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## United States Responses to World War Two War Criminals and Human Rights Violators: National and Comparative Perspectives

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## UNITED STATES RESPONSES

*Ms. Ruti G. Teitel:*<sup>1</sup> We are continuing with the issue of responses to World War II war criminals and human rights violators. We heard in the earlier panel about the difficulty of achieving convictions in the German trials and a variety of proof and jurisdictional problems. And while we now switch to the American response to Nazi war criminals and to the deportation area, which is not *per se* criminal, but still has a very difficult criminal standard, we'll see that we will encounter some of the same issues.

We are very lucky here to have a panel of people who have all been involved in the actual work of the United States Justice Department denazification efforts which have been going on since the 70's. On my right is Allan Ryan Jr.,<sup>2</sup> now at Harvard University and former director of the Office of Special Investigations of the United States Department of Justice. On my left is Eli Rosenbaum<sup>3</sup> who is working with the Justice Department, and is General Counsel at the World Jewish Congress. On his left is Bruce Einhorn<sup>4</sup> who is the Senior Trial Attorney at the Office of Special Investigations.

Martin Mendelsohn was also to be on this panel. He is in Yugoslavia instead at the Artukovic trial. The trial of Andrija Artukovic is one that anybody involved in the U.S. efforts has been awaiting for over thirty years. I am going to turn to Mr. Ryan for his comments, then we will have fifteen minutes of prepared remarks and a discussion.

*Mr. Allan Ryan Jr.:* As Ruti mentioned, I was the Director of the Office of Special Investigations in the Justice Department from 1980, shortly after its formation, until 1983. At this table in front of you, I think, perhaps, might be the first meeting of the Office of Special Investigations. Eli was in the Office, Bruce is still in the Office as a Senior Trial Attorney, and I think it is fair to say that between the three of us we know everything there is to know, so you've come to the right place.

The story of Nazi war criminals in America is a story quite different from what you heard a few moments ago from Fritz Weinschenk and Henry Friedlander. If one were to ask me to summarize the United States' response to Nazi war criminals from 1945 through 1980, the answer would be very simple and short, because the answer would be nothing. Zero. Nothing was done in this country regarding Nazi war criminals for that period of time. To understand why that is so and why it has changed in the last six years, it is necessary, I think, to go back a little bit in history and to look at the question of how Nazi war criminals came to this country. What you will find is contrary to many popular impressions.

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Nazi war criminals in this country, by and large, are neither German nor Austrian, but rather Eastern European, specifically Latvian, Lithuanian, Russian, Estonian, and various other Eastern European nationalities. The reason for that has to do very much with immigration patterns and with the laws of this country after World War II. As you know, the Germans occupied Eastern Europe, virtually all the way to the gates of Moscow, for a good part of the war and it was in that area that they carried out much of the Holocaust. In 1944, as the Red Army started to push the Germans westward, the collaborators, those who had taken part in the machinery and the administration of genocide, retreated with them. In the spring of 1945, with the end of the war, these people were in Germany and Austria like so much driftwood thrown up on the beach after a storm. They became, almost overnight, displaced persons.

Displaced persons or refugees, as we would probably call them in today's parlance, were considered to be those who had been uprooted from their homes by the turmoil of war. There were one million displaced persons in Europe at the end of the summer of 1945. Surely there were innocent people who had done no wrong, but, also among that one million there was a very large number of people who were not innocent. People were there because they had been fleeing the Red Army, fleeing justice coming at them from the east. They were the handmaidens of Nazism, the guards at the death camps, and others, who found themselves in Germany and in Austria at the end of 1945.

The policy in this country during the years from 1945 through 1948 was at first one of indecision, and then one of gradually mounting pressure from a number of segments in this country to let in the refugees of Europe who, after all, were fleeing communism. Particularly after 1947, with the announcement of the Truman Doctrine when communism and the Soviet Union became our officially certified enemies, there was great pressure in this country to allow those displaced people to come here and to begin again, to flee the godlessness of communism and to come to a free country. All of the appeals to our patriotic nature were in full force during those years.

But, what happened in Congress was something quite different. Instead of passing a law that said the first 400,000 people could come, or that innocent refugees could come, or that the victims of the Holocaust could come, Congress said that 400,000 people eventually could come to this country; however four out of every ten visas, by law, had to go to Baltic nationals — Balts being Latvians, Lithuanians and Estonians. The reason for that preference ostensibly was that the Soviet Union had occupied those countries and we did not recognize that occupation. Indeed, to this day we do not recognize that occupation officially.

The logic seems to have been that all of the Balts, the Latvians, the Lithuanians, and the Estonians in these camps were, by virtue of that fact alone, fleeing Soviet occupation and therefore, must have been desirable immigrants to the United States. In fact, that was a grossly wrong and oversimplified generalization because the level of collaboration with the Nazis in those countries was as high as in any country in Europe. Jews in Latvia and Lithuania, and to a somewhat lesser extent, in Estonia were killed not so much by Germans but by Latvians, Lithuanians, and Estonians. These are the very people who went to the head of the line in getting visas to come to the United States.

A second preference that was built into that law was for what were termed agriculturalists, farmers, and foresters. That was a provision that had great benefit for the Ukrainians, who are from an agricultural nation. The level of collaboration with the Nazis in the Ukraine was as high as in any other country in Europe. There was a very

large Jewish population in the Ukraine that was killed through acts of collaboration by Ukrainian nationals. They went to the head of the line along with the Balts because of the farmers' preference.

The third preference that was built into the law, the most unbelievable of all, was that fifty thousand visas were by law to be given to those known as the *Volksdeutsch*. *Volksdeutsch* were German ethnic populations outside Germany. They were, in case after case, the fifth column in many of these countries that were occupied by Nazi Germany. They were such notorious collaborators that even the International Refugee Organization, which was part of the U.N., would have nothing to do with them. They could not qualify as displaced persons (DP) under the International Refugee Organization, and yet in the Displaced Persons Act, 50,000 of them were given visas to come to this country.

The fourth provision in that law said, not quite in so many words, but certainly in effect, that Jews need not apply. It provided that anyone who was not in the DP camps as of December 22, 1945, and who had not been there continuously since then could not come. It was a legal way to write a provision that Jews could not come to this country under the DP Act. At least 90% of them could not come because they could not meet that eligibility requirement. The requirement was debated on the floor of the Congress and the members were for or against it based on whether they thought Jews should or should not come to this country. One senator said, "This would be a very good bill if only we could figure out some way to keep out the Jews." And that was done.

So what you have from 1948 to 1952 in this country when this Act was in effect, is a very large number of those who had taken part in the Holocaust coming to the United States because of the various preferences that were built into the DP Act. The DP Act did have a sentence that said Nazi war criminals were ineligible, but this provision was mainly for show, because it could not be enforced. Indeed, it was almost contrary to the whole spirit of the DP Act because by giving 40% of all visas to Balts it was virtually inevitable that a large number would go to those who had collaborated with the Nazis.

So the question of how Nazi war criminals came to this country by and large is not a story of intelligence collaboration. It is much more shocking, I think, because it is a story that was debated on the front pages of our newspapers. In the Congress it was a very public debate that led to the passage of this law. We invited Nazi war criminals to come into this country because we passed a law that made it easy for them to do so throughout the 1950s, 1960s, and 1970s.

What happened to these people? Nothing. There were one or two cases, the Artukovic case being the most significant, where the immigration service almost literally stumbled over Nazi war criminals and did bring prosecutions that were, without exception, ineffectual. There was no public support. There was no sentiment in Congress. There was no sentiment in any segment of this community. There was no comment in the press, to speak of, saying, "We have Nazi war criminals in this country and we shouldn't. Be rid of them." That simply did not happen.

These people came to this country and they settled in cities like New York, Philadelphia, Chicago, Detroit, Pittsburgh, Baltimore, and Boston. They became quiet neighbors, which happens to be the title of a book that I wrote about the subject because that to me epitomizes Nazi war criminals in this country. They did not join neo-Nazi organizations. They did not take anti-semitic stands on the Boston Common. They did not become politically active. They wanted to lay low and have absolutely no reason for anyone to look at their past, and that is exactly what they did. For thirty years nobody did look at them.

That changed starting in the late 1970s through the efforts of two people — Joshua Eilberg, who had been a Congressman from Philadelphia, and Liz Holtzman, then a Congresswoman from Brooklyn who succeeded Eilberg as Chairman of the Immigration Subcommittee of the House Judiciary Committee. Through their efforts, certainly those of Liz Holtzman, two things happened in this country. To begin with, for the first time in our history, a record of Nazi war crimes became a deportable offense. Prior to 1979, no one could be deported from this country for having committed Nazi war crimes because there was no provision that allowed that. Secondly, the Department of Justice had appropriated, at that time, 2.3 million dollars to investigate and prosecute Nazi war criminals in this country. That was the beginning of the Office of Special Investigations which was created in 1979.

This was the first time that this government took any organized or comprehensive look at Nazi war criminals in the United States. Since that time, fifty cases, more or less, have been filed against Nazi war criminals in this country. How does that happen? It proceeds from a very simple legal theory which was upheld by the Supreme Court in the *Fedorenko* case in 1981, that under the Displaced Persons Act it was illegal to come here if you were a Nazi war criminal. Forget how easy it was as a practical matter. It was still illegal. Anyone who came here with a background, a record of Nazi persecution, was an illegal immigrant. They succeeded in coming here by fraud because they had concealed their backgrounds. They had said they were farmers. They said they were prisoners of war. They said they were anything except death camp guards and they got visas and they came here, so they were illegal immigrants.

If they were illegal immigrants then their citizenship is invalid, since one of the requirements for citizenship is a legal entry into this country and five years lawful residence. If their citizenship is invalid, it can be revoked by court order upon clear and convincing evidence that it is invalid. How do we prove it is invalid? We prove it is invalid by proving that they were Nazi criminals — that is, that they took part in the persecution of innocent people under the Nazi regimes of Europe from 1939 to 1945. That is the definition in the law. They advocated, assisted, and took part in the persecution of those people based on race, religion or political beliefs.

So if you were to walk into a courtroom in one of these trials, you would think that it is a war crimes trial. There are documents. There are witnesses. The entire focus of the trial is, "What did this man do in those years from 1933 to 1945?" We have to prove through the evidence that he took part in the persecution of innocent people, that he committed Nazi war crimes. If that can be shown — and almost without exception, in all of our trials to date it has been — then it is a relatively easy matter from a legal perspective to say, "His entry into this country was illegal, therefore, his citizenship is invalid and should be revoked." Once his citizenship is revoked and he is no longer a citizen of this country, he is subject to deportation. That, unfortunately, requires a second and separate proceeding to bring about his deportation.

We are talking about seven separate levels of hearing and appeals, by the way, in these two procedures combined. Even when that is proven, we face the third, and in many ways, the most difficult hurdle which is, who is going to take this person in. All of the deportation orders in this country do not amount to anything if there is no other country that is willing to accept this deportee. We cannot put them on a ferry and take them three miles out of Boston Harbor and cut the line. Unfortunately, we cannot, and we cannot put them on a plane to nowhere. We have to have the agreement of some

other country to take them in and for many years, and still to some extent today, that agreement was very difficult to achieve.

The Germans do not want any of these people back. The Germans will not take any of these people back, unless they still happen to be German citizens today which has happened to my knowledge in only one case so far. Israel, with one exception that I will mention briefly, has not yet declared its willingness to take these people in. The Soviet Union is perhaps the only exception to the rule. They are willing and ready to take back those whom they consider to be Soviet citizens, that is, born in the Soviet Union.

I'll just cite you the case of Bishop Trifa, a Romanian who was ordered deported from this country for advocating genocide and taking part in genocide in Romania, who simply would not be accepted by any other country. So, people like this stay here. We figured out a few ways to get around that in some cases, but the point to be made is that the deportation order by itself means the end of the legal process. It does not necessarily guarantee that the person leaves this country.

What happens when a person gets to another country under a deportation order? It depends entirely on what that other country chooses to do. In the case of Germany, they have shown no interest in putting these people on trial. Regarding the Soviet Union, the jury is still out, so to speak. There have been two exceptions which I will just mention briefly.

One, is the Artukovic case, the trial that is going on now in Yugoslavia. Artukovic was the Minister of the Interior for the Independent State of Croatia which was nothing more than a Nazi puppet government, set up in that part of Yugoslavia known as Croatia, with the main purpose of killing all the Serbs and all the Jews in Croatia. Some thirty thousand Jews, which comprised a great majority of Jews in that particular country, and over four hundred thousand, perhaps as many as seven hundred thousand Serbs were killed under the secret police that reported to this man. He came to the United States in 1948 under a false name and only six weeks ago he was extradited to Yugoslavia where he is now facing trial on those charges. [Artukovic was convicted. He died in prison in January, 1988.]

The second case that you should be aware of is that of John Demjanjuk, the man who operated the gas chamber at Treblinka. We went to trial against him in 1981 in Cleveland. His citizenship was revoked. He was later ordered deported. While that was on appeal, Israel requested his extradition, which was granted by our courts. He is now in a prison cell in Israel. He will go on trial later this year. The testimony at that trial in Cleveland was remarkable. This is a man who still today, at age 65, is big, strong, and strapping. The testimony was that he had operated the gas chamber at Treblinka into which hundreds of people were crammed every day as they got off the trains coming from Warsaw. Demjanjuk was the man who turned on the engine from a captured Russian tank and pumped carbon monoxide into the room through a rubber hose until all the people were dead, day after day, day after day. The number of people killed at Treblinka, by the most reliable estimate that I have found, is 1.2 million.

The number who survived Treblinka was exactly thirty eight. Five of those people came to Cleveland and were able to identify Demjanjuk by using photo spreads that included photos of Demjanjuk from that period of time, 1941. He is now in Israel. It will be the first war crimes trial in Israel since Adolf Eichmann's twenty five years ago.

The experience of putting Demjanjuk on trial is going to be a fascinating one. I am going to be in Israel next month to work with the State's Attorney over there on this

case, and I think the evidence will show there as it did here, that this man is a major Nazi war criminal. Not because he is a household name, not because he had a high government post like Artukovic or Eichmann, but because he was the man who by his own hand put to death hundreds of thousands of men, women, and children. He lived in this country. He worked on the assembly line of a Ford motor company in Cleveland, a typical quiet neighbor who raised his family, did not cause anybody any problems, and yet who symbolizes what has happened in this country in the last forty years — he spent thirty years of peace and quiet with nobody looking at him and then the last five years facing trial, and now he faces justice in Israel.

I will conclude only with this thought. The record of the United States in prosecuting Nazi war criminals has been, at best, a very mixed one. If we were sitting here in 1979, we would say the record is abysmal, in fact, virtually non-existent. I do not want to pretend to you that in the last six years we have completely redeemed that record. No effort that begins in 1979 to prosecute Nazi war criminals who committed crimes from 1933 to 1945 can be anything more than a very, very belated effort. But I think it does show something very important in this country, which is that we have resolved that Nazi war criminals shall not die here in peace. They may have come here in peace, but they will not die here in peace.

The reason is not necessarily because we will find them all and bring them all to trial. We surely will not. However, there is not one Nazi criminal in this country today who can go to sleep peacefully tonight and say, "I have nothing to worry about." These Nazi criminals look around at what they have seen for the last six years and they see that the government of this country and the people of this country are serious at long last about bringing these people to justice. It is a late effort. There is no question about it. But it is a determined effort through the work and the dedication of people like Eli and Bruce and the others at OSI.

It is a signal, if you will, to all people who came here in those years, that their days of peace and security are over. Many of them will die in this country, but no one I think in this country today can look at Artukovic, who is in Yugoslavia, or look at Demjanjuk, who is in Israel, or look at Arthur Rudolph, who is in Germany, and say, "I have nothing to worry about." So if there is a contribution to be made here, I think that it is what this government has done in the last five or six years. It leaves us, as I say, with a mixed record, but I would prefer a record that began belatedly rather than one that did not begin at all.

So when the history of this effort is written, the verdict, I think, will not be entirely against us. Thank you.

*Ms. Teitel:* Thank you, Allan, for that excellent overview. Now we will turn to Bruce Einhorn who actually worked on the *Demjanjuk* case that Allan Ryan talked about. We will also hear about some new developments.

*Mr. Bruce Einhorn:* Good morning. I am very privileged to have been asked to participate at this symposium. I am particularly privileged to share the podium with two very good friends and former colleagues, Allan and Eli, whose hardworking spirits continue to show their positive effects at the Office of Special Investigations.

Allan has given you a brief history of OSI and I am not going to repeat it except to say that prior to the creation of OSI by the Attorney General Order 851-79 in September of 1979, around the time I started there, the effort to denaturalize and

deport alleged Nazi war criminals and participants was something of an extracurricular activity of the federal government. In large part, this is because that kind of an undertaking with its historical overtones and differentiation from standard immigration law work required a certain kind of staff, a certain kind of budget, and a certain kind of dedication. And that in turn is what led to the creation of the OSI.

The OSI is what it has always been. There are attorneys and prosecutors to be sure. There are historians and multilingual experts on World War II and on the history of twentieth century Germany and Eastern Europe. There are paralegals, criminal investigators, and a support staff of secretaries and clerks. Together, those of us who are there from our various callings make up the OSI. Business at the Office remains quite brisk. We have begun over a thousand investigations in all. There have been about one thousand investigative cases that have come through the Office of Special Investigations. About four hundred of those investigations are still active. Approximately fifty-eight cases have been filed in either Federal District Court or Federal Immigration Court. Almost all the cases that have been litigated by OSI have been won by OSI. Approximately ten people have been permanently expelled from the United States by means of either deportation, extradition or voluntary departure as a result of the denaturalization or deportation cases.

The Immigration and Nationality Act of 1952 is the procedural centerpiece for what OSI does. I refer you to certain provisions of the Immigration Act that are used every day by OSI. One is section 1451A, which is the provision that describes the procedures for denaturalizing naturalized citizens of the United States. Those proceedings are equitable in nature and the trials are conducted by judges and not by juries.

Then there is the deportation provision of the Immigration and Nationality Act, section 1251A, with procedures and sections that follow describing the way in which a lawful permanent resident of the United States, if he can be shown to have been an illegal alien, can be deported — expelled forever from the United States. They are not covered by the Administrative Procedure Act. They are covered by the Immigration Act. They are, however, administrative in nature. They are presided over by finders of fact called Immigration Judges, who are employees of the Department of Justice, and whose decisions are subject to appeal.

The work of OSI also involves other pieces of legislation. These are provisions and laws that were in operation at the time OSI subjects came to the United States. Under the provisions of the Immigration and Nationality Act, if an individual entered the United States in violation of the law under which he was issued entrance or if he lied about material facts of his background in order to procure a visa under that law, then he is subject to denaturalization and/or deportation. In other words, one is procedurally sued under the Immigration Act for having entered the United States in violation of a previous act. Such previous acts are the Displaced Persons Act, the Refugee Relief Act of 1953, the Presidential Proclamation of July 1941, and the subsequently issued regulations in the CFR, Title 8 and Title 22 in 1945 which barred the admission of any person who acquiesced in conduct contrary to civilization and human decency on behalf of the Axis powers. Also we have the Holtzman Amendment, named after one of its sponsors, Congressman Holtzman of New York, in Title 8, USC section 1251(A)(19) and Title 8, USC section 1182(A)(33). To make a long story short, that provision simply states that if you were a participant in conduct which amounts to persecution against people because of their race, religion, national origin, or political opinion, you are deportable if you are here, and excludable if you are trying to come here.



The litigation process at OSI that operates under these laws is a multi-layered process. First, we have to begin with the denaturalization process if the individual is a citizen. Under federal law, a citizen of the United States may never be barred from entering the United States. Therefore, we must change the citizen back into an alien to kick him out. We do that by having a denaturalization trial after having discovery under the Federal Rules of Civil Procedure. It could take quite a long time. Following the bench trial, the equity trial, the OSI wins a denaturalization judgment. That judgment is appealed to the appropriate Circuit Court of Appeals. If OSI prevails with an affirmance, the alien may appeal his denaturalization decision by petitioning for a writ of certiorari to the Supreme Court of the United States. Certiorari is denied. Or if, as in the case of *Fedorenko*, certiorari is granted but an affirmance is issued, then and only then, is the alien deprived of his citizenship once and for all. Then deportation proceedings may proceed.

Deportation proceedings are begun by the filing of what is called an Order to Show Cause. It is the functional, not the moral, equivalent of a complaint and is filed by service on the alien and on the Immigration Court in the city in which the alien resides. The alien is not entitled to an extensive discovery but to a *de novo* hearing of evidence and law in which the government bears the same burden of proof it bore in the denaturalization trial. That burden consists of proving by clear and convincing evidence that the person who is the subject of the allegations in the chosen document is subject either to denaturalization or to deportation.

The clear and convincing evidence standard for denaturalization and deportation cases was established by the United States Supreme Court in the *Schniederman* case for denaturalization actions, and in the *Woodbee* case for deportation actions. It is the highest standard of proof in civil litigation that exists in the United States. If the deportation hearing results in an order of deportation, then the alien again may appeal the decision to an administrative court in Washington, from there to another Circuit Court where he resides, and finally he may again petition for a writ of certiorari. If he is denied certiorari review one more time then he is deportable from the United States, and then we must find a country to take him. By law the alien may choose the country. However, if that country rejects him or, as in the *Demjanjuk* case, the alien refused to answer and I named the Soviet Union, the government would be in the position of naming the country of deportation.

That is how OSI works. That indicates to you some of the frustration as well as some of the challenges of being a litigator for OSI. I do not want to take up too much more time. Let me give you a little idea of what our recent developments have been like.

First, let me tell you that one of the most interesting legal developments that has occurred in OSI has been the development and the application of collateral estoppel. It may not seem interesting but it is important to our work. Finally, courts have begun to apply the doctrine of collateral estoppel to hold that if a denaturalization judgment resulted in a certain series of legal findings which deal with an alien's unlawful entry into the United States, then in the deportation proceeding those issues, if they are necessary to the outcome, are deemed conclusively established and may not be challenged by a *de novo* decision by the immigration judge.

In the *Demjanjuk* case, the Sixth Circuit applied the doctrine of collateral estoppel to uphold the administrative board's order of deportation against Demjanjuk on the theory that the board had had no choice. The District Court in Cleveland had issued findings of fact stating that Demjanjuk, because of his heinous activity in Treblinka, had entered the United States unlawfully under the Displaced Persons Act.

The doctrine of collateral estoppel might well be a valuable assisting agent in the effort to enforce and quicken some of the deportation judgments OSI will get.

Another recent development has been the *Artukovic* case. Allan has filled you in on that case. Andrija Artukovic came to the United States in 1948. The deportation proceedings which were resumed against him in the 1970s and early 1980s were deferred when his extradition was requested by Yugoslavia, which was recently successfully achieved. However, extradition had previously been requested by Yugoslavia in the 1950s. The federal courts in California originally had determined that the crimes with which he was charged were not crimes of a nature that could subject him to extradition. They were political in nature under a doctrine and extradition law known as Political Offenses. He was exempt from extradition. However, the recent decision of the Ninth Circuit in the District Court of California has changed all that. I have a sore spot for the *Demjanjuk* case because I've been on it for six years. Allan has given you a summary of the allegations. Demjanjuk is the subject of a denaturalization case which began nine years ago. When OSI was established we became the managing agency in the prosecution of Demjanjuk in the form of the denaturalization trial in which OSI was successful. We then moved to a deportation form, where, as I told you, we used the doctrine of collateral estoppel, and also alternative findings. We were successful again. Israel requested jurisdiction and, for the first time in history, a nation state voluntarily surrendered a person accused of not only persecuting, but exterminating Jews to Israel for trial in Israel under the laws of Israel. The *Demjanjuk* case is obviously significant for other reasons. There is nothing to compare it to. It is one of a kind and it is significant in a few brief other ways.

The *Demjanjuk* extradition decision basically boiled down to the following holdings. The District Court, which was later affirmed, held that, absent congressional intent to the contrary, the law of nations is part of the law of the United States. International law does not prohibit the application of a nation's laws or of a nation's jurisdiction over non-citizens who commit crimes extraterritorially from the nation which seeks to prosecute the alleged offenders. Certain offenses may be punishable under international law by any state in the world because certain kinds of offenders, those who participate in the mass extermination of civilians for reasons of race and religion, are "enemies of the human race," common enemies of all humankind. Not only is it the right, but also the duty of the world through its states, its nation states, to seek a means of prosecuting such individuals.

That doctrine, by the way, was enunciated not by Israel first, but by the United States military. In the Nuremberg trials, the U.S. military issued a report which clearly stated that the universality principle of jurisdiction and the extraterritoriality principle of jurisdiction were the preeminent principles in the prosecution of alleged Nazi war criminals.

Indeed in a famous case, *United States v. Valdick*, a United States Military Court convicted people for concentration camp atrocities which were committed in a zone of occupation, not American after the war, against nationals who were not American. The case by the United States was based on the theory that the United States had the right and duty to see to it that such people were brought to justice, that crimes, such as mass murder committed at concentration camps, have always been crimes, and that there is no *ex post facto* in the law of murder.

This is a very important part of the *Demjanjuk* case which recites and upholds previous decisions of the United States and International Military Tribunals in post-war Europe. The *Demjanjuk* case is also interesting in that it favorably compares to a previous

decision having nothing to do with OSI, but having a great deal to do with human rights and international law. This previous case is that of *Filartiga v. Pêna-Irala*, in which an individual was found on the streets, I believe in Brooklyn, who had allegedly participated in state torture of civilians in Paraguay. Survivors of the victims sued in federal court in New York under the Federal Alien Tort Statute to bring this man, who was found in New York, to some sort of civil justice.

The Second Circuit held that since the law of nations forms a part of the laws of the United States, and since state torture has always been considered to be criminal under the law of nations, then if there was a jurisdictional predicate for the United States to take cognizance of what American law already regarded as a substantive offense, this individual could be subject to legal action.

Both *Filartiga* and *Demjanjuk* represent a high water mark in the effort to bring international outlaws, who employ state torture and state extermination techniques against innocent civilians, to justice. In *Filartiga* a federal statute brought an individual to justice here, and in *Demjanjuk* a treaty brought a Nazi criminal to justice in another democratic state. The *Demjanjuk* case, while it is in some ways unprecedented, stands for fundamental principles of international and American law that I would hope will not be forgotten in the future. However, what the case holds for the future is the subject of unanswered questions.

*Ms. Teitel*: Thank you, Bruce. We will go straight to Eli, who will bring up some of the proof problems raised by the reliance on evidence from the Soviet Union and other Eastern European countries.

*Mr. Eli Rosenbaum*: Thanks, Ruti. I will try to be brief because I know we are running a little late. Permit me a brief diversion at the beginning to say that I am delighted to be up here, in particular with people I know and admire and have a great deal of affection for. Starting with Allan Ryan: under his leadership, OSI had the highest rate of success in litigation of any section in the entire Criminal Division of the Department of Justice, despite the terrible problems we had in proving these crimes after forty years, crimes that were committed in a way that was intended to annihilate all potentially sympathetic witnesses. Those facts put the record of OSI under Allan's stewardship in a very special light. It really is an extraordinary record. Bruce Einhorn, my colleague for many years at OSI, where he has handled many major cases, did himself a disservice by saying that he was "associated" with the *Demjanjuk* case. He has been directing the prosecution of that case now for many years and he is the one primarily responsible for getting *Demjanjuk* extradited to Israel and also for some remarkable successes in many other cases. I have learned a lot from Bruce, and I continue to learn a lot from him. I do hope, by the way, that you meant to say that I was a former colleague, not a former friend.

Ruti Teitel is the only person up here who really has not been introduced. So, sorry Ruti, I am going to do it. She is Assistant Director of the National Law Department of the Anti-Defamation League of B'nai Brith, someone who has done extraordinary work in many different areas, particularly in the church-state separation area, and who is in substantial measure responsible for the success of the Boston College Holocaust Human Rights Project. She was probably the first person in the organized Jewish community to appreciate the need for this and to arrange for funding for it. Would that we had had something like this group when I was a law student, not too far from here, back in 1978-

79 when the West German Statute of Limitations was about to run — something we tried valiantly to stop. In the end, I think it was the NBC film *Holocaust* that actually prevented it. We had no resource like this to turn to when we desperately needed it. Ruti has played a major role in that, and of course, a major role in the work of what, along with the NAACP, must be considered one of the top two civil rights organizations in this country during the twentieth century.

I have been asked to discuss the subject of U.S.-Soviet cooperation in the Nazi cases. The first question is why do we need it? The explanation is simple. As Allan alluded to earlier, many, if not most, of the Nazi suspects who are under investigation in the United States committed their crimes in areas that are now behind the Iron Curtain. All of the Nazi death camps, for instance, not to be confused with the concentration camps, were located on territory that is now behind the Iron Curtain. When the Germans and their allies retreated from those areas, they left behind a wealth of documentary evidence. These were the documents that they were not able to destroy and which were not destroyed by the concentration camp survivors, who sometimes started bonfires as a means of celebrating their liberation.

Gaining access to eyewitnesses also requires East-West cooperation in some cases. Many people who were either victims of Nazi persecution or who actually perpetrated crimes remained behind the Iron Curtain after the war ended. In the case of the survivors, most simply ended up living there. In the case of the perpetrators, many of them were apprehended by the Soviet government, the Polish government, and the Czech government, and served sentences in those countries. Some of them are still serving sentences. Others of them have since been released. In sum, both documentary and testimonial evidence of great value is located to this day behind the Iron Curtain.

When OSI's predecessor, the Special Litigation Unit of the U.S. Immigration and Naturalization Service was established in the late 1970s, one problem it faced was getting cooperation from the Soviets. The Soviet Union had been cooperating for many years with the West German government, but never with the United States. The Soviets had, in a few cases in the early 60's, identified people they said were Nazi war criminals living in various cities and towns in the United States. They had even requested the extradition of these people. Those requests were consistently turned down — turned down not only on the proper legal basis (namely, that we did not have, as we still do not have, an extradition treaty with the Soviet Union), but also were communicated to the Soviets in a more or less cavalier and insulting way by the State Department. I believe it was in 1978 that the first Director of the Special Litigation Unit, Martin Mendelsohn, went to the Soviet Union and had preliminary discussions with officials there. During those discussions, Moscow indicated in principle its willingness to cooperate. One must remember that some twenty million Soviet citizens were murdered by the Nazis during the Second World War.

One must also understand that the Soviets have gone to lengths that I believe even the United States would not go to permit the testing of their evidence. Surely, in the case of documents, I know the United States would not allow the kind of testing that the Soviets have permitted. The Soviets have allowed original documents from their archives not only to be removed from the Soviet Union and transported to the United States for use in American courtrooms, but they have also permitted what is called "destructive testing." I am anticipating a little bit here, but, as I will discuss later, one of the principal — perhaps the principal defense in any case in which a document from behind the Iron Curtain is offered in evidence — is that it is forged or fabricated. As a

result, the Justice Department finds it extremely helpful if foreign governments allow prosecution and defense experts to test chemically and physically that evidence. In the case of documents, destructive testing involves actually removing plugs of paper and ink samples from the documents themselves. I know the people who run the Modern Military Branch at the U.S. National Archives. If you were to ask, "Can we remove a little plug of paper from one of your documents?" not only would they show you the way to the outside of the Archives, but you would undoubtedly go via the window. There is just no chance that the National Archives would allow that kind of testing, but the Soviets have permitted it, time and again.

Cooperation between the U.S. and U.S.S.R. in Nazi cases generally follows a standard format. Typically, OSI will have someone under investigation. An investigation can begin in any number of ways. If the crimes were committed in the Soviet Union, or in any of the Baltic states that are now occupied by the Soviet Union, OSI's request for assistance will be transmitted from the Justice Department via the State Department to the Soviets. OSI will request copies of any documents they have and any witnesses who may live in the U.S.S.R. If it turns out that the Soviets have located witnesses, depositions will thereafter be scheduled, and American prosecutors from OSI will travel there along with defense counsel, at government expense, to cross-examine those witnesses.

As you might expect, defense counsel generally fight tooth and nail to secure a protective order against the taking of these depositions. The Justice Department's position has consistently been that it will pursue the evidentiary trail wherever it leads, and that just because a trail goes behind the Iron Curtain is no reason to stop following it. If you do not go, for example, to Poland, you are saying that much of the key documentation concerning the Nazi death camps, documentation that has been used in war crimes trials in a number of Western countries, cannot be used here in our own country. You are saying to people who survived the Holocaust, who find themselves now in, for example, the Soviet Union, that their testimony, what they have to say about their own victimization and the victimization of their families and their people, will not be heard, that it will not be credited. The Justice Department, under a succession of Attorneys General has rejected that idea. More importantly, the federal courts have rejected it as well.

What are the objections that have been raised? They are essentially of two types: one to the depositions and the other to the documents. In the case of depositions, the principal objection has been that Soviet procurators, and particularly those who remain in the room while the examination and cross-examination of the witness is being conducted, occasionally restrict questioning by defense counsel. Let us look at what really happens in those confrontations. The fact is, Soviets have allowed full cross-examination by defense counsel as permitted under the Federal Rules of Civil Procedure and full American-style cross-examination. Although U.S. rules are very intricate, and frankly quite alien to the Soviets, they nonetheless do endeavor to conform to these rules. To the extent that questioning has been curtailed by Soviet procurators, it has generally been as a result of a clever tactic that is employed by defense counsel in these cases. More often than not, defense lawyers who go to the Soviet Union to cross-examine witnesses attempt to craft questions that they know will prove objectionable to the Soviet authorities. These are demonstrably irrelevant questions, typically going to matters of Soviet security. For example, a common tactic will be to begin asking the witness about police procedures and KGB personnel and police personnel in the Soviet Union — matters that are completely irrelevant to the adjudication of the case at hand. Typically,

the procurators will let that go on for a little while, and then they will say, "Now wait a minute, what on earth does this have to do with this action?" Defense counsel will then, for the benefit of the video cameras that are brought by the government to record these depositions so that they can be viewed by judges, create a big commotion with a series of angry objections. When they return to the U.S., counsel complains loudly to the court that cross-examination was "improperly restricted." I suppose defense lawyers have a certain poetic license to do that kind of thing. But one must appreciate the gambit for what it is: a clever tactic that has more to do with theatre than with law.

Objections have also been raised to documentary evidence that comes from archives in the Soviet Union and elsewhere behind the Iron Curtain. As I have mentioned before, both the Soviets and the Poles allow destructive testing of their documents. These documents are tested by the American government — by the Federal Bureau of Investigation, by the Bureau of Alcohol, Tobacco and Firearms, by the Immigration and Naturalization Service, and also by experts hired by defense counsel. Not once in the more than forty years that documentary evidence from behind the Iron Curtain has been used in war crimes trials — in Nuremberg, and later in West Germany, Canada, Holland and the United States — has anyone demonstrated that in even one case, that even one document has been improperly altered, tampered with, or fabricated. These documents are tested not only scientifically, but also in terms of their content. They have been found to be consistent with records housed in archives in the United States, many of which were previously classified. Hence, the Soviets would have had no access to those records. As a result, they would have had no ability to "create" documents that are consistent with those in U.S. hands.

Regarding the witnesses, the same experience has been had. That is, in the forty years since Western courts first began using the testimony of witnesses from behind the Iron Curtain, no one has been able to demonstrate that in even one case a witness offered perjured testimony. Do the witnesses always give correct testimony? No, they do not. In no country in the world do witnesses always give absolutely correct testimony. What you find in the Soviet Union, as in the United States, Canada, and every other country in the world, is that witness testimony is by and large consistent. There are those little inconsistencies that one always has when several witnesses are testifying. Those inconsistencies in themselves are powerful indicia of the reliability of the testimony, particularly, of course, when you are talking about events that took place forty years ago.

When one considers the question of the reliability of Soviet source witness testimony, it is important to remember that every single one of these witnesses is an elderly person. Any attorney who has had experience with elderly witnesses will tell you that it is almost impossible even to imagine getting such people to act out a phony story. No amount of "coaching" would work. These people simply could not pull it off.

As I mentioned before, all of these overseas depositions are recorded on videotape. Courts in the United States thus have the opportunity to review the tapes and judge the credibility of the witness for themselves. Further on the subject of Soviet-source testimonial evidence, I would note that time and again witnesses behind the Iron Curtain offer exculpatory testimony about suspects and defendants in the United States. I do not know that anyone at the Justice Department has ever said this before, but I will tell you that in the overwhelming majority of cases in which OSI asks the Soviet government, "Do you have anything on person X?" they come back and tell us either, (a) they have nothing at all, or (b) they have "the enclosed items." What are the "enclosed items?"

They are, as often as not, documents and witness statements fully exculpating OSI's suspect — such as testimony of people who knew him during the war who say, "No, he wasn't involved in anything. He was a clerk. He was a low-level person of a unit, didn't do anything," or, "He wasn't in such a unit at all." So the idea that the Soviets are out to nail all these people simply flies in the face of reality.

I would finally say that those activists who question the validity of Soviet-origin evidence do not want you to know that in case after case, suspects and defendants under investigation by the U.S. Department of Justice admit the essential facts contained in the Soviet-source documents and in the Soviet-source testimony. The suspects rarely make such admissions when the case is first filed, but by the time these cases get to court, most of the defendants are admitting the essential facts. The example that comes to mind most readily and most powerfully is that of George Theodorovich, formerly Yuri Theodorovich. When we found him some years back, he was living outside of Albany, New York. During the war, he had served in a Ukrainian Auxiliary Police battalion in the city of Lvov. The Soviet authorities found several documents seemingly signed by Yuri Theodorovich, reports on events in August of 1942, when most of the Jews were rounded up and sent to camps and many others were killed. These reports, except for their sinister significance, were not at all unlike reports that any police officer in the United States would have to file any time he or she fired a weapon for any reason. In these reports, Theodorovich wrote such things as, "On this day, I, Yuri Theodorovich, a police candidate, fired six bullets with which I killed two Jews." Then he went on to describe matter-of-factly, how the bodies were left in the Jewish cemetery and how another police officer also witnessed what he called "the event." When I first questioned Yuri Theodorovich in the U.S. Attorney's Office in Albany, as soon as we got to the matter of his joining the Ukrainian police, he said, "Who me?" When I asked him again he said, "No, no, not true." Then he turned to my court stenographer and said "KGB do a good job." She looked confused and he said, "Did you hear that? KGB do a good job. Get that down." He then asked if I might terminate the interview so that he could retain an attorney, and I said, "Of course." Some months later at his attorney's office in Philadelphia, with his attorney at his side, he not only admitted being in the Ukrainian Police, he also admitted authoring those damning reports. This was arguably the strongest evidence of murder obtained by federal authorities since Jack Ruby shot Lee Harvey Oswald on national television in 1963. Time and again, then, defendants themselves authenticate the testimony and documents from behind the Iron Curtain. Theodorovich is but one example.

This entire campaign, and that is what it is, against the use of evidence found behind the Iron Curtain, must be placed in context. The context that I would suggest is that it is all part of a larger campaign primarily based in the Baltic and Ukrainian communities, which has as its goal the disabling, or better yet, the closing down of the Office of Special Investigations. If you speak with these people, if you read their very slick literature, they will assure you that they fully support efforts to bring what they call "genuine" Nazi war criminals to justice, and that they only take issue with the "methods" employed by the Justice Department. In private, however, a different message is given. For example, in private meetings held at the State Department, at the White House, with the National Security Council and at the Justice Department, leading anti-OSI activists have quite candidly called for the imposition of the administrative equivalent of a statute of limitations so that these prosecutions would end in the near future. One such proposal was made on behalf of these groups by a man who is now a partner at one of the most

prestigious law firms in the country, Kirkland & Ellis in Chicago, Illinois. This attorney is a frequent speaker. He will fly all over the country to lambast and condemn OSI. When he was recently contacted by a journalist who knew something about his White House meeting, he said, "I do not want to be quoted on anything having to do with the statute of limitations, please."

*Mr. Ryan:* That's because we beat him in court.

*Mr. Rosenbaum:* True. The most lamentable part of this campaign is that it has a significant anti-Semitic component. That is an especial danger for the children who have access in these communities to this material. The groups who publish this literature were hoping, I dare say, that supporters of the Justice Department's Nazi prosecution program would never get our hands on this literature. Typically, it's written in Lithuanian and Ukrainian, and thus few Americans see it. Permit me to read just one example.

This is from the Lithuanian weekly newspaper *Darbininkas*, published in Brooklyn, New York. I read now from a study that I helped put together for the Anti-Defamation League. *Darbininkas* is the largest circulating Lithuanian newspaper in the state of New York. When OSI was first beginning in the late 70's, the newspaper was already opposed to it. Here is the kind of thing that they wrote: "The Jews murdered not sixty but seventy, seventy million innocent people, perhaps more, because the murder of people in the Soviet Union has not stopped even now. Since 1917, the Jews were the rulers of Russia and its enslaved people and the murderers of innocent people." Then, in one of the most obscene sentences I have ever seen, they wrote that the Jews only got what they deserved after all. "Amazing!", they write, "Amazing that the Jews do not answer the question why Hitler started on the destruction of Jews."

One must understand that these groups have ready access to the Reagan administration. They are a powerful Republican voting block. And although I must say in fairness that the Reagan administration has been fully supportive of OSI, the fact remains that the administration is subjected, as is Congress, to heavy lobbying efforts on a weekly and monthly basis by these groups. They have a powerful ally in the person of White House Communications Director Patrick Buchanan, who the *New York Times* called the third most powerful person in the administration. On local Washington television some five years ago Buchanan confronted Allan Ryan and said, "You know it's really a waste of money at this late date to be spending federal tax dollars on the pursuit of Nazi war criminals. Why don't we spend that tracking down organized crime kingpins?"

OSI's opponents have created some very slick promotional literature and even some professionally crafted motion pictures to advance their views. They screened one of their anti-OSI films for members of Congress at the Washington Sheraton Hotel just a few weeks ago, as part of a wine and cheese reception. An important recent development is the creation of well funded-front groups to do battle with OSI. Many of these organizations have adopted names that incorporate objectives that we all would agree are lofty. Who would imagine what the real agenda is of such groups as "Americans for Due Process" or the "Coalition for Constitutional Justice and Security"? Americans for Due Process recently published a book called *Soviet Evidence in North American Courts*. It is 200 pages of misinformation, distortion, and convenient omission. Its purpose is to incorporate all kinds of erroneous hearsay so that it can then be cited in legal briefs. There are enough law students, law professors, and lawyers in this room to tell you that once



it's in a book you can easily cite it in a brief and it matters not that it is hearsay. That was a very clever move.

Finally, let me report the sad news that these groups have not been entirely ineffective. Their efforts have helped convince three courts to throw out Soviet witness testimony and to allow Nazi persecutors to go free even though defense counsel was unable to prove that any of these witnesses had testified falsely. The most dramatic case is that of Edgars Laipeniks. Bruce Einhorn did a yeoman's job in that case, convincing the U.S. Board of Immigration Appeals that the respondent should be deported. Laipeniks had admitted in court that he beat people with his fists while he was serving as an officer in the Nazi-sponsored Latvian Security Police. He used to beat people to get what he called "the truth" out of them. But on appeal, the Ninth Circuit Court of Appeals decided that this was a man who should be allowed to continue living here, and it threw out all of the Soviet deposition testimony concerning his participation in acts of murder.

Another example is the case of Juozas Kungys, whom the U.S. District Court in Newark, New Jersey found was lying about where he was during the war. He tried to convince the court that he wasn't in the town in Lithuania where the murders he was accused of committing took place. His deception was conclusively proven when OSI offered in evidence a letter that he had written to a friend of his after the lawsuit began — a letter in which he said, "Look I was there, but I do not want anyone to know about it." The court found that the defendant had lied his way into the United States. But then it threw out the Soviet witness testimony, although the Court conceded that there was no proof that any of it was perjured. Without that testimony, the government had no proof of murder, and it lost the case. Thus, Kungys was permitted by the court to retain his U.S. citizenship, his lies in procuring that citizenship notwithstanding.

I see that I am out of time. Thank you.

*Ms. Teitel:* Thank you, Eli. Some of the issues that Eli touched upon were the free speech issues that will be discussed later. I just want to make a couple of observations on all three presentations before we turn to questions. The pressures against OSI that Eli noted are real. I just wanted to take this moment with the reunion that we have here on the panel of past and present activist lawyers working within OSI to congratulate OSI for its record. Today is the third day of the *Demjanjuk* trial. We were anticipating the beginning of the *Demjanjuk* trial in Israel and thanks to OSI, justice will finally be achieved.

Another note, Allan Ryan had pointed out that every year counts. There is now a bill in the House, sponsored by U.S. Rep. Barney Frank, that would establish an independent commission to investigate federal involvement with the immigration of Nazi collaborators.

I'd just like to move on and make some comments on the panels. Bruce Einhorn mentioned some of the proof problems. You have a very high standard here of clear and convincing evidence. There was reference made to collateral estoppel, which is an effort to eliminate the duplication between the denaturalization proceedings and deportation proceedings, in order to in some way limit the great number of years that go by with these cases. Let me ask the panel a couple of questions. First, procedurally would there be any changes in the law that you could think of that would facilitate the deportation process? And two, with what we have seen, which is justice achieved through extradition, in the last year, could we have any use of the universality principle and

criminal prosecutions in the United States? We've seen that Israel, a country that was founded after the crimes that Demjanjuk was responsible for, the country of the victims, is responsible for bringing him to justice. Many have asked me "What kind of jurisdiction does this law have?" Well, the jurisdiction is the jurisdiction that Bruce mentioned, the universality principle. It applies when someone has committed a crime against humanity. He is an enemy of all people. So if Israel could bring Demjanjuk to trial, so could we in the United States. It seems a pity after all the work that has been done in the United States that we have stopped short of punishment. We are satisfied with deportation. So I throw those two questions out: whether there are any procedural changes you could recommend, and whether there could be an extension of the universality principle.

*Panel:* The Courts have recognized the existence of the universality principle in the substantive law of the United States via the Law of Nations. The problem seems to be that you need a jurisdictional predicate for trying the individual on what are already recognized to be substantive offenses. In *Filaritiga* there was a civil statute passed by Congress to provide a way of suing state-sponsored torturers. In the *Demjanjuk* case, an international agreement surrendered him to Israel for punishment. It appears that what is required is a jurisdictional predicate. I am a public prosecutor. I am not in private practice. I am not going to express my own personal opinion on whether such predicates should be passed by Congress and the President, nor what form they should take. It appears from the legal work that has been done in this area and from the cases and the history of war crimes work, that what is needed is some sort of legislative or executive action that would create a jurisdictional predicate. Whether that is advisable and what form it should take is for elected representatives and voters.

*Ms. Teitel:* Any other comments?

*Mr. Weinschenk:* Two very brief comments. Twenty years ago, I was called upon by the Immigration Service to obtain evidence from Germany for them. I can only express the highest respect for OSI for the work they have done since then. As an outsider, I have to assure this audience that OSI has done tremendously well with a limited staff.

The second comment is that you can see from the depressing results in Germany how hard this work is. The burden on the American prosecutor is merely to show that these criminals falsify their applications. The German prosecutor has the burden of proof to show substantive law — substantive criminal culpability.

*Mr. Ryan:* I think I'd have to differ with you on the question of the burden of proof for the U.S. government. We have to show both things. We have to show that he falsified his application. But, how do we show that? If we say someone falsified his application when he checked the box that said he was not a Nazi war criminal, the only way we can show that is to prove that he was a Nazi war criminal. What we had to do was go into court and say, "This man is a Nazi war criminal, and this is what he did from 1933 to 1945." So we, as a practical matter, have that burden of proof, even though the ultimate verdict, if you will, is illegal entry into this country. We have to take on that substantive burden as well.