.

In discharging its responsibility, pursuant to the Attorney General's 1979 Order, to enforce the provisions of U.S. law that bar persons who were involved in Nazi/Axis persecution from entering the United States (either as immigrants or as visitors), OSI has compiled and added the names of nearly 70,000 suspected Axis persecutors to the visa denial and border control "watchlists" maintained by the Department of Homeland Security (DHS) and the Department of State (State). World War II suspects whose names have been incorporated in this interagency database continue to attempt to visit this country. To date, more than 170 suspects have been denied entry at airports and other U.S. ports of entry.

In addition, OSI routinely handles inquiries from State regarding applicants for U.S. visas and from DHS regarding applicants for naturalization. Over the years, OSI has also undertaken various special projects, among them representing the U.S. Government in a joint German-Israeli-American effort to trace and apprehend the infamous Auschwitz selector and experimenter Dr. Josef Mengele, Figures 7 and 8 (found on page 36), conducting investigations into U.S. intelligence utilization of former Lyon Gestapo chief Klaus Barbie, Figure 9 (found on page 36), and other Nazi criminals, and performing research into the fate of gold, artwork, books, and other valuables looted by the Nazis from their victims.

In recognition of the actuarial reality that the World War II prosecutions will inevitably come to an end, and in the expectation that skills developed at OSI in the Nazi cases could be successfully applied in other cases of crimes against humanity, support developed in recent years for applying OSI's expertise to modern-day human rights violators cases. The Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004), which was signed by the President in December 2004, Figure 10 (found on page 36), provided OSI jurisdiction for investigating and taking legal action to denaturalize any naturalized U.S. citizen who participated abroad in acts of genocide or, acting under color of foreign law, in acts of torture or extrajudicial killing. The Act also mandated the exclusion and removal of such persons, responsibilities that are discharged by the Departments of State and Homeland Security.

III. Misconceptions about OSI

During my many years of answering journalists' questions and responding to inquiries from members of the public, I have been struck by the persistence of major misconceptions about OSI and its work. Some of the more important of these misapprehensions are addressed below.

A. Initiation of investigations

Perhaps in large part as a result of fanciful portrayals of "Nazi-hunting" commonly found in novels and motion pictures, it is widely believed that OSI's Nazi prosecutions originate in investigations prompted by tips from private "Nazi hunters" and other concerned individuals, including victims who have encountered and recognized their former tormenters in the United States. However, with one exception, the many hundreds of tips to OSI from such sources have never resulted in viable prosecutions. The lone exception involved Jacob Tannenbaum, a brutal "*kapo*" (a specially privileged prisoner who supervised other prisoners for the Nazis) who was recognized by a fellow former concentration camp inmate. In fact, more than two-thirds of the prosecutions initiated by the office since its 1979 creation have resulted from proactive investigative actions taken by OSI staff to identify perpetrators in the United States. All but four of the remaining prosecutions were based on referrals from European governments or from other U.S. Government agencies.

B. Investigative methodology

The vast majority of OSI's prosecutions over the past twenty-five years trace their origin to a long-running project that OSI launched in the early 1980s to attempt to locate surviving Axis records. These include, but are not limited to, SS concentration camp guard rosters, postwar wanted

lists, and other documents from which the unit's investigative staff might gather names of individuals who could reasonably be suspected of having participated in wartime crimes. To date, this effort has enabled OSI to identify more than 70,000 such potential suspects. By methodically checking all of these names against U.S. immigration records and other domestic records, the unit has identified hundreds of suspects who came to this country.

When such an individual is identified and is confirmed to be alive, OSI's investigation-in-chief begins. These investigations are unconventional in a number of respects. Most notably, whereas a traditional law enforcement investigation is a "whodunit" that begins with a crime and attempts to identify the perpetrator(s), an OSI investigation typically begins with a suspect, and the assignment is to determine what, if any, crimes can be attributed to that individual. Of course, proving what a suspect did more than half a century ago is a daunting challenge, and in the overwhelming majority of cases, no incriminating evidence can be found.

It is often assumed that OSI works its World War II investigations and prosecutions extensively with outside law enforcement agencies such as the FBI and DHS' Bureau of Immigration and Customs Enforcement (ICE). In fact, with respect to the Axis persecution cases, OSI is unique within the Department's Criminal Division (and unusual in general among prosecution units in the United States) in that it handles substantially all of the trial, appellate, and investigative work associated with its cases on an in-house basis. The unit does call on other federal agencies for assistance in forensic document examination, DNA analysis, and other technical specialties. Moreover, prosecutors from the U.S. Attorneys' Offices are always welcome to assume significant litigation responsibilities alongside OSI attorneys, and in some instances AUSAs have done so. As will be detailed in a subsequent article, OSI's work on the modern human rights violator cases will involve significant interaction between OSI and other federal agencies, particularly ICE.

A unique aspect of OSI's operating methodology is its use of staff historians to conduct the bulk of the investigative work. There is surprisingly little need in the World War II cases for traditional "gumshoe" detective work, owing especially to the impossibility of finding living eyewitnesses in most cases. As OSI investigations and prosecutions tend to be extremely document-intensive (that is, most cases are proved principally through such evidence as captured wartime rosters and reports), historians are the ideal agents for conducting the necessary archival research. OSI's historians, who collectively possess fluency in nine pertinent foreign languages, are experts at tracking down the surviving fragments of Nazi documentation and related records in archives throughout the world, and interpreting them in order to make possible the partial reconstruction of the wartime whereabouts and activities of OSI's subjects. More than one such individual has responded to his OSI attorney questioner, in frustration and evident amazement, with a variant of "You seem to know more about what happened back then than I do!"–a tribute, albeit an unintentional one, to the remarkable work performed by OSI's staff historians.

C. Caseload

Another common misconception regarding OSI relates to the volume of its caseload. The seemingly logical deduction that OSI's work has steadily dwindled over the years is actually incorrect. The 1990s brought an unexpected increase in OSI's workload. During 1994, for example, the unit filed seven new cases in federal courts, its highest single-year total in a decade. In 2002, OSI commenced ten new prosecutions, its highest-ever single-year total. *The Atlanta Jewish Times* termed this "an incredible feat considering the fact that most participants in the Nazi atrocities are now well into their seventh or eighth decade." Amy Keller, *Nazi Hunters Race the Grim Reaper,* THE ATLANTA JEWISH TIMES 11 (Feb. 6, 2004).

The principal reason for this escalation in activity was the dissolution of communist rule in eastern and central Europe, which resulted in the opening up to OSI investigative personnel of archives previously sealed by communist authorities in the former Soviet Union and its satellite countries. These archives house what is probably, in the aggregate, the largest collection of captured Axis documentation extant. This wealth of evidence suddenly and unexpectedly became available as the Cold War ended, and OSI's multilingual investigative personnel, like their counterparts in other countries, are involved in an unprecedented race against the clock to examine as many of these records as possible.

These newly available records have enabled OSI to build compelling cases against existing suspects and also to locate additional suspects in the United States.

Contributing to the record level of prosecutorial activity in recent years are several factors.

- Continuing refinement of OSI's information management systems and other computerized systems employed in its investigative work.
- Increased investigative cooperation from foreign governments.
- Development of enhanced historical understanding of hitherto little-known Nazi operations through a steady accumulation of the fruits of investigative research over the years.
- In the World War II investigations, as in any series of complex investigations, the occasional stroke of good luck.

D. Burden of proof

Another frequently voiced misconception regarding the World War II cases relates to the burden of proof borne by the government in these prosecutions. As these are civil cases rather than criminal ones, it is commonly believed that the civil "preponderance of the evidence" standard applies, as opposed to the much higher "beyond a reasonable doubt" standard applicable in criminal cases. In fact, denaturalization and removal cases must be proved by "clear, unequivocal and convincing evidence that does not leave the issue in doubt," a standard that the Supreme Court has ruled is "substantially identical" to the criminal beyond a reasonable doubt standard. *Klapprott v. United States*, 335 U.S. 601, 612 (1949).

IV. Other functions performed by OSI

In addition to investigating and prosecuting denaturalization and removal cases involving World War II-era Axis persecutors, OSI continues to bear other significant responsibilities, key examples of which are described below.

A. Assisting in exclusion of Axis perpetrators

As noted above, OSI assists DHS and the Department of State in screening applicants for entrance to the United States and petitioners for naturalization as U.S. citizens. Even at this late date, OSI usually receives one or more calls each month from DHS Customs and Border Protection (CBP) immigration inspectors at U.S. airports seeking assistance because individuals whose names OSI has contributed to the interagency border control/visa denial "watchlist" system have arrived on a flight from abroad. As these individuals are seeking immediate entrance to the United States, a premium is placed on OSI's ability to provide pertinent information to the inspectors swiftly and on a 24/7 basis.

Among the perpetrators recently prevented from entering the United States was Franz Doppelreiter, a convicted Nazi criminal who was stopped in late 2004 at Atlanta's Hartsfield-Jackson International Airport and admitted under questioning at the airport that he had physically abused prisoners at the notorious Mauthausen concentration camp while serving in the SS. Interview by U.S. Customs and Border Protection immigration inspector [name cannot be divulged] with Franz Doppelreiter, convicted Nazi criminal, in Atlanta, Ga. (Nov. 24, 2004). The best known instance of an individual who has been barred from entry as a result of OSI investigation is Kurt Waldheim, the former Secretary General of the United Nations and later President of Austria. Figures 11 and 12 (found on page 36). (OSI's report on the Waldheim matter was released to the public and is available at http://www.usdoj.gov/criminal/publicdocs/11-1prior/crm14.pdf).

An accompanying article describes in detail how OSI discharges its responsibility under the 1979 Attorney General Order for helping to enforce the provisions of the 1978 U.S. law that bars persons who were involved in Nazi/Axis persecution from entering the United States.

B. Cooperating with foreign governments

OSI, in coordination with the Department of State, offers extensive assistance to foreign governments in their investigations and prosecutions of suspected Nazi criminals, and encourages governments to launch such

investigations and prosecute perpetrators. In many instances over the past two decades, this has involved undertaking extensive efforts to persuade foreign governments to take law enforcement action despite initial reluctance to prosecute, or even to investigate, any Nazi cases. In one instance, OSI dispatched attorneys to work with prosecutors for two weeks in a European capital, with the result that war crimes charges were brought against a former officer in a Nazi killing squad. The Simon Wiesenthal Center has publicly commended the Department for its longtime efforts to "facilitat[e] the prosecution of such [Nazi] criminals in other countries." Simon Wiesenthal Center, NAZI WAR CRIMINALS PROSECUTION - ANNUAL STATUS REPORT, 8 (Apr. 19, 2001).

C. Representing the Department in WWII-related interagency projects

In addition to its independent efforts to locate significant information related to Axis criminals and their crimes and disclose this to the public–as reflected most notably in OSI's publicly issued reports on the fate of Auschwitz perpetrator Dr. Josef Mengele, Figures 7 and 8, and on U.S. intelligence utilization of former Lyon Gestapo chief Klaus Barbie, Figure 9, and other Nazi criminals–OSI has participated in a variety of interagency projects that have sought to gather and make public information on Nazi crimes and their aftermath that had long been withheld or was otherwise unknown to scholars and the general public.

In one such instance, OSI served as the lead Department component in a presidentially ordered interagency effort commenced in 1996 to trace the fate of victim assets looted by the Nazis, including gold that had been ripped from the mouths of civilians murdered in the concentration camps. OSI's research at the U.S. National Archives and elsewhere succeeded in finding the long-elusive proof that Holocaust victim-origin gold was transferred by Germany to Switzerland during the war and was included in gold that was shipped to the Tripartite Gold Commission (TGC) by U.S. occupation authorities in postwar Germany, for distribution to European central banks. This discovery led directly to the liquidation of some sixty million dollars' worth of so-called residual gold by the TGC, and the distribution of the proceeds to needy Holocaust survivors throughout the world. (Indeed, these were the very first compensatory funds to be received by Holocaust survivors in the wake of the international community's "rediscovery" in the 1990s of the Nazis' crimes of despoliation.)

In the course of its research, OSI also found captured German documents revealing that the Nazis devised and implemented a secret program of shipping jewelry taken from Jews to Switzerland. This jewelry (explicitly identified in the documents as "Jewish jewelry") was sent by diplomatic pouch to the German legation in Berne, where it was retrieved by a German agent who then used it to purchase industrial diamonds essential to the German war effort. *See, e.g.,* captured Feb. 1, 1943, report of German Foreign Minstry official Ernst Rademacher, United States National Archives, Microform Series T120, Roll No. 1003, Frame 394154. OSI staff also succeeded in tracing the surviving records of the Reichsbank Precious Metals Department, which had been unseen for nearly five decades. In September 1997, the members of OSI's "Holocaust Assets" team received the Assistant Attorney General's Award for Special Initiative, in recognition of their accomplishments.

The public report of the interagency group was released in May 1997 to widespread domestic and international acclaim, and it was commended for elements that were directly attributable to OSI's involvement. These included the landmark tracing of victim-origin gold to Switzerland and the postwar Allied gold pool, and the disclosures concerning 1946 executive branch responses to Congressional inquiries regarding postwar negotiations with Switzerland for the surrender of looted gold. A second interagency report was released in June 1998. It focused primarily on the wartime and postwar conduct of Sweden, Spain, Portugal, Turkey, and Argentina, as well as on allegations that gold of the wartime Axis government of Croatia had been transferred to the Vatican.

In December 1998, OSI completed a preliminary investigation of the holdings of the National Gallery of Art in Washington, D.C. OSI advised the Gallery that four works, including *Still Life with Fruit and Game* by the 17th century Flemish artist Frans Snyders, were possibly identical to works that were looted by the Nazis and found listed by OSI in postwar Office of Strategic Services (OSS) reports of still-missing artworks. (OSI's probe began by comparing the names of works listed in postwar records of the

former OSS as missing with works listed on the Gallery's website.) In November 2000, the National Gallery announced that it would return the Snyders painting to the French Jewish family from which it was looted by the Nazis during the Second World War.

Following enactment in October 1998 of the Nazi War Crimes Disclosure Act, Pub. L. No. 105-246, 112 Stat. 1859 (1998), OSI undertook major responsibility within the newly-established Nazi War Criminal Records Interagency Working Group (IWG). OSI was to assist in the unprecedented government-wide effort to locate, declassify, and disclose to the public, classified documents pertaining to Nazi criminals and to transactions in plundered assets of Holocaust victims. This compliance effort is continuing at this writing. It constitutes the largest search-declassify-and-disclose operation in history. To date, more than 100 million documents, found at the CIA, FBI, Department of Defense, Department of Justice, and other agencies, have been screened for relevance, and more than eight million of them–some containing information of great historical importance–have been found relevant and have been declassified for public release.

D. Assistance to U.S. Attorneys' Offices

In light of its expertise in complex denaturalization cases and its experience in World War II human rights abuser cases, OSI has occasionally been called upon in recent years to provide assistance to U.S. Attorneys' Offices in criminal naturalization fraud and civil denaturalization cases against suspected terrorists and other post-World War II human rights violators. U.S. Attorneys' Offices are encouraged to call upon OSI whenever situations arise in which it is believed that our assistance might be helpful.

V. The new jurisdiction

OSI's currently elevated activity level notwithstanding, it is clear that the World War II investigation/prosecution program will eventually be phased out as the pool of suspects and the community of witnesses inevitably shrink over time. However, the December 2004 intelligence reform bill ensured that the unit would have important work to do for the foreseeable future.

Beginning in the late 1990s, media reports identified multiple alleged human rights violators living in the United States, and human rights groups charged that many such individuals had managed to immigrate to the United States. *See, e.g.*, Amnesty International, UNITED STATES OF AMERICA: A SAFE HAVEN FOR TORTURERS (2002). Allegations that the United States has become home to a large number of aliens and naturalized citizens who participated in war crimes, crimes against humanity, torture, and other serious human rights violations abroad before immigrating to the United States attracted congressional and scholarly attention. *See, e.g.*, S. REP. NO. 108-209, at 1-5 (2004) (in support of S.710, the Anti-Atrocity Alien Deportation Act of 2003), Nov. 24, 2003, at 1-5; William J. Aceves and Paul L. Hoffman, *Using Immigration Law to Protect Human Rights: A Legislative Proposal*, 20 MICH. J. INT'L LAW 657 (1999).

The Intelligence Reform and Terrorism Prevention Act of 2004, *supra*, signed into law by the President on December 17, 2004, provided OSI jurisdiction for detecting, investigating, and bringing denaturalization actions against persons who participated at any time outside the United States in genocide or, when committed under color of law of a foreign nation, torture, or extrajudicial killings. This expansion of OSI's mission ensures that the unit and its partners in the USAOs, DHS, FBI, and other agencies will have much important work to do for the foreseeable future. Since receiving this new assignment, OSI has moved swiftly to establish the new program, and looks forward to working with the U.S. Attorneys' Offices in this important endeavor.

VI. Conclusion

Over the past twenty-five years, the Office of Special Investigations has amassed considerable expertise in World War II human rights violator cases, and it has applied that expertise primarily in the litigation of complex denaturalization and removal cases against Nazi criminals. The Office's resources have also been deployed in aid of the efforts of other government agencies, including other Department components, to pursue law enforcement, and remunerative and/or historical justice in matters related to Axis crimes, as well as in matters wholly unrelated to those ghastly crimes. It is hoped that this quarter-century of human rights and denaturalization experience, and the outstanding relationships that OSI has built

during this period with the U.S. Attorneys' Offices in particular, will serve the unit and the public well as OSI transitions into prosecuting the modern human rights violator denaturalization cases. It is further hoped that the information presented in the foregoing account and in the articles that follow will help promote expanded cooperation between the United States Attorneys' Offices and OSI in these important cases.❖

ABOUT THE AUTHOR

❑**Eli M. Rosenbaum** served as a trial attorney at the Office of Special Investigations from 1980 to 1984. Following turns as a corporate litigator with Simpson Thacher & Bartlett in New York City and as general counsel of an international human rights organization headquartered in the same city, he returned to OSI as Deputy Director in 1988. In 1995, he was appointed Director of that office. BETRAYAL, his book on the Kurt Waldheim affair, was published by St. Martin's Press. He has taught finance at the Wharton School and has lectured widely on OSI's work.✠

OSI's Prosecution of World War II Nazi Persecutor Cases

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I. Introduction

For the first quarter-century of its existence, the Office of Special Investigations (OSI) was tasked solely with detecting, investigating, and taking legal action to denaturalize and/or deport individuals who, in association with the Nazi Government of Germany and its allies, ordered, incited, assisted, or otherwise participated in the persecution of civilians because of race, religion, national origin, or political opinion. In December 2004, the scope of OSI's work was greatly expanded by the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, 118 Stat. 3638. OSI, however, still devotes a very significant portion of its time and resources to investigating and prosecuting those who assisted the Nazis in their genocidal reign of terror.

OSI fulfills its responsibilities in the World War II cases in three ways.

- Suits are brought in federal district courts seeking to revoke the United States citizenship of individuals implicated in the Nazis' persecution of civilians, such as the mass murder of Jews and other crimes against humanity.
- Removal actions are commenced in United States immigration courts to remove noncitizens or former citizens from the United States because of their assistance or participation in persecution of civilians during World War II.
- A border control "watchlist" is maintained and enforced to prevent suspected Axis persecutors from entering the country.

To date, OSI has won cases against 101 individuals who assisted in Nazi persecution. In addition, over 170 suspected European and Japanese World War II perpetrators who sought to enter the United States in recent years have been blocked from doing so as a result of OSI's "Watch List" program.

II. OSI: "all under one roof"

The specialized expertise that OSI has developed allows it to handle the investigation, trial, and appeal of its cases in-house. OSI works closely with the U.S. Attorneys' Offices in the districts in which its cases are brought, and, in some of these cases, Assistant U.S. Attorneys have, at their request, played an active role in the litigation. OSI has also called upon other federal agencies to provide forensic document examination, DNA analysis, and other technical and scientific services.

From an evidentiary perspective, OSI cases are extremely complex. OSI must prosecute cases based on events that transpired more than sixty years ago, in places thousands of miles away from the United States. Given the passage of time, and the routine lack of access to fingerprints, eyewitness testimony, ballistics data, and other forms of evidence commonly used by prosecutors, OSI typically must rely on the written records of the Third Reich and other Axis regimes to successfully prosecute its targets. This unique and highly challenging situation has necessitated the hiring of historians with expertise in the Holocaust and the Third Reich. The historians are at the heart of OSI's investigative efforts in the World War II cases.

III. Investigation

While OSI historians engage in a variety of tasks throughout the course of investigation and litigation, their principal task is to locate and review wartime documents and postwar investigative records housed in various archives and document centers throughout Europe and the United States. They reconstruct the whereabouts and activities of OSI's subjects. This painstaking and tedious task is absolutely essential to establishing the grounds for civil prosecution. OSI historians scour concentration camp rosters, transfer orders, incident reports, personnel records, and similar documentation, often written in German or in East European languages, and collect data on individuals mentioned in each document. OSI staff then compares the names, dates of birth, and any other available biographical data, with United States immigration records to ascertain whether any of the individuals mentioned in the Nazi documents immigrated to the United States. Other identifying data on the wartime documents, such as an individual's hometown or parents' names–all of which also appear on an individual's immigration records–confirms that the individual identified on the wartime documentation and the one identified in U.S. immigration records are one and the same. Some think that OSI's cases trace their origin to tips from self-styled "Nazi-hunters," or from the Holocaust victims who recognize their former tormentors in chance encounters in the United States. Virtually all of the prosecutable cases, however, have originated either with allegations made by European governments (during the first years of OSI's existence) or have resulted from the process of comparing names of Axis personnel with U.S. immigration and other government records. To date, OSI has identified more than 70,000 such potential suspects and checked their names against domestic records.

When OSI locates a suspected Nazi persecutor who resides in the United States (or lives abroad as a U.S. citizen), the historian working on the investigation (under the direction of an OSI attorney) will attempt to develop sufficient evidence to establish that the individual assisted, or otherwise participated, in the persecution of civilians because of race, religion, national origin, or political opinion. The additional investigation generally requires extensive research into the individual's wartime history, whereabouts, or into the activities of the Nazi-controlled unit in which the individual allegedly served.

OSI's attorneys' principal contributions to the investigative process include interviewing Holocaust survivors, who can at least attest to the persecution they suffered at a particular location even if they cannot identify the persecutors by name or face. OSI attorneys also contribute to the process by questioning the subjects. For example, Jacob Reimer, Figures 13 and 14 (found on page 37), admitted to an OSI attorney during a 1992 interview in Manhattan, that he led his platoon on a mission to "exterminate a labor camp" and that he fired his weapon during the killing operation while serving as a noncommissioned officer in a Nazi unit in Poland. Interview by Neal Sher and Eli Rosenbaum with Jacob Reimer, New York, NY (May 1,1992). During a 2003 interview in Wisconsin, Josias Kumpf admitted to OSI attorneys that, while serving in the SS in 1943, he stood guard during the mass shootings that accomplished the liquidation of the Jewish labor camp at Trawniki, Poland, for the specific purpose

of preventing prisoner escapes. Interview by Michelle Heyer and Stephen Paskey with Josias Kumpf, Racine, Wisconsin (Mar. 24, 2003). As he later elaborated at deposition, "I was watching them shoot some people and some of them come out and run away again. . . . Some people was [sic] shot and not good enough so they was [sic] still able to move, you know. That's what we have to watch outside so that they don't go no place." Deposition of Josias Kumpf, Milwaukee, Wisconsin (May 26, 2004), at 74.

OSI's caseload has not abated despite the inevitable decrease in the number of persecutors who remain alive. This is primarily due to the dissolution of communist rule in eastern and central Europe in the 1990s and the subsequent opening of archives in the former Soviet Union and its satellite countries to OSI historians. As the vast majority of OSI subjects served the Nazis in areas ultimately taken by Soviet forces in 1945, these archives house what is almost certainly, in the aggregate, the largest collection of captured Axis documentation extant. Given the advanced age of OSI subjects, the unit's in-house historians are engaged in an unprecedented race against the clock to locate and examine pertinent materials among these vast collections of documents and help construct, where possible, prosecutable cases.

IV. Denaturalization

If an alleged Nazi perpetrator has become a naturalized U.S. citizen, the first step is to bring suit in federal court to obtain an order revoking citizenship. These denaturalization proceedings are initiated by filing a civil complaint in the U.S. District Court in the district in which the individual currently resides. The complaint is filed jointly by OSI and the United States Attorney. The defendant in a denaturalization proceeding is not entitled to a trial by jury. Instead, a federal judge hears the evidence and decides whether the government has presented sufficient evidence to support the defendant's denaturalization. Given that the "right to acquire American citizenship is a precious one," the government must meet a "heavy burden" in order to establish the conditions necessary for denaturalization. *Fedorenko v. United States*, 449 U.S. 490, 505 (1981). The government's burden of proof–clear, unequivocal, and convincing evidence that does not leave the issue in doubt–is substantially identical to the "beyond a reasonable doubt" burden imposed on the government in criminal cases. *Klapprott v. United States*, 335 U.S. 601, 612 (1949).

Unlike the situation encountered in criminal cases, however, both sides may obtain pretrial discovery under Fed. R. Civ. P. 26-37. Also, the defendant may not invoke the Fifth Amendment to refrain from answering questions in a deposition about his or her wartime activities. In *United States. v. Balsys*, 524 U.S. 666, 700 (1998), the Supreme Court ruled that an OSI defendant could not invoke the Fifth Amendment where there was no threat of criminal prosecution in the United States and the only threat of criminal prosecution was in another country. Finally, there is no statute of limitations for bringing a denaturalization suit, *Costello v. United States*, 365 U.S. 265, 283 (1961), nor can the defendant avail himself of other equitable relief, *see Fedorenko*, 449 U.S. at 516-17 (once district court has determined that the government has met its burden, court has no discretion to excuse the conduct).

The government can employ either or both of two legal theories to establish grounds for denaturalization in the World War II cases: the defendant's citizenship was "illegally procured," that is, a requirement for naturalization was not met; and/or procured by "concealment of a material fact or by willful misrepresentation." 8 U.S.C. § 1451(a). While the government may allege both grounds for denaturalization in a complaint and at trial, each ground is independently sufficient to support denaturalization. *See*, *e.g.*, *United States v. Tittjung*, 235 F.3d 330, 341 (7th Cir. 2000); *United States v. Dailide*, 227 F.3d 385, 398 (6th Cir. 2000); *United States v. Negele*, 222 F.3d 443, 448 (8th Cir. 2000).

A. Illegal procurement

Citizenship is "illegally procured" when there has not been "strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship." *Fedorenko*, 449 U.S. at 506, 515-26. Illegal procurement can be established by showing, *inter alia,* that the defendant was not legally eligible to enter the country ("unlawful entry"), 8 U.S.C. § 1427(a)(1), or was not a person of "good moral character" during the period of permanent residence in the United States immediately prior to obtaining citizenship, 8 U.S.C. § 1427(a)(3). In either case,

failure to comply strictly with the prerequisites of citizenship renders the resulting citizenship null and void, and the defendant is returned to the same residency status possessed prior to the illegal procurement.

1. Unlawful entry

An individual who entered the United States without a valid visa has committed an unlawful entry. In order to determine whether an individual's visa was valid, courts must refer to the immigration laws and regulations in effect at the time the individual entered the country. The vast majority of OSI subjects entered the country with visas issued under one of two statutes, the Displaced Persons Act of 1948 (DPA), 62 Stat. 1013, or the Refugee Relief Act of 1953 (RRA), Pub. L. 203, 67 Stat. 400 (1953). In addition to meeting all statutory conditions required by the relevant act, individuals entering the country were also required to meet conditions found in State Department regulations, 22 C.F.R. § 53.33(j) (1949), and the general requirements of the United States immigration laws in effect at the time of admission (either the Immigration Act of 1924 for entry prior to June 27, 1952, or the Immigration and Nationality Act of 1952 for all entries after June 27, 1952).

Under the DPA, there are four primary grounds for establishing unlawful entry.

- Assistance in the persecution of civilians.
- Voluntary assistance to enemy forces.
- Membership or participation in a movement hostile to the United States.
- Willful misrepresentation to immigration officials.

While a number of these grounds may be incorporated in a complaint, the most commonly-included count alleges assistance-in-persecution. The touchstone in determining what constitutes assistance-in-persecution under the DPA is the Supreme Court case of *Fedorenko v. United States*. After noting that other cases might present "more difficult line-drawing problems," the Court held that an armed concentration camp guard assisted in persecution under the DPA. 449 U.S. at 512 n.34. In the wake of *Fedorenko*, various federal courts have held that a broad range of conduct constitutes "assistance-in-persecution" under the DPA. *See*, *e.g.*, *United States v. Sokolov*, 814 F.2d 864, 874 (2d Cir. 1987) (publishing anti-Semitic articles in newspaper in Nazi-occupied Russia constituted "assistance-in-persecution"); *United States v. Reimer*, No. 92-Civ-4638, 2002 WL 32101927 at *9 (S.D.N.Y. Sept. 3, 2002) (individual who provided logistical support for guards who liquidated ghetto assisted in persecution under the DPA, as amended), *aff'd* 356 F.3d 456 (2d Cir. 2004); *United States v. Dercacz*, 530 F. Supp. 1348, 1351 (E.D.N.Y. 1982) (member of local police force who arrested Jews for failing to wear armbands identifying them as Jews assisted in persecution); *United States v. Osidach*, 513 F. Supp. 51, 97-99 (E.D. Pa. 1981) (member of local police assisted in persecution by serving both as an interpreter and a uniformed patrolman).

Under the DPA, the government need not prove that the individual intended to assist in persecution "because of" race, religion, or national origin and that the individual's conduct assisted in that persecution. Rather, it is sufficient to prove that the Nazis persecuted because of race, religion, or national origin. *See*, *e.g.*, *Reimer*, 2002 WL 32101927, at * 8. Moreover, the individual's persecutory conduct need *not* be shown to have been voluntary to constitute assistance-in-persecution. *Fedorenko*, 449 U.S. at 512. By contrast, the government must prove that an individual voluntarily rendered assistance to enemy forces to support a count based on the second primary ground for unlawful entry.

The third primary ground, membership in a "hostile movement," only requires proof that the defendant was a member of an organization that was hostile to the United States during the war. The government need not prove that the defendant engaged in any specific conduct. *See, e.g.*, *United States v. Wittje*, 333 F. Supp.2d 737, 748 (N.D. Ill. 2004), *aff'd,* 422 F.3d 479 (7th Cir. 2005). Thus, for example, membership in the forces that guarded SS-run concentration and labor camps or membership in an auxiliary police unit–again, regardless of voluntariness–constitutes membership in a hostile movement. *See*, *e.g.*, *United States v. Demjanjuk*, No. 1-99Cv1193, 2002 WL 544622 at *28 (N.D. Ohio, Feb. 21, 2002), *aff'd*, 367 F.3d 623 (6th Cir.), *cert. denied*, 125 S. Ct. 429 (2004); *United States v. Ciurinskas,* 148 F.3d 729, 734 (7th Cir. 1998). Figures 15 and 16 (found on page 37).

The fourth primary ground for unlawful entry is willful misrepresentation made to immigration

officials. According to the Supreme Court, in order to establish that a defendant's entry was unlawful because of a willful misrepresentation, the government must prove that: (1) the defendant misrepresented or concealed some fact; (2) the misrepresentation or concealment was willful; (3) the fact was material; that is, the fact had a natural tendency to influence, or was capable of influencing, the decision of the immigration official; and (4) the defendant procured some benefit as a result. *Kungys v. United States*, 485 U.S. 759, 767, 770, 772 (1988). Although *Kungys* involved a misrepresentation made by an OSI defendant at the naturalization application stage, courts have applied the *Kungys* test in situations involving misrepresentations at the visa application stage. *See*, *e.g.*, *United States v. Stelmokas*, 100 F.3d 302, 317 (3d Cir. 1996). The government need not show that the defendant would not have received his visa "but for" the misrepresentation or concealment. *Kungys*, 485 U.S. at 776-77.

The RRA, enacted in 1953, only slightly changed the grounds for unlawful entry. While an individual could no longer be excluded for previous membership in a hostile movement, or for having provided voluntary assistance to enemy forces, the RRA continued to proscribe the entry of individuals who either made a material misrepresentation in the visa application process or who "personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin." RRA §§ 11(e), 14(a), 67 Stat. 400 (1953). Again, as with the DPA, the individual need not be shown to have intended to assist in persecution because of race, religion, or national origin, *United States v. Friedrich*, 305 F. Supp.2d 1101, 1106 (E.D. Mo. 2004), *aff'd*, 402 F.3d 842 (8th Cir. 2005); nor must it be shown that the individual's conduct was voluntary, *United States v. Hansl*, 364 F. Supp.2d 966, 976 (S.D. Iowa 2005), *app. docketed,* No. 05-2540 (8th Cir. June 6, 2005).

If an individual received a visa under the DPA, then-applicable State Department regulations rendered him or her ineligible to receive a visa if he or she had "advocated or acquiesced in activities or conduct contrary to civilization and human decency on behalf of the Axis countries during . . . [World War II]." 22 C.F.R. § 53.33(j) (1949). For example, this regulation rendered invalid a visa issued to an individual who guarded a Jewish ghetto as a member of a Nazi-sponsored auxiliary police battalion. *See United States v. Stelmokas*, No. 92-3440, 1995 WL 464264, *24-25 (E.D. Pa. Aug. 2, 1995), *aff'd*, 100 F.3d 302, 313 (3d Cir. 1996).

2. Good moral character requirement

Citizenship is also "illegally procured" if a person lacks the "good moral character" necessary for naturalization as a U.S. citizen during the period of permanent residence in the United States immediately prior to obtaining citizenship. 8 U.S.C. § 1427(a)(3). However, the applicant's conduct and acts at any time prior to the application for citizenship bear on the determination of whether the applicant has established the requisite good moral character. 8 U.S.C. § 1427(e). Courts have thus held that an individual lacks "good moral character" if he or she assisted in persecution of civilians during World War II, before the individual commenced residence in this country. *See, e.g.*, *Stelmokas*, 1995 WL 464264, at *25-26. Similarly, a person who provides false testimony in connection with an application for a visa or for naturalization lacks "good moral character." *See* INA § 101(f)(6), 8 U.S.C. § 1101(f)(6). A count premised on alleged false testimony requires that the government prove that the defendant had a subjective intent to obtain immigration benefits and made an affirmative misrepresentation under oath (as opposed to merely concealing some information), but unlike a count premised on willful misrepresentation, does not require that the government prove that the misrepresentation was material. *Kungys*, 485 U.S. at 779-81.

B. Procurement by concealment or misrepresentation

The second basis for denaturalization is procurement of naturalization by concealment or misrepresentation. A count based on alleged procurement by concealment or misrepresentation is identical, in all significant respects, to a count based on illegal procurement by material misrepresentation. The only difference is in the timing of the misrepresentation or concealment. If a misrepresentation or concealment was made during the visa application process, then the government may allege illegal procurement. If the misrepresentation or concealment was made during the naturalization process, then the government may allege procurement by

concealment or misrepresentation. As with a material misrepresentation count, the government must prove that a defendant willfully misrepresented or concealed a material fact and that citizenship was procured as a result.

C. Appeals

As denaturalization is a civil proceeding, either party may appeal an unfavorable outcome to a federal court of appeals, and, ultimately, may seek review by the United States Supreme Court. OSI lawyers typically handle all appellate proceedings, with the exception of Supreme Court cases, which are handled by the Office of the Solicitor General.

V. Removal

If the government prevails on an illegal procurement or fraudulent procurement theory and a court revokes the defendant's citizenship, OSI must initiate administrative proceedings to have the defendant removed from the country. If the individual was never naturalized, OSI is able to commence removal proceedings without the necessity of first litigating a denaturalizing case.

In order to commence a removal action, OSI and the Bureau of Immigration and Customs Enforcement of the Department of Homeland Security (DHS) jointly file a Notice To Appear (NTA) in the Immigration Court for the jurisdiction in which the individual resides. As with denaturalization proceedings, removal hearings in immigration court are civil proceedings and the government must prove the allegations in the NTA by clear, unequivocal, and convincing evidence that does not leave the issue in doubt. *See*, *e.g., Woodby v. INS*, 385 U.S. 276, 286 (1966). The alien may appeal an immigration judge's order of removal to the United States Board of Immigration Appeals (BIA), and if unsuccessful at the BIA, he may then seek review of the removal order in the appropriate federal circuit court, and ultimately, the Supreme Court.

The NTA may assert either (or both) of two independent, but related grounds for removal. The government may claim, under Section 237(a)(1)(A) of the INA, 8 U.S.C. § 1227(a)(1)(A), that the alien was "within one or more of the classes of aliens inadmissible by the law existing at such time. . . ." In order to remove the alien under this ground, it must be established that the alien was ineligible to receive a visa under the statute by which the alien entered the United States, typically either the DPA or RRA. Alternatively (or additionally), the government may proceed under the so-called Holtzman Amendment of the INA that requires the removal of any alien who, during 1933 to 1945, "under the direction of, or in association with the Nazi Government of Germany [or one of the other Axis regimes] . . . ordered, incited, assisted or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion." 8 U.S.C. § 1182(a)(3)(E); 8 U.S.C. § 1227(a)(4)(D). This amendment applies regardless of the law under which the persecutor entered the country. Furthermore, unlike INA § 237(a)(1)(A), 8 U.S.C. § 1227(a)(1)(A), the Holtzman Amendment bars Axis persecutors, as a matter of law, from seeking all forms of relief from removal other than protection under the Convention Against Torture. 8 U.S.C. § 1182(a)(3)(E); 8 U.S.C. § 1229b(c)(4). The language of the Holtzman Amendment tracks the assistance-in-persecution language in both the DPA and the RRA; indeed, it is slightly broader since it applies to individuals who participated in persecution because of political opinion.

The fact that the three statutes are so similarly worded and that the same burden of proof applies at both the denaturalization and removal stages allows OSI to employ the principle of collateral estoppel to prevent relitigation of the assistance-in-persecution issue in immigration court. *See*, *e.g., Hammer v. INS*, 195 F.3d 836, 841-42 (6th Cir. 1999); *Schellong v. INS*, 805 F.2d 655, 660 (7th Cir. 1986). OSI may also use collateral estoppel to bar relitigation of the issues supporting a Section 237(a)(1)(A) count or a Holtzman Amendment count in the NTA if OSI succeeded in proving, at the denaturalization stage, that the alien participated in Nazi-sponsored persecution and therefore was ineligible for a visa under either the DPA or RRA.

If collateral estoppel is not available for all facts required to establish that an alien is removable as charged, then those additional facts must be proved at a removal hearing. Neither the Federal Rules of Civil Procedure nor the Federal Rules of Evidence apply at such a hearing. At the removal hearing, OSI may introduce documents and fact and expert witness testimony to establish that the alien is removable. If an order of removal is issued by the immigration judge, after the alien

exhausts all administrative and judicial appeals, OSI then works with the State Department and DHS to effectuate removal to a country designated by the immigration judge.

ABOUT THE AUTHOR

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Taking the Paper Trail Instead of Memory Lane: OSI's Use of Ancient Foreign Documents in the Nazi Cases

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> "And I would sooner trust the smallest slip of paper for truth, than the strongest and most retentive memory, ever bestowed on mortal man."

Georgia Supreme Court Chief Justice Joseph H. Lumpkin, *Miller v. Cotton*, 5 Ga. 341, 349 (1848).

I. Introduction

A United States district court judge once marveled at the ability of the Office of Special Investigations (OSI) "to discover the acts of a single individual across the temporal expanse of fifty years and a distance of an ocean and half a continent." *United States v. Hajda*, 963 F. Supp. 1452, 1457 (N.D. Ill. 1997), *aff'd,* 135 F.3d 439 (7th Cir. 1998). In murdering millions of unarmed civilians, the Nazis ensured that there would be few potential survivors who could stand as witnesses to their crimes. Moreover, the majority of the surviving victims have died in the six decades since the war ended. Of those remaining, few were in a position during the war to learn the names of their tormentors or to gain comprehensive, first-hand knowledge of their actions. With the passage of decades, the perpetrators now bear scant physical resemblance to their wartime appearance, rendering lineup or in-court identification a virtual impossibility. Although OSI has found cohorts of its targets, most are reluctant in the extreme to testify, or to testify candidly, for fear of implicating themselves.

OSI owes much of its success, therefore, to the treasure trove of documents, including rosters, reports, and correspondence, left behind by Nazi bureaucrats and their agents in the field. These wartime documents often mask the horror that gave rise to their existence as they recite, in bone-chillingly matter-of-fact language, names, numbers, statistics, and terse narratives. Such evidence is usually clear and compelling on its face. Yet because the documents embodying such evidence are often in excess of sixty-years old and are the product of a foreign regime that has long since vanished, they typically require explication by expert historians for courts to understand their full import.

How do OSI prosecutors manage to build their cases on the cornerstone of such historical and foreign documentation? The answer is that, with the proper foundation laid, nearly all courts have found such evidence to be entirely trustworthy and extremely persuasive. The documents are typically, though not exclusively, authenticated as ancient documents (being twenty years or older) under Fed. R. Evid. 901(b)(8), or foreign public documents under Fed. R. Civ. P. 44(a)(2) and Fed. R. Evid. 902(3). They are regularly exempted from the hearsay rule by, *inter alia*, the ancient documents exception of Fed. R. Evid. 803(16), the public records or reports exception of Fed. R. Evid. 803(8), or the business records exception of Fed. R. Evid. 803(6).

Although decades-old documentation from defunct regimes is rarely used in non-OSI federal prosecutions, it has been the bread-and-butter of OSI's Nazi cases. Such evidence may continue to play a vital role in OSI's denaturalization cases against post-World War II human rights violators, who may have committed their crimes abroad during the 1970s and 1980s, if not earlier. Thus, prosecution of such targets will often involve foreign documents that have been in existence for twenty years or longer. As a result, those who will prosecute denaturalization cases involving Nazi-era, or more recently perpetrated human rights violations, would do well to familiarize themselves with the rules and mechanics of working with these ancient foreign documents.

II. Authentication

Fed. R. Evid. 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Moreover, the burden of proof for authentication is "slight." *Link v. Mercedez-Benz of N. Am.*, 788 F.2d 918, 927 (3d Cir. 1989). "[T]here need only be a *prima facie* showing, to the court, of authenticity, not a full argument on admissibility." *Threadgill v. Armstrong World Indus.*, 928 F.2d 1366, 1375 (3d Cir. 1991).

A. Ancient documents rule

An example of authentication meeting the requirements of Fed. R. Evid. 901(a) is set forth in Rule 901(b)(8).

> Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

This "ancient documents rule" is the result of three policy considerations. The first is necessity. The passage of twenty years or more makes it more difficult to find witnesses with information that could help authenticate the document in more direct ways. The second is that fraud is less likely given the remoteness of time. One should not reasonably expect to encounter fabrications produced in the expectation of affecting the outcome of a dispute twenty years or more in the future. The third is the relatively high probability of genuineness. The circumstances of proper custody and unsuspicious appearance, when combined with age, give positive circumstantial assurance that the document is what it purports to be. *See* 5 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 529 (2d ed. 2005).

Although the ancient documents rule requires that the document be free from suspicion, that suspicion goes not to the content of the document, but rather to whether the document is what it purports to be. *See United States v. Kairys*, 782 F. 2d 1374, 1379 (7th Cir. 1986).

> [T]he issue of admissibility is whether the document is a *Personalbogen* [wartime German personal information sheet] from the German SS records located in the Soviet Union archives and is over 20 years old. Whether the contents of the document correctly identify the defendant goes to its weight and is a matter for the trier of fact; it is not relevant to the threshold determination of its admissibility.

OSI's practice is to establish the elements of Rule 901(b)(8) principally by calling expert historians to the stand, including renowned Holocaust scholars such as Dr. Raul Hilberg and Dr. Charles Sydnor. *See*, *e.g.*, *United States v. Koziy*, 728 F.2d 1314, 1321-22 (11th Cir. 1984) ("The government produced Dr. Raul Hilberg, a renowned expert on the holocaust [sic]. . . Dr. Hilberg testified that he had seen other *anmeldungs* and *abmeldungs* [wartime German registration forms] and that the ones involved in

the present dispute were very similar to the ones he had seen."); *United States v. Szehinskyj*, 104 F. Supp.2d 480, 489 (E.D. Pa. 2000), *aff'd* 277 F.3d 331(3d Cir. 2002) ("Dr. Sydnor, whose knowledge on this subject is encyclopedic, testified that there is nothing unusual about any of these documents."). Based on familiarity with Nazi organizations and procedures, as well as the condition and location of archives housing Nazi records, these experts can establish the following.

- The documents do not contain anything out of the ordinary.
- They were found in locations, such as German or former Soviet repositories, where they are likely to be found.
- The form of each document is consistent in every way with the document being an unaltered original.

See, *e.g.*, *Szehinskyj*, 104 F. Supp.2d at 490-91.

Owing to the strength of such testimony, courts have admitted into evidence a wide range of wartime Nazi documents and related postwar records. *See, e.g*, *United States v. Demjanjuk*, 367 F.3d 623, 630-31 (6th Cir. 2004) (upholding admission of SS service pass), *cert. denied*, 125 S.Ct. 429 (2004); *United States v. Stelmokas*, 100 F.3d 302, 312 (3d Cir. 1996) (affirming admission of rosters and other wartime Nazi documents from former Soviet archives); *Kairys*, 782 F.2d at 1379 (upholding admission of Nazi personnel record from archive in the then-Soviet Union); *Koziy*, 728 F.2d at 1322 (affirming admissibility of Ukrainian police forms from archive in the then-Soviet Union under ancient document exception to hearsay rule). Similar expert testimony has also been employed to offer relevant postwar documents into evidence. *See*, *e.g.*, *Hajda*, 135 F.3d at 443-44 (upholding admission of postwar trial testimony and Soviet interrogation protocols).

B. Foreign public documents

Courts may also find wartime documents offered in OSI's cases to be self-authenticating as certified foreign documents under Fed. R. Civ. P. 44(a)(2) and Fed. R. Evid. 902(3). *See Demjanjuk*, 1:99CV1193, 2002 WL 544622, at *23 (N.D. Ohio 2002). Fed. R. Civ. P. 44(a)(2) provides, in pertinent part:

> A foreign official record . . . may be evidenced by . . . a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person. . . .

Fed. R. Evid. 902(3) provides, in relevant part, that "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility" is not required with respect to:

> A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person. . . .

When offered under this theory in OSI's cases, government exhibits have been accompanied by certifications, as well as attestations, by foreign officials from public archives authorized to make them. *See In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 285 (3d Cir. 1983) (certified documents from public archives presumptively admissible), *rev'd on other grounds*, 475 U.S. 574 (1986). Thus, even if courts refuse to admit wartime documents under the ancient documents rule, they may still find that they are self-authenticated as foreign public documents.

C. Arguments attacking authenticity

The government need not prove chain of custody for original World War II-related documentary evidence to satisfy its burden of establishing authenticity because such documents are "non-fungible, and 'unique, identifiable and relatively resistant to change.'" *United States v. Demjanjuk*, 2002 WL 544622, at *22. *See also United States v. Humphrey*, 208 F.3d 1190, 1204-05 (10th Cir. 2000) (unlike drugs, which are fungible, documents are unique and relatively resistant to change and thus do not need a perfect chain of custody). In any event, chain of custody need not be shown to establish that documents are authentic under the ancient documents rule. *See Stelmokas*, 100 F.3d at 312 (3d Cir. 1996).

Defendants have also argued that documents from archives in the former Soviet Union should not be authenticated because of allegations that the Soviets forged documents. This argument has been similarly unavailing. *See Demjanjuk,* 2002

WL 544622, at *15 ("There is no evidence that the Soviets ever forged or altered documents to implicate any American for Nazi (sic) era crimes."); *Szehinskyj,* 104 F. Supp.2d at 490 (court finds no evidence the Soviets ever falsified a document to implicate a Ukrainian living in North America). The court in one OSI case pointed out the fallacy inherent in such claims.

> Lileikis' claims regarding the possibility of Soviet tampering or forgery are totally unsubstantiated and incredible . . . why would even the KGB go to the trouble of forging documents implicating Lileikis in war crimes, and then bar all access to its handiwork for some fifty years, while awaiting the collapse of the government whose evil intentions towards Lileikis it presumably sought to serve?

United States v. Lileikis, 929 F. Supp. 31, 38 (D. Mass. 1996). *See also United States v. Stelmokas*, No. 92-3440, 1995 WL 464264, at *8 (E.D. Pa. Aug. 2, 1995) (expert historical witness "testified that he was not aware of a single instance of a World War II archival document pertaining to the Holocaust that was a Soviet forgery"), *aff'd*, 100 F.3d 302, 313 (3d Cir. 1996) ("We cannot conceive that any rational person would believe that someone set out to incriminate Stelmokas and planted fake documents in widely-scattered places for that purpose.")

Nevertheless, out of an abundance of caution, OSI routinely retains the services of forensic document experts, including: (1) scientists who conduct various chemical and other tests on the paper and ink, *see*, *e.g.*, *Koziy*, 728 F.2d at 1321-22 (11th Cir. 1984) (Dr. Antonio Cantu's testimony helped authenticate Nazi *anmeldung* and *abmeldung* by showing through chemical analysis that these documents were not manufactured after their purported dates of creation); and (2) handwriting specialists, who can analyze, *inter alia*, movement impulses in known writing samples and compare them to those in the writing on documents in question. *See*, *e.g.*, *Demjanjuk*, 2002 WL 544622, at *23.

III. Hearsay issues

A. The ancient documents exception

The key admissibility hurdle to surmount in employing World War II-related documents in OSI's cases is the rule against hearsay. Among the exceptions to this rule is the following: "[s]tatements in a document in existence twenty years or more the authenticity of which is established." Fed. R. Evid. 803(16). This "ancient documents" hearsay exception has been applied to a variety of documents. *See*, *e.g.*, *Dartez v. Fireboard Corp.*, 765 F.2d 456 (5th Cir. 1985) (memoranda and correspondence from the 1940s discussing the dangers of asbestos); *Compton v. Davis Oil Co.*, 607 F. Supp. 1221 (D. Wyo. 1985) (warranty deeds); and *Bell v. Combined Registry Co.*, 397 F. Supp. 1241 (N.D. Ill. 1975) (old newspaper articles), *aff'd* 536 F.2d 164 (7th Cir. 1976). It has also been cited by courts in permitting admission of wartime documents in OSI's Nazi cases. *See, e.g., Hajda*, 135 F.3d at 443-44 (postwar statements from former SS guards admissible under ancient documents exception to hearsay rule); *Stelmokas*, 100 F.3d at 311-13 (affirming admission of Nazi occupation documents from former Soviet archives under ancient documents exception to hearsay rule).

In *Hajda*, 135 F.3d at 444, the Seventh Circuit addressed, *inter alia*, the admissibility of postwar written statements by former Nazi collaborators who claimed that the defendant had served alongside them during the war. After the *Hajda* court found that these documents were properly authenticated under the ancient documents rule, it examined whether their contents were admissible under Rule 805 and found that they were.

> These documents are more than 20 years old and they were properly authenticated, so they are exceptions to the hearsay rule admissible under Rule 803(16) of the Federal Rules of Evidence. However, this admissibility exception applies only to the document itself. If the document contains more than one level of hearsay, an appropriate exception must be found for each level. Fed. R. Evid. 805. As for Kazimiera's statements, while a government official prepared them, Kazimiera signed and adopted them, so they contain only one level of hearsay, which makes them admissible under Rule 803(16). . . . The signed statements of the Treblinka [death camp]

> guards are admissible for the same reason. Stanislaw's statement, on the other hand, isn't signed, so it contains two levels of hearsay. The document itself falls under Fed. R. Evid. 803(16), but Stanislaw's actual statement needs a separate exception in order to be admissible. Here, the proper exception is a declaration against interest, which permits hearsay statements when (1) they are against the declarant's penal or pecuniary interest at the time made; (2) corroborating circumstances show the trustworthiness of the statement; and (3) the declarant is unavailable. Fed. R. Evid. 804(b)(3).

Id. *Cf. United States v. Stelmokas*, 1995 WL 464264, at *5-6 (wartime German report investigating Lithuanian collaborator not admitted because multiple levels of hearsay violated Rule 805). *See* Gregg Kettles, *Ancient Documents and the Rule Against Multiple Hearsay*, 39 SANTA CLARA L. REV. 719 (1999).

B. The business records exception

Another exception to the hearsay rule is found in Rule 803(6) for documents: (1) made at or near the time of the events they record; (2) authored by, or created from information transmitted by, a person with knowledge of the information therein; (3) if kept in the course of a regularly conducted business activity; (4) when it was the regular practice of that business to make the document at issue; and (5) as shown by the testimony of the custodian or other qualified witness.

OSI has presented expert historians as "other qualified witnesses" to establish the applicability of this exception with respect to wartime Nazi documents and related postwar records. *See*, *e.g.*, *Szehinskyj*, 104 F. Supp. 2d at 492 ("Dr. Sydnor testified at length about how the documents are akin to business records, in particular the personnel records of any large organization. He stated that they were necessary in order for the camps to function properly and outlined the circumstances surrounding their creation."); *United States v. Palciauskas*, 559 F. Supp. 1294, 1296 (M.D. Fla. 1983), *aff'd* 734 F.2d 625 (11th Cir. 1984).

C. The public reports and catchall exceptions

Finally, OSI's proffered documents have also been admitted through the public reports and records exception of Fed. R. Evid. 803(8) and the residual exception of Fed. R. Evid. 807. These exceptions have been applied to such documents as judgments in German postwar prosecutions of Nazi criminals and postwar witness affidavits. *See, e.g. Szehinskyj*:

> Many of the documents also are admissible under Rule 803(8), which provides for the admission of certain public records and reports. For example, the [German] court documents fit within this exception. Finally, the documents are admissible under Rule 807, the general catchall hearsay exception, as all experts agree that they are highly reliable.

104 F. Supp.2d at 492.

IV. Conclusion

In the final week of World War II, Michel Thomas, a Jewish concentration camp inmate who had escaped the Nazis and joined the U.S. Army Counter Intelligence Corps as it swept into Germany, received a tip about a convoy of trucks in the vicinity of Munich said to be carrying unknown, but possibly valuable cargo. Thomas went to the trucks' destination, where he discovered an empty warehouse filled with veritable mountains of documents and cards with photos attached. He had come upon the complete worldwide membership files of the Nazi Party, which had been sent to the mill to be destroyed on the orders of the Nazi leadership in Berlin. Thomas and others ensured that the documents were protected. Prosecutors at Nuremberg found invaluable evidence in these files, as have generations of prosecutors since that time.

Sixty years later, these documents and many others like them found in archives in Germany, the former Soviet Union, and elsewhere, stand as unassailable witness to the barbarities of Nazi racial policies and the role of Hitler's henchmen in carrying them out. Through use of the ancient documents rule and related provisions in the Federal Rules of Evidence, the government has been able to marshal such evidence against those henchmen in U.S. courts and obtain a measure of belated justice on behalf of Holocaust victims.

Moreover, the judicial precedents established by such cases could prove invaluable for denaturalizing certain post-World War II human rights violators, whose unspeakable deeds are captured in paper and ink and await retelling before the scales of justice.❖

ABOUT THE AUTHOR

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Barring Axis Persecutors from the United States: OSI's "Watch List" Program

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I. Introduction

In addition to denaturalizing and removing Nazi persecutors from the United States, the Office of Special Investigations (OSI) is responsible for enforcing the Holtzman Amendment's provisions barring aliens who assisted in Axis crimes from entering this country. *See* 8 U.S.C. § 1182(a)(3)(E)(i). Such individuals continue to seek to visit the United States. For example, during the Thanksgiving holiday in 2004, an 82-year-old suspect from Austria attempted to enter this country in order to visit relatives in Arizona. OSI had placed his name and birth date on the government's border control "watch list" of aliens possibly ineligible to enter the United States. Therefore, when he arrived at Atlanta's Hartsfield-Jackson International Airport, Customs and Border Protection (CBP) inspectors referred him for secondary inspection and contacted OSI. Following guidelines developed by OSI, a CBP inspector questioned the man in detail about his World War II activities. He soon confessed that he had been sentenced to death after the war for the murder and mistreatment of concentration camp prisoners, but had received amnesty after ten years' imprisonment. Interview by U.S. Customs and Border Protection immigration inspector [name cannot be divulged] with Franz Doppelreiter in Atlanta, Ga. (Nov. 24, 2004). CBP, a component of the Department of

Homeland Security (DHS), barred his entry into the United States and returned him to Europe the same day. *See* Ira Rifkin, *He Was Hoping to Spend the Winter in Phoenix With His Family*, THE JERUSALEM REPORT, June 13, 2005. Since 1990, when OSI began compiling statistics on the watch list referrals received from immigration officials, the unit has handled over 475 such inquiries. As a result, 175 suspected participants in Axis crimes have been refused admission at U.S. airports and other ports of entry.

II. Development of the OSI watch list

The OSI watch list is actually a shorthand term for the tens of thousands of "lookouts" for suspected Axis persecutors that OSI has placed in the automated border security systems that immigration inspectors and visa-issuing officials consult in assessing the admissibility of aliens to the United States. These lookouts are based on evidence amassed by OSI that establishes a reasonable basis to suspect that the individual in question ordered, incited, assisted, or otherwise participated in Axis-sponsored persecution on the basis of race, religion, national origin, or political belief, and therefore is barred from entry by the Holtzman Amendment. The names that OSI has contributed to the interagency system constitute a comparatively small portion of the millions of names in the system, which covers suspected terrorists, narcotics traffickers, and others who are or may be ineligible to enter the United States.

OSI's watch list began in 1980, when, acting at OSI's request, the State Department (State) entered the names and birth dates of all known SS officers into its Automated Visa Lookout System (AVLoS), using a list of 40,000 names supplied by OSI. The decision to list all former SS officers was based on the fact that the International Military Tribunal (IMT) at Nuremberg judged the SS to be a criminal organization because of the key role it played in carrying out Nazi crimes. *See The Nurnberg Trial,* 6 F.R.D. 69, 143 (1946). The logical corollary of this judgment by the IMT is that the officers in such an organization may reasonably be suspected of having ordered, incited, assisted, or participated in such crimes.

Since 1980, OSI has sent the names of thousands of concentration camp guards, members of *Einsatzgruppen* (Nazi mobile killing squads), and other suspects to the former Immigration and Naturalization Service (INS), DHS, and State to be placed in the automated lookout systems. As a result, more than 26,000 additional names of suspected Nazi persecutors were added to State's Consular Lookout and Support System, which superseded AVLoS, INS's National Automated Lookout System (NAILS), and the Treasury Department's Treasury Enforcement Communications System (TECS), to become the primary automated border security system used at ports of entry. OSI also arranged for State to incorporate the lookouts for SS officers into NAILS and TECS. Once this was accomplished, it was estimated that the number of lookouts in each of the automated "watch list" systems for suspected excludable Nazi persecutors who had not "aged out" of the systems (who were not more than ninety years old) was between 60,000 and 70,000.

OSI continues to add individual names to the watch list as it becomes aware of Nazi persecutors residing outside of the United States who might attempt to enter this country. OSI also routinely adds the names of OSI defendants who are removed from or leave the United States as a result of litigation brought by OSI. Probably the best known example of an individual on the OSI watch list is former Austrian president and United Nations Secretary General Kurt Waldheim. In 1987, five years after he concluded his term as U.N. Secretary General, Waldheim was banned from entering the country because a comprehensive investigation by OSI established a *prima facie* case that he had participated in Nazi persecution.

III. Barring Japanese war criminals

The Holtzman Amendment's reference to crimes committed on behalf of Nazi Germany and governments "allied to" Nazi Germany has been interpreted to include crimes committed by Japanese Imperial Forces during the period that Japan was Germany's ally. Of the tens of thousands of names added to the border control watch list system by OSI, however, fewer than one hundred are names of Japanese perpetrators. This disparity exists because the Japanese Government has long declined to provide OSI with access to pertinent information in its archives. In 1996, OSI requested State and INS to add to the watch list members of the Japanese Army's infamous Unit 731, which conducted lethal medical experiments on prisoners of war. In

addition, OSI requested lookouts be posted for former Japanese military personnel who were implicated in the operation of so-called "comfort women" stations, where imprisoned non-Japanese women were repeatedly raped. This sparked considerable public comment in Japan and among groups of Japanese victims. *See* Michael J. Sniffen, *U.S. Bars Japan War Criminals*, ASSOCIATED PRESS, Dec. 3, 1996.

To date, only one of the aliens on the watch list because of assistance in Japanese war crimes is known to have attempted to enter the United States at a port of entry. He was stopped by INS inspectors and returned to Japan on the first available flight. Michael Zielinger, *Ex-Japanese Soldier Deemed War Criminal—Man Who Was To Tell Acts Denied U.S. Entry*, HOUSTON CHRONICLE, July 3, 1998. A second Japanese suspect's visa application was denied.

IV. Enforcing the OSI watch list

In 1989, the government implemented the Visa Waiver Program, which permits citizens of certain countries (primarily members of the European Union, including Germany and Austria) to enter the United States without visas. With the commencement of this program, individuals who matched (or appeared to match) lookouts for suspected Nazi persecutors began arriving at ports of entry into the United States. *See* Ronald J. Ostrow, *U.S. Catching Former Nazis at Airports*, LOS ANGELES TIMES, Mar. 25, 1990. To assist immigration inspectors in assessing the eligibility of such individuals for entry, OSI developed a set of instructions to be followed when a suspected Axis persecutor attempted to enter the United States. The instructions were sent to INS personnel at key ports of entry, such as New York and Miami. They were also incorporated into training materials given to new immigration inspectors and a videotape of a seminar, taught by an OSI official on inspecting suspected Axis persecutors, was incorporated into INS training protocols.

The key element of OSI's assistance to INS inspectors, and now to DHS' Immigration and Customs Enforcement officials, however, is that an OSI official is *always* available to provide information and advice when would-be entrants are stopped at U.S. ports of entry. The availability of off-hours assistance is particularly vital to the success of efforts to bar Nazi persecutors from entering the United States because the flights on which such individuals travel usually arrive in the United States outside of normal business hours. The great majority of such watch list incidents involve visitors attempting to enter under the Visa Waiver Program, who, under the program terms, must be excluded if suspicion exists that they are inadmissible. In such instances, all that is usually required to determine inadmissibility is to establish that the traveler is identical to the subject of the lookout, which can generally be resolved fairly quickly. If the suspected Nazi persecutor possesses a U.S. visa, however, the inspection for admissibility must be deferred for four business days after the date of entry. In such cases, OSI must locate and assemble, within ninety-six hours, evidence of the individual's World War II-era activities. This usually involves obtaining records from several archives in Germany, translating documents, analyzing the evidence, and presenting it so that the DHS official conducting the inspection clearly understands the matter and can conduct an effective interview. OSI attorneys have also assisted on-site at inspections of individuals whom the evidence strongly implicated in Nazi crimes.

When State receives visa applications from individuals who appear to match OSI lookouts or whom vice consuls suspect may have assisted in Nazi crimes, it calls upon OSI for assistance in vetting those applicants. OSI attempts to gather evidence relating to the applicants' activities during the Nazi era, recommends whether the applicants should be questioned further about specific matters, and advises whether the evidence supports a suspicion of assistance in persecution. The applicants bear the burden of proving admissibility and are usually unable to overcome this burden.

Similarly, whenever a question arises about the admissibility, under the Holtzman amendment, of an alien applying for adjustment of immigration status or for U.S. citizenship, immigration officials turn to OSI. OSI determines whether the benefit should be denied because of the applicant's activities during the World War II era. If, in the course of vetting such applicants, OSI discovers evidence of assistance in Axis crimes, it institutes removal proceedings. In one such instance, a Lithuanian immigrant's denial of any military service during World War II raised the suspicion of his naturalization examiner. Evidence showed that he served in a unit that

assisted in the persecution and murder of Jews. He subsequently agreed to depart permanently from the United States in order to avoid being the subject of OSI-instituted removal proceedings.

V. Prosecutions originating from the OSI watch list

In enforcing the Holtzman Amendment's ban on the entry of aliens who assisted in Axis crimes into the United States, OSI's aim is to return such aliens as quickly as possible to their countries of origin, not to arrest or otherwise detain them. On two occasions, however, immigration officials in Hawaii have arrested the subjects of OSI lookouts and, with OSI's assistance, successfully prosecuted them for visa fraud. *See* Bob Egelko, *Court Upholds Visa Fraud Conviction of SS Guard*, THE HONOLULU ADVERTISER, July 6, 1991. In two other instances, subjects of OSI lookouts for former concentration camp guards were questioned by immigration authorities when they arrived at ports of entry. They were found to be legal permanent residents whose presence here had gone undetected when INS previously checked their names against U.S. immigration records at OSI's behest. OSI subsequently brought successful removal cases against both men. *United States v. Goertz*, No. 90-00762-ACK (D. Haw. July 3, 1990); *United States v. Paal*, No. 90-00935 DAE (D. Haw. Sept. 4, 1990), *aff'd*, 937 F.2d 614 (9th Cir. 1991).❖

ABOUT THE AUTHOR

❑**Dr. Elizabeth B. White** began working as a historian for the Office of Special Investigations in 1983. As Chief of Investigative Research from 1988 to 1997, her responsibilities included developing and enforcing OSI's watch list. She drafted guidelines and provided training for immigration inspectors for questioning and assessing the admissibility of suspected Axis persecutors. She has been OSI's Chief Historian since 1997 and was named Deputy Director in 2004. Her published works include *The Disposition of SS-Looted Victim Gold During and After World War II*, 14 AM. UNIV. INT'L L. J. 213 (1999) and GERMAN INFLUENCE IN THE ARGENTINE ARMY (Garland Publishing, Inc. 1991).✠

Practical Questions and Answers About OSI for AUSAs

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Q: Are OSI's cases brought as criminal or civil prosecutions?

Although OSI is part of the Criminal Division, its World War II denaturalization and removal actions are civil proceedings. There is no basis under federal law for criminal prosecution of the underlying conduct that was committed abroad. The post-World War II human rights violator cases are different, as some of these defendants may be prosecuted criminally for immigration fraud (such as violations of 18 U.S.C. § 1425–obtaining naturalization by fraud) or may even be liable for the abuses themselves, for example, for torture under 18 U.S.C. § 2340A, genocide under 18 U.S.C. § 1091, or war crimes under 18 U.S.C. § 2441 (prosecutions which are not within OSI's purview).

Although denaturalization is a civil proceeding, the right at issue in denaturalization cases–the right to U.S. citizenship–is considered especially precious, therefore the government bears an unusually high burden of proof. That burden, "clear, unequivocal, and convincing evidence that does not leave the issue in doubt." *Fedorenko v. United States*, 449 U.S. 490, 505 (1981), is "substantially identical" to the "beyond a reasonable doubt" standard imposed in criminal cases. *Klapprott v. United States*, 335 U.S. 601,

612 (1949). Other than the much higher burden of proof, denaturalization defendants are generally treated like other civil defendants. Over the years, OSI defendants have attempted to invoke a number of rights afforded to criminal defendants, virtually always unsuccessfully. Courts have found, for example, that OSI defendants have no right to appointed counsel or to invoke the Fifth Amendment right to refuse to answer questions about their wartime activities based on fear of denaturalization proceedings or foreign criminal prosecution. Recently, a court held that the procedures for dealing with incompetent criminal defendants do not apply in denaturalization proceedings; instead, allegedly incompetent denaturalization defendants in OSI cases may have a guardian appointed under Federal Rule of Civil Procedure 17(c), if appropriate. *United States v. Mandycz*, 199 F. Supp. 2d 671, 674-75 (E.D.Mich. 2002).

Q: How does an OSI case proceed through the court system?

Procedurally, cases differ depending on whether the defendant is a naturalized U.S. citizen or a resident alien. The first step with citizen defendants is a denaturalization proceeding under 8 U.S.C. § 1451(a). Denaturalization cases are filed in the district in which the defendant resides and they follow the typical course of civil litigation, including discovery. If warranted, summary judgment is available in denaturalization actions. There is no right to a jury trial. If the United States prevails, the defendant's certificate of citizenship is canceled, and he reverts to resident alien status. Denaturalization actions are appealable to the circuit courts and the Supreme Court.

The next step, which is also the starting point for subjects who never became U.S. citizens, is a removal proceeding before the Executive Office for Immigration Review. As with all removal proceedings, OSI cases begin with hearings before an immigration judge, in an administrative hearing. Decisions of the immigration judge are appealable first to the Board of Immigration Appeals, and subsequently through the federal appellate system.

Q. What role do U.S. Attorneys' Offices play in OSI prosecutions?

USAOs typically play no role in removal cases against non-U.S. citizens, as all proceedings in such cases will be in immigration court. With denaturalization actions, historically, USAOs have acted as local counsel for OSI. The actual role of an AUSA assigned to an OSI matter may be more or less substantive, depending on factors such as the AUSA's interest in the case, workload, and experience. In many cases, AUSAs have taken on primarily supportive functions, such as filing the initial complaint, arranging for court reporters and deposition facilities, and advising OSI on local rules and practices. In some cases, AUSAs have been more actively involved in the litigation, assisting with discovery and motion practice and handling witnesses at trial. Such active participation by AUSAs is more the exception than the rule, and while OSI welcomes it, OSI would not expect an AUSA to litigate a case actively absent an indication of interest from the AUSA.

Q: Do AUSAs need any special expertise to handle OSI cases effectively? Should OSI cases be assigned to AUSAs with experience in, for example, immigration law?

Familiarity with immigration law is helpful but the statutes under which OSI proceeds are quite specialized. The best qualifications for assisting OSI are a solid background in general civil litigation and knowledge of the local rules, as well as the practices of the judge assigned to the case. AUSAs can often assist by providing information about the local community, which may be relevant to an investigation. Additionally, AUSAs may be familiar with defense counsel. If an AUSA is going to be an active participant in litigation, OSI attorneys and staff historians can help him or her become familiar with the relevant statutes and case law, as well as the historical and factual background of the case.

Q: How does OSI identify potential defendants? What if I come across information about a suspected human rights violator?

As discussed in detail in another article in this issue, most Nazi-era defendants have been identified through the work of OSI's staff historians who review wartime records and

submit names extracted from those documents for checking against U.S. immigration records. Leads on modern human rights abusers come from a variety of sources. One primary source is the Department of Homeland Security (DHS), especially its Immigration and Customs Enforcement (ICE) and U.S. Citizenship and Immigration Services (the DHS component responsible for adjudicating naturalization applications). OSI also relies on its own research, leads provided by human rights organizations, media reports, and referrals from foreign governments and international tribunals regarding U.S. citizens who may have participated in the perpetration of human rights violations.

As OSI's new jurisdiction expands the geographic and temporal scope of its work, public referrals will likely increase. Some of these calls may come to U.S. Attorneys' Offices. It is also possible that AUSAs will realize that defendants or targets of investigation in seemingly unrelated matters have a history which suggests they could have participated in the commission of human rights violations. AUSAs who come into possession of information about naturalized citizens who may have participated in the commission of human rights abuses are asked to contact OSI. If the suspected human rights violator is not a naturalized citizen, the information should instead be transmitted to ICE in the DHS. If the suspect's citizenship is not known, it may be ascertained by contacting OSI.

Q: What if I get press inquiries about an OSI matter?

OSI cases frequently attract press attention, and reporters who are not aware of OSI's involvement sometimes direct their inquiries to the local U.S. Attorney's Office. If you or someone in your office receives a call from the press, or from any party seeking information, please direct the caller to the Department's Office of Public Affairs, at (202) 514-2007.❖

ABOUT THE AUTHOR

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OSI's Expanded Jurisdiction under the Intelligence Reform and Terrorism Prevention Act of 2004

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I. Introduction

For twenty-five years, it has been the mission of the Office of Special Investigations (OSI) to investigate naturalized U.S. citizens and U.S. residents suspected of participating in crimes of persecution sponsored by Nazi Germany or its allies from 1933-1945, and take legal action to denaturalize and remove (deport) or extradite such persons. The 1979 Attorney General Order that created OSI tasked the unit with this sole responsibility. *See* Order No. 851-79 (Sept. 4, 1979).

On December 17, 2004, the President signed into law the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, 118 Stat. 3638 (2004), which grants OSI authority, in addition to its existing World War II-related responsibilities, to investigate and take legal action to denaturalize any naturalized U.S. citizen who participated abroad in acts of genocide or, acting under color of foreign law, participated in acts of torture or extrajudicial killing. It also mandates the exclusion and removal of such persons, which will be handled by the Department of State (State) and the Department of Homeland Security (DHS).

This new jurisdiction means a vastly expanded geographic scope for OSI. Over the sixty years since World War II ended, government-sponsored torture and extrajudicial killing have been perpetrated in numerous countries. Genocide has been committed as well, most notoriously in Rwanda during 1994.

In enacting the provisions relating to post-World War II human rights violators, Congress expressed a clear desire for coordinated and effective law enforcement action in cases of state-sponsored atrocities. In a November 2003 report, the Senate Judiciary Committee outlined the justification for the legislative provisions that were ultimately enacted as part of IRTPA. After noting OSI's success in the Nazi-era cases ("The success of the OSI in hunting Nazi war criminals demonstrates the effectiveness of centralized resources and expertise in these cases. The OSI has worked, and it is time to update its mission."), the Committee opined:

> Not enough is being done about the new generation of international human rights abusers living in the United States, and these delays are costly. Such delays make documentary and testimonial evidence more difficult to obtain. Stale cases are the hardest to make. The mistakes of the past–when decades passed before Nazi war criminals who settled in this country were tracked down and brought to justice–should not be repeated.

S. REP. NO. 108-209, in support of S. 710, the Anti-Atrocity Alien Deportation Act of 2003 (Nov. 24, 2003) at 7.

II. Background

Recent data confirm that the concerns of Congress were well-founded. DHS announced in April 2005, for example, that its Bureau of Immigration and Customs Enforcement (ICE) was tracking and litigating more than 900 cases involving human rights violators from more than sixty countries in immigration courts nationwide.

The nature of the problem is dramatically exemplified by the case of Kelbessa Negewo, an Ethiopian citizen, who immigrated to the United States and was eventually naturalized. Negewo served as a local official under the repressive military regime that ruled Ethiopia from 1974 to 1991. In September 1990, three Ethiopian women filed suit against Negewo under the Alien Tort Claims Act (28 U.S.C. § 1350) in U.S. District Court in Atlanta, alleging that they had been tortured in a jail he controlled. *See Abebe-Jira v. Negewo*, 72 F.3d 844, 844-46 (11th Cir. 1996).

In August 1993, the district court found that Negewo had both supervised and directly participated in the torture of the women and the court awarded damages. *Id.* at 846. In its decision, the district court described the torture. It found, for example, that one of the plaintiffs had been forced to remove her clothes, then was bound by her hands and feet, hanged from a pole, and beaten severely while water was poured on her wounds to increase the pain. *Abebe-Jira v. Negewo,* 1993 WL 814304 (N.D. Ga., Aug. 20, 1993) at *2, *aff'd,* 72 F.3d 844 (11th Cir. 1996).

Negewo's application for citizenship was granted in 1995 while his (unsuccessful) appeal was pending, even though some personnel of the former Immigration and Naturalization Service were aware of the district court judgment against him. That judgment had been reported and even featured in a front-page article in the Atlanta Journal and Constitution (August 21, 1993). A denaturalization action was filed against Negewo in May 2001 by the U.S. Attorney's Office in Atlanta. Negewo's U.S. citizenship was finally revoked pursuant to a settlement agreement in October 2004, eleven years after a federal district court found that he had committed torture.

Negewo is currently in federal custody pending the outcome of removal proceedings. That case, initiated by ICE in January 2005, was the first removal action brought under IRTPA's

human rights violator provisions. If the United States is successful in these proceedings, Negewo likely will be removed to Ethiopia, where in 2002 he was convicted *in absentia* and sentenced to life imprisonment for numerous human rights violations, including thirteen counts of murder, three counts of disappearance, one count of torture, and one count of unlawful taking of property. *See* Teresa Borden, *Deportation in Motion for Torturer*, ATLANTA JOURNAL CONSTITUTION, Jan. 5, 2005, at A1.

Another human rights violator who became a naturalized U.S. citizen faced criminal prosecution. Eriberto Mederos, a Cuban-American who immigrated to south Florida in the 1980s, was alleged to have used electroshock equipment to torture opponents of the Castro regime while working at a Cuban psychiatric hospital. In 1991, these allegations were published in a book and were soon examined by the FBI. When Mederos applied for citizenship in 1993, the INS naturalization examiner was unaware of the allegations against Mederos and permitted him to gain naturalization. *See, e.g.,* Madeline Baro Dias, *Former Inmate Alleges Torture,* SOUTH FLORIDA SUN-SENTINEL, Jul. 18, 2002 at 3B and Chitra Ragavan, *A Tale of Torture and Intrigue,* U.S. NEWS & WORLD REPORT, Sept. 10, 2001 at 33.

In September 2001, Mederos was charged by the U.S. Attorney's Office in Miami with unlawful procurement of U.S. citizenship. The criminal complaint alleged that Mederos lied under oath when he applied for citizenship by falsely claiming he had not assisted in persecution and had not been a member of the Communist party. Mederos was convicted on those charges in August 2002, but died before he could be sentenced. *See, e.g.,* Charles Rabin, *Accused Cuban Torturer Dies After Trial,* THE MIAMI HERALD, Aug. 24, 2002 at B1.

III. The legislative response

During the 106th, 107th, and 108th Congresses, a bipartisan group of lawmakers led by Senators Orrin Hatch and Patrick Leahy and Representatives Mark Foley and Gary Ackerman sponsored legislation intended to address this problem. Their proposed Anti-Atrocity Alien Deportation Act (AAADA) would have mandated the exclusion, removal, and denaturalization of post-World War II human rights violators, specifically participants in genocide and, where carried out under color of law of a foreign nation, torture and extrajudicial killings as well. That legislation also sought to provide OSI with authority to investigate and litigate the pertinent denaturalization actions.

The original version of the AAADA passed the Senate by unanimous consent in November 1999, but it repeatedly failed to reach the House floor, having stalled in the Subcommittee on Immigration, Border Security, and Claims of the House Committee on the Judiciary as a result of disagreements on a peripheral issue involving the Convention Against Torture. However, on October 8, 2004, as the House of Representatives was in its closing hours of considering the House version of the 2004 intelligence reform bill (H.R. 10), Rep. Foley introduced an amendment that would, in effect, insert the text of the AAADA into the intelligence reform bill. He, Rep. Ackerman, and House Immigration, Border Security, and Claims Subcommittee Chairman John Hostettler, spoke in favor of the amendment. Their comments stressed the nexus between human rights violator cases and terrorism cases, and also referenced OSI's record over the past twenty-five years in investigating and prosecuting Nazi cases.

When the intelligence reform legislation (S. 2845 and H.R. 10) went to conference committee in October 2004, the Foley amendment was one of the comparatively few immigration provisions in the House version found acceptable by the Senate conferees. It was retained in the compromise legislation that was hammered out on December 6. The bill was approved by the House of Representatives on December 7, 2004 by a vote of 336-75, and it was passed by the Senate the following day, in the closing legislative action of the 108th Congress, by a vote of 89-2. Ten days later, it was signed into law by President Bush.

IV. The relevant provisions of IRTPA

To deal with modern human rights violator cases in a centralized and systematic way, IRTPA names the Office of Special Investigations as the specific government unit with authority to detect, investigate, and take legal action to denaturalize any naturalized U.S. citizens who participated abroad in acts of genocide or in acts of torture or extrajudicial killing committed under color of foreign law. It does so through Title V, Subtitle E, which consists of six sections, numbered 5501

through 5506. Collectively, these provisions contain the full text of the AAADA. For purposes of this article, three changes effected by IRTPA to the Immigration and Nationality Act are most pertinent.

A. Expanding the human rights violator exclusion/removal provisions

IRTPA amended the grounds of exclusion and removal set forth in Immigration and Nationality Act (INA) §§ 212(a)(3)(E) and 237(a)(4)(D), 8 U.S.C. §§ 1182(a)(3)(E) and 1227(a)(4)(D), respectively. Previously, those sections provided for the exclusion and removal of persons who "ordered, incited, assisted, or otherwise participated" in Axis-sponsored acts of persecution, as well as those who "engaged" in genocide. The provisions relating to Axis-sponsored persecution are unchanged, but the genocide provision was amended and new provisions were added.

Pursuant to IRTPA, the existing exclusion and removal provisions relating to genocide now apply to persons who "ordered, incited, assisted, or otherwise participated" in genocide. *See* 8 U.S.C. § 1182(a)(3)(E). In addition, Title 8 previously referred to conduct that is defined as genocide for purposes of the Convention on the Prevention and Punishment of the Crime of Genocide. The Senate Judiciary Committee explained that, for clarity and consistency, the new statute substitutes the definition of genocide contained in 18 U.S.C. § 1091, "which was adopted to implement United States obligations under the Convention and also prohibits attempts and conspiracies to commit genocide." S. Rep. No. 108-209, at 9 (2003). While the federal criminal statute is limited to those offenses committed within the United States or by a U.S. national, the grounds for exclusion and removal added by IRTPA relate to acts committed outside the United States that would be criminal under 18 U.S.C. § 1091 if committed in the United States or by a U.S. national. *See* S. REP. NO. 108-209, at 10 (2003).

The new provisions of Title 8 also provide for the exclusion and removal of aliens who, under color of foreign law, "committed, ordered, incited, assisted, or otherwise participated" in "torture" (as defined in 18 U.S.C. § 2340—the domestic federal criminal prohibition enacted pursuant to U.S. obligations under the Convention Against Torture), or any "extrajudicial killing" committed under color of foreign law (as defined in section 3(a) of the Torture Victim Protection Act (TVPA) of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1991)). The Senate Judiciary Committee emphasized that the phrase "committed, ordered, incited, assisted, or otherwise participated" is intended "to reach the behavior of persons directly or personally associated with the covered acts, including those with command responsibility." S. REP. NO. 108-209, at 10 (2003). Attempts or conspiracies to commit torture or extrajudicial killing are encompassed in the "otherwise participated in" language. S. REP. NO. 108-209, at 10 (2003).

As defined in Title 18, "torture" means "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." 18 U.S.C. 2340(1).

"[S]evere mental pain or suffering" is further defined to mean 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.

18 U.S.C. § 2340(2).

As defined in the TVPA, the term "extrajudicial killing" means "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." Extra-judicial killing, however, does not include "any such killing that, under international law, is lawfully carried out under the authority of a foreign nation." TVPA, Pub. L. No. 102-256, 106 Stat. 73 (1991). As of yet, there are no published court decisions addressing whether particular

conduct constitutes an extrajudicial killing for purposes of this provision.

It is important to bear in mind that the definitions of both "torture" and "extrajudicial killing" require that the alien be acting under color of law. A criminal conviction, criminal charge, or confession, is not required for an alien to be inadmissible or removable under the new grounds added by IRTPA. *Cf.* INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i), (barring admission of alien who has been convicted of a crime involving moral turpitude or who admits committing acts that constitute the essential elements of such a crime).

B. The moral character provision

INA § 101(f)(9), 8 U.S.C. § 1101(f)(9), as added by IRTPA, also provides that a person described in INA § 212(a)(3)(E), 8 U.S.C. § 1182(a)(3)(E), shall not, as a matter of law, be regarded as a person of good moral character. Thus, persons who participated in Axis-sponsored persecution, genocide, torture, or extrajudicial killings, are now statutorily barred from naturalization as U.S. citizens. *See* INA § 316(a), 8 U.S.C. § 1427(a) (requiring applicant for naturalization to prove good moral character). They are also barred from certain other immigration benefits, most notably cancellation of removal under INA § 240A, 8 U.S.C. § 1229(c)(4). Before the enactment of IRTPA, Axis persecutors and persons who had "engaged" in genocide were already barred from obtaining such benefits.

C. Consideration for criminal prosecution

Finally, INA § 103(h)(3), 8 U.S.C. § 1103(h)(3), as added by IRTPA, provides that consideration shall be given, where possible, to the criminal prosecution or extradition of persons who participated in Axis-sponsored persecution, or in genocide, torture, or extrajudicial killing. This provision directs that the Attorney General "shall consult with the Secretary of Homeland Security in making determinations concerning the criminal prosecution or extradition" of such persons.

V. Application of IRTPA

A. Civil prosecutions

Questions have arisen as to whether the new denaturalization grounds in IRTPA can be applied only to persons who were naturalized after IRTPA was enacted. As a result, the government may have to rely on remedies available pre-IRTPA in prosecuting human rights violators naturalized before IRTPA's enactment. This may include, *inter alia*, seeking the denaturalization of human rights violators who had not been lawfully admitted because they engaged in genocide, pursuant to 8 U.S.C. § 1182(a)(3)(E) (relying on the pre-IRTPA language), otherwise lack good moral character, pursuant to 8 U.S.C. § 1427(a)(3), concealed material facts or made willful misrepresentations in procuring naturalization, pursuant to 8 U.S.C. § 1451(a), or did not properly procure citizenship pursuant to any other relevant law or regulation (including, for example, on the basis of initial entry through an invalid visa).

B. Potential criminal prosecutions

The possibility of prosecution under various criminal statutes, such as 18 U.S.C. § 1425 (obtaining naturalization by fraud), 18 U.S.C. § 1001 (making a false statement regarding a matter within the jurisdiction of a federal agency), 18 U.S.C. § 2340 (torture, if committed after November 20, 1994), or 18 U.S.C. § 2441 (war crimes, if committed after August 21, 1996) should always be considered. In the Criminal Division, prosecutions for torture and war crimes are the responsibility of the Domestic Security Section or, if there is a terrorism nexus, the Counterterrorism Section. Any such prosecution would arise from the same nucleus of operative facts as the civil case. Prosecuting under the criminal statutes might, at least initially, permit the government to imprison human rights violators upon conviction and it would be consistent with IRTPA Section 5505's injunction that consideration be given, where possible, to the criminal prosecution of such violators. Fortunately, a criminal conviction under 18 U.S.C. § 1425 automatically results in revocation of U.S. citizenship under 8 U.S.C. § 1451(e), thus setting the stage for removal proceedings to be instituted by ICE.

Criminal prosecutions could confer other important advantages. In the first place, they would permit the use of grand juries to investigate cases. This would help ensure secrecy during the investigative stage and provide for compelled testimony and production of evidence through the use of grand jury subpoenas. The secrecy feature, in particular, may be of utmost importance in the modern human rights violator cases, where there is the potential for witness intimidation. This is quite possible in cases where younger perpetrators committed crimes on behalf of regimes that are still extant and active. Moreover, in cases involving multiple parties, where some subjects might be persuaded to testify on behalf of the government, grand jury investigations facilitate granting immunity from criminal prosecution and developing cooperating witnesses.

Criminal investigations can also employ search warrants. Again, given the relative recency of the criminal conduct at issue, it is possible that OSI's new generation of defendants, as well as their cohorts, will still have evidence of their crimes within their constructive possession. Civil discovery methods (such as document requests and depositions), which necessarily rely on the honesty of the defendants, would likely be far less effective than search warrants in obtaining such evidence. Moreover, in certain instances in civil prosecutions, defendants might invoke their Fifth Amendment right not to incriminate themselves through the act of producing incriminating documents. *See, e.g., United States v. Hubbell*, 530 U.S. 27 (2000). The ability to collect evidence pursuant to valid search warrants in criminal proceedings would provide a solution to this potential problem.

VI. Conclusion

With the enactment of IRTPA, the scope of OSI's jurisdiction has been significantly expanded. After a quarter-century of investigating and prosecuting individuals who participated in Axis-sponsored persecution, OSI is well-positioned to identify and take legal action against other naturalized human rights violators who have come to the United States. We look forward to working on these important cases with our colleagues in the U.S. Attorneys' Offices, and encourage prosecutors to call OSI at (202) 616-2492 with any questions regarding OSI's new jurisdiction.❖

ABOUT THE AUTHOR

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Intra- and Inter-Agency Cooperation in the Investigation and Litigation of Cases Involving Modern Human Rights Violators

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I. Introduction

From the beginning of OSI's existence in 1979, cooperation between OSI and other offices and agencies, including the U.S. Attorneys' Offices (USAOs), has been an important factor in the successful prosecution of civil denaturalization cases against persons who assisted in Nazi persecution. In each of those cases, OSI has received valuable assistance from immigration authorities (previously Immigration and Naturalization Service (INS), now Department of Homeland Security (DHS)) during the investigation phase, and from the USAOs during subsequent litigation in the federal courts. The flow of expertise and assistance, however, has not been a one-way street. OSI continues to reach out to the USAOs to offer its assistance and expertise in civil and criminal cases involving the illegal procurement of naturalized U.S. citizenship and other matters, including those involving suspected terror-linked individuals.

Despite the assistance provided by DHS and the USAOs, to a great degree, OSI has been self-reliant in the World War II cases. OSI possesses the expertise and resources needed to pursue each case from the initial investigation through a trial and any appeals. In cases involving post-World War II human rights violators, however, the situation will be very different.

The World War II cases involved countries in western and eastern Europe, while the modern cases involve a far greater number of countries, as well as relatively recent conflicts. As a result, modern investigations present a much broader range of factual issues. The State Department (State) and components of the intelligence community may have an interest in the underlying circumstances and/or significant information about an investigative subject. In many of the modern cases, it may be possible for the U.S. Government to pursue criminal prosecution, either for human rights abuses committed overseas (under the torture statute at 18 U.S.C. § 2340A), or for offenses committed during the process of obtaining a visa or naturalization (such as false statements and/or the unlawful procurement of citizenship in violation of 18 U.S.C. § 1425). Because the abuses committed under Nazi authority during World War II were not prosecutable under U.S. laws when they were committed, the criminal prosecution of OSI's World War II subjects for any such offenses has not been an option. In addition, in all but a few World War II cases, the statute of limitations has expired on any action involving the illegal procurement of citizenship in violation of 18 U.S.C. § 1425 or other fraud-related offenses committed during the naturalization process.

Consequently, the successful investigation and litigation of the modern cases will require extensive cooperation and coordination, both within the Department of Justice (Department) and between the Department and other federal agencies. The discussion that follows is intended to give the reader an overview of key issues relating to this cooperation, the role of the USAOs in the modern cases, and the assistance that OSI can provide to USAOs in other types of cases involving the illegal procurement of U.S. citizenship.

II. The legal framework for the modern cases

The legal framework for the investigation and litigation of cases involving the unlawful procurement of U.S. citizenship arises from provisions contained in Titles 8 and 28 of the

United States Code. The Secretary of Homeland Security (the Secretary) is charged with the administration and enforcement of U.S. immigration and nationality laws, including the investigation of civil and criminal cases involving any person who has illegally procured U.S. citizenship. *See* INA § 103, 8 U.S.C. § 1103 (detailing the Secretary's authority). *See also* 8 C.F.R. § 340.2 (discussing investigation of matters involving unlawful naturalization). As with other criminal matters, the Federal Bureau of Investigation (FBI) has investigative authority for criminal violations of U.S. immigration and naturalization laws–in this instance, an authority that runs concurrently with that of DHS. *See* 28 U.S.C. § 533 (outlining the authority of FBI officials, and noting that other agencies may have concurrent investigatory authority).

In general, responsibility for the litigation of such cases (whether criminal or civil) rests with the U.S. Attorneys. Pursuant to 28 U.S.C. § 547, the U.S. Attorneys are directed to prosecute all criminal offenses against the United States, and all civil actions "in which the United States is concerned." Moreover, with regard to civil denaturalization cases, the INA expressly provides that "[i]t shall be the duty of the United States attorneys . . . to institute proceedings" for the denaturalization of any naturalized citizen residing in their district whose U.S. citizenship was illegally procured or procured by concealment of a material fact or wilful misrepresentation. *See* INA § 340(a), 8 U.S.C. § 1451(a).

For the past twenty-five years, however, civil denaturalization cases involving persons who took part in Nazi-sponsored acts of persecution have been handled differently. As discussed elsewhere in this issue, in 1979 the Attorney General issued an order directing that OSI shall have the responsibility to "investigate and take legal action" to denaturalize and deport persons who assisted in Nazi persecution. *See* Order No. 851-79 (Sept. 4, 1979). With the passage of new legislation, OSI now also has authority to investigate and take legal action in cases involving modern human rights violators. As amended by the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-408 §§ 5501-06, 118 Stat. 3638 (2004), the INA provides that OSI has authority "to detect and investigate, and, where appropriate, take legal action to denaturalize" any naturalized person who assisted in genocide, Nazi persecution, torture, or extrajudicial killing committed abroad under color of foreign law. *See* INA § 103(h)(1), 8 U.S.C. § 1103(h)(1); INA § 212(a)(3)(E), 8 U.S.C. § 1182(a)(3)(E).

In enacting the new provisions concerning human rights violators, Congress noted that priority should be given to the criminal prosecution of such persons, or their extradition to a foreign jurisdiction that is prepared to undertake prosecution. INA § 103(h)(3), 8 U.S.C. § 1103(h)(3). Congress also specified that, in making determinations concerning criminal prosecution or extradition, the Attorney General must consult with the Secretary. INA § 103(h)(3), 8 U.S.C. § 1103(h)(3).

Taken together, these various provisions implicate the involvement of multiple components within both the Department and DHS in any case involving the unlawful procurement of U.S. citizenship by a modern human rights violator. The interests of other federal agencies arise from the nature of their own missions, such as State's role in foreign affairs and the intelligence agencies' responsibility for gathering and analyzing foreign intelligence.

III. The organizational framework for intra- and inter-agency cooperation

As the preceding statutory framework makes clear, close cooperation between interested offices and agencies is essential for the successful investigation and litigation of cases involving the unlawful procurement of U.S. citizenship by modern human rights violators. To that end, the Department and DHS have spearheaded the creation of an *ad hoc* interagency working group to facilitate the coordination of federal law enforcement efforts in such cases. Through an extensive series of meetings that began in early 2005, this interagency working group has begun to develop procedures for gathering and sharing information about human rights violators, and for determining what measures should be taken by which federal components in individual cases. The group has also undertaken an effort to revise various immigration and naturalization forms, as needed, to ensure that applicants provide sworn answers to appropriate questions about their activities abroad before they are granted benefits under the INA. False statements may, of course,

provide a basis for denaturalization and/or criminal prosecution.

Within the Department, current participants in this group include representatives from OSI and several other components of the Criminal Division, as well as the FBI. DHS has been represented by officials from Citizenship and Immigration Services and both legal and investigative offices within the agency's Bureau of Immigration and Customs Enforcement (ICE). The other participating agencies are the Central Intelligence Agency and State, the latter of which has been represented by the Office of the Ambassador at Large for War Crimes Issues, as well as by consular officials. Additional agencies and components have been, and will continue to be, consulted and invited to participate as appropriate.

In addition to these interagency efforts, the Criminal Division has formed an internal working group to coordinate investigations and information sharing, as well as criminal and civil prosecutions. That group is comprised of senior managers and attorneys from OSI, the Domestic Security Section (DSS), the Counterterrorism Section (CTS), and the Office of International Affairs (OIA) (all of whom also participate in the interagency group). Any matter that is referred to, or otherwise comes to the attention of, any one of these Department components is shared with the other components, and each such matter is then reviewed for potential investigation, criminal prosecution, extradition, and/or civil denaturalization proceedings. Depending on the circumstances, this assessment may include consideration of the potential for successful criminal prosecution under 18 U.S.C. § 1425 (unlawful procurement of citizenship or naturalization), which, upon conviction, results in denaturalization under 8 U.S.C. § 1451(e).

Through extensive consultation, information sharing, and other cooperative activities, both the interagency working group and the Criminal Division group have already made significant progress in promoting the effective enforcement of the provisions relating to modern human rights violators. With respect to civil denaturalization investigations in the modern cases, OSI and the ICE Office of Investigations have established a close working relationship. Currently, when ICE becomes aware of a suspected human rights violator who has become a naturalized U.S. citizen, that information is provided to OSI, along with the names of the ICE personnel assigned to the investigation. Similarly, if OSI identifies suspected human rights violators living in the United States (regardless of whether those persons are aliens or naturalized citizens), it notifies ICE at the headquarters level. This mutual notification system ensures that joint investigations of naturalized citizens can be commenced promptly. In addition, OSI ensures that the other participants in the Criminal Division working group are advised of all such investigations. OSI and ICE have already utilized these procedures in numerous cases involving both aliens and naturalized citizens, and joint investigations are in progress.

Cases involving human rights violators are referred to the Department in a number of ways. Federal law enforcement agencies, including ICE, FBI, the Diplomatic Security Service, and others, may refer these matters directly to the Criminal Division or to the local USAO. Foreign governments may identify suspects in communications sent to OIA or to other Criminal Division components in connection with extradition requests, requests for legal assistance, and the like. In addition, OSI is working closely with State, whose staff, both those based in Washington D.C. and officers serving at U.S. embassies and consulates overseas, have been briefed on the relevant provisions of IRTPA and advised to refer any potential cases involving naturalized citizens to OSI. U.N.-sponsored war crimes tribunals have been yet another source of information, especially the International Criminal Tribunal for the former Yugoslavia (ICTY). Finally, some investigative leads have come from nongovernmental sources, including human rights groups, the media, and concerned citizens.

IV. The role of the USAOs in modern human rights violator cases

A. Civil denaturalization cases

The role of the USAOs in civil denaturalization cases involving modern human rights violators is largely a matter of each U.S. Attorney's discretion, and each USAO is encouraged to assist OSI in the investigation and litigation of these cases in whatever manner best suits its individual priorities, expertise, and resources. Obviously, in any related criminal prosecutions (whether for abuses committed

overseas or immigration violations), the USAOs have primary responsibility for the litigation of the case, as they do in other criminal cases.

Historically, the USAOs generally have not been involved in the investigation phase of the World War II cases, except to a limited extent when OSI has conducted a voluntary prefiling, sworn interview with a prospective defendant. Nonetheless, there have been exceptions. For example, in the fall of 2002, the USAO for the Eastern District of Michigan worked closely with OSI and investigators from both the FBI and the former INS in a successful effort to locate Johann Leprich, a former concentration camp guard who went into hiding after his naturalized U.S. citizenship was revoked. Leprich was arrested in July 2003, was ordered removed from the United States in November 2003, and remains in DHS custody pending his appeals from that decision. *In re Johann Leprich*, In Removal Proceedings, File A 08 272 762 (Detroit, MI, Nov. 21, 2003), *aff'd*, *In re Leprich*, File A 08 272 762 (BIA, Mar. 5, 2004), *appeal docketed,* No. 04-3337 (6th Cir. Mar. 17, 2004).

To some extent, the ability of the USAOs to provide input during the preliminary investigative phase of cases involving the illegal procurement of naturalization has been limited by the fact that, as a general rule, DHS (like its INS predecessor) does not always notify a USAO of any such preliminary investigations in its district. Normally, until the preliminary investigation has been completed and DHS personnel have concluded that the case should be pursued as a criminal or civil matter, local USAOs are not contacted.

During the litigation phase of civil denaturalization cases involving World War II suspects, USAOs have generally acted as local counsel for OSI. It is hoped that this practice will continue in the modern denaturalization cases. The actual role of an AUSA assigned to an OSI matter will vary depending on factors such as the AUSA's interest in the case, workload, and experience. A more complete description of the AUSAs role in an OSI prosecution may be found on page 23 of this issue of the *United States Attorneys' Bulletin*.

B. Criminal cases

In criminal prosecutions involving naturalized U.S. citizens who participated in human rights violations, OSI and other Criminal Division components will provide whatever assistance is necessary.

Litigation-related activity involving suspected participants in torture, genocide, and war crimes, is subject to additional Department notification and approval requirements. In a January 25, 2005 Memorandum, the Deputy Attorney General issued guidance to all United States Attorneys concerning notification in such cases. Pursuant to this Memorandum, U.S. Attorneys are required to notify the Criminal Division before initiating or declining to initiate investigations, as well as to provide notification of any significant developments in these matters. In addition, prior approval of the Assistant Attorney General (AAG) in charge of the Criminal Division, or the AAG's designee, is required before taking certain actions in torture, war crimes, and genocide matters. Such actions include, *inter alia*, filing an application for a search warrant or a material witness warrant; filing a criminal complaint or seeking return of an indictment; and dismissing a charge for which prior AAG approval was initially required, including as part of a plea agreement. These requirements apply in all investigations in which a U.S. Attorney contemplates charging an offense involving torture (18 U.S.C. §§ 2340 and 2340A), war crimes (18 U.S.C. § 2441), genocide (18 U.S.C. §§ 1091-1093), or any other statute (such as 18 U.S.C. §§ 1001 or 1425) in which proof of the offense (for example, a false statement or fraud) will require proving that torture, a war crime, or genocide, was committed.

Deputy Attorney General Comey's guidance of January 2005 concerning matters involving terrorism, genocide, war crimes, and other related offenses has been implemented on a temporary basis for a period of one year, at the conclusion of which the Attorney General's Advisory Committee and the Assistant Attorney General for the Criminal Division will confer with the Deputy Attorney General and the Attorney General to determine whether these provisions should be adopted on a permanent basis, and, if so, whether any modifications are appropriate. The guidance is scheduled to be finalized in January 2006 and will then be included in the United States Attorneys' Manual.

V. Assistance that OSI can provide to USAOs in other cases

Over the past twenty-five years, the majority of reported appellate cases involving the unlawful procurement of naturalized citizenship have been investigated, litigated, and won, by OSI. As a result, OSI has developed the broad range of expertise needed to prevail in such cases, including expertise in foreign archival research, the ability to locate fact witnesses to events that happened overseas decades earlier, and the use of expert historian witnesses at trial. OSI has also developed expertise in the full range of pertinent legal issues, such as evidentiary issues relating to ancient foreign documents and the scope of 8 U.S.C. § 1451(a)'s provisions dealing with the illegal procurement of naturalization. In addition, OSI has developed significant expertise in legal issues relating to expatriation.

Even before OSI's jurisdiction was expanded to include the modern cases, OSI had begun providing advice and assistance to the USAOs in other civil and criminal matters involving the unlawful procurement of naturalized U.S. citizenship, including one case in which a Cuban immigrant was successfully prosecuted in the Southern District of Florida for lying on his naturalization application about his former Communist Party membership and his role in the persecution of political dissidents. (The defendant, Eriberto Mederos, had worked in a Cuban psychiatric hospital and had administered severe, debilitating electric shocks, without any legitimate medical purpose, to dissidents who were being detained there.) *See* Charles Rabin, *Accused Cuban Torturer, 79, Dies*, MIAMI HERALD, Aug. 24, 2002, at 1B. As civil and criminal denaturalization actions are increasingly utilized in terrorism cases, including cases in which a prosecution for a terror-related offense cannot be mounted, OSI has also provided advice to USAOs regarding the prosecution of such cases.

Upon request, OSI assists the USAOs by, among other things, reviewing prosecution memos and indictments, discussing legal issues and strategy, and providing samples of briefs, expert reports, and other materials. OSI is also able to query DHS databases to determine whether a suspect is a naturalized citizen, is developing a wide range of contacts with human rights experts and organizations that are able to assist in these cases, and can provide such information on request. OSI welcomes any request for assistance on matters within its areas of expertise.

VI. Conclusion

Modern-day perpetrators of torture, genocide, and other serious human rights abuses, were long able to immigrate to the United States with near-impunity, but that has now changed. The legal and organizational frameworks needed to detect and investigate such persons, and to pursue appropriate criminal and civil actions against them, are largely in place. With the cooperation of all interested federal offices and agencies–including the USAOs–we can collectively ensure that the perpetrators of human rights violations committed overseas will not find a safe haven in the United States.❖

ABOUT THE AUTHOR

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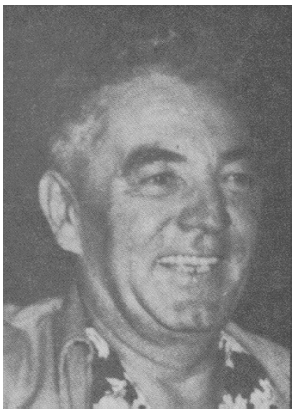
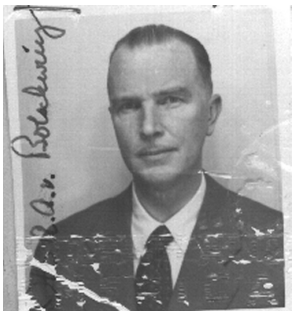


Artukovic - 1951
Figure 1

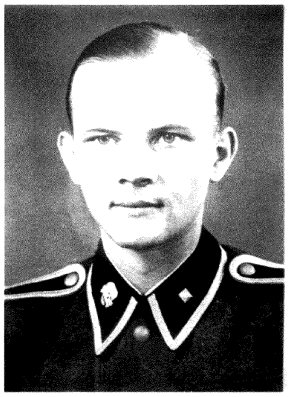
Artukovic
Figure 2



von Bolschwing 1953
Visa Photo
Figure 3

Schellong
Figure 4

Schellong War
Figure 5



Schweidler BDC
Figure 6

Mengele Half Face/Half Skull
Figure 7

Mengele
Figure 8

Barbie in Uniform
Figure 9

President Bush Signs IRTPA
Figure 10

Waldheim 1943
Figure 11

Waldheim United Nations Photo
Figure 12

Reimer 1952 Visa Photo
Figure 13

Reimer Trawniki Photo
Figure 14

Demjanjuk Visa Photo
Figure 15

Demjanjuk Trawniki Card
Figure 16

Notes

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