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Nazi War Criminals in the United States: It's Never Too Late For Justice

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"The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating that civilization cannot tolerate their being ignored because it cannot survive their being repeated."

—Justice Robert H. Jackson,
Chief United States Prosecutor,
Opening Statement before the
International Military Tribunal,
Nuremberg, November, 1945.[1]

I. INTRODUCTION

The conclusion of the international manhunt for Josef Mengele in 1985 reawakened the conscience of the world. Mengele, the Nazi, "Angel of Death," sent hundreds of thousands of innocent victims to their deaths at Auschwitz and performed heinous medical experiments on thousands of others. He was, perhaps, the most "wanted" war criminal of the Third Reich.[2] In August, 1985 an international team of forensic scientists and medical examiners confirmed Mengele's death as the victim of a drowning accident.[3] The search and identification of Mengele, the capture of and impending trial of Klaus Barbie — the "Butcher of Lyon" — and the recent extraditions from the United States of Andrija Artukovic to Yugoslavia and Ivan Demjanjuk to Israel signal a rebirth of international cooperation in the prosecution of Nazi war criminals. They provide an opportunity to renew the spirit of the Moscow Declaration[4] and London Agreement[5] and remind the international community of its legal and moral obligations to bring these criminals to justice.

From the outset, one question looms: Why bother? Why expend valuable economic, physical and judicial resources to find these aged criminals and prosecute crimes committed more than forty years ago? In response, the words of Justice Jackson cannot be improved upon:

> What makes this inquest significant is that these [criminals] represent sinister influences that will lurk in the world long after their bodies have returned to dust. They are living symbols of racial hatreds, of terrorism

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1. R. JACKSON, THE CASE AGAINST THE NAZI WAR CRIMINALS 3 (1946).
2. The reward for Mengele's capture reached $3.4 million by 1985. Johnson, *Hunting the "Angel of Death"*, TIME, May 20, 1985, at 33.
3. Ultimately, Mengele's dental x-rays matched the remains of a body found in Argentina. *Angel's Wings Clipped At Last*, TIME, April 7, 1986, at 43; Wall St.J., Mar. 28, 1986, at 18, col. 1.
4. *See infra* note 8 and accompanying text.
5. *See infra* note 10 and accompanying text.

> and violence, and of the arrogance and cruelty of power. They are symbols of fierce nationalism and of militarism, of intrigue and war-making which have embroiled Europe generation after generation, crushing its manhood, destroying its homes, and impoverishing its life. They have so identified themselves with the philosophies they conceived and with the forces they directed that any tenderness to them is a victory and an encouragement to all the evils which are attached to their names. Civilization can afford no compromise with the social forces which would gain renewed strength if we deal ambiguously or indecisively with the men in whom those forces now precariously survive.[6]

There exists an ever-increasing need to educate current and future generations to the causes and events of the Holocaust, and a related need to bring war criminals to justice. Escalating military power, the alarming increase in terrorist activity, and the proliferation of nuclear weaponry, coupled with racial, religious, and political tensions, offer compelling support for those needs. As Justice Jackson warned: "If we cannot eliminate the causes and prevent the repetition of these barbaric events, it is not an irresponsible prophecy to say that this twentieth century may yet succeed in bringing the doom of civilization."[7]

While this note focuses on Nazi war criminals living in the United States, it calls for *international* cooperation in prosecuting war criminals. It traces the history of post-war agreements relating to the prosecution of Nazi war criminals, and their application at the Nuremberg Trials. This note then examines how Nazi war criminals entered the United States following World War II, and how they have lived here for four decades virtually unnoticed. Additionally, this note analyzes the recent efforts of the Office of Special Investigations (OSI), a branch of the Department of Justice, to prosecute Nazi war criminals living in the United States. Finally, this note argues that justice is best served through a rebirth of the spirit embodied in the Moscow Declaration and London Agreement and calls for the reestablishment of an international tribunal with criminal jurisdiction over international war criminals. Additionally, the recent *Artukovic* and *Demjanjuk* extraditions should stand as strong precedent, and signal an invitation to countries with criminal jurisdiction over Nazi war criminals to make similar extradition requests.

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6. R. JACKSON, *supra* note 1, at 4.

7. R. JACKSON, THE NUREMBERG CASE 120 (1972) (from Justice Jackson's Closing Address before the International Military Tribunal, Nuremberg, July 26, 1946).

II. INTERNATIONAL AGREEMENTS AND THE NUREMBERG TRIALS

On November 1, 1943 the United States, Great Britain, and the Soviet Union signed a Declaration of German Atrocities,[8] later known as the Moscow Declaration. Although the Moscow Declaration did not provide a method for the prosecution of Nazi war criminals, it did signify early recognition of the Nazi atrocities and the need for international cooperation in bringing the perpetrators to justice. Specifically, the agreement stated:

> [T]hose German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in . . . atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein.[9]

Following victory in 1945, the United States, France, Great Britain, and the Soviet Union signed the London Agreement[10] reaffirming the values of the Moscow Declaration and formally pledging to deliver Nazi war criminals[11] to a swift and sobering justice. The London Agreement established an International Military Tribunal for the trials of major Nazi war criminals "whose offenses have no particular geographical location."[12] The Charter of the London Agreement provided the Tribunal

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8. The Declaration of German Atrocities, November 1, 1943, *reprinted in Alleged Nazi War Criminals: Hearing Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 59 (1977) [hereinafter Moscow Declaration].

9. *Id.*

10. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 279 [hereinafter London Agreement] (19 other states acceded to this Agreement).

11. For a detailed discussion of the distinction between "Nazi" and "war criminal," see Comment, *Denaturalization of Nazi War Criminals: Is There Sufficient Justice For Those Who Would Not Dispense Justice?* 40 MD. L. REV. 39, 29 n.2 (1981). Briefly, a Nazi was someone who belonged to the Nazi party (NSDAP, translated as the National Socialist German Worker's Party). A "war criminal," as defined in the London Agreement, was someone guilty of at least one of the following: "crimes against peace," "war crimes," or "crimes against humanity." Conspiracy to commit one of these acts also constituted a crime. *See infra* note 13 and accompanying text. Furthermore, at the Nuremberg Trials, membership in the Nazi party did not, itself, constitute a war crime, though membership in certain Nazi contingents, such as the Gestapo, was sufficient to support a guilty verdict.

12. London Agreement, *supra* note 10, art. 1, 59 Stat. 1544, 1544, E.A.S. No. 472, at 1, 82 U.N.T.S. 279, 280.

with jurisdiction over persons who, "acting in the interests of the European Axis countries, whether as individuals or as members of organizations," committed crimes against peace, war crimes or crimes against humanity.[13]

The Nuremberg Trials, which began in late 1945, implemented the intentions of the London Agreement.[14] The International Military Tribunal in Nuremberg tried twenty-two defendants.[15] The Nuremberg Trials, which lasted over ten months, resulted in nineteen convictions and three acquittals. Of those found guilty on October 1, 1946, twelve were sentenced to death, three to life imprisonment, and four to periods of imprisonment ranging from ten to twenty years.[16]

Subsequently, the parties to the London Agreement formed indepen-

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13. London Agreement, *supra* note 10, Charter of the International Military Tribunal, art. 6, 59 Stat. 1544, 1547, E.A.S. No. 472, at 4, 82 U.N.T.S. 279, 286. These crimes were defined as:

> (a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
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> (b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> (c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
>
> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Id., 59 Stat. 1544, 1547, E.A.S. No. 472, at 4, 82 U.N.T.S. 279, 288.

14. For an excellent account of the Nuremberg Trials, see R. CONOT, JUSTICE AT NUREMBERG (1983) and A. TUSA & J. TUSA, THE NUREMBERG TRIAL (1984).

15. Originally twenty-four defendants were to face charges at Nuremberg. One scheduled defendant, Dr. Robert Ley, Head of the Reich Organization, committed suicide before the hearing opened. Another, Gustav Krupp von Bohlen und Halback, a Nazi industrialist, was found to be unfit for trial and the court directed separate proceedings.

16. A. RUCKERL, THE INVESTIGATION OF NAZI CRIMES, 1945-1978, at 25-26 (1980) (Mr. Ruckerl provides a list of each of the 22 defendants and their respective sentences).

dent tribunals at Nuremberg, which continued the prosecution of Nazi war criminals through the middle of 1949. The American Military Tribunal conducted twelve major trials. It tried 184 persons and sentenced 142 war criminals.[17] Other American tribunals conducted "lesser" trials, and by the close of the proceedings in Nuremberg, the United States tribunals had instituted charges against 1,941 persons, of whom 1,517 were sentenced and 367 were acquitted. In 57 cases the charges were dropped.[18]

On January 31, 1951, United States High Commissioner John J. McCloy granted pardons to the convicted war criminals, mitigating the severity of their sentences (with the exception of death sentences).[19] By 1958, all the prisoners convicted by the United States tribunals were released.[20]

Despite the trials at Nuremberg, the majority of Nazi war criminals avoided prosecution. Moreover, some convicted criminals did not serve full sentences. The initial commitment of the Allied nations to justice proved to be short-lived.

III. How Nazi War Criminals Came to the United States: The Displaced Persons Act of 1948

> "How did Nazi war criminals come to the United States? We invited them in."
>
> —Allan A. Ryan, Jr., Director of the Justice Department's Office of Special Investigations, 1980-83.[21]

Most Nazi war criminals living in the United States entered the coun-

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17. Of the 184 accused, seven were not tried because of illness or death, 35 were acquitted, 98 were given sentences ranging from 18 months to 20 years imprisonment, 20 were sentenced to life imprisonment, and 24 were sentenced to death, though only 12 of the death sentences were actually carried out. *Id.* at 26-29.

18. Of the 1,517 persons sentenced, 324 were death sentences, 247 life imprisonment, and 946 sentenced to varying terms of imprisonment. *Id.* at 28-29; *see also* H.R. Rep. No. 1452, 95th Cong., 2d Sess. 6, *reprinted in* 1978 U.S. Code Cong. & Admin. News 4700, 4705. Great Britain, France, the Soviet Union, and other countries also held war crimes trials; for an account of those proceedings see A. Ruckerl, *supra* note 16, at 29-31.

19. A. Ruckerl, *supra* note 16, at 135 n.6.

20. *Id.*

21. A. Ryan, Quiet Neighbors 28 (1984).

try under the Displaced Persons Act of 1948 (DP Act).[22] The DP Act adopted the definition of "displaced person" provided in Annex I of the Constitution of the International Refugee Organization (IRO Constitution).[23] This definition excluded all persons shown:

> (a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or
>
> (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.[24]

In theory, the DP Act excluded Nazi war criminals. In actuality, however, a Nazi who lied about his past could easily enter the United States.[25]

After the close of World War II, many Nazi sympathizers posed as war victims and sought refuge in the displaced person camps (DP camps) in Germany. The New York Times reported in 1945 that many Nazi collaborators lived in these camps under the care of the United States military.[26] The article further estimated that one-third of the Balts in the DP camps had either fought for the Germans or been members of the Gestapo or SS.[27] United States Army investigations later confirmed these reports. Hundreds of thousands of refugees crowded the DP camps, hindering the United States goal of reconstructing Germany.[28]

The DP Act authorized the entry of 202,000 displaced persons into the United States over two years.[29] Rather than providing for random selection of eligible persons, however, the DP Act operated to exclude many concentration camp victims and include Baltic, Ukranian and ethnic Germans.[30] Because the DP Act provided only for displaced persons

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

23. Constitution of the International Refugee Organization, *opened for signature* Dec. 15, 1946, 62 Stat. 3037, T.I.A.S. No. 1846, 18 U.N.T.S. 3 (*entered into force* Aug. 20, 1948) [hereinafter IRO Constitution]. The International Refugee Organization (IRO) was a committee established by the United Nations for the purpose of resettling persons displaced by World War II.

24. *Id.*, Annex I, pt. II, § 2(a)-(b), 62 Stat. 3037, 3051-52, T.I.A.S. No. 1846, at 17, 18 U.N.T.S. 3, 20.

25. A. RYAN, *supra* note 21, at 5.

26. N.Y. Times, Oct. 19, 1945, at A9, col. 3.

27. *Id.*

28. *See* A. RYAN, *supra* note 21, at 14.

29. DP Act § 3(a), 62 Stat. at 1010.

30. A. RYAN, *supra* note 21, at 16.

who entered Germany, Austria, or Italy before December 22, 1945,[31] it declared close to 100,000 Jewish refugees who fled from Poland in 1946 ineligible. Ultimately, only about one percent of the displaced person population were Jewish refugees who had been in the DP camps since December 1945.[32] According to one critic, "Congress [carefully said that] 85 percent of the Jews in DP camps need not apply to come to America."[33]

Congress established quota systems for the eligible displaced persons. Forty percent of the United States visas went to persons "whose place of origin or country of nationality has been de facto annexed by a foreign power."[34] This quota reflected a policy to admit Latvians, Lithuanians, and Estonians, because the Soviet Union had annexed their countries, an act not officially recognized by the United States government.[35] Thirty percent of the visas went to farmers,[36] thereby favoring Ukranians and, to a lesser extent, Poles.[37] Finally, the DP Act adopted a preference for *Volksdeutsche*—persons of German ethnic origin from Eastern Europe.[38] Fifty thousand *Volksdeutsche* entered the United States under the DP Act. Many of them were Nazi collaborators who returned to Germany at the end of World War II or shortly thereafter. Arguably, anti-semitism played a formidable role in establishing these quotas under the DP act.[39] As a result, the DP Act denied admittance to many legitimate refugees. Consequently, it proved "easier for a former Nazi to enter the United States than for one of the Nazis' innocent victims."[40]

Section 13 of the DP Act denied admission to "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."[41] In accordance with this clause, the proponents of the Act established a two-step screening process to keep out Nazi collaborators. Unfortunately, these preventive measures proved ineffective.

The IRO Constitution required refugees to be screened and certified

31. DP Act § 2(c)(1), 62 Stat. at 1009.
32. A. RYAN, *supra* note 21, at 16.
33. *Id.*
34. DP Act § 3(b), 62 Stat. at 1010.
35. A. RYAN, *supra* note 21, at 17.
36. DP Act § 6(a), 62 Stat. at 1012.
37. A. RYAN, *supra* note 21, at 17.
38. DP Act § 12, 62 Stat. at 1013-14.
39. *See* A. RYAN, *supra* note 21, at 17-18.
40. N.Y. Times, Aug. 30, 1948, at A1, col. 6, & A3, col. 5.
41. DP Act § 13, 62 Stat. at 1014.

prior to admittance to any nation.[42] For example, one who voluntarily assisted the enemy in military operations or in persecuting civilians could not be certified.[43] This level of the screening process was ineffectual and, arguably, corrupt.[44] Moreover, the DP Act created a huge loophole when it authorized 50,000 visas for *Volksdeutsche*. Under the IRO Constitution, *Volksdeutsche* left their homes voluntarily to assist the German war effort, and thus technically were not "displaced." Since the IRO dealt only with displaced persons, the *Volksdeutsche* avoided the first level of screening.[45]

The DP Act itself established the second level of screening by creating the Displaced Persons Commission (DP Commission),[46] which was responsible for investigating the background of each applicant.[47] Each applicant, however, had the burden of proving his eligibility.[48] The DP Commission eventually delegated its responsibility to the United States Army Counter Intelligence Corps (CIC). The CIC did not have access to the records of Eastern European applicants and was therefore unable to ascertain whether these persons were Nazi collaborators.[49] The only documents available to CIC investigators were United States military and government records, and certain records in the Berlin Document Center (BDC). The BDC, captured at the close of the war, housed the personal records of members of the Nazi party and SS that originated in Germany and Austria. The records of Eastern European collaborators were either destroyed or held by the Soviets. In either case, they remained unavailable to the CIC. A BDC check on *Volksdeutche* was therefore often futile, limiting the CIC investigation to documentation of an applicant since he had entered Germany and the DP camps.[50]

In effect, the DP Act facilitated the entry of Nazis into the United States by awarding preference to groups which, like the *Volksdeutche*, were filled with Nazi collaborators. In addition, the bureaucratic admin-

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42. IRO Constitution, *supra* note 23, Annex 1, pt. 1, § C, 62 Stat. 3037, 3050-51, T.I.A.S. No. 1846, at 15-16, 18 U.N.T.S. 3, 19-20.

43. *Id.*, Annex I, pt. II, § 2(a), 62 Stat. 3037, 3051-52, T.I.A.S. No. 1846, at 17, 18 U.N.T.S. 3, 20.

44. R. RYAN, *supra* note 21, at 20.

45. *Id.*

46. DP Act § 8, 62 Stat. at 1012.

47. *Id.*, § The DP Commission was charged by executive order with the responsibility of preparing eligibility reports. Executive Order No. 10,003, 3 C.F.R. 229 (Supp. 1948).

48. DP Act § 10, 62 Stat. at 1013.

49. A. RYAN, *supra* note 21, at 21.

50. *See id.* at 21-22.

istration of the Act rendered the IRO and CIC investigators virtually incapable of properly screening applicants. Notwithstanding the odd occasion when a Jewish DP spotted a Nazi collaborator, or a fellow DP turned over information or prevented some illegitimate entry, or where an applicant admitted his membership in a military organization, the screening process was in large part unreliable.[51]

On June 16, 1950, Congress amended the Displaced Persons Act.[52] Primarily, Congress eliminated the 1945 cut-off date,[53] thereby opening the door to thousands of previously ineligible displaced persons, including many Jews. In addition, Congress increased the number of authorized visas to 341,000[54] and eliminated the quota preferences for Balts and farmers.[55]

Four hundred thousand persons entered the United States under the DP Act before it expired in 1952: 337,000 (eighty-five percent) displaced persons and 63,000 (fifteen percent) *Volksdeutsche*.[56] Although only a small percentage of these immigrants actually committed war crimes, many were Nazi sympathizers. An estimated 10,000 alleged Nazi war criminals entered the United States under the DP Act.[57] Although the numbers are imprecise, the facility with which any Nazi war criminal entered this country is significant.

IV. THE IMMIGRATION AND NATURALIZATION SERVICE AND NAZI INVESTIGATIONS: 1945-1973

"This is one of those cases where the imagination is baffled by the facts."

—Winston Churchill[58]

Although government officials knew that alleged Nazi war criminals entered the United States during the late 1940s and early 1950s, they made little effort to locate and prosecute them for nearly thirty years.

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51. For example, the 30% quota for farmers produced a mass of counterfeit agriculturalists. By 1951, 90% of the "farmers" were no longer with their United States farm sponsors. A. RYAN, *supra* note 21, at 24. This need to fill quotas substantially impaired the safeguards against Nazi immigration.

52. Act of June 16, 1950, Pub. L. No. 81-555, 64 Stat. 219 (1950) (expired 1952).

53. *Id.*, § 2(d), 64 Stat. at 219.

54. *Id.*, § 3(a), 64 Stat. at 221.

55. *Id.*, § 3, 64 Stat. at 221-23.

56. A. RYAN, *supra* note 21, at 25.

57. *Id.* at 26. The exact number is unkown, and estimates vary.

58. Sir Winston Churchill made this remark in the House of Commons on May 13, 1941 following the parachute descent of Rudolf Hess into Scotland. It seems particularly appropriate to the INS' inactivity for 30 years following World War II.

Government efforts to identify and deport ex-Nazis through the Immigration and Naturalization Service (INS) between 1945 and the 1970s were superficial and ineffective. During this period, the INS filed fewer than ten cases against alleged Nazi collaborators. Of these cases, only one resulted in deportation.[59]

Although the INS' inefficiency in handling alleged Nazi war criminals in the United States may be attributed to various administrative problems, the rapid shift in focus of attention of the Department of Justice from Nazism to communism following World War II proved to be the underlying cause. The Department of Justice concentrated its efforts on combating communism and, consequently, treated immigration in general, and the prosecution of war criminals specifically, as a low priority. As a result, the INS, which is part of the Department of Justice, received limited funding and adopted a position of relative autonomy.

Almost 400,000 immigrants flooded United States shores from 1948 to 1952 and ultimately settled all over the country.[60] Because INS investigations into the backgrounds of these immigrants proceeded through many district offices rather than through the main office in Washington, D.C., INS investigators operated without any central control authority. Furthermore, INS afforded the investigations into alleged Nazi backgrounds no special treatment. It handled those cases just as any other immigration case.[61] Given this background, the results are disappointing but not unexpected.[62] Prior to 1973, the INS filed nine claims against persons alleged to be Nazi collaborators.[63] The trial court acquitted the defendants in three cases and the INS did not appeal.[64] Although in six cases the trial court ordered deportation, the Board of Immigration Appeals (BIA) upheld three and reversed three.[65] Based on this record, one could conclude that the INS never pursued earnest investigation and prosecution of Nazi war criminals in the United States.

In response to vocal congressional demands, the General Accounting Office (GAO) in 1978 investigated INS handling of Nazi war criminals

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59. A. RYAN, *supra* note 21, at 31. The sole deportee was Ferenc Vajta, who worked for United States intelligence agencies in Italy following World War II. For a detailed account of his story, see *id.* at 37-41.

60. *See id.* at 32.

61. *Id.*

62. For an in-depth look at INS activity regarding Nazi war criminals, see *id.* at 32-42.

63. *Id.* at 42.

64. *Id.*

65. *Id.*

in the United States and presented its findings to Congress.[66] The GAO report revealed that although the INS filed charged against only nine people between 1946 and 1973, it received allegations against fifty-seven individuals concerning a history of Nazi involvement.[67] The GAO probe reviewed the INS' treatment of forty cases concluding that one-half had not been investigated at all,[68] and that fifteen had received "deficient or perfunctory" treatment.[69] According to the report, thirty-five of the forty cases were inadequately investigated. The GAO concluded that although nine of those thirty-five cases did not merit investigations,[70] no satisfactory explanation existed for inadequate review of the other twenty-six.[71] Although the GAO investigation did not discover a conspiracy to suppress INS investigations into alleged Nazi war criminal backgrounds,[72] it recognized the probability of an ongoing controversy.[73] The GAO report concluded that the INS' failure to undertake an earnest investigation of Nazi war criminals in the United States stemmed from the INS, prior to 1973, placing priority on combating communism, smuggling, and racketeering.[74] Strong congressional reaction to the report, primarily from Representatives Joshua Eilberg of Pennsylvania and Elizabeth Holtzman of New York, suggested that an amended approach to Nazi investigations was inevitable.

V. CONGRESSIONAL OUTCRY AND NECESSARY CHANGES: 1973-1979

In 1973, the much publicized case of Hermine Braunsteiner Ryan[75] culminated in her extradition to West Germany. Braunsteiner was one

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66. GENERAL ACCOUNTING OFFICE, REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES, WIDESPREAD CONSPIRACY TO OBSTRUCT PROBES OF ALLEGED NAZI WAR CRIMINALS NOT SUPPORTED BY AVAILABLE EVIDENCE—CONTROVERSY MAY CONTINUE, REPORT NO. GGD-78-73, pp. 32-39 (May 15, 1978), *reprinted in Alleged Nazi War Criminals: Hearing Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 159 (1977) [hereinafter GAO REPORT].

67. *Id.* at 8, *reprinted at* 179.

68. *Id.*

69. *Id.* at 11-12, *reprinted at* 182-83.

70. Of those nine cases, six of the people had died, and three were flimsy cases. *Id.* at 13, *reprinted at* 184.

71. *Id.* at 9, *reprinted at* 180.

72. *Id.*

73. *Id.* at 43, *reprinted at* 214. The GAO noted that it "could not absolutely rule out the possibility of undetected, isolated instances of deliberate obstruction of investigations of some alleged Nazi criminals." *Id.* at i; *reprinted at* 161.

74. *Id.* at 16, *reprinted at* 186.

75. *In re* Ryan, 360 F. Supp. 270 (E.D.N.Y.), *aff'd*, 470 F.2d 1397 (2d Cir. 1973).

of the most vicious female guards at Maidenek—a killing center created in 1942 outside Lublin, Poland. Braunsteiner was renowned for her fierce whip which had leather straps filled with lead bullets, and for beating women prisoners and their small children to death as they stepped off the cargo trains.[76] In 1964, Simon Weisenthal[77] and Joseph Lelyveld, a New York Times journalist, tracked down Braunsteiner in Queens, New York where she lived with her husband under the name Hermine Ryan.

The investigations and hearings into Braunsteiner's background lasted until 1973. On March 22, 1973, the West German Government requested Bruansteiner's extradition.[78] United States officials then arrested her and held her in New York. On May 1, 1973, after reviewing overwhelming evidence, the District Court for the Eastern District of New York ordered Braunsteiner returned to West Germany to stand trial.[79] The trial in Germany lasted nearly six years.[80] On June 30, 1981, the German court convicted Braunsteiner of multiple murder.[81] She is currently serving a life sentence in a German prison. The *Braunsteiner* case focused public awareness on the issue of Nazi war criminals in the United States. The case demonstrated the United States Government's general disinterest and inaction with respect to Nazi war criminals in this country during the preceding twenty-five years.

In 1973, Dr. Otto Karbach of the World Jewish Congress gave the INS a list of fifty-nine alleged Nazi collaborators living in the United States.[82] The INS subsequently established a "project control office" to investigate these accusations and provide a system for gathering evidence.[83] Although this "office" consisted of only one individual, INS investigator Sam Zutty, it nonetheless marked the first time since the Nu-

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76. For a more detailed account of the Braunsteiner case, see A. RYAN, *supra* note 21, at 46-52.

77. Wiesenthal was born in 1908 near Lvov, Poland, now part of the USSR. In July 1941, shortly after the German invasion, Wiesenthal, an architect at the time, was arrested by the Ukranian militia. In 1945 he was liberated from the Mauthausen concentration camp, and he quickly began working for the Counter Intelligence Corps of the United States Army, locating his former Nazi captors. In 1947 Wiesenthal established an office in Austria to identify and locate Nazi war criminals still at large. Wiesenthal became famous in the early 1960s when he was instrumental in the capture of Adolf Eichmann. The Simon Wiesenthal Center still operates today.

78. *In re* Ryan, 360 F. Supp. at 271.

79. *Id.* at 275.

80. A. RYAN, *supra* note 21, at 52.

81. *Id.*

82. *Id.*

83. *Id.*

remberg Trials that the United States Government investigated Nazi war criminals as a distinct group.

The task proved to be far too extensive for one individual, especially since there were no preexisting methods for tracking these people down and investigating their past. Furthermore, the State Department was not very helpful in locating and acquiring evidence from other countries.[84] The INS' inability to achieve positive results again prompted congressional response.

In June 1974, Congressman Joshua Eilberg, Chairman of the House Judiciary Committee, wrote a stinging letter to Secretary of State Henry A. Kissinger conveying his "deep concern over the Department of State's failure to cooperate with the Department of Justice in its investigation of the alleged Nazi war criminals currently residing in the United States."[85] Assistant Secretary of State for Congressional Relations Linwood Holton responded that although the Department of State would "give serious consideration to German requests for extradition," with regard to obtaining evidence and interviewing witnesses abroad "there is no agreement between the U.S. and the USSR permitting investigations or the taking of testimony or statements of Soviet citizens by U.S. officials in the USSR."[86] Heated correspondence continued until the Department of State agreed to meet with the INS to evaluate the Nazi war criminal problem.[87]

Congressman Eilberg seized another opportunity to voice his discontent when, in August 1974 (two weeks after President Nixon's resignation) he wrote President Ford alerting him to the State Department's apparent reluctance "to initiate discussions with foreign governments."[88] Eilberg concluded by asking the President to "use the power of [his] office to require the Department of State to effect the coordination, cooperation, and initiative which is necessary to determine whether or not the alleged Nazi war criminals in the United States are subject to denatural-

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84. *Id.* at 52-53.

85. Letter from Joshua Eilberg to Henry A. Kissinger (June 26, 1974), *reprinted in Alleged Nazi War Criminals: Hearing Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 69 (1979) [hereinafter *August, 1977 Hearing*].

86. Letter from Linwood Holton to Joshua Eilberg (July 5, 1974), *reprinted in August, 1977 Hearing, supra* note 85, at 70.

87. Letter from Linwood Holton to Joshua Eilberg (Aug. 1, 1974), *reprinted in August, 1977 Hearing, supra* note 85, at 71.

88. Letter from Joshua Eilberg to President Ford (Aug. 22, 1974), *reprinted in August, 1977 Hearing, supra* note 85, at 71.

ization, extradition, or deportation."[89] The White House acceded to the wishes of the Chairman of the Judiciary Committee. On November 21, 1974 an administrative official reported that the Department of State was planning approaches to the German, Israeli, Polish, Hungarian, and Soviet Governments concerning the fifty-nine names submitted to the INS by Dr. Karbach in 1973.[90]

International cooperation in locating and prosecuting Nazi war criminals appealed to officials in Germany, Israel, and the Soviet Union. They suggested that the United States develop a plan.[91] In July 1975, the Department of State formally requested the West German government to furnish whatever evidence it possessed relating to the allegations in Dr. Karbach's list.[92] The State Department planned to assess the outcome of the request to Germany and consider approaching other governments, particularly the Soviet Union, with similar requests.[93]

International cooperation finally became a reality, but the tangible benefits were not forthcoming. By the end of October 1975, the West German Government produced useful information on only six of the fifty-nine cases presented to them, and "additional but unsubstantiated allegations against ten others."[94] As a result, the Department of State maintained its reluctance to formally approach the Soviets.[95]

The West German Government continued to supplement its original production of information. On January 12, 1976, the Department of State reported that the West Germans provided information on twenty-six cases.[96] One month later, the Department of State formally approached the Soviet Union.[97] The INS also enlisted the help of the Is-

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89. *Id.* at 71.

90. Letter from Max L. Friedersdorf to Joshua Eilberg (Nov. 21, 1974), *reprinted in August, 1977 Hearing, supra* note 85, at 72-73.

91. A. RYAN, *supra* note 21, at 55.

92. *See* Letter from Robert J. McCloskey to Joshua Eilberg (July 29, 1975), *reprinted in August, 1977 Hearing, supra* note 85, at 75-76. The United States Embassy in Bonn made the official request to the Federal Republic of Germany by diplomatic Note on July 14, 1975 after the U.S. Mission in Berlin made a preliminary background check from the Berlin Document Center. *Id.*

93. *Id.* at 75.

94. *See* Letter from Leonard F. Walentynowicz to Joshua Eilberg (Oct. 31, 1975), *reprinted in August, 1977 Hearing, supra* note 85, at 76.

95. *See id.* at 77.

96. *See* Letter from Leonard F. Walentynowicz to Joshua Eilberg (Jan. 12, 1976), *reprinted in August, 1977 Hearing, supra* note 85, at 78.

97. Letter from Lawrence S. Eagleburger to Joshua Eilberg (Feb. 10, 1976), *reprinted in August, 1977 Hearing, supra* note 85, at 78.

raeli police unit on Nazi war criminals to locate witnesses in Israel.[98] Organized international cooperation resulted in a willingness of foreign governments to provide the United States with available evidence and witnesses.

As the available evidence grew, the issue became whether the United States Government was properly handling it. In June 1976, Congressman Eilberg accused the Department of State, and specifically Attorney General Edward Levi of treating the identification and prosecution of Nazi war criminals in the United States as a "non-priority issue."[99] Eilberg further charged that "the Immigration and Naturalization Service is not making proper use of available evidence in the alleged Nazi war criminal cases," and urged the INS to "expedite the preparation of cases."[100] In August 1976, the INS responded by announcing an intention "to initiate proceedings against seven persons in the United States who are alleged to have committed war crimes during and prior to World War II."[101]

The INS filed charges against ten alleged Nazi war criminals over the next ten months.[102] The filing proved to be premature because the INS lacked sufficient documentation to corroborate witness testimony; government lawyers were inadequately prepared; and Soviet witnesses remained unavailable. Furthermore, the INS made no attempt to locate survivors located in the United States and neglected to take the testimony of aging survivors, hoping they would live long enough for trial.[103]

Members of Congress noted the INS' handling of these cases. In August 1977, Leonel J. Castillo, Commissioner of the INS, testified before Congressman Eilberg's Subcommittee on Immigration, Citizenship and International Law.[104] Mr. Castillo announced the dissolution of Sam Zutty's "project central office," and the creation of a special centralized unit under the direct control of the General Counsel of the INS.[105] This

98. *See* A. RYAN, *supra* note 21, at 55.

99. Letter from Joshua Eilberg to Edward H. Levi (June 25, 1976), *reprinted in August, 1977 Hearing, supra* note 85, at 79.

100. *Id.* at 79.

101. INS Press Release (Aug. 12, 1976), *reprinted in August, 1977 Hearing, supra* note 85, at 81-82.

102. On October 13, 1976, the INS filed deportation charges against two Latvians and one Lithuanian. The subsequent seven suits were against one Latvian alien and against six U.S. citizens: four Ukranians, one Lithuanian, and a Polish *Volksdeutsche.* A. RYAN, *supra* note 21, at 59.

103. *Id.* at 59; *August, 1977 Hearing, supra* note 85, at 26-27.

104. *August, 1977 Hearing, supra* note 85, at 22.

105. *Id.* at 24.

litigation unit would assume full control of the Nazi cases, and the files would be reviewed by attorneys, rather than by INS investigators; the attorneys could deal directly with the Department of State to coordinate foreign investigations.[106] The benefits of the litigation unit failed to materialize. The attorneys lacked the necessary experience to conduct efficient investigations, and, as a result, by 1979 they had not filed any charges.[107] Between 1977 and 1979, this litigation unit tried only five of the cases filed by Zutty's project central office.[108] This ineffectiveness signaled the end of the INS' handling of Nazi war criminals in the United States.

As chairman of the House Immigration Subcommittee, Elizabeth Holtzman in 1979 relentlessly pressured the Department of Justice to relieve the INS of all responsibility for the Nazi cases and create a new department with greater resources.[109] Although the Department of Justice initially resisted the proposal, Attorney General Griffin Bell announced on March 28, 1979, that the Justice Department would handle the matter itself. Congress allocated 2.8 million dollars to support an ungraded staff, thus relieving the INS of its responsibility for Nazi war criminals.[110] As a result, the Office of Special Investigations (OSI) became the section of the Criminal Division of the Department of Justice which handled the investigation and prosecution of Nazi war criminals living in the United States.[111] Since its creation, the OSI has instituted numerous denaturalization suits against alleged Nazi war criminals, and, most recently, has assisted foreign governments in securing the extradition of individuals who face criminal prosecution in other countries for their past activities.[112]

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106. *Id.*

107. A. RYAN, *supra* note 21, at 60.

108. "Three were lost; one was discontinued; the fifth was won, but with highly embarassing consequences." *Id.* at 60. The lone government victory was against Frank Walus, accused of being a member of the Gestapo in Poland. Judge Julius Hoffman of Chicago revoked Walus' citizenship. On appeal, however, Walus introduced new evidence and the verdict was set aside with an order for a new trial. Evidence later showed that Walus was, in fact, the wrong man—he was on a farm in Germany throughout World War II. United States v. Walus, 453 F. Supp. 699 (N.D. Ill. 1978), *vacated*, 616 F.2d 283 (7th Cir. 1980). For a detailed account of the *Walus* case, see A. RYAN, *supra* note 21, at 191-217.

109. Congressman Eilberg lost his re-election bid in 1978.

110. *Hearing on Alleged Nazi War Criminals Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. of the Judiciary*, 96th Cong., 1st Sess. 122-30 (1979) [hereinafter *March, 1979 Hearing*].

111. 44 Fed. Reg. 54,045 (1979) (codified at 28 C.F.R. § 0.55 (1986)).

112. A. RYAN, *supra* note 21, at 62.

VI. THE DENATURALIZATION PROCESS

Absent an extradition request from another country with criminal jurisdiction over alleged Nazi war criminals, the United States is limited to prosecuting these individuals under existing immigration law.[113] Virtually all legal actions brought against alleged Nazi war criminals in the United States are denaturalization proceedings instituted by the government. If successful, a denaturalization suit deprives the individual of United States citizenship and subjects him to deportation.[114]

The Immigration and Nationality Act of 1952[115] (INA) listed various classes of aliens subject to deportation. Four of these categories could encompass Nazi war criminals living in the United States:

> 1. Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense), or aliens who admit having committed such a crime,[116]
> 2. Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact,[117]
> 3. Aliens who are members of or affiliated with . . . (iv) . . . [the] totalitarian party of . . . any foreign state, or of any political or geographical subdivision of any foreign state, or . . . (vi) the direct predecessors or successors of any such association or party,[118]
> 4. Any alien in the United States . . . who at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry.[119]

In October 1978, Congress amended the INA to exclude Nazi war criminals from eligibility for United States visas, and to make those indi-

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113. The Immigration and Nationality Act of June 27, 1952 established the basic structure of existing immigration and nationality law in the United States. Act of June 27, 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified at 8 U.S.C. §§ 1101-1525 (1982)) [hereinafter INA].

114. 8 U.S.C. § 1451(a). *See infra* notes 218-24 and accompanying text (deportation becomes difficult because few countries are willing to accept Nazi war criminals).

115. *See supra* note 113.

116. 8 U.S.C. § 1182(a)(9). This section lists various requirements which limit its potential applicability to Nazi war criminals.

117. *Id.*, § 1182(a)(19).

118. *Id.*, § 182(a)(28)(C). "This provision is limited by the requirement that a totalitarian party must advocate the establishment in the United States of a totalitarian dictatorship or totalitarianism." Lippman, *The Denaturalization of Nazi War Criminals in the United States: Is Justice Being Served?*, 7 HOUS. J. INT'L LAW 169, 180 n.68 (1985).

119. 8 U.S.C. § 1251(a)(1). Regarding Nazi war criminals, this provision could be used in reference to the DP Act.

viduals deportable. This amendment addressed:

> Any alien who during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—
>
> (A) the Nazi government of Germany,
> (B) any government in any area occupied by the military forces of the Nazi government of Germany,
> (C) any government established with the assistance or cooperation of the Nazi government of Germany, or
> (D) any government which was an ally of the Nazi government of Germany,
>
> ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.[120]

In effect, the new clause added to the class of deportable Nazi war criminals those who entered the United States under the INA rather than DP Act or the Refugee Relief Act.[121]

It is the duty of United States district attorneys to bring denaturalization suits against any individuals whose certificate of naturalization and order of citizenship "were illegally procured or were procured by concealment of a material fact or by willful misrepresentation. . . ."[122] The Government must prove its case by "clear, unequivocal, and convincing" evidence.[123] Once denaturalized, the alien is subject to deportation.[124] If found deportable by an immigration judge,[125] the alien may appeal the decision to the Board of Immigration Appeals (BIA),[126] and the order is

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120. Act of October 30, 1978, Pub. L. No. 95-549, 92 Stat. 2065 (codified at 8 U.S.C. § 1182(a)(33) (1978)).

121. The Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400 (1953), was enacted to further assist post-World War II refugees fleeing communist-controlled Europe. H.R. REP. NO. 974, 83rd Cong., 1st Sess. 3 (1953), *reprinted in* 1953 U.S. CODE CONG. & ADMIN. NEWS 2103, 2104. Though the Act did not specifically exclude Nazi war criminals, it held, *inter alia*: "No visa shall be issued under this Act to any person who personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin." Refugee Relief Act § 14(a), 67 Stat. 400, 406 (1953). War criminals who entered under the DP Act or Refugee Relief Act were already deportable under the INA, though mere membership in the Nazis did not justify excludability. Lippman, *supra* note 118, at 180 & n.64.

122. 8 U.S.C. § 1451(a) (1982).

123. Schneiderman v. United States, 320 U.S. 118, 125 (1943) (plurality opinion).

124. 8 U.S.C. § 1251(a).

125. *Id.*, § 1252(b).

126. 8 C.F.R. § 242.21 (1984).

then subject to judicial review in the federal court system.[127] The recent denaturalization suits instituted by the government against Nazi war criminals required the interpretation of many of the statutory standards.[128] The controlling case, decided by the United States Supreme Court in 1981, is *Fedorenko v. United States.*[129]

A. *The Judicial History of Fedorenko v. United States*

Feodor Fedorenko, a Ukranian, was conscripted into the Soviet Army in June 1941, when the Germans invaded the Soviet Union. The Germans captured Fedorenko and sent him to Trevnicki, a prisoner-of-war camp, where most of the guards were *Volksdeutsche.*[130] The Germans beat Fedorenko, but his hard work at the camp brought him occasional rewards. In 1942, Fedorenko was sent to Lublin, Poland where the prisoners guarded their own camp. In addition, the Germans sent the prisoners to the nearby Jewish ghetto to enforce the will of the Nazis. At Lublin, Fedorenko was converted from a worker to a guard. Finally, in September 1942, the Germans transferred Fedorenko as a prisoner-guard to the Treblinka concentration camp.[131] After the war, Fedorenko lived in a DP camp near Hamburg, Germany where he worked for the British.[132] In October 1949, he applied for a visa under the DP Act. Fedorenko came to the United States on November 5, 1949 and went to work as a farmer in Connecticut.[133]

At trial in 1977, the government produced six witnesses who testified to "specific instances of murder or brutality on the part of the defendant."[134] The government, however, produced no documentary evidence to corroborate the witnesses' testimony.[135] Fedorenko did admit, however, to misrepresenting his history to the DP Commission.[136] In addition he failed to disclose his service as a guard at Treblinka on both his application for naturalization in 1969, and to INS examiners. Despite these

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127. 8 U.S.C. § 1105(a).

128. *See* Lippman, *supra* note 118, at 178-82.

129. 449 U.S. 490 (1981).

130. United States v. Fedorenko, 455 F. Supp. 893, 900 (S.D. Fla. 1978).

131. *Id.* at 900-01.

132. *Id.* at 911.

133. *Id.*

134. *Id.* at 901-02. The atrocities included shooting prisoners and beating them with a leather whip with lead balls in the straps. *Id.* at 902-03.

135. *Id.* at 902.

136. Fedorenko told the Commission that he was born in Poland and lived there until 1942 when he was deported to Germany and forced to work in a factory in Poelitz. Fedorenko also stated that following the war he fled to Hamburg, Germany. *Id.* at 911.

misrepresentations, the INS recommended to the court that Fedorenko's petition for naturalization be granted, and on April 23, 1970, he became a United States citizen.[137]

The government charged that because Fedorenko served as an armed guard at Treblinka and committed atrocities against inmates, he should have been denied a visa under the DP Act.[138] Further, because Fedorenko "willfully concealed this information" when applying for a visa and again when applying for citizenship, he entered the country and procured his citizenship illegally.[139]

The United States District Court for the Southern District of Florida entered judgment for the defendant.[140] Applying the standards for "materiality" set forth in *Chaunt v. United States*[141] the court held, "immigration laws prohibit giving . . . false answers and . . . therefore any mispresentation is 'illegal', once citizenship has been confirmed it may be taken away only if it can be clearly and convincingly shown that the misrepresentation was 'material'."[142]

In *Chaunt* the Supreme Court required "clear and convincing proof that either (1) 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'."[143] The district court held that the government failed to satisfy either prong of the *Chaunt* test.[144]

In addition, the district court ruled that equity demands consideration of mitigating circumstances, even if Fedorenko had concealed material facts.[145] The court found the defendant to be "an unsophisticated man

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137. The Superior Court of New Haven granted Fedorenko's petition for naturalization. 449 U.S. at 497.

138. *Id.* at 497-98.

139. *Id.* at 498.

140. 455 F. Supp. at 921.

141. 364 U.S. 350 (1960).

142. 455 F. Supp. at 915.

143. *Id.* (quoting Chaunt v. United States, 364 U.S. at 355).

144. *Id.* In reaching this conclusion, the court questioned the reliability of the expert testimony which claimed that all concentration camp guards were ineligible for visas under the DP Act. *Id.* at 912-13. The court pointed out that *kapos* — Jewish guards selected by the Nazis to "control" fellow prisoners — often did only what they were forced to, and witnesses would be very reluctant to testify against such people. "The difficulty with that construction is that it would bar every Jewish prisoner who survived Treblinka because each one of them assisted the SS in the operation of the camp. Each did so involuntarily and under the utmost duress." *Id.* at 913. The court considered Federenko's action to be involuntary. *Id.*

145. *Id.* at 918.

with very little education who is not only willing but anxious to work," and "a man who is not interested in 'making waves' or causing trouble."[146] Thus, the court seized an opportunity to exercise discretion, and concluded that the equities weighed in favor of Fedorenko.[147]

Although the Fifth Circuit agreed with the district court that *Chaunt* is the controlling test, it held that the government need not "prove the existence of facts which, in and of themselves, would have justified denial of citizenship."[148] In reversing and remanding to the district court, the Fifth Circuit held that the government must show only that the misrepresentation "might, if disclosed, have led to the discovery of other facts, which would have justified denial of citizenship."[149] Applying the second prong of the *Chaunt* test, the court concluded that "[t]he evidence before the district court clearly and convincingly proved that had the defendant disclosed his guard service, the United States authorities would have conducted an inquiry that might have resulted in a denial of a visa."[150]

Finally, the Fifth Circuit held that the district court erred in exercising discretion by balancing equities in favor of Fedorenko. The court acknowledged a distinction between the district court's authority to grant citizenship and to revoke citizenship and held that "[o]nce it has been determined that a person does not qualify for citizenship . . . the district court has no discretion to ignore the defect and grant citizenship."[151]

The Supreme Court affirmed the Fifth Circuit's decision,[152] recognizing that "there must be strict compliance with all congressionally imposed prerequisites to the acquisition of citizenship."[153] The majority noted that the judiciary can not bend or change immigration law. Specifically, Justice Marshall wrote, "this judicial insistence on strict compliance with the statutory conditions precedent to naturalization is simply an acknowledgement of the fact that Congress alone has the constitu-

146. *Id.* at 920.

147. *Id.* at 920-21.

148. United States v. Fedorenko, 597 F.2d 946, 947, *reh'g en banc denied*, 601 F.2d 1195 (5th Cir. 1979).

149. *Id.*

150. *Id.* at 953.

151. *Id.* at 954. The appellate court pointed out that "[t]he denaturalization statute, 8 U.S.C. § 1451, does not accord the district courts any authority to excuse the fraudulent procurement of citizenship." 597 F.2d at 954.

152. Fedorenko v. United States, 449 U.S. 490 (1981). Chief Justice Burger concurred in the result; Justice Blackmun concurred in the result in a separate opinion; Justices White and Stevens wrote separate dissenting opinions.

153. *Id.* at 506.

tional authority to prescribe rules for naturalization."[154]

Once it clarified the appropriate judicial role, the Supreme Court considered the facts in *Fedorenko*. The Court held:

> [t]here was no dispute that petitioner "lied" in his application. Thus, petitioner falls within the plain language of the DPA's admonition that "[a]ny person who shall willfully make a misrepresentation for the purposes of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible to the United States."[155]

The Court next addressed the issue of "material misrepresentation." The Court adopted the standard that "the materiality of a false statement in a visa application must be measured in terms of its effect on the applicant's admissibility into this country."[156] In the instant case, "disclosure of the true facts about petitioner's service as an armed guard at Treblinka would, as a matter of law, have made him ineligible for a visa under the DPA."[157]

The Court finally addressed Fedorenko's procurement of citizenship and reasoned that the INA "required an applicant for citizenship to be lawfully admitted to the United States for permanent residence."[158] The majority concluded that "inasmuch as petitioner failed to satisfy a statutory requirement which Congress has imposed as a prerequisite to the acquisition of citizenship by naturalization, we must agree with the Government that petitioner's citizenship must be revoked because it was 'illegally procured.' "[159] Finally, the Court agreed with the Fifth Circuit that the district courts lacked equitable discretion to withhold a denaturalization judgment.[160] The principles of material misrepresentation established in *Fedorenko* apply in virtually all denaturalization proceedings against Nazi war criminals in the United States.

B. Denaturalization Cases Since Fedorenko

In addition to the *Fedorenko* material misrepresentation analysis, United States courts have relied on the provisions of the DP Act to revoke the citizenship of Nazi war criminals.

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154. *Id.*
155. *Id.* at 507 (quoting DP Act, § 10, 62 Stat. at 1013).
156. 449 U.S. at 509.
157. *Id.*
158. *Id.* at 514. The Court specifically considered sections 316(a) and 318 of the Immigration and Nationality Act of 1952 (codified at 8 U.S.C. §§ 1427(a), 1429 (1983)).
159. 449 U.S. at 515.
160. *Id.* at 517.

In *United States v. Osidach*,[161] for example, the United States District Court for the Eastern District of Pennsylvania revoked the citizenship of a former member of the Nazi-sponsored Ukranian police. Relying on section 13 of the DP Act,[162] the court found that Osidach was a voluntary member of the movement hostile to the United States.[163] The court concluded that the defendant's initial visa was invalid because his entry was unlawful. Consequently, his procurement of a certificate of naturalization was illegal.[164]

The facts in *United States v. Demjanjuk*[165] are similar to those in *Fedorenko*. The defendant served in the Soviet Army until his capture by the Germans. Eventually, Demjanjuk worked as a guard at Treblinka.[166] The United States District Court for the Northern District of Ohio relied on section 10 of the DP Act[167] and found that Demjanjuk materially misrepresented his background. The court held that because Demjanjuk's entry was illegal, his visa was invalid.[168] The Sixth Circuit denied a retrial, and the Supreme Court denied certiorari.[169]

In *United States v. Linnas*,[170] the District Court for the Eastern District of New York revoked the citizenship of a former member of the Estonian Home Guard,[171] a group which assisted occupying Nazi forces in the prosecution of civilians during World War II.[172] The government introduced sufficient evidence to establish that Linnas was the Commandant at the Tartu Concentration Camp in Estonia.[173] The court then applied sections 10 and 13 of the DP Act[174] and found that Linnas pos-

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161. 513 F. Supp. 51 (E.D. Pa. 1981).

162. DP Act § 13, 62 Stat. at 1014.

163. 513 F. Supp. at 95-96. The court also noted that Osidach assisted in the persecution of civilians. *Id.* at 96-97.

164. *Id.* at 100.

165. 518 F. Supp. 1362 (N.D. Ohio 1981), *aff'd*, 680 F.2d 32 (6th Cir. 1982), *cert. denied*, 459 U.S. 1036 (1982). The Demjanjuk extradition proceedings are discussed *infra* notes 247-81 and accompanying text.

166. 518 F. Supp. at 1363-76.

167. DP Act, *supra* note 22, § 10, 62 Stat. at 1013.

168. 518 F. Supp. at 1380-82. As an independent ground for revoking Demjanjuk's certificate of naturalization, the court relied on fraudulent procurement. *Id.* at 1382-83.

169. United States v. Demjanjuk, 680 F.2d 32 (6th Cir. 1982), *cert. denied*, 459 U.S. 1036 (1982).

170. 527 F. Supp. 426 (E.D.N.Y. 1981), *aff'd mem.*, 685 F.2d 427 (2d Cir.), *cert. denied*, 459 U.S. 883 (1982).

171. The Germans referred to this Group as the "Selbstschutz." 685 F.2d at 430.

172. *Id.* at 430-31.

173. *Id.* at 434.

174. DP Act §§ 10, 13, 62 Stat. at 1013, 1014.

sessed an invalid visa.[175] As an alternative ground for denaturalization, the court found Linnas had procured his citizenship through concealment and misrepresentation of his past services.[176] The Second Circuit affirmed the revocation of citizenship and the Supreme Court declined to hear the case.[177]

In *United States v. Dercacz*,[178] the United States District Court for the Eastern District of New York found no triable issue of fact in a case against a former member of the Nazi-sponsored Ukranian police.[179] Applying section 2(b) of the DP Act,[180] the court held that Dercacz, as a matter of law, was ineligible for a visa at the time of his application.[181] He therefore procured his visa through willful misrepresentation of a material fact under section 10 of the DP Act.[182] Additionally, Dercacz willfully misrepresented material facts on his application for naturalization,[183] and the court revoked his citizenship on both grounds.[184]

All of these cases relied on one or more of the three applicable sections in the DP Act, sections 2(b), 10, and 13, to revoke the citizenship of Nazi war criminals living in the United States. These sections unavoidably overlap in the courts' analyses.[185] For example, if the defendant was ineligible for a visa under section 2(b), then he willfully misrepresented a material fact under section 10, and his visa was illegally procured.[186]

Although the OSI generally prosecutes Nazi war criminals in the United States in denaturalization suits, it occasionally has negotiated the voluntary surrender or renunciation of citizenship of individuals under

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175. 527 F. Supp. at 439.

176. *Id.* at 440. Karl Linnas currently faces possible deportation to the Soviet Union, where he has been sentenced to death as a Nazi war criminal. Linnas has not yet found another country that will grant him refuge. N.Y. Times, Mar. 16, 1987, at A14, col. 1.

177. *Aff'd mem.*, 685 F.2d 427 (2d Cir.), *cert. denied*, 459 U.S. 883 (1982).

178. 530 F. Supp. 1348 (E.D.N.Y. 1982).

179. *Id.* at 1351.

180. DP Act, § 2(b), 62 Stat. at 1009.

181. 530 F. Supp. at 1351.

182. DP Act, § 10, 62 Stat. at 1013; 530 F. Supp. at 1353.

183. 530 F. Supp. at 1353.

184. *Id.* The same sequence of events occurred in United States v. Koziy, 540 F. Supp. 25 (S.D. Fla. 1982), *aff'd*, 728 F.2d 1314 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 130 (1984); *see also*, United States v. Palciauskas, 559 F. Supp. 1294 (M.D. Fla. 1983), *aff'd*, 734 F.2d 625 (11th Cir. 1984).

185. Moeller, *United States Treatment of Alleged Nazi War Criminals: International Law, Immigration Law, and the Need for International Cooperation*, 25 VA. J. INT'L L. 793, 825 (1985).

186. *See id.* at 826.

investigation for alleged war crimes.[187] In addition, several courts have granted consent judgments against alleged Nazi war criminals.[188] Finally, several courts have dismissed suits as moot, because the defendant died prior to the disposition of the case.[189]

VII. THE DIFFICULTIES OF DENATURALIZING NAZI WAR CRIMINALS IN THE UNITED STATES

> "Commit a crime, and the earth is made of glass. . . . You cannot recall the spoken word, you cannot wipe out the foot-track, you cannot draw up the ladder, so as to leave no inlet or clue. Some damning circumstance always transpires."
>
> — Ralph Waldo Emerson[190]

Securing the denaturalization of Nazi war criminals is difficult. Because the alleged criminals committed the offenses over forty years ago, gathering sufficient admissible evidence is burdensome, requiring time, money and international cooperation. In a denaturalization proceeding the government must show that the defendant actually participated in previously undisclosed activity which would have rendered him ineligible for a United States visa.[191] Although denaturalization suits are civil actions, federal courts have applied criminal law standards when ruling on the admissibility and weight of the government's evidence, further burdening the prosecution.[192]

Witness bias, the susceptibility of witnesses to suggestive influences, and the lapse of time are the primary obstacles to the acquisition of admissible eyewitness identification.[193] As an alternative the government commonly employs photographic identification. This method, however,

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187. *See id.* at 831-33.

188. United States v. Artishenko, No. 82-3822 (D.N.J. Oct. 18, 1984) (consent judgment); United States v. Trifa, No. 5-70924 (E.D. Mich. Sept. 3, 1980) (consent judgment), *aff'd*, 662 F.2d 447 (6th Cir. 1981), *cert. denied*, 456 U.S. 975 (1982); United States v. von Bolschwing, No. S-81-308 (C.D. Cal. Dec. 22, 1981) (consent judgment); United States v. Paskevicius, No. 77-167-RF (C.D. Cal. Aug. 23, 1979) (consent judgment). *Accord* Moeller, *supra* note 185, n.243 at 831.

189. *See* Moeller, *supra* note 185, 831 n.244.

190. *Compensation*, in THE SELECTED WRITINGS OF RALPH WALDO EMERSON 183 (B. Atkinson ed. 1968).

191. *See* Lippman, *supra* note 118, at 189.

192. *See Fedorenko*, 455 F. Supp. at 905-06; United States v. Walus, 453 F. Supp. 699, 712-13 (N.D. Ill. 1978), *rev'd*, 616 F.2d 283, 292 n.15 (7th Cir. 1980); Lippman, *supra* note 118, at 189-90.

193. Lippman, *supra* note 118, at 189.

raises questions of reliability. In *United States v. Walus*,[194] the government used newspaper photograph advertisements to solicit Israeli citizens who could testify about war crimes committed by Frank Walus.[195] Because the photos depicted the defendant years after the alleged crimes occurred, and because the photo quality was questionable, they undermined the credibility of the witnesses' identification.[196] In *United States v. Fedorenko*,[197] the district court ruled that the photographs shown to Israeli witnesses were "impermissibly suggestive," leading "to a substantial act of misidentification."[198] Other courts have recognized the unavoidable suggestiveness of photographic identifications, and weighed the resulting bias against witness credibility.[199]

The lapse of time since the alleged crimes, often exceeding forty years, undermines the reliability of eyewitness identification of alleged Nazi war criminals.[200] As Professor Lippman notes:

> The indelible impact of the Holocaust on the witnesses and the witnesses' opportunity to view their persecutors for an extended period of time must be balanced against the fact that the witnesses more than likely were apt to respond positively to any suggestion that a given photo was that of an individual who perpetrated atrocities against the witnesses and their friends and family.[201]

In *United States v. Kowalchuk*,[202] the United States District Court for the Eastern District of Pennsylvania found that the witnesses' testimony about Kowalchuk's participation in alleged war crimes might be exaggerated and embellished as a result of the discussion among the witnesses over a period of many years.[203] The court held, therefore, that the evidence introduced by the government was insufficient to clearly and convincingly show that the defendant engaged in war crimes.[204]

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194. 616 F.2d 283 (7th Cir. 1980).

195. *Id.* at 293-94.

196. *Id.* at 292-94.

197. 455 F. Supp. 893 (S.D. Fla. 1978).

198. *Id.* at 906.

199. *See, e.g.*, Manson v. Brathwaite, 432 U.S. 98, 114 (1977); *see also* Lippman, *supra* note 118, at 191.

200. *See* Walus v. United States, 616 F.2d at 289-90; *see* United States *ex rel.* Phipps v. Follete, 428 F.2d 912, 915 (2d Cir. 1970).

201. Lippman, *supra* note 118, at 192.

202. 571 F. Supp. 72 (E.D. Pa. 1983).

203. *Id.* at 79. The evidence did, however, show that Kowalchuk was a member of the Ukranian militia, which assisted the occupying Nazi forces in their persecution of civilians. *Id.* at 81.

204. *Id.* at 81. The district court revoked Kowalchuk's certificate of naturalization on

All of the concerns about eyewitness identification are legitimate and necessitate sufficient safeguards to guarantee due process of law at the denaturalization proceedings. However, despite the limited number of surviving witnesses and the unavoidable bias against defendants, courts must not extend protections beyond those which are constitutionally required.

An additional obstacle for the government in prosecuting Nazi war criminals is convincing the courts of the credibility of Soviet witnesses. In many cases Soviet citizens are the only available eyewitnesses to Nazi war crimes. The Soviet Union has, in many instances, cooperated with the Department of Justice and allowed its citizens to be deposed. Yet even when both OSI prosecutors and counsel for the defendants examine the witnesses and the court reviews videotapes of the depositions, some federal judges doubt the credibility of Soviet testimony.

In *Kowalchuk*, for example, the court was concerned that the testimony of Soviet witnesses might be used as a political weapon by the Soviet government.[205] In *United States v. Kungys*,[206] the United States District Court for New Jersey held that depositions taken by the OSI, with the cooperation of the Soviet government, were inadmissible to prove the defendant's participation in war crimes.[207] The court maintained that the Soviet Union has "a continuing, strong state interest in a finding that defendant was guilty."[208] Although the defendant did not attempt to discredit the witnesses' testimony or the Soviet-supplied documents, the court ruled that the "government's proofs are inadequate to establish any of the bases for revocation of defendant's citizenship."[209]

United States courts should not sacrifice due process to expedite or enhance the prosecution of Nazi war criminals. Indeed, the criminal proceedings at Nuremberg emphasized due process. The need to bring these criminals to justice, however, requires international cooperation and trust. United States courts should not dismiss the testimony of eyewitnesses to these atrocities simply because it comes from Soviet witnesses.

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grounds of illegal procurement, *id.* at 83, but held that there was no justification for revocation based on the concealment or misrepresentation of a material fact. *Id.* at 82.

205. 571 F. Supp. at 78; *see* Lippman, *supra* note 118, at 193.

206. 571 F. Supp. 1104 (D.N.J. 1983).

207. *Id.* at 1131-32.

208. *Id.* at 1126.

209. *Id.* at 1144. The central theme of the court's opinion was the concern that neither side was aware of how Soviet officials might have prepared the witnesses. No defendant in these cases is given the opportunity to investigate the circumstances under which the KGB and procurator prepared the witnesses for interrogation by the OSI. Lippman, *supra* note 118, at 195 n. 160.

Unless Soviet testimony carries legitimate weight, Nazi war criminals will remain unpunished.

Many Nazi war criminals continue to assert the defense of duress—that their actions were "involuntary." The Military Tribunal at Nuremberg recognized the "superior orders defense"[210] only when "no moral choice was in fact possible."[211] Indeed, this defense worked for Fedorenko at the district court level when the court found his services at Treblinka to be involuntary.[212] "Involuntariness," an exception to excluding individuals from eligibility for a DP visa or naturalization, ensured the eligibility of the kapos—the Jewish prisoners forced to assist the Nazis in the operation of the concentration camps and persecution of fellow prisoners.[213] Justice Marshall, however, writing for the majority in *Fedorenko*, was "unable to find any basis for an 'involuntary assistance' exception."[214] Marshall believed that the courts should not focus on whether the conduct was voluntary, but "on whether particular conduct can be considered assisting in the *persecution* of civilians."[215]

Professor Lippman argues that courts unfairly deny the involuntariness defense used by defendants such as Fedorenko because "various high-level Nazi war criminals who organized the activities . . . have not yet been criminally prosecuted or were given lenient prison sentences."[216] This argument ignores two important issues. First, in a

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210. London Agreement, *supra* note 10, Charter of the International Military Tribunal, art. 8, 59 Stat. 1544, 1548, E.A.S. No. 472, at 15, 82 U.N.T.S. 279, 288.

211. Lippman, *supra* note 118, at 201 (quoting 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 224 (1947)). The Tribunal said, "the true test . . . is not the existence of the order, but whether moral choice was in fact possible." Lippman, *supra* note 118, at 201, n. 198.

212. *See supra* note 144 and accompanying text.

213. *See* Lippman, *supra* note 118, at 200.

214. Fedorenko v. United States, 449 U.S. 490, 512 (1981).

215. *Id.* at 512 n.34. Justice Marshall wrote:

> Thus, an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians.

Id.

216. Lippman, *supra* note 118, at 201. Professor Lippman also suggests an estoppel defense based on evidence of United States assistance to known Nazi war criminals and collaborators entering the United States. *Id.* at 196-99. Additionally, costs of prosecution, including securing testimony of foreign witnesses and paying the investigators and prose-

denaturalization suit the main issue is whether the defendant misrepresented a material fact when applying for a visa. The misrepresentation is no *less* material because the crime committed was organized by a different individual. Second, the atrocities committed by any individual are not excused because his "superiors" have not yet received just punishment. As at Nuremberg, the defense of duress should be accepted only when the defendant can demonstrate that "*no* moral choice was in fact possible."[217] This standard preserves the citizenship of legitimate kapos without providing a loophole for true Nazi criminals.

VIII. THE DEPORTATION OF NAZI WAR CRIMINALS

Following the denaturalization of Nazi war criminals, the government seeks their deportation.[218] This two-step process represents the full extent of United States prosecution of Nazi war criminals through immigration law. An alien is deportable if he is found to be in the United States illegally. This basic issue, in the case of Nazi war criminals, is typically resolved during the naturalization proceedings. These individuals are almost always found deportable. Immigration law allows aliens to apply to the Attorney General, under certain circumstances, for suspension of deportation and a restriction of the status of permanent resident alien.[219] A 1981 amendment to the Immigration and Nationality Act, however, denied this statutory relief to deportable Nazi war criminals.[220]

Once he is denaturalized, the alien may request voluntary departure and leave on his own accord.[221] Alternatively, if a court finds him deportable, the alien may designate the country to which he is sent.[222] If the alien makes no choice, he may be deported to the country from which he came, or the country of his birth, or any other country which will take him.[223] The major problem with this discretionary approach is that virtually no country is willing to accept Nazi war criminals. Those countries which will accept them, for example, Israel and the Soviet Union, are unacceptable to the alien who would face criminal prosecution. In most deportation cases international law requires the alien's country of

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cutors salaries, inhibit prosecution. *Id.* at 202-05.

217. *See supra* note 211 (emphasis added).

218. *See supra* notes 122-29 and accompanying text.

219. 8 U.S.C. § 1254(a) (1982).

220. Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 18(h)(2), 95 Stat. 1611, 1620 (1981).

221. 8 U.S.C. § 1252(g) (1982).

222. *Id.*, § 1253(a).

223. *Id.*

citizenship to take him back.

In a Nazi deportation case and other denaturalization cases, however, the problem is markedly different. Under the laws of most countries, the acceptance of citizenship is accompanied by a renunciation of citizenship in the homeland. A revocation of citizenship by the United States Government does not act to restore original citizenship; rather, it creates an individual without a country. No nation is required to accept him. The United States must obtain the consent of a foreign government to accept a denaturalized person.[224] What the accepting nation does with the individual after deportation is a matter of concern to that country. A Nazi criminal, therefore, may or may not face criminal prosecution after deportation.

IX. THE EXTRADITION OF NAZI WAR CRIMINALS — THE CASE OF IVAN DEMJANJUK

As noted earlier, denaturalization and deportation mark the full extent of the United States' power to prosecute Nazi war criminals. Immigration law is, therefore, a poor substitute for the criminal justice system. Unfortunately, most nations, including the United States, lack the requisite jurisdiction to prosecute former Nazis and collaborators because the war crimes occurred outside their territories or against foreign citizens.[225] This jurisdictional impediment alone should create an international obligation for every state to cooperate in returning alleged Nazi war criminals to those countries with proper jurisdiction to prosecute.

Certain current international conventions and agreements create this obligation. For example, in 1948, the United Nations adopted the *Genocide Convention*,[226] designed to prevent further acts of genocide and to punish previous acts. The United States adopted the Genocide Act in 1986. In addition, by signing the Moscow Declaration and the London Agreement, the United States and other nations assumed both a legal and moral obligation to extradite alleged Nazi war criminals to stand trial in those states exercising the requisite criminal jurisdiction, or to deliver such individuals to the International Military Tribunal.[227] In

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224. *See* A. RYAN, *supra* note 21, at 343-44. (Ryan discusses the problems arising when no nation will accept a Nazi war criminal.)

225. Moeller, *supra* note 185, at 797.

226. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9,1948, 78 U.N.T.S. 277 (entered into twice January 12, 1951) [hereinafter Genocide Convention].

227. *See supra* notes 8-20 and accompanying text; *see also* Moeller, *supra* note 185, at 800-01. The United States Department of State still considers the London Agreement

1946, the General Assembly of the United Nations adopted Resolution 3, which recommended that all nations arrest war criminals and "cause them to be sent back" to the countries where they committed their crimes to stand trial.[228] The following year, the General Assembly adopted Resolution 170 which reaffirmed the obligation to surrender Nazi war criminals and clarified the language in Resolution 3.[229] Since extradition is a bilateral process requiring a formal request for the return of a criminal, Resolution 170 urged nations with proper jurisdiction to make such requests and to support them with sufficient evidence to establish a *prima facie* case against these criminals.[230]

United States extradition law[231] authorizes any federal judge or magistrate to hear evidence on the extradition request of a foreign government with which there is a valid treaty or convention. The judicial officer determines whether there is sufficient evidence to sustain the charge under the appropriate provisions of the treaty.[232] If so, the judge must certify the surrender of the individual to the Secretary of State.[233] The Secretary of State, at his discretion, may order the delivery of the individual to the requesting foreign state to stand trial, or he may refuse extradition.[234]

Although the United States recognizes the "political offense" exception to extradition, which precludes extradition for political as opposed to criminal offenses, Congress has not codified the exception.[235] In *Artukovic v. Boyle*,[236] the United States District Court for the Southern District of California granted Artukovic's petition for habeas corpus, holding that the 1902 extradition treaty between the United States and

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binding although the International Military Tribunal disbanded in 1946. *See* U.S. DEP'T OF STATE, TREATIES IN FORCE 304 (1984).

228. G.A. Res. 3, U.N. Doc. A/64, at 9 (1946).

229. G.A. Res. 170, U.N. Doc. A/519, at 102 (1947).

230. *Id.*; *see* Moeller, *supra* note 185, at 802-03.

231. 18 U.S.C. §§ 3181-3195 (1982).

232. *Id.*, § 3184.

233. *Id.*, § 3186. If the judge or magistrate does not certify the extradition, the Secretary of State has no authority to surrender the individual. *Id.*, § 3185.

234. *Id.*, §§ 3184, 3186.

235. Moeller, *supra* note 185, at 805 & n.62. Many states, however, have adopted this exception in domestic legislation. *Id.* at 805 n.62. Generally, the court of extradition determines the applicability of the political offense doctrine, and if the court finds it applies, that decision is final. *Id.* at 805 & n.66. If the court certifies extradition, the Secretary of State retains the discretion to withhold extradition under the doctrine. *Id.* at 805-06; *see also* 18 U.S.C. § 3186.

236. 107 F.Supp. 11 (S.D. Cal. 1952), *rev'd*, 211 F.2d 565 (9th Cir. 1954).

the Kingdom of Serbia[237] was no longer in effect.[238] On remand, the district court held that the political offense doctrine precluded Artukovic's extradition under article VI of the treaty.[239] The district court reasoned that since Artukovic was not charged with murder, but with issuing orders to commit murder while serving as a government official, he fell within the political offense exception.[240] The Supreme Court, however, vacated the judgment and remanded to the district court.[241] The Ninth Circuit resolved the *Artukovic* litigation in February 1986, by denying Artukovic's motion to stay his extradition order to Yugoslavia,[242] affirming the district court's express denial of the political offense exception.[243]

Consensus exists within the international community against the use of the political offense doctrine to preclude extradition in war crimes cases. In essence, war crimes are "the exception to the exception."[244] The *Genocide Convention*, for example, states that "[g]enocide and other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition."[245] The *Artukovic* decision reflects the nonapplicability of the political offense doctrine to Nazi war crimes.

The Artukovic extradition and the Braunsteiner extradition are the two instances when the United States has extradited a Nazi war criminal to a European country to face criminal prosecution. The recent Artukovic and Demjanjuk[246] extraditions to Israel may provide the impetus for further extradition requests from nations exercising criminal jurisdiction over Nazi war criminals.

In *Matter of Extradition of Demjanjuk*,[247] the United States District Court for the Northern District of Ohio certified the extradition of John

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237. Treaty of Extradition, Oct. 25, 1901, United States-Serbia, 32 Stat. 1890, T.S. No. 406 [hereinafter Treaty of Extradition].

238. 107 F. Supp. at 33.

239. Artukovic v. Boyle, 140 F. Supp. 245 (S.D. Cal. 1956); *see* Treaty of Extradition, *supra* note 237, art. VI.

240. 140 F. Supp. at 246-47.

241. Karadzole v. Artukovic, 355 U.S. 393 (1958). On remand the district court again denied the extradition request on the grounds of insufficient evidence and the political nature of the offenses charged. United States *ex rel* Karadzole v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959).

242. Artukovic v. Rison, 704 F.2d 1354 (9th Cir. 1986).

243. In re Artukovic, No. C-84-8743-R (C.D. Cal. May 1, 1985).

244. Moeller, *supra* note 185, at 809 & n.82.

245. Genocide Convention, *supra* note 226, art. VII.

246. *See supra* notes 165-69 and accompanying notes; *see also infra* notes 247-81 and accompanying text.

247. 612 F. Supp. 544 (N.D. Ohio 1985).

Demjanjuk to the State of Israel.[248] For the first time a court extradited an individual to Israel to stand trial for Nazi war crimes.[249]

The Israeli government made the extradition request for John Demjanjuk on October 31, 1983 pursuant to an Israeli arrest warrant charging Demjanjuk with "the crimes of murdering Jews, which are offenses under sections 1 to 4 of the Nazis and Nazi Collaborators (Punishment) Law of the State of Israel."[250] The United States Government filed a complaint seeking Demjanjuk's extradition to Israel, pursuant to its obligation under the extradition treaty between the two states.[251]

Demjanjuk, a Ukranian, had entered the United States on February 9, 1952 under the DP Act, and on November 14, 1958, he was naturalized as a United States citizen.[252] On June 23, 1981, the district court found that Demjanjuk had materially misrepresented his background on both his visa and naturalization application by failing to disclose his service as a guard at the Trawniki and Treblinka concentration camps. Consequently, the court revoked his citizenship.[253] At his deportation hearing, the immigration judge found Demjanjuk deportable to the USSR, his native land, but granted him the option of voluntary departure.[254]

The district court held that the government need only establish a *prima facie* case to identify the individual as the person requested by the State of Israel, requiring only a threshold showing of probable cause.[255] The court examined documents, listened to the testimony of eyewitnesses, and viewed photographs, concluding that the government had introduced sufficient evidence to meet its burden.[256]

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248. *Id.* at 571.

249. The only other trial of a Nazi war criminal in the State of Israel was that of Adolf Eichmann, who was convicted and hanged. Eichmann, however, was not extradited to Israel but captured in Argentina and brought back to stand trial. For an excellent account of the Eichmann capture and trial, see G. HAUSNER, JUSTICE IN JERUSALEM (1968), and for an account of his capture, see I. HAREL, THE HOUSE OF GARIBALDI STREET (1975). *See also* Lippman, *The Trial of Adolf Eichmann and the Protection of Universal Human Rights Under International Law*, 5 HOUS. J. INT'L L. 1 (1982).

250. 612 F. Supp. at 546 (State of Israel's request).

251. *Id.; see* Convention on Extradition between the Government of the United States of America and the Government of the State of Israel, Dec. 10, 1962, 14 U.S.T. 1707, T.I.A.S. 5476 (*entered into force* Dec. 5, 1963) [hereinafter Extradition Treaty].

252. 612 F. Supp. at 546.

253. United States v. Demjanjuk, 518 F. Supp. 1362 (N.D. Ohio 1981), *aff'd*, 680 F.2d 32 (6th Cir. 1982), *cert. denied*, 459 U.S. 1036 (1982).

254. 612 F. Supp. at 546.

255. *Id.* at 548.

256. *Id.* at 552. The court held that Demjanjuk's claim that the Soviets altered the

The district court next turned to the issue of whether the crimes alleged were within the jurisdiction of the State of Israel and were covered by the Extradition Treaty. Israel's Nazis and Nazi Collaborators (Punishment) Law, enacted in 1950 addressed the crimes charged. The statute provides that crimes against the Jewish people or against humanity and acts constituting war crimes which occurred during the Nazi period, are punishable under Israeli law.[257] The court found that Israel's jurisdiction over Demjanjuk conformed with the international law principles of "universal jurisdiction."[258] The court stated, "[u]niversal jurisdiction over certain offenses is established in international law through universal condemnation of the acts involved and general interest in cooperating to suppress them. . . ."[259]

In addition, the district court found that article II of the Extradition Treaty covers the charges made by Israel.[260] Furthermore, the State Department declared that Demjanjuk's crimes are covered by article II of the Extradition Treaty, and the court noted that these statements "are entitled to great weight."[261] The court noted, however, that murdering civilians in Nazi concentration camps in Europe during World War II is not a prosecutable criminal offense under United States law. Under article III of the Extradition Treaty, therefore, extradition is discretionary, and the court can only determine whether Demjanjuk *can* be extradited; the Executive branch determines whether he *will* be extradited.[262] The court's analysis ignored the statutory discretion for extradition resting exclusively with the Secretary of State.[263] The court concluded that "extradition treaties are to be liberally construed so as to effect the apparent

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photographs was "baseless." *Id.* at 553.

257. *Id.* at 554-55, 554 n.8.

258. *Id.* at 555.

259. *Id.* at 556.

260. *Id.* at 559-60. Demjanjuk claimed that the Extradition Treaty does not cover the alleged murder charges because it does not address war crimes, genocide, or crimes against persecuted nationalities. The court dismissed this argument because it found "no reason to presume that the Treaty drafters intended to extradite for 'murder' and not for 'mass murders.' " *Id.* at 561.

261. *Id.* at 562.

262. *Id.* at 561. Article III of the Extradition Treaty provides, *inter alia*:

> When the offense has been committed outside the territorial jurisdiction of the requesting Party, extradition need not be granted unless the laws of the requested Party provide for the punishment of such an offense committed in similar circumstances.

Extradition Treaty, *supra* note 251, art. III.

263. *See* 18 U.S.C. § 1386 (1982).

intention of the parties."[264]

Finally, the court addressed the issue of whether probable cause existed to conclude that the defendant committed the crimes. The court recognized that it "does not inquire into the guilt or innocence of the accused. It looks only to see if there is evidence sufficient to show reasonable ground to believe the accused guilty."[265] The court determined that sufficient evidence did exist to identify Demjanjuk. It reviewed the same evidence to determine if Demjanjuk committed crimes at the concentration camps during World War II. The court held that "[t]he quantity of evidence necessary for a determination of probable cause, as well as its weight and sufficiency, is a matter for the extradition court's discretion."[266] In the instant case, "probable cause exists to believe respondent committed multiple acts of murder and that he may be extradited to Israel for those murders."[267] The district court also held that article VI of the Extradition Treaty, the "double jeopardy" clause, did not bar extradition because denaturalization and deportation proceedings are not criminal prosecutions.[268] The court dismissed Demjanjuk's argument that the acts must be criminal in both the United States and Israel. Because the Extradition Treaty contemplates the alleged crimes, the United States may surrender Demjanjuk, although the crimes are not prosecutable offenses in this country.[269]

Finally, the district court emphatically held that the political offense exception is inapplicable to these crimes:

> The murder of Jews, gypsies and others at Treblinka was not part of a political disturbance or struggle for political power within the Third Reich. . . . Rather, the members of an innocent civilian population were the intended victims of the "Final Solution." The alleged crimes were committed without regard for the political affiliations or governmental or military status of the victims.[270]

The district court certified Demjanjuk's extradition to the State of Israel.[271]

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264. 612 F. Supp. at 563.

265. *Id.* at 563 (quoting Sayne v. Shipley, 418 F.2d 679, 685 (5th Cir. 1969)).

266. 612 F. Supp. at 566.

267. *Id.* Demjanjuk claimed several defenses which the district court found to be without merit. Specifically, he claimed that the Israeli statute was *ex post facto* and that it was invalid because it preceded the independence of the state of Israel. *Id.* at 567.

268. *Id.* at 569.

269. *Id.*

270. *Id.* at 570.

271. *Id.* at 571.

The Sixth Circuit affirmed the lower court, and upheld the certification of extradition of "Ivan the Terrible."[272] Demjanjuk appealed the jurisdiction issues:[273] jurisdiction of the district court to consider the extradition request, and the jurisdiction of Israel to prosecute the alleged crimes. Again, Demjanjuk asserted that the crime with which he was charged, "murdering thousands of Jews and non-Jews," was not covered by the Extradition Treaty's designation of "murder."[274] The court rebuked this argument. The court held, "Demjanjuk's argument that to interpret murder to include murder of Jews would amount to judicial amendment of the Treaty is absurd and offensive."[275] Addressing the jurisdiction of the State of Israel, the court of appeals reiterated the district court's reasoning. Article III of the Extradition Treaty gives the requested state the discretion to honor the extradition request for extraterritorial crimes; it does not rule over extradition.[276] Under the theory of universal jurisdiction over these crimes, established at Nuremberg and reaffirmed in Israel in 1961 during the Eichmann proceedings, Israel has criminal jurisdiction over Demjanjuk, and the district court properly honored the extradition request.[277]

As a final matter, Demjanjuk raised the question of the application of the "principle of speciality." This principle requires that the requesting state not prosecute for crimes listed in the Extradition Treaty but for which extradition was not granted.[278] Demjanjuk was certified as extradictable only for the charge of murder, and Israel may prosecute for any charge included in the definition of murder.[279] The court noted, however, that "[t]he right to insist on application of the principle of specialty belongs to the requested state, not to the individual whose extradition is requested."[280] The district court's decision was thus affirmed.[281]

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272. Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985). At Treblinka, Demjanjuk was known as "Ivan Grozny"—or "Ivan the Terrible."

273. *Id.* at 579. Demjanjuk also claimed that Judge Battisti who presided at the denaturalization proceedings should have excused himself from the deportation hearing. The Sixth Circuit dimissed that claim. *Id.* at 577.

274. *Id.* at 579.

275. *Id.* at 580.

276. *Id.* at 581.

277. *Id.* at 581-82.

278. *Id.* at 583.

279. Israel may try him for crimes against the Jewish people, crimes against humanity, and war crimes, for example, as long as they fall under the broad category of murder. *Id.*

280. *Id.* at 584.

281. *Id.* The Supreme Court denied certioriari. Demjanjuk v. Petrovsky, *cert. denied*, ___ U.S. ___, 103 S.Ct. 1198 (1986).

The United States extradited Demjanjuk to Israel where he awaits trial. The *Demjanjuk* decision is a positive example of the revived spirit of the London Agreement and Moscow Declaration and a symbol of international cooperation that will encourage other nations with criminal jurisdiction over Nazi war criminals to make similar extradition requests.

X. CONCLUSION

The Artukovic and Demjanjuk extraditions may encourage Israel and other states with proper criminal jurisdiction to request the surrender of Nazi war criminals living in the United States. The Artukovic and Demjanjuk extradition cases exemplify a sound process for honoring such requests without sacrificing due process protections to which every criminal defendant is entitled and which justice demands. Other than honoring extradition requests, the United States is limited to prosecuting these individuals under existing immigration law — an inherently poor substitute for criminal justice. The charge is simply entering this country illegally, rather than committing atrocities for the "Final Solution."

The ideal procedures require rebirth of the principles and spirit of the Moscow Declaration and London Agreement, and the reestablishment of an international tribunal with jurisdiction over individual defendants. Though such a move does, concededly, meet with political obstacles, its benefit to international justice and peace is self-evident. The utilization of international law through all organized judicial bodies to combat the greatest meance of our time — aggressive war — symbolizes an awareness that "[t]he common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched."[282] The motivating forces behind the Nuremberg Trials are no less important today. Once again, the great nations of the world must band together and commit to voluntarily submit international criminals to the judgment of the law.

As the years since World War II pass, the need for international cooperation in the prosecution of Nazi war criminals grows even more urgent. Even after these criminals have died, the symbolic effect of their prosecution will signal a recognition that all forms of aggressive warfare cannot and will not be tolerated. If we forget the lessons of history, we are doomed to repeat them.

David R. Gelfand

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282. R. JACKSON, *supra* note 1, at 3.