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The Uncertain Role of Innocence in United States Efforts to Deport Nazi War Criminals

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The Uncertain Role of Innocence in United States Efforts to Deport Nazi War Criminals

In the thirty years following World War II, the United States was a safe haven for Nazi war criminals.[1] During this time, the U.S. Immigration and Naturalization Service (INS) prosecuted only one alleged war criminal.[2] Responding partly to Congressional outrage over INS inaction, the Attorney General in 1978 created the Office of Special Investigations (OSI) to prosecute war criminals.[3] This special Justice Department office has launched scores of prosecutions, resulting in the denaturalization of many individuals, the deportation of several, and the probable denaturalization and deportation of many more now wending their way through the appellate process.[4] Since most of these defendants originate from the Soviet Union, they also face a probable death sentence upon deportation. According to one report, the OSI is investigating over 300 individuals.[5]

Although bringing Nazi war criminals to justice is a laudable goal, serious flaws exist in the current program. Defendants in denaturalization proceedings receive a level of due process inferior to that accorded defendants in criminal trials.[6] Even more serious, the present procedures never allow the accused a right to trial on the merits of the war crimes charge, focusing instead upon the illegal procurement of citizenship. Thus, even a defendant whom the government cannot prove guilty may be stripped of citizenship and deported to face a death sentence.

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1. This situation has caused considerable embarrassment for the United States. The Soviet Union, for instance, charged that western countries were harboring Nazi war criminals and refusing to extradite them. *See generally* United States v. Kungys, 571 F. Supp. 1104, 1125 (D. N.J. 1983), *aff'd*, 793 F.2d 516 (3d Cir. 1986), *cert. granted*, 107 S.Ct. 431 (1986).

2. The INS was unsuccessful in this single prosecution attempt. *See infra* note 99; *cf.* notes 100-03 and accompanying text.

3. *Infra* notes 96-98 and accompanying text.

4. In 1984, approximately 35 cases were reportedly being litigated. N.Y. Times, Aug. 15, 1984, at A3, col. 1. Many more prosecutions have begun since that time, but this author did not investigate the number. For lists of cases in progress or being newly initiated, see newsletters of Americans for Due Process, P.O. Box 85, Woodhaven, NY 11421.

5. *Id.*

6. *See generally* Comment, *Denaturalization of Nazi War Criminals: Is There Sufficient Justice For Those Who Would Not Dispense Justice?*, 40 MD. L. REV. 39, 72-73 (1981).

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One such individual was recently executed.[7] Another defendant, acquitted of war crimes by the district court, may nevertheless be deported by the INS to the Soviet Union.[8]

The deportation of innocent persons is possible for two reasons. First, the United States does not assert jurisdiction over persons who committed war crimes. Second, although denaturalization is a proceeding in equity, judges may not exercise their equity power to consider innocence, good citizenship, or a probable ultimate death sentence.[9] During the trial, a judge may consider only whether the defendant was originally eligible for citizenship or for his entry visa. Any immigration irregularity is sufficient to strip the defendant of citizenship and subject him to deportation, probably to the Soviet Union.[10] If stripped of citizenship, the defendant's only hope for escaping this "juggernaut" lies in the ability of a political office—the U.S. Attorney General's—to step in and block deportation.[11] This Note contends that such a "remedy" is grossly inadequate.

Part I of this Note examines the historical anomalies that permitted war criminals to enter the United States, the legal regimes that governed their entry, and the creation of the organization now prosecuting them. Part II describes the due process deficiencies of denaturalization procedure in general, as well as some known deficiencies unique to OSI prosecutions. Part III analyzes the Nazi prosecutions from a different angle, focusing upon the problems inherent in avoiding a trial on the merits and the serious injustice that can thereby result. Parts IV and V assess the inadequacies of the remedies heretofore suggested, make two alternative proposals for reform, and weigh the relative merits of each proposal.

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7. United States v. Fedorenko, 455 F. Supp. 893 (S.D. Fla. 1978), *rev'd*, 597 F.2d 946 (5th Cir. 1979), *reh'g denied*, 601 F.2d 1195 (5th Cir. *En banc* 1979), *aff'd*, 449 U.S. 490 (1981). Fedorenko was executed in July, 1987. *See infra* note 185.

8. United States v. Kungys, 793 F.2d 516 (3d Cir. 1986), *rev'g* 571 F. Supp. 1104 (D.N.J. 1983). Kungys emigrated from Lithuania. *Kungys*, 571 F. Supp. at 1136. Under current procedures, he will likely be sent back to his country of origin (now the U.S.S.R.), except in the unlikely event he can find another country willing to take him.

At least one other defendant may be following the same path, Serge Kowalchuk. United States V. Kowalchuk, 773 F.2d 488 (3d Cir. 1985) (*en banc*), *cert. denied*, 106 S. Ct. 1188 (1986), *aff'g*, 540 F. Supp. 25 (S.D. Pa. 1983). The Justice Department said that Kowalchuk, a Ukrainian, could be deported to the Soviet Union. N.Y. Times, Mar. 1, 1986, § I, at 13, col. 4; *see also infra* note 130.

9. *See Fedorenko*, 455 F. Supp. at 513-16.

10. More than three-quarters of the defendants currently being prosecuted face probable deportation to the Soviet Union or other Eastern European countries. *See infra* note 136.

11. *See infra* notes 193-95 and accompanying text.

I. Denaturalization Law

A. Relevant Definitions

Denaturalization and expatriation are terms concerning the loss of citizenship. Denaturalization is an involuntary proceeding whereby the U.S. government revokes citizenship.[12] Denaturalization creates the legal fiction that the denaturalized person never was a U.S. citizen.[13] Expatriation, in contrast, is the voluntary surrender or abandonment of nationality or allegiance. Loss of citizenship through expatriation occurs automatically upon an expatriating act by the citizen.[14]

Extradition and deportation are legal processes by which a country removes individuals involuntarily. In extradition, one state formally requests another state to detain and surrender an individual whom the requesting state seeks to prosecute.[15] The United States refuses to extradite unless it has a formal extradition treaty with the requesting state.[16] Deportation is a unilateral action whereby the United States expels an alien from this country.[17] Technically, a deported alien is not "sent" anywhere since the U.S. interest in the matter ends upon the alien's expulsion.[18] Most alleged Nazi war criminals face deportation, not extradition,[19] because the United States does not have an extradition treaty with the Soviet Union, the country of origin of most of these defendants.[20] Citizenship is the necessary link between denaturalization (or expatriation) and deportation. Only aliens may be deported.[21] Thus, the necessary precondition to deportation is either denaturalization or an expatriating act.

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12. 8 U.S.C. § 1451(a) (1982). "[T]he denaturalization proceeding is regarded as a direct, and not a collateral, attack upon the naturalization judgment. . . . It is important to bear in mind, moreover, that asserted fraud or impropriety . . . [in obtaining naturalization] does not make the [naturalization] decree void but only *voidable*." 3 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 20.2(a) (1959) (emphasis added) [hereinafter GORDON & ROSENFIELD]. *See infra* notes 55-58 and accompanying text.

13. 8 U.S.C. § 1451(a) (1982). Because denaturalization merely changes the status of a U.S. citizen to that of resident alien, the government must then seek a deportation hearing before it can expel the denaturalized person. Comment, *supra* note 6, at 46.

14. 3 GORDON & ROSENFIELD, *supra* note 12, § 20.7(a).

15. *See* M.C. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 2 (1974).

16. *Id.* at 7.

17. 8 U.S.C. §§ 1251-1254 (1982).

18. 8 C.F.R. 242.17(c). 1A GORDON & ROSENFIELD, *supra* note 12, § 5.8(f).

19. John Demjanjuk is a famous exception. N.Y. Times, Feb. 28, 1986, § 1, at 10, col. 1. For an account of the Demjanjuk proceedings, see Reiss, *The Extradition of John Demjanjuk: War Crimes, Universality, and the Political Offense Doctrine*, 20 CORNELL INT'L L.J. 281 (1987).

20. *See infra* notes 136 and 140.

21. Citizens may, of course, be extradited. *See generally* 1A GORDON & ROSENFIELD, *supra* note 12, §§ 4.5(a), (b) and (d).

B. Denaturalization

1. Equitable Nature of Proceeding

Although Congress passed the first act governing denaturalization in 1906,[22] the courts have been the true shapers of the law. In *Johannessen v. United States*,[23] the Supreme Court declared denaturalization to be a proceeding in equity. The *Johannessen* court reasoned that the antecedent naturalization is a possessory interest "closely analogous to a public grant of land," and therefore must be "open like other public grants to be revoked if and when it shall be found to have been unlawfully or fraudulently procured."[24] Because rules of civil rather than criminal procedure apply to equitable proceedings, the *Johannessen* decision led to significant due process problems.[25] For example, the Court denied a defendant's request for a jury trial the succeeding year,[26] and only required the prosecution to prove guilt by a preponderance of the evidence, the least rigorous evidentiary standard.[27]

The Court soon recognized that *Johannessen*'s "land" analogy was "flawed and ill-conceived,"[28] abandoning it in 1943 in *Schneiderman v. United States*,[29] conceding that the loss of one's citizenship "is more serious than a taking of one's property, or the imposition of a fine or other penalty;"[30] the Court elevated the prosecution's burden of proof to evidence that must be clear and convincing.[31] Although individual justices subsequently characterized citizenship in even stronger terms, as a right as precious as life or liberty,[32] the Court has not further elevated the level of due process protection. The Court has applied the *Schneiderman* standard in every subsequent denaturalization proceeding.[33]

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22. The original statute was the Act of June 29, 1906, ch. 3592, § 15, 34 Stat. 601. The current law is the Immigration and Nationality Act of June 27, 1952, Pub. L. No. 414, § 340, 66 Stat. 260 (codified as amended at 8 U.S.C. § 1451 (1982)). Section 340 of the Act is the sole method of denaturalization. United States v. Zucca, 351 U.S. 91, 99 (1956) (quoting Bindczyck v. Finucane, 342 U.S. 76, 83-84 (1951)).

23. 225 U.S. 227 (1912).

24. *Id.* at 238.

25. *See infra* notes 109-35 and accompanying text. *See generally* Comment, *supra* note 6.

26. Luria v. United States, 231 U.S. 9 (1913).

27. *See, e.g.*, United States v. Zgrebec, 38 F. Supp. 127, 130 (E.D. Mich. 1941) (cited in Comment, *supra* note 6, at 62).

28. Comment, *supra* note 6, at 65.

29. 320 U.S. 118 (1943).

30. *Id.* at 122.

31. *Id.* at 123. For discussion of this advance, see Comment, *supra* note 6, at 61-62. *See also* United States v. Zgrebec, 38 F. Supp. 127, 130 (E.D. Mich. 1941).

32. Justice Brandeis described denaturalization as a loss of "all that makes life worth living." Ng Fung Ho v. White, 259 U.S. 276, 284 (1922). Justice Rutledge said that "[t]o take away a man's citizenship deprives him of a right no less precious than life or liberty, indeed of one which today comprehends those rights and almost all others." Klapprott v. United States, 335 U.S. 601, 616 (1949) (Rutledge, J., concurring).

33. 3 GORDON & ROSENFIELD, *supra* note 12, § 20.5d(3). *See also infra* text accompanying note 50.

2. Grounds for Denaturalization

An applicant for a visa, residency, or naturalization must fully disclose all material facts; misrepresentation or concealment of a material fact constitutes illegal procurement of citizenship and is grounds for denaturalization.[34] The Court set forth the requisite standard of materiality in *Chaunt v. United States*.[35] Under *Chaunt*, concealment of a fact that would have been grounds for denial of status, or concealment of a fact that *might have led* to the discovery of facts that would have been grounds for denial, constitute grounds for revocation of citizenship.[36]

For example, the concealment or misrepresentation of participation in subversive associations and activities, such as Nazi and Communist Party affiliations,[37] is grounds for denaturalization.[38] The existence of a criminal record usually bars residency or naturalization, and is always relevant to eligibility.[39] Knowingly making false statements about marital or family status, past residence, or occupations or trade, that conceal information that would have led to denial of the naturalization petition, is also a ground for denaturalization.[40] Indeed, any deliberate misrepresentation or concealment, even if not material, might be grounds for denaturalization, as tending to show the applicant's lack of good moral character.[41]

Most of these grounds have provided the basis for denaturalization suits against alleged Nazi war criminals.[42] For example, conviction of

34. 3 GORDON & ROSENFIELD, *supra* note 12, §§ 20.4a, 20.4b(2).

35. 364 U.S. 350 (1960).

36. *Id.* (emphasis added). In *Chaunt*, the defendant had been arrested three times for distributing handbills in a public street, making an oration in a public park, and generally disturbing the peace. *Id.* at 352. Eleven years later, when the defendant filled out a form in connection with his petition for naturalization, he answered "no" to whether he had ever been arrested or charged with any violation of U.S. law. *Id.* at 351-52. The prosecution argued that if the defendant had told the truth about his arrests, the subsequent investigation might have revealed that the defendant had been a leader in the Communist Party and thus ineligible for citizenship. *Id.* at 352. The Court held, however, that,

> in the circumstances of this case, the Government has failed to show by 'clear, unequivocal, and convincing' evidence either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship.

Id. at 355.

37. *See* Nowak v. United States, 356 U.S. 660 (1958) (Communist Party); Klapprott v. United States, 335 U.S. 601 (1949) (Nazi Party); Sweet v. United States, 211 F.2d 118 (6th Cir. 1954), *cert. denied*, 348 U.S. 817 (1954) (Communist Party).

38. 3 GORDON & ROSENFIELD, *supra* note 12, § 20.4b(4)(b).

39. *Id.* § 20.4b(4)(a).

40. *Id.* §§ 20.4b(4)(c)-(f).

41. *Id.* § 20.4b(4)(d); *see also id.* § 15.15.

42. In United States v. Linnas, 527 F.Supp. 456 (E.D.N.Y. 1981), *aff'd*, 685 F.2d 427 (2d Cir. 1982), *cert. denied*, 459 U.S. 883 (1982), the defendant was charged with illegal procurement, concealment of material facts, willful misrepresentation, having committed crimes of moral turpitude, and lacking the requisite good moral character. In United States v. Kowalchuk, 773 F.2d 488 (3d Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986), the defendant was charged with having "illegally procured" his natural-

war crimes or of crimes against humanity would, *ipso facto*, show that the defendant lacked the requisite good character ever to have gained citizenship.[43] Furthermore, membership in any Nazi-affiliated party in any German-occupied country, or in an analogous group such as the Nazi-dominated police forces in German-occupied Ukraine and the Baltic republics, would have constituted grounds for exclusion under the immigration regimes set up after World War II and thus would constitute grounds for current denaturalization.[44]

The *Chaunt* test applies expansively to defendants alleged to be Nazi war criminals. The government need not prove that the defendant was a member of the Nazi party or a guard in a concentration camp. Once the government shows that the defendant misstated his occupation or residence during the War, it need prove only that an accurate statement about occupation or residence would have led to an investigation that *might* have uncovered evidence of incriminating activities.[45]

3. The Denaturalization Process

United States Attorneys institute denaturalization proceedings in their respective districts upon the order of the Department of Justice.[46] Typically the government brings suit in the United States District Court for the district in which the defendant resides or last resided.[47] Because the suit is in equity, it is tried without a jury unless specifically ordered by the court.[48] Unless the defendant pleads the privilege against self incrimination, the court may compel the defendant to testify. If the defendant invokes the privilege, his silence may be the basis for adverse comment and inference.[49] The government must present evidence that

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ization, or having procured it by concealment of a material fact or by willful misrepresentation. In United States v. Kungys, 793 F.2d 516 (3d Cir. 1986), *cert. granted*, 107 S.Ct. 431 (Nov. 10, 1986), the defendant is charged with illegal procurement, misrepresentation, and lack of the requisite good moral character.

43. Crimes of moral turpitude constitute one ground of exclusion. 1 GORDON & ROSENFIELD, *supra* note 12, § 2.43 (citing Sec. 212(a)(9), Act of 1952, 8 U.S.C. § 1182(a)(9)). A new ground of exclusion was added in 1978, specifically barring the entry of any alien who, between March 29, 1933, and May 8, 1945, participated in any Nazi-associated persecutions. *Id.* § 2.47a.

44. *See supra* note 37, and *infra* notes 85-89 and accompanying text. Similarly, service as a guard in a concentration camp, whether voluntary or involuntary, would have constituted a bar to entry. United States v. Fedorenko, 449 U.S. 490 (1981). The trial court found Fedorenko innocent of the atrocities of which he was accused. Yet, his status as a guard at Treblinka was sufficient to mandate denaturalization and deportation. "The plain language of the [Displaced Persons] Act mandates precisely the literal interpretation that the District Court rejected: an individual's service as a concentration camp guard—whether voluntary or involuntary—made him ineligible for a visa." *Id.* at 512.

45. *See supra* note 36.

46. 8 U.S.C. § 1451(a) (1982); *see also* 3 GORDON & ROSENFIELD, *supra* note 12, § 20.5c(1).

47. 8 U.S.C. § 1451(a) (1982); *see also* 3 GORDON & ROSENFIELD, *supra* note 12, § 20.5c(2).

48. 3 GORDON & ROSENFIELD, *supra* note 12, § 20.5d(2); *see* FED. R. CIV. P. 38(1).

49. 3 GORDON & ROSENFIELD, *supra* note 12, § 20.5d(2). Silence has not, however, been dispositive of guilt in any case to date. *Id.*

is clear, unequivocal, and convincing, a standard easier to satisfy than the reasonable doubt standard used in criminal prosecutions.[50] A defendant may appeal an adverse decision to a United States Court of Appeals and, ultimately, to the Supreme Court. The appellate court reviews the evidence *de novo*.[51]

C. Deportation

A single immigration officer, the immigration judge, conducts deportation hearings.[52] His decision may be appealed to the Board of Immigration Appeals (BIA), whose decision to hear the appeal is discretionary.[53] During the hearing, the defendant may designate countries to which he wants to be deported; these countries, however, may refuse to accept him, in which case he may be deported to the place of his nationality or former residence or to any country that will accept him.[54]

A denaturalized person is not only considered an alien, but in a legal fiction courts have held him never to have been a citizen through the principle of "relation-back."[55] However, although an alien, he is not necessarily subject to deportation.[56] In most cases the Attorney General can prevent deportation.[57] However, a recent amendment to the law removes the Attorney General's discretionary powers in cases of aliens who assisted in Nazi persecutions.[58]

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50. *Id.* § 20.5d(3).

51. *Id.* § 20.5d(5).

52. 1A GORDON & ROSENFIELD, *supra* note 12, § 5.7a.

53. *Id.* § 5.13a.

54. *See id.* §§ 5.17(a)-(c) (citing Sec. 243(a), Act of 1952, 8 U.S.C. 1253(a)).

55. *Id.* § 20.6. The denaturalized citizen is restored to his previous state of alienage. "The purpose of this concept is to deprive the wrongdoer of benefits accruing from his wrongful actions. While this purpose doubtless is sound, a legal fiction cannot completely obliterate actualities which have developed while the naturalized person possessed a paper title to citizenship." 3 GORDON & ROSENFIELD, *supra* note 12, § 20.6. The legal fiction of never having been a citizen can have tragic consequences. In many situations, the defendant's spouse and children will also lose citizenship, a situation carrying overtones of tainted blood. *Id.* The 1952 Act provided a complicated formula governing derivative citizenship as follows:

(a) all derivative citizenship rights are extinguished if the denaturalization was based on actual concealment or misrepresentation;
(b) derivative citizenship rights are extinguished if the denaturalization was based on presumptive fraud unless the derivative is residing in the United States at the time of the denaturalization decree;
(c) derivative citizenship rights are not affected if the denaturalization was based on illegality.

Id. Immigration and Nationality Act of 1952, Pub. L. No. 414, § 340(f), 66 Stat. 260 (codified as amended at 8 U.S.C. § 1451 (1982)).

Thus, a child born in this country has a claim on citizenship, but one brought over as an infant, now knowing no language other than English, could therefore be deported as an adult.

56. *Id.*

57. Immigration and Nationality Act of 1952, Pub. L. No. 414, § 243(h), 66 Stat. 214; *see also* 1A GORDON & ROSENFIELD, *supra* note 12, § 5.16(b)(1).

58. *See* Act of Oct. 30, 1978, Pub. L. No. 95-549, § 104, 92 Stat. 2065. The Board of Immigration Appeals has adopted a broad reading of "assisted," using an objec-

D. The Relevant Immigration Law

1. Historical Background

The situation in Europe after World War II created two aspects of the problem this Note addresses: the influx into the United States of war criminals; and the influx of non-war criminals who nevertheless needed to conceal aspects of their war-time background in order to qualify for entry. When hostilities ended, the Allies were confronted by millions of displaced persons.[59] These included war refugees, prisoners of war, survivors of concentration and extermination camps, and 1.5 million non-German laborers conscripted by the Germans to operate German farms and industry.[60] Large numbers of displaced persons whose country of origin was now occupied by Soviet forces refused to go back.[61] Expulsions of ethnic minorities from many countries,[62] as well as refugees from the newly-Communist countries in Eastern Europe,[63] exacerbated the problem in the immediate post-war years.

As the plight of displaced persons worsened over the next several years, international dissatisfaction grew concerning the United States's restrictive and ethnically biased immigration laws.[64] The United States Congress responded by enacting the Displaced Persons Act of 1948 (hereinafter DPA).[65] Under the aegis of the DPA, 440,000 displaced persons immigrated to the United States.[66] Some of these immigrants were Nazi war criminals who slipped in by misrepresenting their backgrounds.[67] Significantly, many persons who were not war criminals also

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tive test, not a test based upon intent to assist or upon direct participation in persecution. *See infra* note 191; *see also* 1A GORDON & ROSENFIELD, *supra* note 12, § 5.16b(1).

59. The Allies found approximately 2.5 million displaced persons in Germany alone. N.Y. Times, May 19, 1945, at 4, col. 4.

60. *See generally Refugees*, 19 ENCYCLOPEDIA BRITANNICA 9 (15th ed. 1987).

61. *See* N.Y. Times, Oct. 19, 1946, at 9, col. 8 (Latvian, Lithuanian, and Estonian DPs estimated at 250,000); N.Y. Times, June 21, 1946, at 4, col. 7 (UNRRA (United Nations Relief and Rehabilitation Administration) poll of DPs in Germany reported to show only 6% want repatriation); N.Y. Times, Oct. 15, 1945, at 8, col. 2 (about one million Poles, Yugoslavs, former Baltic States citizens, and pre-1939 Russians oppose repatriation); N.Y. Times, May 24, 1945, at 7, col. 4.

62. One week of reports in the *New York Times* illustrates the continuing dislocations. *See* N.Y. Times, June 5, 1946, at 5, col. 1 (U.S. Zone of Germany unable to handle scheduled influx of 2,377,000 deportees); *id.* at 6, col. 6 (Polish government announces expulsion of 500,000 Germans since March 1); *id.* (repatriation of 800,000 Poles from U.S.S.R. territory to be completed by end of July); *id.* at 11, col. 8 (Czechoslovakia to transfer 65,000 German civilians to U.S.S.R. Zone of Germany by November).

63. The Refugee Relief Act of 1953 was created solely to meet this continuing problem. *See infra* note 88 and accompanying text.

64. *See, e.g.*, N.Y. Times, Mar. 14, 1946, at 6, col. 5 (Pope assails forcible repatriation moves, urges lifting of U.S. immigration restrictions as aid in solving problem). For a description of the ethnic bias of contemporary U.S. immigration laws, see *infra* note 81.

65. Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009, *as amended by* Act of June 16, 1950, Pub. L. No. 81-555, 64 Stat. 219 (expired 1952).

66. *See infra* notes 81-82 and accompanying text.

67. Most Nazi war criminals entered the United States under the DPA. *See infra* note 84 and accompanying text.

misrepresented themselves in order to qualify under the DPA.[68]

Many displaced persons misrepresented themselves simply because the United States was an attractive option when compared to war-ravished Europe.[69] Evidence suggests that fears of forced repatriation motivated others.[70] The Allies forcibly repatriated over two million persons during and immediately after the War, and several thousand more in 1946 and 1947.[71] Forced repatriation remained a fear, with charges of continued forced repatriations occasionally appearing in the press.[72] Newspapers played up stories of numerous suicides and savage violence employed by troops at the entrainments.[73] The Eastern bloc countries considered refugees from their countries to be collaborators and war criminals,[74] and pressed aggressively for forced repatriation of all nationals, which Great Britain and the United States opposed.[75]

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68. According to one historian, between a quarter and half a million Soviet non-Russians managed to evade repatriation, often by forging DP papers showing another nationality. Only 35,000 such Soviet citizens were listed officially as having been retained knowingly in the West. N. TOLSTOY, THE SECRET BETRAYAL 371-72 (1977). Of those who were retained unknowingly, any estimate would place a significant percentage in the United States which, along with Canada, Australia, and the United Kingdom, took large numbers of DPs.

69. Those who misrepresented themselves to enter the United States but who were not genuine war criminals could fall into varying degrees of culpability: Soviet citizens of the minority peoples (*e.g.*, Ukrainians, Byelorussians, etc.) who evaded possible forced repatriation by forging DP papers giving them another nationality, people who billeted Nazi troops in their homes, managers of factories, officials in villages and towns, members of local militia dominated by the Nazis, guards in concentration or extermination camps. Reasonable persons can differ about the level of moral culpability, for instance, of a prisoner of war conscripted into serving as a camp guard. Many were vicious sadists, while some may have been victims of the Nazis. The U.S. denaturalization and deportation process makes no attempt to calibrate moral distinctions. Savage war criminals, people who misstated their age or birthplace, and all the degrees of moral culpability between, are treated similarly: all are equally prosecuted, denaturalized, and deported, regardless of what awaits them following deportation.

70. *See* N.Y. Times, May 25, 1946, at 8, col. 4 (describing Ukrainians' terror at possibility of repatriation to U.S.S.R.).

71. N. TOLSTOY, *supra* note 68, at 371-72. Tolstoy puts the figure at 2,272,000 between 1943 and 1947. From September, 1945 to January, 1946 a moratorium existed on forced repatriations. Between January, 1946 and May, 1947, a few thousand more were compelled to return. *Id.*

72. The New York Times reported a virtual manhunt conducted by U.S.S.R. agents within France. N.Y. Times, Mar. 7, 1946, at 7, col. 2. It also printed charges by Cardinal Tisserant who reported forcible shipments of Ruthenians, Ukrainians, Slovenes, Slovaks, and other groups in Germany and Austria to the U.S.S.R. by the United States and Great Britain despite assertions to the contrary by the United States State Department. Tisserant charged that the Crimea Conference accords provided for return of persons who left the U.S.S.R. after 1929 and cited the kidnapping of refugees from camps near Rome. N.Y. Times, Mar. 6, 1946, at 3, col. 5.

73. N. TOLSTOY, *supra* note 68, at 370. At least one attempted suicide actually occurred, when a returning prisoner tried to slit his own throat. *Id.*

74. *See* N.Y. Times, Feb. 2, 1946, at 6, col. 2 (Ukrainian Soviet Republic charges most DPs not wanting to return home are war criminals and collaborators).

75. *See* N.Y. Times, Feb. 8, 1947, at 4, col. 8 (Ukraine official urges forcible repatriation); *id.*, Aug. 16, 1946, at 12, col. 5 (UNRRA council debates treatment of displaced persons; Eastern bloc seeks total repatriation; Westerners refuse to force

Indeed, the displaced persons camps were such hotbeds of anti-Soviet feeling that one camp rioted from fear of repatriation when the Allies merely tried to move it to another location.[76]

2. The Evolution of United States Immigration Law

The United States joined fifteen countries in adopting the Constitution of the International Refugee Organization (IRO).[77] The Constitution, which became effective in August of 1948,[78] set international standards for treatment of refugees and displaced persons.[79] Congress subsequently enacted the Displaced Persons Act of 1948 (DPA) to implement the IRO Constitution.[80] The DPA temporarily suspended the annual quotas of immigrants from various countries to facilitate immigration into the United States by persons eligible under the IRO Constitution.[81] In the three and one-half years following passage of the DPA, 440,000

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repatriation); *id.*, Mar. 18, 1946, at 10, col. 4 (Polish delegate to UNRRA Subcommittee on Displaced Persons urges forced repatriation); *id.*, Feb. 9, 1946, § 1, at 2, col. 3 (Mrs. Roosevelt leads UNO fight to reject U.S.S.R. efforts to allow East European countries to enforce repatriation).

76. *See* N.Y. Times, Jan. 12, 1947, at 24, col. 4; *id.*, Feb. 2, 1946, at 6, col. 2 (Ukrainians feared forced repatriation after twenty-five Ukrainians arrested for assaulting Russian officials in Ukrainian camp).

77. Aug. 20, 1948, 62 Stat. 3037, T.I.A.S. No. 1846, 18 U.N.T.S. 4.

78. *Id.*

79. *Id.*

80. Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009, *as amended by* Act of June 16, 1950, Pub. L. No. 81-555, 64 Stat. 219 (expired 1952).

81. Visas were to be issued to 202,000 eligible displaced persons in the next two years; an amendment then increased the number to 341,000 for three years, beginning in 1948. *Id.* Ultimately, 440,000 entered. *See infra* note 82.

The need for such an act was apparent from the sheer numbers of displaced persons and the existence of national origin quotas in U.S. immigration law. For example, approximately 250,000 Baltic displaced persons were reported in 1946. *See supra* note 62. As shown in the table below, however, the annual quotas for the three Baltic countries totaled only 738 persons annually. At the same time, 60,000 Lithuanians alone were reported in displaced persons camps. N.Y. Times, Jan. 28, 1947, at 20, col. 6. This system of country-by-country quotas had been set up by the Immigration Act of May 19, 1921, Pub. L. No. 67-5, 42 Stat. 5, and revised but not scrapped by the Immigration and Naturalization Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, formerly the McCarran-Walter Act. The law based each country's annual quota upon ratios of persons of each national origin actually in the United States in 1920, with some exceptions—Japanese and Chinese were totally excluded. M. BENNETT, AMERICAN IMMIGRATION POLICIES: A HISTORY 173 (1963). The purpose of the quota system was to prevent the ethnic and cultural composition of the United States from changing. The motives were xenophobic and racist. As Senator McCarran wrote in defense of the quota system, and of his own revised immigration law: "[T]oday there are hard-core, indigestible blocs which have not become integrated into the American way of life. . . . This oasis of the world [the U.S.] shall be overrun, *perverted, contaminated*, or destroyed. . . ." *Id.* (emphasis added). The quotas varied widely. Great Britain and Northern Ireland were allowed 65,721 spaces, while many countries received only 100 spaces (the minimum). The following table shows annual quota spaces under the two immigration acts for the countries of origin of alleged Nazi war criminals, and the number from those countries admitted under the special emergency provisions described in this section.

refugees entered the United States.[82] To further assist refugees fleeing Communist-controlled Europe, Congress in 1953 passed the Refugee Relief Act, which increased the number of individuals allowed to immigrate.[83] Nearly all the alleged Nazi war criminals under current investigation and prosecution entered the United States under one of these emergency protocols.[84]

All these acts contained provisions excluding war criminals from entry. The IRO Constitution specifically excluded from eligibility for resettlement war criminals, quislings, traitors, and individuals who assisted the enemy in persecuting civil populations of countries.[85] Initially, the DPA excluded from entry "any person who is or has been a member of, or participated in, any movement which is or has been hostile to the United States or the form of government of the United States."[86] The amended version of the DPA excluded ". . . any person who advocated or assisted in the persecution of any person because of race, religion, or national origin or . . . any person who has voluntarily borne arms against the United States during World War II."[87] The Refugee Relief Act differed only slightly from the amended DPA.[88] This

Country	1924 (annual quota)	1952 (annual quota)	No. Admitted DPA and Refugee Relief Act
Estonia	116	115	11,247
Latvia	236	235	38,207
Lithuania	386	384	27,263
Poland	6,524	6,488	159,952
U.S.S.R.	2,798	2,697	43,749
Yugoslavia	938	933	57,664

F. AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES 49-51 (1955); M. BENNETT, *supra*, at 338. The DPA, unfortunately, mortgaged up to half of future quotas to accomplish the purposes of immediate entries, so that countries with small quotas lost even half that far into the future. *Id.* at 76-77. Latvia's quota, for example, was mortgaged until the year 2123. F. AUERBACH, *supra*, at 81. A 1965 revision abolished the national origin quotas altogether. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (effective June 30, 1968); *see* 1 GORDON & ROSENFIELD, *supra* note 12, § 1.4a.

82. 1 GORDON & ROSENFIELD, *supra* note 12, § 1.2d.

83. Act of Aug. 7, 1953, Pub. L. No. 82-203, 67 Stat. 400, *amended by* Act of Aug. 31, 1954, Pub. L. No. 751, 68 Stat. 1044.

84. Indeed, virtually all alleged Nazi war criminals entered the United States under the Displaced Persons Act. Lippman, *The Denaturalization of Nazi War Criminals in the United States: Is Justice Being Served?*, 7 HOUS. J. INT'L L. 169, 179 (1985). The President has the power to regulate aliens' departure from and entry into the United States during wartime. Act of May 22, 1918, Pub. L. No. 65-154, 40 Stat. 559. *See generally* Lippman, *supra*, at 178-80.

85. Constitution of the International Refugee Organization, *supra* note 77 at Annex, Part II(1), (2). *See also* Lippman, *supra* note 84, at 179.

86. Displaced Persons Act of 1948, Pub. L. No. 774, § 13, 62 Stat. 1009. *See also* Lippman, *supra* note 84, at 179.

87. An Act to Amend the Displaced Persons Act of 1948, Pub. L. No. 81-555, § 11, 64 Stat. 219 (1950). The word "personally" was added to modify "advocated and assisted in the persecution."

88. Refugee Relief Act, Pub. L. No. 83-203, § 14(a), 67 Stat. 400, 406 (1953); *see Alleged Nazi War Criminals: Hearings Before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 8 (1977).

Act did not exclude applicants on the basis of mere membership in the Nazi party.[89]

In 1952, Congress established the structure of contemporary United States immigration law by passing the Immigration and Nationality Act.[90] Of the categories of aliens deportable under the Act, the following four have been used to prosecute alleged Nazi war criminals: (1) individuals who procured a visa or entered the United States by fraud, or by willfully misrepresenting a material fact;[91] (2) individuals who committed a crime of moral turpitude before entering the United States or who have admitted committing such a crime;[92] (3) individuals with past or current membership in, or affiliation with, a totalitarian party, its affiliates or predecessor or successor organizations;[93] and (4) individuals who were excludable on their entry into the United States under existing laws such as the Displaced Persons Act or the Refugee Relief Act.[94] The Act of October 30, 1978, amended the Immigration and Nationality Act to specifically exclude Nazi war criminals and to authorize the deportation of those now in the United States.[95]

E. The Office of Special Investigations

The Attorney General created the Office of Special Investigations (OSI) after the Immigration and Naturalization Service (INS) failed to vigorously prosecute Nazi war criminals. A General Accounting Office study had concluded that INS investigation of some cases before 1973 was either deficient or perfunctory.[96] Although a Special Investigations Unit existed within the INS to denaturalize and deport Nazi war criminals, its funding was withheld by the INS.[97] Facing "Congressional displeasure," the Attorney General, by executive order, transferred the unit to the Justice Department, where it became the OSI.[98]

OSI's vigor presents a sharp contrast to that of the INS. In the thirty years preceding the OSI's establishment, the INS prosecuted only one war criminal, Andrija Artukovic, which single effort that proved unsuccessful.[99] In contrast, by August 15, 1984, OSI had 300 individu-

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89. Lippman, *supra* note 84, at 180 n.64.

90. Immigration and Nationality Act of June 27, 1952, Pub. L. No. 82-414, 66 Stat. 163; *see* 1 GORDON & ROSENFIELD, *supra* note 12, at §§ 1.3, 1.4.

91. 8 U.S.C. § 1182(A)(19) (1982).

92. *Id.* § 1182(A)(9).

93. *Id.* § 1182(A)(28)(c).

94. *Id.* § 1251(A)(1).

95. Act of Oct. 30, 1978, Pub. L. No. 95-549, 92 Stat. 2065 (codified at 8 U.S.C. §§ 1182(A)(33), 1251(9), 1253(N), 1254(c) (1982)).

96. *See* Lippman, *supra* note 84, at 177 n.45 (citing GOVERNMENT ACCOUNTING OFFICE, WIDESPREAD CONSPIRACY TO OBSTRUCT PROBES OF ALLEGED NAZI WAR CRIMINALS NOT SUPPORTED BY AVAILABLE EVIDENCE—CONTROVERSY MAY CONTINUE, Report No. GA 1.13 GGD-78-73, at 8-39 (1978)).

97. Lippman, *supra* note 84, at 177.

98. *Id.* at 177-78. *See also* 44 Fed. Reg. 54,045 (1979), *codified as* 28 C.F.R. § 0.55.

99. Karadzole v. Artukovic, 247 F.2d 198, 206 (9th Cir. 1957), *vacated and remanded on other grounds*, 355 U.S. 393 (1958) On remand, United States v. Artukovic, 170 F.Supp. 383, 393 (S.D. Cal. 1959), the district court refused to surrender the

als under investigation and 35 cases in litigation.[100] Of these, many defendants have been denaturalized,[101] and several deported,[102] including Artukovic, who was subsequently convicted and sentenced to death in Yugoslavia.[103] One person, Frank Walus, successfully appealed his conviction on the basis of new, exonerating evidence,[104] and one denaturalization suit has been denied.[105]

II. General Problems With Process

Several journal articles have identified deficiencies in the Nazi war crimes trials, including problems of estoppel,[106] relaxed due process in

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defendant to Yugoslavia because the alleged war crime constituted a non extraditable "political offense". *See also In re* Artukovic, No. A7-095-961 (Bd. Imm. App., filed Mar. 7, 1980) (government overturned the 1959 stay of deportation pursuant to the Act of Oct. 30, 1978). For a discussion of the relevant issues involved in these proceedings, see Comment, *supra* note 6, at 42-43 n.10, 50-51 n.38.

100. Taylor, Jr., *Deported Bishop Flies to Portugal*, N.Y. Times, Aug. 15, 1984, at 3, col. 2.

101. Twenty-five have been denaturalized already; three others have voluntarily left the country before formal legal proceedings began (Arthur Rudolph, Paul Bluemel, Juozas Kisielatis). *See supra* note 4.

102. Those deported include Fedorenko, *see* N.Y. Times, July 28, 1987, § I, at A3, col. 5; Bohdan Koziy, N.Y. Times, Aug. 13, 1985, § II, at B5, col. 5; Alexander Lehman, N.Y. Times, Mar. 1, 1984, § I, at A19, col. 1; Archbishop Valerian D. Trifa, N.Y. Times, Aug. 15, 1984, § I, at A3, col. 1; Hans J. Lipschis, N.Y. Times, Apr. 23, 1983, § I, at A8, col. 1; Karl Linnas, N.Y. Times, Apr. 21, 1987, § I, at A1, col. 6.

103. *See* N.Y. Times, July 26, 1986, § I, at A2, col. 6 (Croatia Supreme Court rejects Artukovic's appeal of death sentence); Kaufman, *Croatian War Criminal Sentenced to Firing Squad*, N.Y. Times, May 15, 1986, § I, at A2, col. 3; *id.*, Apr. 19, 1986, § I, at A2, col. 6 (Artukovic lapses into disorientation at war crimes trial); *id.*, Feb. 16, 1986, § I, at 17, col. 1 (Artukovic formally charged with ordering murder of 231,000); Pear, *U.S. Extradites Croat to Yugoslavia*, N.Y. Times, Feb. 13, 1986, § I, at A3, col. 1.

104. United States v. Walus, 616 F.2d 283 (7th Cir. 1980); *see infra* notes 117-29 and accompanying text.

105. United States v. Sprogis, 763 F.2d 115 (2d Cir. 1985) (denaturalization suit denied), *aff'g*, No. CV-82-1804 (E.D. N.Y. May 18, 1984).

106. *See* Comment, *The Effect of Government Knowledge on Denaturalization Proceedings: A Return to Illegal Procurement?*, 30 AM. U.L. REV. 519 (1981). Many alleged war criminals have argued that the government is precluded from bringing suit either because it had, or should have had, sufficient knowledge at the time of the naturalization of the facts now alleged in the denaturalization suit. The estoppel argument is especially significant because reliance by the government is an essential element in proving misrepresentation, a key charge in many of the war crimes denaturalization suits. *Id.* at 520 & n.8. Allegations have also been made that government departments colluded with war criminals to evade restrictions in the DPA, so as to obtain the collaboration of people whose scientific expertise was useful to the national defense or who were able to give intelligence information about the Soviet Union. These allegations were substantiated recently. *See* Blumenthal, *C.I.A. Accused of Aid to 30's Terrorist*, N.Y. Times, Feb. 6, 1986, § II, at 5, col. 1; N.Y. Times, June 29, 1985, § I, at 7, col. 1. The GAO told Congress that at least two wanted Nazi war criminals, as well as an SS officer and a convicted assassin, received official U.S. help in immigrating to the United States after World War II; all four reportedly had links to U.S. intelligence agencies. According to the GAO, the CIA misled Congress when it denied such reports several years earlier during hearings. *See* Comptroller General of the United States, Widespread Conspiracy to Obstruct Probes of Alleged Nazi War

denaturalization proceedings,[107] and the use of Soviet source evidence.[108] This section briefly describes these specific problems.

A. Due Process Concerns

In *Klapprott v. United States*, Justice Rutledge persuasively stated the case for a strict application of due process in all denaturalization cases:

> To take away a man's citizenship deprives him of a right no less precious than life or liberty, indeed of one which today comprehends those rights and almost all others. To lay upon the citizen the punishment of exile for committing murder, or even treason, is a penalty thus far unknown to our law and at most but doubtfully within Congress' power. U.S. Const., Amend. VIII. Yet by the device or label of a civil suit, carried forward with none of the safeguards of criminal procedure provided by the Bill of Rights, this most comprehensive and basic right of all, so it has been held, can be taken away and in its wake may follow the most cruel penalty of banishment. . . . Regardless of the name given it, the denaturalization proceeding when it is successful has all the consequences and effects of a penal or criminal conviction, except that the ensuing liability to deportation is a greater penalty than is generally inflicted for crime.[109]

The due process deficiencies inherent in the U.S. denaturalization proceedings are numerous. There is no statute of limitations in denaturalization cases.[110] The defendant's failure to testify is subject to adverse comment.[111] The defendant has no right to trial by jury[112] or state-provided counsel if indigent.[113] Furthermore, the defendant may be "convicted" by a standard of guilt less than "beyond a reasonable doubt."[114] These due process deficiencies are not only longstanding,[115] but are especially unfair in light of the high stakes for accused war criminals.[116]

Criminals Not Supported by Available Evidence—controversy May Continue, No. GGP-78-73, iii (May 15, 1978); for a summary of this report, see Comment, *supra* at 520 n.10.

107. *See infra* notes 109-35 and accompanying text.

108. *See infra* notes 136-51 and accompanying text.

109. Klapprott v. United States, 335 U.S. 601, 616-17, 619 (1949) (Rutledge, J., concurring) (footnote omitted).

110. 3 GORDON & ROSENFIELD, *supra* note 12, at § 20.2e.

111. *Id.* § 20.5d(2); *see supra* note 49.

112. *See supra* note 48 and accompanying text. The court can, however, order a jury trial. *Id.*

113. *See* Comment, *supra* note 6, at 88; Lippmann, *supra* note 84, at 203.

114. *See supra* notes 50, 58 and accompanying text.

115. *See* Comment, *supra* note 6, at 70, 72-73.

116. Loss of citizenship is always a severe penalty. *See supra* note 109 and accompanying text. For the alleged Nazi war criminals, however, denaturalization results in devastating public opprobrium, and vulnerability to war crimes trials abroad as long as they live. *See* Comment, *supra* note 6, at 73-74 & n.147. This vulnerability is especially strong when defendants face probable deportation to countries when a strong state interest may influence the outcome of a trial, or, as was the case with one defendant, where a trial has already been held *in absentia* and a death sentence proclaimed. *See In re* Linnas, No. A8-085-626 (Bd. Imm. App., Oct. 16, 1985) (cited as Interim Decision #300 in Hein's Interim Decisions Service, U.S. Dept. of Justice,

The prosecution of Frank Walus shows how the denial of a right to a jury and of the right to state-provided counsel can create injustice in the war crimes context.[117] Walus was accused of committing crimes against civilians in the ghettos of Kielce and Czestochowa, Poland, while allegedly a member of the Gestapo, or "SS".[118] He pleaded an alibi—that he was removed from his home in Poland at age seventeen, spending the years in question as a forced laborer on German farms.[119] Walus's evidence consisted of documentary records from the German bureaucracy,[120] and affidavits from witnesses such as fellow forced laborers, the farm owners who employed him, and a priest whose church he attended.[121] Despite this evidence, the district court judge found Walus guilty.[122] Although Walus subsequently produced additional evidence strengthening his alibi, the judge refused to re-open the case.[123] On appeal, the Seventh Circuit Court of Appeals reversed the conviction and remanded for a new trial.[124] The Court of Appeals commented several times on the extraordinary bias shown by the district court judge.[125]

1983) (evidence presented that results of trial and death sentence published before the trial took place).

117. United States v. Walus, 616 F.2d 283 (7th Cir. 1980), *rev'g* 453 F. Supp. 699 (N.D. Ill. 1978).

118. *Walus*, 453 F. Supp at 700.

119. *Id.* at 704-05.

120. These included records from the German health insurance system, as well as other documents. *Id.* at 708.

121. *Id.* at 706-07. The judge found the alibi testimony to be inconsistent and of limited credibility. *Id.*

122. *Id.* at 716.

123. Walus made two motions to vacate based on newly discovered evidence, both documentary and testimonial, from a laborer from Poland, a prisoner of war from France, and a priest who claimed to have known him from 1942-45. He also submitted statements from a German institute asserting that Poles were not admitted in the Gestapo or the SS, and that Walus did not meet the height requirements. The district court judge denied the motions but was overturned on appeal. United States v. Walus, 616 F.2d 283, 285-86 (7th Cir. 1980).

124. *Id.* at 304.

125. The court stated that "our reading of the record has revealed instances of attitudes we find somewhat disturbing on the part of this experienced trial judge," but declined to require reversal on this ground. *Id.* at 286-87. For example:

> The record shows that the district court often restricted questioning on the subject of the perpetrator's resemblance to the defendant or expressly accorded no significance to the answers given. During the cross-examination of the witness Koenigsberg, for example, the defense asked about Koenigsberg's memory of scars or other identifying marks. The trial court interrupted the answer with this exchange with the defendant's counsel:
>
> The Court: Certainly there is no foundation for asking that kind of a question. You asked this witness whether he had any scars on any part of his body. Now, if you were to ask him if he ever saw him without any clothes on, you would be laying a foundation.
>
> Defense Attorney: Your Honor, I specifically asked—
>
> The Court: Let's not waste our time.
>
> Defense Attorney: Judge, I don't want to waste your time.

Walus prevailed on appeal only because he produced a strongly

The Court:	He has answered it. You may continue, but I interpose this observation because I think it is an absurd question to ask a man whether he ever saw a scar on any part of his body when he hasn't testified that he has seen him—had seen him with no clothes on.
Defense Attorney:	Your Honor, I specifically stated on any part of his body that the witness could see.
The Court:	Well, you didn't say—
Defense Attorney:	I thought I did. If I did not, I apologize to the Court.
The Court:	I think it is unfair to the witness. I don't know whether you have any scars on your body or not. From here, I cannot even see whether you have any on your face. Continue with the examination. Try to ask some questions that will help us decide the issues here.

Id. at 290-91.

. . .

Because of the defendant's small stature, the defense also attempted to show failure of recollection on what could well have been his most distinguishing feature. Questioning on this subject, however, met with a similarly poor reception from the trial court. During the questioning of the witness Rozanski, for example, the following exchange occurred:

Defense Attorney:	Mr. Rozanski, before you identified the defendant in the case as the very same man you knew in Czestochowa, you didn't see him standing up, did you?
Witness:	No.
Defense Attorney:	So when you made that identification this morning, the only view you had of this defendant was from his stomach upward, isn't that a fact?
Witness:	Yes.
The Court:	Are you suggesting that this witness could see his stomach?
Defense Attorney:	I asked if he could only see the man from his stomach up. No, I am not suggesting that he could see his stomach.
The Court:	That is what you said.
Defense Attorney:	I thought it might be interesting in this case, since the crucial issue is identification, that we explore the area of identification.
The Court:	How can a man see his stomach, either standing or sitting? Let's get down to questions that are of interest here.

. . . [Material deleted by appellate court]

Defense Attorney:	If these questions are not of interest, then I will move on.
The Court:	How can a man's stomach be seen, either standing or sitting, without X-ray or some other instrument?

. . . [Material deleted by appellate court]

Please ask the next question if you have one, sir.

supported alibi, and was tried by an openly biased judge.[126] The judge's biased behavior reflects the incendiary nature of war crimes trials and evidences the need for the right to a jury. Although the conventional wisdom is that defendants prefer a judge to a jury trial in a highly emotional case, the Walus case suggests that a defendant may be better off facing a jury in some such cases. This is particularly true in those cases where Soviet source evidence plays a crucial role.[127] Some judges are much less sympathetic than others to defendant complaints about the nature and trustworthiness of such evidence. In a jury trial, these biases would likely point in both directions, thus tending to nullify their effect.

The Walus case also stands as a compelling example of the need for government supplied counsel. In order to mount a successful defense, Walus spent one and one-half years engaged in an extensive, costly search for evidence, covering two continents and stretching 35 years into the past.[128] In addition, his attorney conducted a three-week investigation in Europe.[129] The Walus case is not unique in this regard; in general the requirements for an effective defense are daunting. The events in question occurred forty years ago. Possible witnesses might be dead, have new names, or be scattered across Europe and North America. Some witnesses are unavailable because the Soviet government will not allow the defendant to question them.[130] Documentary evidence is also scattered. Sometimes a defendant requires assistance from the State Department to obtain access to documents.[131] Mounting a successful defense is made more difficult by the need to counter the enormous resources of government prosecutors. One judge com-

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Id. at 291-92.

126. The district court judge's "disturbing attitude," *id.*, was so pronounced it provoked rebuke on appeal. Walus was fortunate that his judge's bias was sufficiently overt to be noticed by the court of appeals. A less overtly-biased judge would be less likely to be reversed.

127. *See infra* notes 136-49 and accompanying text.

128. *Walus*, 616 F.2d at 303.

129. *Id.* at 303 n.52.

130. Defendant Kowalchuk, for example, was denied access to the village in which many people familiar with the events in question still reside. The defendant had access only to those witnesses produced for deposition by the Soviet government in its cooperation with the OSI. United States v. Kowalchuk, 571 F. Supp. 72, 80 (E.D. Pa. 1983). The district court judge did not accept the testimony of these Soviet witnesses as clear and convincing evidence of guilt, however, because of the obvious unfairness in this situation to the defendant. Indeed, the judge was inclined to doubt the defendant took part in any way in the massacre of the Jewish ghetto at Lubomyl. *Id.* at 81. However, by his own testimony the defendant was a member of a Ukrainian militia, albeit in a largely clerical capacity. This identity meant he was not a genuine refugee "of concern" to the IRO, and therefore not eligible for the benefits of the Displaced Persons Act. *Id.* at 82-83.

131. Frank Walus tried many methods in an attempt to obtain files of district commissions in Kielce or Czestochowa, the Polish towns where the atrocities of which he was accused had occurred. The defendant requested the district court to issue letters rogatory to the Polish War Crimes Commission for production of its depositions and investigative file. Even Secretary of State Vance intervened, but to no avail. *Walus*, 616 F.2d at 304.

mented that never before had he seen the government marshal such resources in prosecuting a case, not even when prosecuting important Mafia and organized crime figures.[132]

Many defendants would be unable to afford such efforts. The defendants are often workingmen or retired people of modest means. Frank Walus, for instance, was unemployed.[133] Feodor Fedorenko was a retired foundry worker with a life savings of $5,000.[134] John Demjanjuk was a retired auto worker.[135]

B. The Use of Soviet Source Evidence

Because the OSI largely prosecutes individuals suspected of committing war crimes in areas now under Soviet control (Latvia, Lithuania, and the Ukraine),[136] it must obtain most of the relevant documents and testimony through Soviet cooperation.[137] Defendants normally challenge the use of this evidence on two grounds. First, defendants argue that the Soviet Union has a strong state interest in achieving their conviction and a history of fabricating evidence for such ends.

Most targets of OSI prosecutions are naturalized Americans of Latvian , Lithuanian, or Ukrainian descent.[138] One argument as to the nature of the Soviet Union's interest in their prosecutions runs as follows. All three Soviet republics have a history of ethnic nationalism and recalcitrance to centralized state control.

To combat this particularism, the Soviet government has used various means to foster feelings of friendship between these smaller ethnic groups and the Russian people, including promotion of the Soviet role in liberating these countries from the Germans during the "Great Patriotic War." Part of this effort involves branding as "Nazi collaborators" those who engaged in independence struggles, and thus discrediting

132. United States v. Fedorenko, 455 F. Supp 893, 899 S.D. Fla. 1978), *rev'd*, 597 F.2d 946 (5th Cir. 1979), *aff'd*, 449 U.S. 490 (1981). The district court judge added that

> in view of the similarity in the burden of proof between criminal cases and denaturalization cases, and in view of what is at stake for the naturalized American citizen, the defendant in a denaturalization case ought to have the same resources that are provided a defendant in a criminal case . . . in short the naturalized citizen—provided the defendant's financial condition warrants it—should receive the benefit of court-appointed counsel and other experts at the Government's expense.

Id.

133. *Walus*, 616 F.2d at 303 n.52.

134. *Fedorenko*, 455 F. Supp. at 896.

135. Clines, *Once Again Into That Ashen Night of History*, N.Y. Times, Feb. 22, 1987, § 4, at 3, col. 1.

136. Note, *Denaturalization of Suspected Nazi War Criminals: The Problem of Soviet Source Evidence*, 24 COLUM. J. TRANSNAT'L L. 365 (1986). Of those OSI defendants whose national origin is known, well over half are from Soviet republics. *See generally* newsletter, Americans for Due Process, *supra* note 4.

137. *See generally id.*

138. Note, *supra* note 136, at 366 n.2.

émigrés with fabricated or exaggerated charges of war crimes.[139]

Some judges accept the argument that its state interest may lead the Soviet government to fabricate evidence. In *United States v. Kungys*, the district court judge noted:

> In these circumstances OSI received from the Soviet authorities the product of the KGB investigation . . . we also are faced with the fact that the Soviet Union uses special procedures in political cases such as this which, on occasion at least, result in false or distorted evidence in order to achieve the result which the state interest requires.[140]

In *United States v. Kowalchuk*,[141] the district court judge held that "there is ample support in the record for the proposition that false or exaggerated accusations have often been employed by the Soviet government as a political weapon."[142] Other courts, however, reject such blanket characterizations, laying the burden of showing evidence of coercion or forgery on defendants,[143] even though defendants may have no access

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139. These arguments are developed and evaluated at greater length in Note, *supra* note 136, at 365-66 n.2. For a description of Soviet methods of discrediting émigrés, see United States v. Kungys, 571 F. Supp. 1104, 1124 (D. N.J. 1983), *rev'd*, 793 F.2d 516 (3d Cir.), *cert. granted*, 107 S. Ct. 431 (1986).

> Three witnesses, whose testimony was submitted in deposition form or in the form of testimony from other trials, described the steps the Soviet Union has taken to counter the influence of émigrés from the Baltic states.
>
> Lesinskis, born in Latvia, studied at the Moscow institute for International Relations and after working briefly in Latvia returned to Moscow for KGB training. The KGB (the State Security Committee) has a central headquarters in Moscow where it is attached to the Council of Ministers, and it has a similar headquarters in each of the federal republics, including Latvia, Lithuania and Estonia.
>
> Lesinskis worked for the KGB from 1956 to 1978 when he defected. One of his early assignments was with "Motherland's Voice", an agency engaging in propaganda designed to discredit Latvian emigres abroad by characterizing them as war criminals or collaborators during the German occupation or by characterizing them as acting under orders of western intelligence agencies. Sometimes the charges were true; sometimes they were fabricated.
>
> In 1964 there was formed the Latvian Committee for Cultural Relations of Latvians abroad, and during 1970-76 Lesinskis was chairman of its presidium, receiving instructions from the KGB. Its objective was also to discredit Latvian emigres, particularly those who actively sought the end of the Soviet occupation. This was accomplished by publication of books and articles purporting to describe the war crimes and collaboration of which emigres were guilty. The facts were often embellished and supplemented with forged documents, false testimony and pure invention. When he was assigned to a post in the United States, Lesinskis' job was to obtain information about Latvian communities abroad, to promote discord within them and to discredit their leaders. All of this was a KGB function.

Id. at 1124.

140. *Kungys*, 571 F. Supp. at 1126.

141. 571 F. Supp. 72, 78 (E.D. Pa. 1983).

142. *Id.*

143. United States v. Demjanjuk, 518 F. Supp. 1362, 1366 (N.D. Ohio 1981), *aff'd*, 680 F.2d 32 (6th Cir. 1982), *cert. denied*, 459 U.S. 1036 (1982). *See also* United States v. Kairys, 600 F. Supp. 1254, 1258 (N.D. Ill. 1984), *aff'd*, 782 F.2d 1374 (7th Cir. 1986), *cert. denied*, 476 U.S. 1153 (1986) (trial judge admitted, over defendant's objec-

to such evidence.[144]

Defendants also contend that the kinds of evidence used—documents and depositions—do not allow the investigation and challenge usually possible in American courts, thereby creating problems of due process. For example, in the deposition process (the Soviet government so far has not allowed witnesses to testify at trial in the United States),[145] a Soviet government procurator presides over the proceedings. The procurator's presence may intimidate witnesses into saying only what the government has told them to say.[146] Moreover, although the defendant may have his lawyer present at the deposition, this is an expensive option for defendants of limited means who are not entitled to counsel at government expense.[147] If the lawyer is not present, however, the courts have tended to rule that the defendant's "choice" waives any right to challenge the deposition's fairness.[148] If the defendant's lawyer does attend, the procurator has reportedly barred certain lines of cross-examination that would be allowed in an American trial.[149]

Another problem results from the Soviet government's refusal to grant defendants or their attorneys access to potential witnesses or documentation. One district court judge described this Soviet practice as follows:

> Neither the government nor the defendant was permitted to interview other persons in Soviet-controlled territory having knowledge of the facts, or even to visit Lubomyl, where a great many persons familiar with the events still reside. The notion that only selected witnesses favorable to the government have been permitted to testify (and with the opportunity for informed and meaningful cross-examination severely restricted) is not easily squared with accepted concepts of due process of law.[150]

The judge refused to accept the testimony "for the most part," instead revoking the defendant's citizenship on the basis of his own testimony.[151]

Courts have split with respect to the treatment of Soviet-source evidence. While some courts are troubled by such evidence,[152] other

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tions, Lithuanian documents as self-authenticating, ancient documents). *See* Note, *supra* note 136, at 368-69 n.7.

144. "[O]f course, no defendant in any such case has had the opportunity to investigate the circumstances under which the KGB and procurator prepared the witnesses for interrogation by the OSI." *Kungys*, 571 F. Supp. at 1126.

145. Note, *supra* note 136, at 373 n.27.

146. *Kungys*, 571 F. Supp. at 1127; *see also* Note, *supra* note 136, at 375-78, for a more detailed discussion.

147. *See* Comment, *supra* note 6, at 88.

148. United States v. Linnas, 527 F. Supp. 426, 434 (E.D. N.Y. 1981), *aff'd*, 685 F.2d 427 (2d Cir.), *cert. denied*, 459 U.S. 833 (1982); United States v. Palciauskas, 559 F. Supp. 1294, 1297 n.3 (M.D. Fla. 1983), *aff'd*, 734 F.2d 625 (11th Cir. 1985); *see* Note, *supra* note 136, at 376-77.

149. Note, *supra* note 136, at 376-77.

150. United States v. Kowalchuk, 571 F. Supp. 72, 80 (E.D. Pa. 1983).

151. *Id.*

152. United States v. Sprogis, 763 F.2d 115, 121 (2d Cir. 1985); Laipenieks v. I.N.S., 750 F.2d 1427, 1432-33 (9th Cir. 1985); United States v. Kungys, 571 F. Supp.

courts have found the deposed testimony of Soviet witnesses to be credible, dismissing defendants' claims that Soviet documents were forged or witnesses coerced.[153] Courts have yet to find a way of treating Soviet source evidence so that the concerns of both prosecution and defense are met.[154] Because higher courts have not resolved the divergent treatment of Soviet source evidence, both OSI and the defense remain at the mercy of a particular judge's, or circuit's, approach.[155]

III. Analysis: The Problem of Avoiding a Trial on the Merits

The United States's decision to actively pursue alleged Nazi war criminals, coupled with its refusal to accept jurisdiction to try them domestically on the merits of the war crimes charges,[156] inadvertently has created a combination of procedures that never focus on the relative culpability of different defendants. A defendant could receive the death sentence without ever having a fair trial on the merits. The general due process inadequacies of all denaturalization proceedings,[157] the use of Soviet-source evidence,[158] and the removal of the power of equitable

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1104, 1123 (D.N.J. 1983), *aff'd,* 743 F.2d 516 (3rd Cir. 1986), *cert. granted,* 107 S.Ct. 431 (1986); United States v. Kowalchuk, 571 F. Supp. 72, 79-80 (E.D. Pa. 1983), *aff'd, en banc* 773 F.2d 488 (3rd Cir. 1985), *cert. denied* 475 U.S. 1012 (1986). *See generally* Note, *supra* note 136, at 378-87.

153. United States v. Koziy, 540 F. Supp. 25, 31-32 (S.D. Fla. 1982) *aff'd,* 728 F.2d 1314 (11th Cir. 1984) *cert. denied,* 469 U.S. 835 (1984); United States v. Linnas, 527 F. Supp. 426, 433-34 (E.D.N.Y. 1981), *aff'd,* 685 F.2d 427 (2d Cir. 1982), *cert. denied,* 459 U.S. 883 (1982); United States v. Osidach, 513 F. Supp. 51, 89-90 (E.D. Pa. 1981).

154. *See Koziy,* 728 F.2d at 1322, where the appeals court held:

> The Federal Rules of Evidence, however, add support to the district court's finding that the anmeldung and the abmeldung were properly authenticated. Under Fed. R. Evid. 902(3), a document is self-authenticated if it purports "to be executed or attested in his 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, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation." A Russian official authorized to authenticate such documents attested to the anmeldung and the abmeldung. These documents, therefore, were self authenticated under rule 902(3). Since there was competent evidence in the record to support the district court's finding that the anmeldung and the abmeldung were properly authenticated, the district court did not abuse its discretion by allowing them into evidence.

One can imagine many cases, involving many countries, where such reasoning could produce frightening results.

Contrast the above with *United States v. Kungys,* where the judge admitted the Lithuanian depositions only for the limited purpose of establishing that killings occurred at Kedainiai in July and August of 1941, but not as evidence that the defendant participated in those killings. *Kungys,* 571 F.Supp. at 1132-33.

155. *See* Note, *supra* note 136, at 378-92.

156. *See* Comment, *supra* note 6, at 43 n.13.

157. *See supra* notes 109-35 and accompanying text.

158. *See supra* notes 136-55 and accompanying text.

discretion from district court judges exacerbate the problem.[159] The lack of public sympathy for war crimes defendants[160] and the severity of the ultimate sanction—often the death penalty,[161] make these systemic failures even more troubling.

Moreover, the system puts many who fled Europe at risk. The Justice Department's stated policy is to not pursue possibly fraudulent procurement of citizenship once the individual has conducted himself as a good citizen for many years, unless that person's removal from the United States will protect "the body politic."[162] The OSI defendant, however, once charged with war crimes, faces an inexorable prosecution of any immigration irregularity, even though such an irregularity would not be pursued if it came to light absent the war crimes charges.

A. The Scope of the Problem: The *Fedorenko* Case

Feodor Fedorenko, a Ukrainian, entered the United States in 1949 on a DPA visa, and became a naturalized citizen in 1970.[163] In order to gain initial access to the United States, Fedorenko concealed information that as a prisoner of war he served as an armed guard in the Nazi concentration camp at Treblinka, Poland.[164]

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159. *See infra* note 179 and accompanying text.

160. For example, in one OSI case, the Jewish Defense League ran ads in local newspapers offering chartered buses to the situs of the trial on opening day. A demonstration outside the courtroom ensued with the chant: "Who do we want? Fedorenko. How do we want him? Dead." United States v. Fedorenko, 455 F. Supp. 893, 899 n.9 (S.D. Fla. 1978). In addition, a memorial service for the dead at the Treblinka concentration camp (where the defendant had served as a guard) was held in a park outside the court building. *Id.* at 900 n.11.

161. Fedorenko was executed in the Soviet Union. *Infra* note 185. Karl Linnas also faced execution at the time of his deportation. N.Y. Times, Apr. 2, 1987, at B1, col. 5.

162. The Department of Justice's guidelines for bringing denaturalization suits are as follows:

> The legislation referred to [denaturalization], being retroactive, is construed to be remedial rather than penal in its nature; for the protection of the body politic rather than for the punishment of the individuals concerned. Ordinarily, nothing less than the betterment of the citizenship of the country should be regarded as sufficient to justify the disturbance of personal and property rights which cancellation proceedings may occasion. This does not mean that such proceedings should not be instituted in any case where willful and deliberate fraud appears, as the perpetration of such fraud would indicate lack of the moral qualifications necessary for citizenship. If, however, many years have elapsed since the judgment of naturalization was apparently so procured, and the party has since conducted himself as a good citizen and possesses the necessary qualifications for citizenship, cancellation proceedings should not, as a rule, be instituted.

United States v. Fedorenko, 455 F. Supp. 893, 898-99 n.7 (S.D. Fla. 1978) (quoting Dept. of Justice Circular Letter No. 107 (Sept. 20, 1909), *reprinted in* Immigration and Naturalization Service Handbook at 6508, 08.1). Note that the government's failure to follow the Department of Justice's policies does not bar the bringing of a denaturalization suit. *See* United States v. Melligan, 573 F.2d 251 (5th Cir. 1978).

163. *Fedorenko*, 455 F. Supp. at 911.

164. *Id.* at 895-96.

In 1978, based on evidence of this concealment, the U.S. government filed a seven-count indictment in a federal district court, charging that Fedorenko illegally procured his citizenship by giving false information on his visa application.[165] The indictment also charged that Fedorenko failed to disclose his participation in war atrocities and that he lacked the "good moral character required to become a citizen."[166] In response, Fedorenko claimed that he had served only as a perimeter guard who patrolled the fence and served in the guard tower,[167] and that he had performed his duties involuntarily while a prisoner of war.[168]

The district court judge ruled that the government fell "woefully short" of proving Fedorenko's participation in war atrocities by the required standard of "clear and convincing proof."[169] With respect to the government's claim that Fedorenko misrepresented facts on his citizenship application, the court held that Fedorenko's concealment of his Treblinka service did not constitute a misrepresentation of "material fact" that would have justified denaturalization under the *Chaunt* test.[170] Alternatively, the court held that even if Fedorenko's omissions were sufficiently material to justify denaturalization, "equitable and mitigating" circumstances should permit him to retain his citizenship.[171] Such circumstances included the unproven nature of the war crimes allegations and Fedorenko's 29 years as a responsible U.S. resident and citizen.[172] Adding to the weight of the equities in Fedorenko's favor was that "[h]e was a victim of Nazi aggression, fearful of repatriation, many years and many miles from a home he thought to be empty of his wife

165. *Id.* at 897.

166. *See id.* at 897-98. Specifically, the government produced witnesses who testified that Fedorenko committed specific acts of murder and brutality against Treblinka camp inmates. *Id.* at 901-03.

167. *See id.* at 903-04.

168. *Id.* at 898.

169. *Id.* at 909. Judge Roettger found Fedorenko far more credible than the eyewitness testimony, which he found untrustworthy for several reasons. He concluded, "[t]he evidence left the court with suspicions about whether defendant participated in atrocities at Treblinka but they were only suspicions." *Id.* The court was clear, however, about its duty if Fedorenko had committed atrocities. "If the court were convinced that the allegations charging defendant with atrocities at Treblinka were true, there is no doubt that defendant would not be entitled to citizenship in a country which prides itself on its adherence to principles of equality and human dignity." *Id.* at 920.

170. *See id.* at 914-17. For a discussion of the *Chaunt* materiality test in denaturalization proceedings, see *supra* notes 34-36 and accompanying text. The district court adopted the Third and Ninth Circuit's interpretation of the *Chaunt* text, under which a fact suppressed or misstated is not material unless the truth, if known, would have justified denial of citizenship. *See, e.g.*, United States v. Riela, 337 F.2d 986 (3d Cir. 1964); United States v. Rossi, 299 F.2d 650 (9th Cir. 1962). The court held that Fedorenko's guard service, if known, would not necessarily justify denial of citizenship. *Fedorenko*, 455 F. Supp. at 916-17.

171. *Fedorenko*, 455 F. Supp. at 920.

172. Fedorenko had acquired a reputation as a conscientious and able worker at a Waterbury, Connecticut factory.

and children, and was longing for a chance in America."[173]

The Fifth Circuit reversed on appeal,[174] holding that Fedorenko's failure to fully disclose his war-time activities constituted a misrepresentation of material fact on his citizenship application,[175] and, further, that the judge possessed no discretion to permit equitable factors to excuse fraudulent procurement of U.S. citizenship.[176] The Supreme Court affirmed the denaturalization order.[177] Rather than consider the proper application of the *Chaunt* materiality standard to Fedorenko's citizenship application,[178] the Supreme Court ruled as a matter of law that U.S. authorities could not have given the defendant a visa under the Displaced Persons Act had they known of the defendant's guard service. Because Fedorenko's visa was not valid, it was illegally procured, and therefore revocable.[179] Most important for this Note, the Court held that equitable factors cannot prevent denaturalization once a court establishes illegal or fraudulent procurement of citizenship.[180] In ordering Fedorenko's denaturalization, neither the Supreme Court nor the Fifth Circuit questioned the trial court's finding that the evidence was insufficient to support the war crimes charge.[181]

Once denaturalized, Fedorenko became subject to deportation. In the deportation proceeding, the Board of Immigration Appeals held Fedorenko's actions as a guard for the Nazis constituted assistance of persecution whether he personally did or did not abuse, mistreat, or exterminate any individuals.[182] He was therefore deportable under the Holtzman Amendment, regardless of whether his guard service was voluntary, and regardless of the possibility that as a Ukrainian, he might be persecuted upon his return to the Soviet Union.[183] In 1984, after Canada refused to accept Fedorenko,[184] the United States deported him to the Soviet Union where, in a widely publicized trial, he pled guilty to all charges and was sentenced to death.[185] The Soviet Union executed

173. *Id.* at 920-21.

174. United States v. Fedorenko, 597 F.2d 946, 953-54 (5th Cir. 1979).

175. The Fifth Circuit Court refused to adopt the Third and Ninth Circuit interpretation of the *Chaunt* test, discussed *supra* note 169. Instead, the court held the government need only prove "by clear and convincing evidence that disclosure of true facts would have led the government to make an inquiry that might have uncovered other facts warranting denial of citizenship." *Fedorenko*, 597 F.2d at 951. Based on this analysis of the *Chaunt* test, Fedorenko was guilty of misrepresentation and concealment of material facts because "had [he] disclosed his guard service, the American authorities would have conducted an inquiry that might have resulted in denial of a visa." *Id.* at 953.

176. *Id.* at 953-54.

177. Fedorenko v. United States, 449 U.S. 490 (1981).

178. *See supra* notes 170 and 175.

179. *See Fedorenko*, 449 U.S. at 513-16.

180. *Id.* at 517.

181. *Fedorenko*, 449 U.S. at 505 n.24.

182. Matter of Fedorenko, Interim Decision 2963 (BIA 1984), at 16-18.

183. *See supra* note 58 and accompanying text.

184. N.Y. Times, Dec. 23, 1984, § A, at 12, col. 3.

185. N.Y. Times, June 20, 1986, § A, at 2, col. 5.

Fedorenko in 1987.[186]

B. Procedural Consequences of Avoiding Jurisdiction Over Accused War Criminals

The *Fedorenko* case highlights several procedural consequences of the United States's failure to assert jurisdiction to try OSI defendants for their alleged war crimes. The current denaturalization and deportation process, as it affects accused war criminals, disregards the failure to prove complicity of war crimes, so long as the government establishes improper procurement of U.S. citizenship.[187] Furthermore, the denaturalization procedure prohibits courts from considering countervailing equitable factors and disregards the high probability that OSI defendants will not receive a fair trial if deported to the Soviet Union and other states whose interest in convicting such defendants is strong.[188]

1. Irrelevance to the Deportation Decision of Failure to Prove War Crimes

In prosecuting alleged Nazi war criminals, OSI normally alleges both the commission of war crimes and the misrepresentation or concealment of material facts. The OSI, however, need only establish either allegation by "clear and convincing" proof to win its case.[189] An accused war criminal can absolve himself of war crimes charges yet nevertheless be denaturalized for having misrepresented himself as a displaced person to obtain a DPA visa.

By statute, the Attorney General cannot deport a denaturalized alien to a country where the alien's "life or freedom would be threatened" due to considerations such as race, religion, or nationality.[190] Arguably, this relief could apply to OSI defendants from the Baltic States and the Ukraine. However, the Attorney General must deport an alien not deportable under the "life or freedom" exception if the Attorney General determines the alien "ordered, incited, assisted or otherwise participated" in persecution.[191] As interpreted by the Board of Immigration Appeals, "it is the objective effect of an alien's actions which is controlling," even if the individual did not directly participate in persecution, or the conduct was involuntarily undertaken.[192] Thus, immigration officials must deport the OSI defendant unless the defendant can show not only that he was entirely innocent of all war crimes, but

186. N.Y. Times, July 28, 1987, § I, at A3, col. 5. The official announcement did not indicate when the execution occurred. *Id.*

187. No court has explicitly said this, but the result inevitably follows from the Supreme Court's Fedorenko decision. By leaving undisturbed the district court's "acquittal" of war crimes, but nevertheless ordering deportation, the Court created two, independent prongs for denaturalization and deportation.

188. *See Fedorenko*, 455 F. Supp. at 920; *Fedorenko*, 449 U.S. at 513-16. *See also* text accompanying notes 171-72.

189. 3 GORDON & ROSENFIELD, *supra* note 12, at § 20.5d(3). *See also supra* note 187.

190. 8 U.S.C.A. § 1252(h) (Supp. 1987).

191. Act of Oct. 30, 1978. *See supra* note 58.

192. Matter of Fedorenko, Interim Decision 2963 (BIA 1984), at 17. *See also* Matter of Laipenieks, Interim Decision 2949 (BIA 1983).

that he did not collaborate, voluntarily or involuntarily, with any group that persecuted others.

2. The Consequences of Avoiding Jurisdiction

The procedural framework governing the denaturalization and deportation of citizens accused of war crimes raises doubt about the effectiveness and fairness of the current system. The United States legal system concerns itself with accused war criminals only to the extent that the standards for denaturalization and deportation can or cannot be satisfied. This inflexible approach treats all defendants charged with war crimes the same, regardless of their level of subjective culpability and the involuntariness of their participation. By avoiding jurisdiction, United States courts lose the power to weigh the nature of a defendant's actions (i.e., interrogating suspects for the police vs. participation in mass murder), the level of a defendant's subjective moral culpability, and any extenuating circumstances (i.e., an 18-year old prisoner of war ordered to act as a camp guard may deserve more lenient treatment than a volunteer for the SS).[193] The United States avoids the responsibility of providing punishments proportionate to the particular crimes committed.

3. Vesting in a Political Official the Sole Power to Predicate a Decision Upon Innocence of War Crimes or Mild Culpability

In general, the Attorney General has final authority to determine which aliens will be deported.[194] The Attorney General's discretion remains the sole hope of an OSI defendant not found guilty of war crimes but guilty of misrepresentation or illegal procurement of entry. No court has passed on how the Act of Oct. 30, 1978, merges into the Attorney General's pre-existing statutory mandate to refuse to deport aliens facing persecution.[195] The effect of the two statutes together would seem to still give the Attorney General power to block deportation of an OSI defendant if the Attorney General determined both that the alien did not participate in persecution, and that upon deportation he would be persecuted.

Although the above interpretation gives the OSI defendant innocent of war crimes a chance of avoiding a probable death sentence, such a solution to an otherwise egregious miscarriage of justice is inadequate. The Attorney General is a political appointee, responsive to political pressures. Many Attorneys General would find it extremely awkward to generate headlines like "Attorney General Rescues Accused Nazi War Criminal." The political pressure would increase if the Board of Immi-

193. In a trial on the merits, the judge or jury always weighs such factors in deciding whether to find the defendant guilty of a lesser included offense, or in applying sentencing discretion.

194. This power arises from the Attorney General's statutory authority to prevent deportation of an alien he believes will be persecuted upon deportation. *See supra* notes 57, 190. Such a decision is inherently discretionary.

195. 8 U.S.C.A. § 1252(h) (Supp. 1987).

gration Appeals had found that the defendant "objectively" assisted in persecution, even though he may not have directly participated in any persecutions, or may have acted only under duress. Moreover, such a decision by a member of the Executive Branch would be a direct insult to the Soviet Union, possibly conflicting with important foreign policy concerns. These political considerations should not decide such cases. The power should rest with courts, insulated from political concerns, able to weigh the individual merits of the case.[196]

IV. The Deficiency of Already Proposed Solutions

Commentators have proposed two solutions to the due process deficiencies in Nazi war crimes prosecutions. One proposal suggests giving defendants a trial by jury on the factual issue of misrepresentation, providing assistance of counsel at government expense if needed, and, establishing a code for the denaturalization procedure merging elements from the traditionally separate spheres of civil and criminal law.[197] A second proposal advocates reconvening the Nuremberg Tribunals.[198]

The proposals have differing shortcomings. Although creation of an international tribunal to try war criminals could be a satisfactory solu-

196. The Attorney General's power is analogous to a governor's power to commute a death sentence, or a presidential amnesty or pardon. This Note does not argue that the Attorney General should be stripped of this power, only that a "commutation stage" should not be the only place where the merits are considered. When a governor commutes a death sentence, this occurs *after* the defendant has received a trial and a sentence for the crime of which he is accused. OSI defendants never receive such a trial.

197. *See* Comment, *supra* note 6, at 88.

198. Lippman, *supra* note 84, at 212. The Nuremberg (Nurnberg) trials resulted from a London agreement between the four main Allies on Aug. 8, 1945, which included a charter for an international military tribunal for the trial of the major Axis war criminals whose offenses had no particular location. Nineteen other governments later adhered to the agreement. The trials lasted more than ten months, resulting in twelve sentences of death by hanging, three sentences of life imprisonment, four prison sentences ranging from ten to twenty years, and three acquittals. The London agreement and charter contemplated a series of trials by the international military tribunal. Associate Justice Robert Jackson of the United States Supreme Court, one of the chief prosecutors, recommended against such proceedings, arguing that the remaining defendants could be tried by each occupying power in its own zone of occupation for single and specific crimes. Over 2,000 subsequent trials are estimated to have taken place involving many times that number of defendants (but this estimate does not include trials by the Soviet Union and the Eastern European countries, for which even approximations are unavailable).

From their very outset these trials were controversial. One of the most frequently advanced legal arguments against the program was that the war crimes trials were *ex post facto*, punishing acts that had not been criminal when they were committed. Against this view, the Nuremberg tribunal held that a series of international declarations, acts, and treaties, ratified by Germany and nearly all other states, had established a rule of customary international law. *See* War Crimes, 12 NEW ENCYCLOPEDIA BRITANNICA, 491 (1987). Justice Jackson expressed the argument this way: "We propose to punish acts which have been regarded as criminal since the time of Cain and have been so written in every civilized code." *See* Comment, *supra* note 6, at 39-40 n.2.

tion, the major international initiative required to create it is not apparently forthcoming.[199] The proposal suggesting the establishment of due process safeguards has merit for general denaturalization cases but does not address the specific problems of the Nazi war crimes prosecutions. The additional safeguards would not help an alleged Nazi war criminal who is innocent of war crimes but whose illegal entry itself nevertheless makes him deportable.

V. Fairness Proposals

Two different approaches could lessen the potential risk that alleged war criminals will be shuffled through the denaturalization process and deported to a country where they will be deprived of due process protections. First, Congress could simply assert jurisdiction in war crimes cases, trying and punishing the alleged criminals domestically. Alternatively, the United States could adopt a procedure to ensure that only those alleged war criminals guilty of war crimes are deported. This proposal requires an actual trial on the war crimes issue for defendants who meet specific requirements.

A. Proposal to Assert Jurisdiction

The United States may, consistent with international law, assert jurisdiction to try alleged war criminals domestically. Canada, for example, is already following this route.[200] The universality basis of jurisdiction authorizes any nation to punish persons guilty of universally condemned crimes, deeming some crimes so important that nexus is necessary between the nation and the defendant.[201] Although traditionally asserted in piracy and slave trade cases, nations have used this basis of jurisdiction more recently for war crimes, genocide, and crimes against humanity.[202] The United States has never used universality jurisdiction to prosecute a Nazi war criminal, but the United States has recognized the legitimacy of its use in such cases by allowing Israel to use universality jurisdiction to extradite John Demjanjuk.[203]

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199. This author's search of the literature has found no call for a renewed Nuremberg tribunal other than Lippman's.

200. N.Y. Times, March 13, 1987, § I, at A1, col. 1.

201. M.C. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 262 (1974). Most theories of jurisdiction require a link between the state asserting jurisdiction and the individual, such as *situs* of the offense, or nationality of the offense. *Id.* at 261-62. Under the universality theory, the gravamen of the offense is such that it constitutes an offense against mankind. *Id.* at 262.

202. *Id.* at 263, 266-67.

203. In fact, the district court and court of appeals in the Demjanjuk extradition trial found that the United States had specifically incorporated the universality principle into the Restatement of the Foreign Relations Law of the United States. Demjanjuk v. Petrovsky, 776 F.2d 571, 582-85 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *In re* Extradition of Demjanjuk, 612 F. Supp. 544, 555-58 (N.D. Ohio 1985); *see also* Reiss, *supra* note 19, at 298.

Israel used a municipal law to criminalize Demjanjuk's offense, the Nazis and Nazi Collaborators (Punishment) Law 5710, 57 SEFER HAHUKIM 281 (1950). The law

B. Proposal to Prove Guilt Before Deporting

When the OSI launches denaturalization proceedings on the basis of alleged Nazi war crimes, the Justice Department should require as an initial matter that the OSI either:

(a) present a request for extradition from a country with whom the United States has an extradition treaty, or
(b) state that the Justice Department ultimately seeks deportation rather than extradition.

If (a) applies, the courts would proceed as they always have with extradition requests. However, if (b) applies, OSI would be required to specify the probable country of destination if deportation occurs. Then, before the deportation proceeding could begin, the Secretary of State would be required to certify that the destination country would provide the defendant a trial with adequate due process protections.

If the Secretary of State could not so certify, the defendant would then receive a U.S. trial specifically upon the war crimes issue, providing criminal procedure due process protections. Because under this alternative the United States would not be exercising jurisdiction, such defendants could not be punished for war crimes in the United States. However, justice dictates that before a U.S. court sends a defendant to face trial in an untrustworthy judicial system, that court should be certain the defendant is guilty of the crimes for which he will likely be punished.

This proposal would require at least two statutory reforms. Congress would need to amend the Act of October 30, 1978 to implement the changes. Concomitantly, Congress would need to establish appropriate penalties for defendants like Fedorenko and Kungys, who have violated U.S. law but do not deserve deportation.

C. The Two Proposals: Discussion

The United States should adopt the first proposal and assert jurisdiction, although the second proposal is also narrowly tailored to address the problem. Under the second proposal, alleged war criminals would continue to be deported or extradited to appropriate countries, such as West Germany and Israel, to receive trials. Moreover, all defendants who the United States can *prove* to be war criminals would continue to be deported wherever, without regard for their subsequent fate. However, those whom the United States could not prove committed war crimes could not be deported unless a country could be found that would not persecute them. Those remaining in the United States would then be suitably punished for the fraud they practiced on the U.S. government.

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criminalizes, *inter alia*, crimes against the Jewish people, crimes against humanity, and war crimes. Reiss, *supra* note 19, at 283 n.7. States may also define their rights and duties by treaties allowing universal jurisdiction, such as the Geneva Convention of the High Seas. *Id.* at 302.

Despite the above-described attempts to narrowly tailor a deportation solution, actual assertion of jurisdiction has one decisive advantage. Under current U.S. law, "assistance" in Nazi war crimes is given a broad interpretation, covering kinds of persons whose moral culpability can vary widely: members of police forces in Nazi-dominated conquered states, prisoners of war drafted to be perimeter guards for the death camps (many of them eighteen year old youths at the time), those camp guards who actually herded prisoners to their death, and those notorious guards who took special pleasure in inflicting additional pain or humiliation upon the inmates. Asserting jurisdiction would allow the United States to distinguish levels of culpability, punishing the most culpable most harshly.

In contrast, the deportation solution might lead to allowing those of mild or moderate culpability to remain in the United States. Although these would be punished in some way for illegal procurement of entry, they could not be prosecuted for their participation in crimes against humanity. Such a solution would be offensive to many people. A mere perimeter camp guard may not deserve being deported to a death sentence, but his level of moral culpability might nevertheless require some form of punishment. Society must uphold certain moral norms of individual responsibility, including its expectation of certain standards of conduct in even the most exigent circumstances.

VI. Conclusion

American laxity in seeking out and prosecuting war criminals who took advantage of lenient post-war immigration policies is no longer acceptable. The Act of October 30, 1978 and the founding of the OSI were belated but progressive corrections. Unfortunately, longstanding due process inadequacies in U.S. denaturalization procedure, and the unique problems resulting from deportation of alleged war criminals, create potential dangers to some American citizens. By attempting to right one injustice the system may create new injustices. A balance must be struck so that, in pursuing the guilty, disproportionate punishment is not inflicted upon the innocent or the less culpable.

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