determinations.

The precedential value of the ruling for OSI is minimal. It is highly unlikely that a similar factual pattern will recur – an individual born abroad to a U.S. citizen mother and non-U.S. citizen father and who assisted the Nazis in acts of persecution.

The ruling could, however, have ramifications in non-OSI cases. The Circuit's determination that membership in the SS was so antithetical to American values that it warranted expatriation even if that was not the defendant's intent might be cited in support of an expatriation argument involving someone who joined another group whose core values are inimical to U.S. interests. It could also apply to someone who committed intentionally destructive acts to the U.S. body politic.[32]

Breyer, however, need not worry; he may remain in the United States for the duration of his life. While he can take satisfaction in his victory, he did make one serious miscalculation in a related proceeding.

In 1994, Breyer sued two networks over their coverage of his denaturalization case.[33] He was particularly distressed over their equating him with Ivan the Terrible.[34] Two weeks before trial, CBS offered to settle the case for $20,000. When Breyer did not respond in a timely manner, CBS withdrew the offer. Breyer failed to show up for trial, but on the morning it was due to start, he notified CBS that he wanted to accept their offer. By that time, the network was no longer willing to settle and the judge dismissed the lawsuit because Breyer was not present. He therefore lost both the payment and the opportunity to litigate his claim.[35]

The *Breyer* litigation is so convoluted that it is difficult to categorize. In retrospect, it appears that the original anomaly in the law – granting citizenship to the children of U.S. citizen

fathers but not U.S. mothers – was fatal to the government's case.[36] There was simply no way to level the playing field despite heroic efforts by both Congress and the courts to do so.

The gender-neutral amendment in 1934 left uncovered the children born to U.S. citizen mothers before 1934. Had the 1994 amendment simply established retroactivity, it would have overcompensated for this inequity by giving *more* protection to the children of U.S. citizen mothers than to the children of U.S. citizen fathers. Since anything such children did before knowing they were citizens could not have been done with the intent to relinquish that citizenship, military service on behalf of the Axis would not be expatriating. Yet the very same service could be expatriating if performed by someone whose citizenship was derived patrilineally.

One possible solution was to include a statutory exemption for persons inadmissible under the DPA or RRA. But this created yet another inequity. Some children born abroad to U.S. citizen mothers (*i.e.*, those ineligible for entry under the DPA or RRA) were now categorically denied the possibility of derivative citizenship. They had no opportunity to show that their service was *not* intended to be expatriating. Children of U.S. citizen fathers might be expatriated, but they would at least have an opportunity to litigate the issue. Children of U.S. citizen mothers who served the Axis could not.

In an effort to resolve *this* problem, the Third Circuit fashioned a remedy allowing for the possibility that someone could voluntarily expatriate himself absent knowledge that he was a U.S. citizen. This tortured traditional notions of expatriation and created an intellectual impossibility. How could someone commit a sentient act of expatriation if he had no idea that he was a citizen? By ruling that Breyer's continued service in the SS was *involuntary*, the district

court avoided the problem.[37]

In sum, the legislature and courts faced an insoluble dilemma. There was simply no way to remove all inequities in the law. Breyer benefitted from a statutory anomaly.

1. Rev. Stat. of 1874, § 1993. The law was a bit more complicated in that citizenship could pass only if the father had at some point resided in the U.S. However, this factor is irrelevant to the handling and outcome of the Breyer litigation.

2. 48 Stat. 797 (1934).

3. Whether he had served at the Auschwitz death camp (Auschwitz II) or the Auschwitz labor camp (Auschwitz I) was itself an issue during part of the case. The court ultimately concluded that he had served at Auschwitz I. However, resolution of that issue is not essential to the legal issues or outcome of this case.

4. Breyer made these admissions in depositions given during the OSI litigation as well in a deposition in the case of *Breyer v. Capital Cities/ABC, Inc., and CBS, Inc.*, Civ. No. 94-5872 (E.D. Pa.), discussed on p. 185. *See also, Breyer v. Meissner*, 2002 WL 31086985, Finding of Fact 101 (2002).

5. The government also charged misrepresentation and concealment of material facts, but these counts were not ultimately relevant to disposition of the case.

6. *U.S. v. Breyer*, 829 F. Supp 773 (E.D. Pa. 1993).

7. *U.S. v. Breyer*, 841 F. Supp. 679 (E.D. Pa. 1994).

8. *U.S. v. Breyer*, 41 F.3d 884 (3rd Cir. 1994).

9. The impetus for this amendment was a Ninth Circuit ruling, in a non-OSI case, which held that the statute was unconstitutional to the extent that it did not retroactively confer citizenship on offspring of U.S. citizen mothers. *Wauchope v. Dep't of State*, 985 F.2d 1407 (9th Cir. 1993).

10. Comments by Sen. Kennedy, Cong. Record, S16863, Nov. 20, 1993.

11. The Immigration and Nationality Technical Corrections Act of 1994 (INCTA), Pub. L. No. 103-416, § 101 (a) and (c)(2).

12. 132 Cong. Rec. H9280 (daily ed. Sept. 20, 1994) (statement of Rep. Schumer). In fact, the only pending case affected by the bill was Breyer's.

13. *In re Breyer*, A08-305-096 (Office of Administrative Appeals 1996).

14. The government questioned whether Breyer could even raise the issue. Theoretically, the discrimination was against his mother rather than against him (in that she could not pass on her citizenship whereas a U.S. citizen father could have). However, since Breyer's mother had long since died, there was no way to resolve the potential inequity unless Breyer could himself raise the issue. The court ruled that he could.

15. INS was at the time part of the Justice Department.

16. *Breyer v. Meissner*, 23 F. Supp.2d 521, 535 (E.D. Pa. 1998).

17. This principle has been important in many OSI cases. *See e.g., Linnas v. INS*, 790 F.2d 1024,1030 (2nd Cir. 1986); *Artukovic v. INS*, 693 F.2d 894, 897 (9th Cir. 1982).

18. *Breyer v. Meissner*, 23 F. Supp. at 545 (internal citations omitted).

19. *Breyer v. Meissner*, 23 F. Supp.2d 521 (E.D.Pa. 1998) and *Breyer v. Meissner*, 23 F. Supp.2d 540 (E.D. Pa. 1998).

20. *In the Matter of Johann Breyer*, A 08 305 906 (Imm. Ct., Phila., Pa. 1997).

21. *Breyer v. Meissner*, 214 F.3d 416, 427 (3rd Cir. 2000).

22. This ruling is at odds with the traditional expatriation law. *See e.g., Rogers v. Patokowki*, 271 F.2d 858, 861 (9th Cir. 1961). *Rogers* was cited in *dicta* in another OSI case which was reviewed (in an unpublished and therefore not precedent binding decision) by the same appellate court which handled *Breyer*. In *U.S. v. Schiffer*, 831 F. Supp. 1166, 1189 (E.D. Pa. 1993), *aff'd*, 31 F.3d 1175 (3rd Cir. 1994) (Table), the district court stated that "[a] United States citizen could not form the intent to relinquish his citizenship if, at the time he committed the expatriating act, he did not know he was a citizen." (Schiffer had been born in the U.S. but later moved to Romania and served as a camp guard during World War II. Unlike the Breyer case however, the court found that Schiffer knew during the relevant period that he was a U.S. citizen and his camp guard service therefore constituted an intent to expatriate.)

23. As noted by the Solicitor General's office, in denying retroactive application to those who were ineligible to enter under the DPA and RRA, the statute arguably included a very wide group – not simply those who were Nazi persecutors. Moreover, the government's defense of the statute in district court was problematic. The government had argued that expatriation of Nazi persecutors protected national security and preserved the integrity of the citizenry by removing a group of undesirables. However, since serial murderers, terrorists, child molesters and others involved in heinous activity do not face expatriation, this defense of the statute is dubious. *See*, Aug. 20, 2000 memorandum to the Solicitor General from Malcolm Stewart, Assistant to the Solicitor General.

24. August, 2000 memo to the Solicitor General from David Ogden, Acting AAG, Civil Division, re *Breyer v. Meissner*.

25. *Breyer v. Meissner*, 2001 WL 1450625 (E.D. Pa. 2001).

26. Breyer's mother was living in Czechoslovakia when it became a state in 1918. Under the law of the new republic, she automatically became a Czech citizen, unless she indicated that she wanted to retain her U.S. citizenship. OSI wanted to argue that her failure to take affirmative action to retain the citizenship amounted to a renunciation of it.

27. *Breyer v. Meissner*, 2002 WL 922160 (E.D. Pa. 2002). The issue had been lurking for years. As noted at p. 177, the 1994 district court ruling mentioned this possibility. The court at that time noted that "the parties did not present evidence or argument" on the point. *U.S. v. Breyer*, 841 F. Supp. at 685. Two years later the INS, denying Breyer's claim to derivative citizenship, made the same point, stating that it was "aware of no evidence that she expatriated before the applicant's birth in 1925." *In re Breyer*, A08-305-096 (Office of Administrative Appeals, Oct. 15, 1996), p.3.

28. When deposed by OSI, Breyer claimed he had deserted (by failing to return from leave) in January 1945. The court, however, believed his court testimony that he had left in August 1944. The variance is significant. By January 1945, it was clear that the Germans were fighting a losing cause. Moreover, the advancing Russians would likely have cut off Breyer's means of access to his unit. Failure to return to his unit in January 1945 was therefore less likely due to "desertion" than if he failed to return in August 1944.

29. The government found some useful information even in these documents. According to one, "the inductee" appeared before the German Party in January 1945 to plead his case. OSI argued that the inductee was an obvious reference to Breyer himself and that if he had been a deserter since the prior August, he would hardly appear before the authorities to seek their assistance. However, because of several factual inaccuracies in the document referring to the January event, the court concluded that it was not authentic and discounted it entirely. *Breyer v. Meissner*, 2002 WL 31086985, n. 13 (2002). This significantly weakened the government's case.

(OSI believed that most of the inaccuracies had plausible explanations. This could not have been a case of "Soviet fabrication" – an argument which even Breyer did not make – since the documents were helpful to him.)

30. *Breyer v. Meissner*, 2002 WL 31086985 (E.D. Pa. 2002), Findings of Fact 103 and 118, Conclusion of Law 3.

31. *Breyer v. Ashcroft*, 350 F.3d 327, 335 (3rd Cir. 2003). The Circuit agreed with the lower court that Breyer's return to his unit was borne of necessity, rather than choice. "There is no evidence of any other place Breyer safely could have gone. . . . [Therefore] his return was not voluntary in the sense that it might represent an intentional relinquishment of United States citizenship." *Id.* at 338.

32. Indeed, Breyer's attorney argued that the Circuit's language was so broad that it would encompass terrorist acts such as the 1995 bombing of the federal building in Oklahoma City. Yet despite the horrific nature of that act, intended by its perpetrators as an act of defiance against the federal government, no one argued that the defendants should be expatriated. The perpetrators were tried and convicted. One was executed; the other was sentenced to life in prison.

33. *Breyer v. Capital Cities/ABC, Inc., and CBS, Inc.*, Civ. No. 94-5872 (E.D. Pa.).

34. *See* p. 150. On Sept. 7, 1993, a television announcement of upcoming news asked: "Could Philadelphia have its own Ivan the Terrible?"

35. *Breyer v. Captial Cities/ABC, Inc., and CBS, Inc.*, 1995 WL 733384 (E.D. Pa. 1995).

36. If the government had been able to establish – in a timely manner – that Breyer's mother had in fact expatriated herself before Breyer was born, the outcome of the case would have been different.

37. Whether the court would have ruled in the same way in the absence of this intellectual impossibility is unclear, although the opinion does suggest that the district court judge felt constricted in some measure by the Circuit's ruling. *See Breyer v. Meissner*, 2002 WL 31086985, n. 26 (2002).

Propagandists

The International Military Tribunal at Nuremburg sentenced Julius Streicher, publisher and editor of a German anti-Semitic weekly newspaper, to death.

> In his speeches and articles, week after week, month after month, he infected the German mind with the virus of anti-Semitism and incited the German people to active persecution.
>
> ***
>
> Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with War Crimes. . . and constitutes a Crime against Humanity.[1]

The DPA excluded propagandists because they were seen as members of a "movement hostile" to the United States as well as abettors in persecution.[2]

Vladmir Sokolov – A Persecutor Who Found a Home in Academia

Vladmir Sokolov was a Ukrainian-born writer and editor of *Rech*, a Russian-language newspaper published by the Germans after they invaded the U.S.S.R. Before being hired at *Rech*, Sokolov underwent a background check by German military intelligence to assure, among other things, that he was opposed to "Jewish Bolshevism."[3]

His work included writing articles and giving propaganda speeches and lectures to the civilian population. The position provided him with a salary and privileges, including better food and living quarters than would otherwise have been available.[4] Sokolov, who wrote under the penname Samarin, received two medals from the Germans for his work. His writing often harped on the theme that Jewry and Communism were synonymous.

> The same mug with the hooked nose peers from behind the hundreds of millions of bodies that were tortured, executed and shot in the back of the neck over the Katyn graves, in distant Siberia and in the far North.[5]

> The current war was prepared and provoked by Jewry, which already had brought so much suffering to mankind through the centuries. . . .
>
> In this war, the peoples of Europe and Asia are fighting against kike-plutocracy and Kike-bolshevism, against two outwardly different but inwardly common systems . . .[6]

Sokolov claimed that "kikes" ran the government, and listed Jews in his hometown who occupied executive posts in various organizations and institutions. Although the list was "far from complete," he exhorted his readers to "Thrash them!"[7]

Sokolov emigrated to the United States in July 1951. He advised the authorities that he had been working at *Rech* as a "corrector."[8] His visa application included an oath stating that he had not been part of any "movement hostile" to the United States nor had he advocated or assisted in the persecution of any person because of race, religion or national origin.

In 1954, the FBI received information that Sokolov had been associated with *Rech*, and that he had collaborated with the Gestapo. INS learned of these accusations when processing his application for citizenship in 1956 and called him in for an interview. He told them that he had served as the literary editor and later Deputy Editor of *Rech* but denied having any involvement with the editorial policies of the newspaper. According to Sokolov, *Rech* was neither pro-Fascist nor anti-Semitic. He contended that, to the extent that such views appeared in the newspaper, it was at the behest of the German occupation forces.

> [W]e were forced to assume certain political lines. We Russians fought this the best way we could, but under the ever-present danger of being shot to death on the spot, we had to put in remarks Fascist and anti-Semitic to please the Germans, but we fought against the Fascist line. . . . Personally, I confined myself to Anti-Communist articles. I have not written one single Fascist or Pro-Fascist line, and as to Anti-Semitic remarks, there may have been some to which I was forced.[9]

He went on to deny collaborating with the Gestapo. The INS found "[n]o evidence on which to

base Service proceedings." Approximately one month after his INS interview, Sokolov became a U.S. citizen.

In 1959, Sokolov was hired as a language instructor at Yale University. His application listed his work as an assistant editor of *Rech*. However, University officials did not do a thorough background verification for this non-tenured position.[10] As they later explained: "If he'd gotten into the United States, the assumption was that he had been closely checked by the government."[11]

At Yale, Sokolov became active in pro-Zionist affairs and wrote several articles for a Zionist Russian-language newspaper.[12] One of his colleagues described him as the "best language teacher" in the department.[13]

In March 1974, *Voice of the Homeland*, a Russian-language newspaper published overseas, listed several former Nazi war criminals living in the United States. "Samarin" was among them. Two years later, *Komsomol'skaya Pravda*, the official journal of Soviet Communist youth, carried a brief article asserting that a current Yale University teacher had worked for the Nazis during occupation of the U.S.S.R.

Neither article attracted much attention. Then in April 1976, *Sovetish Heimland*, a Yiddish language monthly in Moscow, quoted from several articles written by Sokolov. A Yale librarian who did translations for *Morning Freiheit* discovered the piece.[14] On May 23, 1976, *Morning Freiheit* carried a story under the headline "Moscow Yiddish Magazine Charges: Russian Fascist Has Teaching Position at Yale University."

Yale first learned about the writings a couple of weeks earlier when then Slavic Department Chair Robert Jackson received the text of one of the Soviet articles.[15] He arranged a

meeting with Sokolov. According to two attendees, Sokolov acknowledged writing the *Rech* articles. He contended, however, that stylistic changes had been made, including substitution of the word "kike" for "Jew."

Sokolov's past activity was not ground for academic dismissal and the University recommended his reappointment for another two-year term.[16] Support for Sokolov within his own department, however, was thin. Four of the six professors wrote him on June 29, 1976.

> Some recent publications which carry photocopies of your articles in Rech, as well as extensive reproductions of the same newspaper which have come into our possession recently, reveal to us beyond any reasonable doubt that you were engaged not only in anti-Communist but also in pro-Nazi and anti-Semitic activities under the German occupation. As individual members of the department, and as people engaged in a humanistic endeavor, we feel obliged to express to you our profound feeling of disgust and outrage at these documented revelations of your past activities. We should like to make it clear that under no circumstances can you count on the undersigned for any support whatsoever.

The next day Chairman Jackson advised Sokolov that while he had the right to remain on the faculty, the department "in no way condoned" his activity.[17]

The following month, Sokolov resigned.[18] He attributed this decision to the "character of the campaign in [his] own department" and claimed he "did not want to create difficulties for the University administration." He also cited medical problems.[19] Under the terms of his resignation, he continued to receive his salary for a full year and remained eligible to collect a pension from a national teachers organization.

The story did not resonate nationally until students returned to the Yale campus and the *Yale Daily News* published its first piece on the affair.[20] Professor Schenker, Sokolov's strongest ally in the Department (and himself a refugee from Nazi Germany), tried to put Sokolov's activities in historical context. "The German occupation, paradoxical as it may seem, was the

only real chance to escape. A guy sitting in his apartment in New York can't understand what it was like growing up in a Gulag Archipelago world."[21]

The *Yale Daily News* also defended Sokolov.

> The hasty action of the four members of the Slavic Languages and Literature Department had the predictable effect of coercing Mr. Samarin into resignation. Acting upon insufficient information, they displayed a contempt not only for Nazism, but for due process as well. Those four instructors did, however, spare the Yale Corporation from a hard decision: should Mr. Samarin have remained at Yale? We are sure the answer to that question ought to have been yes.
>
> Mr. Samarin was and is a dedicated foe of the Soviet government. We find his unspeakable attack on the Jewish people unjustifiable, whatever its ultimate purpose. Not all opponents of Bolshevism found it necessary to lace their essays with anti-Semitism. If there is any argument against Mr. Samarin's dismissal from Yale, it does not lie in his chilling rationalization of Nazi collaboration.
>
> Since his arrival here 17 years ago, Mr. Samarin has become an effective and sympathetic teacher. Had his story not filtered out of Soviet Russia this summer, he would have been remembered as a gentle friend to many Yale undergraduates. In fact, his opposition to the Soviet regime has led him to espouse Zionist interests. Although we are somewhat alarmed by the vast ideological distance one man can travel in 30 years, we must believe Mr. Samarin when he says that he is no longer anti-Semitic and that he "loves his students."
>
> * * *
>
> . . . His conduct here is in part a testament to the wisdom of running a university free from the political forces and ideological tyranny that he was too weak to transcend in the 1940's. The lesson is simple: all men grow when the[y] leave the house of intellectual bondage.[22]

The New York Times and several other newspapers around the country picked up the story.[23] The following month INS ordered a review of the file in order to determine whether a "full scale and comprehensive investigation" should take place. They concluded that, given the "full investigation" conducted in 1957, there was no basis for a reinvestigation.

The newly formed OSI, reviewing all INS Nazi files, took the matter up in 1979.

However, they had no access to the offending articles. Although Yale had copies in Sokolov's personnel file, the university would not release the material absent a subpoena or Sokolov's consent. During an interview with OSI attorneys, Sokolov agreed to authorize release of the articles.[24]

OSI filed suit in 1982, alleging that Sokolov's citizenship was illegally procured. As set forth in the complaint, Sokolov had been ineligible for citizenship because he had assisted in persecution, been a member of a movement hostile to the United States, voluntarily assisted enemy forces, and made misrepresentations in his visa and citizenship applications (by denying membership in a movement hostile to the United States). The complaint also cited his lack of good moral character (as evidenced by his misrepresentations).

The case generated much publicity and various people, to no avail, urged the government to reconsider its position. Among them were author and commentator William F. Buckley, Jr. and Mstislav Rostropovich, Russian emigré and renowned cellist and conductor of the Washington National Symphony. Buckley wrote a note to President Reagan, thanking him for the time they had recently spent together and relaying his "outrage[]" at the filing.[25] Maestro Rostropovich came to OSI to speak with Director Sher directly. As Sher recalled it, Rostropovich described Sokolov as "a shit [whose] life [was] worth shit." Nonetheless, he begged Sher not to "throw him to the Russians."[26]

Trial opened in November 1985 before Senior Judge Tom Murphy, himself an historic figure. Murphy was a former New York City police commissioner and the lead prosecutor in the Alger Hiss trials. The government's expert historian explained how the Nazis used propaganda to condition the Russians to accept, and assist the Nazis in executing, the policy of Jewish

extermination. He also explained the hidden role played by the Germans in controlling the content of *Rech*. OSI submitted 17 *Rech* articles published under Samarin's byline as well as an oath of fealty signed by Sokolov to obtain membership in an anti-Bolshevik group.

> In joining the ranks of associates of the Union for Struggle Against Bolshevism, I give my solemn pledge of loyalty to Adolph HITLER, the Liberator of the Peoples of Russia, and the Unifier of New Europe.
>
> I declare myself an irreconcilable and undaunted enemy of Judeo-Bolshevism in all its manifestations.
>
> I oblige myself to place the interests of the people and of the common struggle against Jew-Bolshevism and its allies above my own. . . .

The thrust of Sokolov's defense was that he had viewed the Germans as liberators from Communism and that his articles had been heavily edited – so much so that he hardly recognized his own work. He claimed he had remained at the newspaper because he feared that if he left he would have been sent to a camp or killed.

In February 1986, while the case was under submission, it was featured on *CBS Sunday Morning*. Director Sher explained to the viewing television audience the rationale for pursuing propagandists.

> It was not just a few crazed men in Berlin who had the notion of destroying Jews and others. It took hundreds of thousands of people, if not more. People to operate at every aspect of German society -- in Germany proper and in the occupied territories to implement them. Propagandists, they were one cog in that wheel as were the people who pulled the triggers.

Later that year, the district court issued its ruling withdrawing Sokolov's citizenship.[27] He appealed to the Second Circuit Although there were very few appellate decisions in OSI cases at that time, the government had recently lost a case in that circuit which it believed it should have won.[28] This naturally caused OSI concern about the current case.

The concern was unnecessary. The Circuit accepted all the government's arguments and

affirmed the ruling below.[29] It concluded that Sokolov's articles "assisted the enemy," that they advocated or assisted in persecution, and amounted to participation in a "movement hostile" to the United States – all of which made him ineligible for a visa under the DPA. Significantly, in finding that Sokolov had advocated or assisted in persecution, the Court held that no evidence of *actual* persecution resulting from the articles need be shown. The mere fact that Sokolov's articles worked to "condition[] the Russian people into accepting and carrying out the National Socialist Policy in regards to the Jews" was sufficient.

Once the Supreme Court denied review, OSI commenced deportation proceedings. Before the first scheduled hearing, OSI learned from media accounts that Sokolov had left the country. After subpoenaing the family telephone records, OSI surmised that Sokolov was in Montreal, Canada.

DAAG Richard worried about the Canadian reaction to this turn of events. Years earlier, when refusing to accept an OSI deportee, they had made clear their distaste for these defendants: "[I]t is extremely unlikely that Canada would be willing to accept any individual, as a deportee, whose removal from the United States is being effected for reasons similar to those pertaining to [the defendant]."[30]

Although Sokolov had not been deported to Canada, DAAG Richard opined that the Canadians were "very sensitive about US wilfully 'dumping' our Nazis into their country." He feared they would believe (mistakenly) that the United States had a role in Sokolov's choosing their country.[31]

Sokolov had found refuge in a Russian Orthodox church in Montreal. This information, conveyed to OSI by the Royal Canadian Mounted Police War Crimes Investigations Section, was

confirmed by an OSI historian. Conversant in Ukrainian, he called the monastery and identified himself as an anti-OSI crusader. Sokolov spoke with him and asked for a number where he could return the call. The historian happened to have open on his desk a Ukrainian newspaper; he passed along the phone number of a tombstone company advertised therein.

Although Sokolov had already left the country and was on the government's Watchlist to preclude his reentry, OSI proceeded with the deportation hearing *in absentia*. Director Sher, asked about it years later, surmised that he had been concerned that the U.S./Canadian border was too porous for the Watchlist to be fully effective. Deputy Director Einhorn recalled feeling that living in Canada was no punishment. If Sokolov reentered the United States, the government wanted to be able to put him on a plane to the U.S.S.R. without an additional hearing.[32]

Sokolov did not appear at the deportation hearing nor was he represented by counsel. The government presented the record from the denaturalization hearing and the court ordered Sokolov deported to the U.S.S.R. The order was never carried out because (to the best of OSI's knowledge) Sokolov never returned to the United States. He died in Canada in 1992.[33]

1. *The Nuremberg Trial*, 6 F.R.D. 69, 162-163 (I.M.T. 1946).

2. There is no First Amendment issue in these cases as the protections from that Amendment do not apply to actions by foreign nationals overseas.

3. Jan. 24, 1984 deposition of Artur Bay, pp. 11-12. Corporal Bay was with Panzer Propaganda Co. 693 and issued assignments to the Russians working for *Rech*. The assignments were based on directions from the German Propaganda Ministry.

4. Sokolov deposition, July 10, 1984, pp. 24, 165.

5. *Rech*, July 11, 1943, No. 79 (262), p. 1 "Criminals."

6. *Rech*, May 14, 1943, No. 54 (237), p. 1 "Liberation Struggle."

7. *Rech*, May 30, 1943, No. 61 (244), p. 2, "The Former Masters of Orel."

8. A corrector took care that type setting corresponded to the copy.

9. April 19, 1957 sworn statement taken by INS Investigator Herbert Fichlander, p. 4.

10. "Samarin Cited 'Rech' Ties in Original 1959 Resume," by John Harris and Jonathan Kaufman, *Yale Daily News*, Sept. 22, 1976.

11. Statement by Yale's Director of Public Information, speaking on behalf of University President Kingman Brewster, Jr. *Id.*

12. As Sokolov explained it, he adopted a new approach after the war when the U.S.S.R. began its anti-Jewish campaign. "From now on the Jews have become my allies in the struggle against our common enemy – Communism. The enemy of my enemy is my friend." Letter to the Editor, *Yale Daily News*, Oct. 8, 1976.

13. Statement by Prof. Alexander M. Schenker, Chair of Yale's Department of Slavic Languages and Literature at the time of the Sokolov denaturalization trial, quoted in "Ex-Yale Teacher Tried As a Nazi Collaborator," *The New York Times*, Nov. 8, 1985.

14. *JTA* [Jewish Telegraphic Agency] *Daily News Bulletin*, Jan. 20, 1989.

15. "Samarin Cited 'Rech' Ties in Original 1959 Resume," *supra*, n. 10.

16. *Id.*

17. *Id.*

18. According to the *Yale Daily News*, the Soviets cited the resignation as an example of "progressive public opinion" which is powerful even at traditionally "imperialist and reactionary"

universities like Yale. "Soviets Condemn 'Fascist' Samarin" by John Harris, *Yale Daily News*, Feb. 21, 1977, quoting "Kicked Out", a Jan. 30, 1977 article in *Komsomolskaya Pravda*.

19. Letter to the Editor, *Yale Daily News*, *supra*, n. 12.

20. "Nazi Ties Revealed; Samarin Quits Faculty," by John Harris, *Yale Daily News*, Sept. 20, 1976.

21. *Id.*

22. *Yale Daily News*, "Samarin," Sept. 29, 1976.

23. "Yale Teacher Quits Over Pro-Nazi Role," *The New York Times*, Sept. 21, 1976.

24. Thereafter OSI, aided by the State Department, obtained certified copies of the articles from the U.S.S.R. for submission to court.

25. Letter from William F. Buckley to Ronald Reagan, April 19, 1982. By happenstance, the letter became a matter of public notice in 2005 when the National Archives released documents relating to then Supreme Court nominee John Roberts' tenure at the Justice Department. The Buckley letter had apparently crossed Roberts' desk. The notation in Roberts' handwriting said "keep RR [President Reagan], AG [Attorney General William French Smith] out." "The Case of the Nazi Propagandist," by Josh Gerstein, *The New York Sun*, Aug. 4, 2005.

26. Sher recorded interview, Apr. 27, 2001. (All references to Sher's actions hereafter in this chapter stem from this interview unless otherwise noted.) Sher viewed the Buckley letter as "the old Yale boy connection rallying around." (Buckley was a Yale alumnus.)

27. *United States v. Sokolov*, No. N-82-56-TFM (D. Conn. 1986).

28. *United States v. Sprogis*, 763 F.2d 115 (2nd Cir. 1985). *Sprogis* is discussed at pp. 101-105.

29. *United States v. Sokolov*, 814 F.2d 864 (2nd Cir. 1987).

30. Feb. 28, 1985 letter to Director Sher from William Lundy, Counsellor and Consul, Canadian Embassy re Karl Linnas. The *Linnas* case is discussed at pp. 271-295.

31. Routing and transmittal slip of July 7, 1988 from DAAG Richard to AAG Dennis.

32. Once stripped of his citizenship, Sokolov reverted to the status of a legal permanent resident. As such, he would have been able to return to the United States at any time within 180 days of his departure.

33. The Canadians, who had opened their own investigation, never filed charges nor did they act on the request for asylum Sokolov filed shortly after entering their country.

Valerian Trifa – A Persecutor Who Found Refuge in His Church

The prosecution of Valerian Trifa was particularly convoluted since he could say – in truth – that he had spent much of the war in Nazi concentration camps and had fought against a government allied with Nazi Germany. The challenge for OSI was to show that those were only half truths.

In 1940, the Romanian government was sympathetic to Nazi Germany.[1] The Iron Guard, a fascist organization within Romania, was part of a governmental coalition whose most dominant group was the Army. The Iron Guard was the most extreme member of the coalition, both in its anti-Semitism and its fascism.

In the fall of 1940, theology student Viorel Trifa[2] became leader of the Iron Guard's student movement and editor of *Libertatae*, an anti-Semitic weekly newspaper linked to the Iron Guard cause. As a student leader, he addressed various rallies. A mid-December speech discussed anti-Semitism.

> The Romanian student has been anti-Semitic not because he read in some book that he must oppose the Yids, but because he felt that he could no longer make a living in his own country. If our students have been anti-Semitic from 1922 on, this is due to this Romanian tragedy, that after leaving the villages where they were being plundered by the Yids, they found themselves in cities once again plundered by the Yids. And then they had to rise up and say: This can no longer go on!![3]

Trifa's newspaper writings in *Libertatae* expressed similar sentiments.[4]

Throughout the fall and into January, Iron Guardists terrorized the local citizenry, extorting money, expropriating property, looting and killing wantonly.[5] Most victims were Jewish, though some were non-Jewish political adversaries. In mid-January, General Antonescu, head of the coalition government, reacted. He dismissed hundreds of Iron Guardists from

government posts, forbad the wearing of the Iron Guard uniform other than at ceremonial events, and fired the pro-Guard Minister of the Interior.[6]

On January 20, a widely-publicized Iron Guard manifesto, issued in Trifa's name, called for the "replacement of all Masonic and Judaized persons in the government."[7] The "Trifa Manifesto" was read over Bucharest radio, and that evening Trifa gave the keynote speech at a student demonstration. He extolled the virtues of:

> a housepainter with his healthy soul [who] rose to confront the interest of Judaism and of London Free Masonry. . . . The struggle thus initiated led to the unmasking and the removal of the Jewish-Masonic domination in Central Europe, an achievement that is to the credit of Chancellor Hitler.[8]

On January 21, the Trifa Manifesto was distributed in the provinces. Local Iron Guardists were urged to demonstrate on the basis of its text for the reinstatement of the fired Interior Minister and establishment of an Iron Guard government. For three days, January 21 - 23, bands of Iron Guardists drove through Jewish neighborhoods, plundering, burning and murdering. The riots extended into the countryside, but were most intense in Bucharest, where dozens were killed, many at an animal slaughterhouse. The American legation chief reported that there were "60 Jewish corpses on the hooks used for carcasses . . . all skinned. The quantity of blood about [seemed to indicate]. . . that they had been skinned alive."[9] Dozens, and perhaps many more, were killed before the rioting was quelled.[10]

Germany was ambivalent about the uprising. While sympathetic to the ideological purity of the Iron Guardists, Hitler was concerned that the rioting would destabilize the country and endanger vital supply lines. Although Germany did not assist the insurrection, it granted nine of the top Iron Guard leaders, Trifa among them, sanctuary in the German embassy once the

rebellion was crushed. From there, three months later, the leaders (along with several hundred Iron Guard loyalists) escaped to Germany. The Romanian president was sufficiently outraged by this that Otto von Bolschwing, the German responsible for providing shelter within the embassy, was recalled.[11] Romania tried Trifa *in absentia* and sentenced him to life at hard labor.[12]

With the Iron Guard leaders in Germany, the Nazis faced a dilemma. Hitler had given sanctuary to Antonescu's adversaries, but still needed the Antonescu regime to remain a stalwart ally. Hitler's solution was to appear to punish the Iron Guardists without actually doing so. They were kept in minimal detention, similar to house arrest, although Trifa was spared even this. Due to medical problems, he was allowed to travel throughout the country, visiting spas.

In December 1942, shortly after one of the Iron Guard leaders tried to flee Germany, new restrictions were imposed on the detainees. All, Trifa included, were sent to concentration camps. However, they were segregated from the other prisoners and given special privileges – better living quarters, decent food, and no work assignments. At Dachau, for example, the men had individual cells and a common room with a radio.

Trifa remained in Germany throughout the war. His four years there included three months at Buchenwald and 17 months at Dachau. After the war, he emigrated to Italy and from there, in 1950, to the United States. At that time, those who had been members of the Iron Guard were ineligible to receive a visa.[13] Trifa's visa application made no mention of his Iron Guard membership; it stated that he had been a forced laborer at Buchenwald and Dachau from 1941 to 1945. He settled in Michigan, and shortly thereafter was ordained as a bishop in the Romanian Orthodox church.

At that time, the church's traditional headquarters in Romania was part of the Soviet bloc.

Some Romanian Orthodox in America, therefore, vehemently opposed control from abroad. Trifa was in this group. In 1952, when his faction selected him to serve as Archbishop, the pro-Soviet faction obtained a court order blocking the ordination. The ceremony took place nonetheless and Trifa was then cited for contempt of court for violating the order.[14] The order was later vacated and Trifa retained his new position.

Even before Trifa had emigrated, the CIC knew that he had been a member of the Iron Guard.[15] For reasons not clear from the files, he was nonetheless granted a visa. Shortly after his arrival, however, the State Department realized that he "may have misrepresented the facts of his career in obtaining his visa."[16] Around the same time, the FBI, alerted about Trifa's background by a confidential informant, notified INS.[17] In a May 1951 INS interview, Trifa denied having been a member of the Iron Guard. When asked if he had given any anti-Semitic speeches, he replied "I don't believe so."[18]

In September 1951, Walter Winchell, then one of the most influential broadcasters in America, denounced Trifa in a radio broadcast as a Nazi "murderer." Trifa was reinterviewed by the INS shortly thereafter. This time, he admitted organizing and leading a demonstration on January 20, 1941 as the president of a Romanian student group. He insisted, however, that after his speech he had told the demonstrators to disperse. He denied participating in any of the post-demonstration atrocities or killings.[19] INS closed its investigation in 1953, concluding (incorrectly) that membership in the Iron Guard would not have barred Trifa from entering the country under the DPA.[20]

As head of the Romanian Episcopate in the United States, Trifa was a powerful and influential religious figure. In May 1955, he presented the opening invocation in the United

States Senate. This sparked renewed controversy as Drew Pearson, another nationally syndicated journalist, questioned the propriety of a "Nazi terrorist" leading the Senate in prayer.[21]

In December 1955, the FBI spent three days interviewing Trifa. He again acknowledged speaking to assembled students in January 1941, though he claimed not to remember the content of his statements. To the extent that there was any anti-Semitism, he insisted that the speech, as the manifesto, was written by others; he had simply read the prepared script. He denied any involvement in, or responsibility for, the rioting that followed his speech.

Both the INS and FBI were skeptical of the charges against Trifa, the INS because they believed the source of the allegations to be a rival church faction,[22] and the FBI because they suspected the source to be the Communist government in Romania.[23]

In 1956, Trifa applied to become a U.S. citizen. The naturalization examiner had a very clear recollection of the matter as "it was an unusual and different type of case."

> I asked him specifically if he had ever been a member of the Romanian Iron Guard, the Nazi Party, the Fascist Party or the Communist party. He categorically denied membership in any of these organizations. . . I asked him if the student organization he had belonged to in Romania was a branch of the Iron Guard and he stated that it was not.

Trifa claimed that he had been arrested by the Germans because of his opposition to the Romanian government. He said he had been taken to Germany against his will.

> I asked Mr. Trifa if he had ever been an anti-Semite and he stated that he had not. I asked him if he had ever taken any part in the killing of Jews, or whether he had ever directed any persecutions of Jews and he stated that he had not. . . . He told me that he had not signed the manifesto, but that his name had been placed thereon . . . and that he had been ordered to and did appear at [the January 20, 1941] demonstration. He denied having taken part in the later killing of Jews and other atrocities that allegedly occurred.[24]

He became a U.S. citizen in 1957.

Since 1952, one private citizen had been exhorting the government to deport Trifa. Dr. Charles Kremer, a Jew, had lost dozens of Romanian relatives in the Holocaust. During a letter writing campaign that spanned more than 20 years, he repeatedly contacted INS and urged the White House, the Secretary of State, the Attorney General, Congressmen, news media and members of the public to do the same.[25] He was consistently rebuffed. In retrospect, this may be due to the fact that Trifa, unlike most OSI subjects or defendants:

> had been of note in his homeland. . . . He had a constituency in this country. He was a churchman. He was an outspoken anti-Communist. He had a ready-made story about how these accusations were out to scandalize him as part of the Communist disinformation machine. When you play that tune to INS and Congress, which is willing to hear it, it doesn't take all that much to succeed. No one was looking for these guys then.[26]

As the years passed without any legal action against him, Trifa – an increasingly public figure, both as a church dignitary and as an anti-Communist activist – seemed emboldened. In 1972, he admitted to a reporter that he had been the top leader of a Fascist Youth movement sympathetic to Hitler's Germany. He went on to acknowledge that there had been anti-Semitism at the time, but he attributed it to the perception that Jews "monopolized the economy," rather than to any Nazi ideology. He opined that "[p]eople should not be over-sensitive over some incidents."[27]

Following Trifa's admission of leadership, Dr. Kremer met with an INS investigator and presented dozens of exhibits, including letters, books and newspaper articles. He had assembled the material with the help of various Jewish groups, including the Anti-Defamation League (ADL), the Simon Wiesenthal Center (SWC), and *The United Israel Bulletin*. While much of the information had already been sent to INS by Congressional members at Kremer's behest,[28]

there was some new material, including statements from eyewitnesses who had been present when Trifa delivered his January 1941 speech. INS forwarded the material to the local U.S. Attorney, who concluded that Trifa's entry and naturalization should now "be investigated fully."[29]

In 1973, *The New York Times* reported the renewed investigation on the front page. The reporter spoke with Trifa, who acknowledged that he had worn an Iron Guard uniform and made anti-Semitic speeches. Trifa also admitted that his claim of having been arrested by the Germans was not accurate. Rather, he had received protection from the Germans. Trifa was "not ashamed" of his past "at all."

> For those circumstances in that time I think that I didn't have any other alternative but to do what I thought to be right for the interests of the Rumanian people.[30]

A few months later, the INS Commissioner testified at a routine oversight hearing before the House Immigration Subcommittee. Representative Holtzman pressed him about the Trifa investigation;[31] she also followed up thereafter.[32] Reacting to this pressure, INS met with Dr. Kremer and interviewed witnesses whose names he had earlier forwarded.[33] Based on this new eyewitness testimony – some of which had Trifa exhorting and/or joining marauding mobs – INS recommended that a denaturalization petition be filed.[34]

The Detroit U.S. Attorney's Office filed a complaint in May 1975. It alleged that Trifa had misrepresented and concealed material facts both in his visa application and in his quest for citizenship. Among the facts allegedly concealed were his membership in the Iron Guard, and his advocacy of, and participation in, the slaughter of Jews.

As noted earlier, the SLU was established in July 1977, shortly after "Wanted, the Search

for Nazis in America" became a *New York Times* bestseller. Kremer provided much of the book's material on Trifa. As recounted in the book, Trifa had led an execution squad into a cell filled with Jews. The case was thus notorious by the time the SLU took over primary responsibility for its prosecution. SLU Chief Martin Mendolsohn assigned the prosecution to attorney Gene Thirolf.

> I called Gene in and told him this is the biggest dog ever – an absolute loser and totally screwed up. The only thing I can promise you is that I will sign every pleading and go down with you. [Gene] turned it around.[35]

Although Dr. Kremer had served a vital function in keeping the issue alive, the material he provided was not particularly helpful. Much of it was irrelevant to the legal issues at hand.[36] Thirolf concluded that only one witness proposed by Dr. Kremer and the INS was viable;[37] he realized that the government needed documentary evidence. Thirolf began by searching through Romanian newspapers at the Library of Congress. A reference to Trifa's work on a newspaper led to the discovery that he had edited *Libertatae*, a fact that had not been known when the case was first filed in 1975. DOJ requested copies of the newspaper from Romania.

Getting material from Romania proved exceedingly difficult, however. In four years, Romania had provided only one pertinent document.[38] The Romanians told Thirolf that he could neither interview witnesses nor get archival material because the country had no judicial assistance treaty with the United States.[39] At Mendelsohn's suggestion, Thirolf spoke about the problem to a *New York Times* reporter who then wrote an article about Romania's intransigence.[40]

Under the law at the time, eastern bloc countries enjoyed preferential trade status with the United States only if their governments allowed free emigration. This most favored nation

status (MFN) needed to be renewed by the president each year and approved by both houses of Congress. Politicians sympathetic to OSI's mission realized that the renewal process might give them leverage with the Romanians. Two days after *The Times* article appeared, the Chair of the House subcommittee in charge of MFN hearings asked the Romanian Ambassador to meet with Representative Holtzman. Days after that meeting, the Romanians delivered a packet of material to the American Embassy in Bucharest. A week later, Representative Holtzman testified before the subcommittee in the hope of pressuring Romania into allowing OSI personnel to interview witnesses and examine archival material. She did not urge Congress to deny MFN status, but suggested that the subcommittee postpone its decision "until the Romanian government has fully cooperated in the prosecution of the Trifa case."[41] A senator interested in the matter sent a similar message through an aide, advising that "anything Romania does to please Congress would be to its advantage."[42]

The Congressional pressure had immediate effect. As Representative Holtzman recalled it:

> After I testified . . . the Ambassador came slithering across the floor in my office and I knew the minute that he picked up my hand to kiss it that I was getting good news. He didn't have to say a word.[43]

Shortly thereafter, Thirolf and an historian were granted access to material and personnel. In acknowledgment of this, Representative Holtzman supported extension of MFN status.[44]

OSI, as is routine, also checked with U.S. intelligence agencies for information about Trifa. The FBI had information from a confidential source that the Romanian government was out to get Trifa because of his unwillingness to collaborate with the Romanian home church and government. According to this source, the Romanian government provided information to

American Jewish groups in the hope that they would use it to attack Trifa.[45] While the source claimed that most of the information provided was legitimate, (s)he advised that some documents were altered to make Trifa's actions appear worse; a certain number were fabricated altogether. The alterations and fabrications were designed to show that Trifa was personally responsible for the decision to murder civilians and/or for the actual murders themselves. According to the FBI:

> the Romanian plan against Trifa was . . . to put Trifa in a sufficiently difficult position with U.S. Government authorities that he would be disgraced in his church position and lose it. The use of American-Jewish organizations was a means to this end as was the tactical use of exaggeration and falsifying documents to fill holes in the Trifa story.[46]

An OSI historian also expressed concern. He noted the possibility of tampering not only by the Communists, but also by preceding Romanian governments. Official reports prepared by the Romanian government shortly after the uprising may have been designed to portray the Iron Guard and its leaders in the worst light possible.[47] OSI already had in its possession at least one document the authenticity of which it doubted. A photograph of Trifa looked as if his face had been superimposed. The government did not plan to introduce it into evidence.[48]

To allay concerns, the government sought multiple levels of corroboration. In addition to examining Romanian documents, including newspapers, trial transcripts and government reports, the government wanted evidence of non-Romanian origin. They searched foreign ministry documents from Germany, England and the United States which detailed the situation in Romania at the time Trifa was active. German SS records yielded a contemporaneous report of the January 1941 rally from a German exchange student studying in Romania. Enclosed with his account was a copy of the Trifa manifesto. OSI also traced Trifa's life in Germany to establish that he had been given special status because of his Iron Guard activities. Finally, they turned to

Trifa's own statements in the U.S. press. OSI planned to present testimony from *The New York Times* reporter who had interviewed Trifa in 1973.[49]

While the case was pending, but before a trial date had been set, Trifa was invited to participate in a broadcast prepared by Radio Free Europe (RFE) for transmission to Romania.[50] The occasion for the broadcast was the fiftieth anniversary of the establishment of the Romanian Orthodox Epsicopate in North America. The use of an alleged Nazi war criminal in a government-sponsored broadcast created a furor.[51] Martin Mendelsohn, first as SLU chief and thereafter as Deputy Director of OSI, protested to RFE.[52] Representative Holtzman too took up the cause.[53] Shortly after the uproar died down, Trifa received another torrent of negative publicity. He was featured on a nationally broadcast television show entitled "Escape from Justice – Nazi War Criminals in America."[54]

Trifa's trial was set for October 1980. Government attorneys traveled to Romania and Israel during the summer interviewing witnesses. Suddenly, seven weeks before trial, and without any forewarning, Trifa's attorney told the U.S. Attorney in Michigan that he had a "bombshell." Trifa would turn in his certificate of naturalization; there was no need for a trial. According to his attorney, Trifa "wasn't up to" a trial because of his health.[55]

Trifa issued a public statement in which he ceded no ground to the government.

> The relinquishment of my citizenship is in no way to be considered an admission of the government allegations. . .
>
> The litigation against me has actually been enlarged into something far more comprehensive – a trial of the ideological and political milieu of Romanian history in the pre-war years, nearly 50 years ago. To that obvious purpose and direction, I have been made a hostage of my own naturalization, forced to act as a vehicle in the condemnation of my country of origin; and particularly of the Legionary Movement [Iron Guard] of those years, and of the many fine men and

women who gave so much in their dedication to what was then felt as the best solution to Romania's many and complex difficulties. This I cannot and I will not permit to continue.

However much I believe in the American judicial process – and I do – it is with an equally firm conviction I feel I have been denied due process in this protracted litigation. Even if I were accorded a fair trial as such in a procedural sense, it would appear to be irrelevant when such would still render impossible any attempt to bring across the truth of the matters taking place in Romania during the critical years between the great wars.

The tremendous cost, the enormous amount of time, the heavy burdens of many years of litigation and harassment have rendered me unable to effectively defend myself and give full measure to the parishioners of my far-flung Episcopate.

* * *

Thus, in order to preserve the integrity of my own convictions, and in the best interests of my Church and its faithful, the struggle must end!

The struggle did not end, however. Two months later, the government filed a deportation action. The denaturalization complaint, which had been filed by the USAO, alleged that Trifa had personally participated in acts of murder. By contrast, the OSI-filed deportation action focused on Trifa as a propagandist. OSI's exhaustive research into Trifa's background left it unconvinced that Trifa himself had partaken in the mayhem; it did believe, however, that his writings and speeches had helped create an atmosphere in which such wanton murder and destruction was deemed acceptable.[56]

The government alleged that Trifa had concealed all information about his Iron Guard activities, and that he had advocated violence and the persecution of Jews. According to the government, "hundreds of innocent civilians were killed" as a result of the Trifa Manifesto.[57]

As always, Dr. Kremer followed the litigation closely. He wrote to the immigration judge

urging that the trial be expedited.

> We ask for an immediate and speedy trial of this pogromist. The pogrom that was ordered by Mr. Trifa is considered by contemporary historians the most ghastly ever, even more cruel than Hitler's gasing [sic] and incinerating men, women and children. In this pogrom Mr. Trifa and his cohorts perpetrated the most vicious acts ever devised by distorted human minds: Jews and Christians had their ears, tongues, sexual organs cut off before being put to death by slashing their throats "in the ritual manner", their heads cut off and the carcasses hung on hooks and marked "KOSHER" – on their bellies (KARNE KOSHER in Rumanian).[58]

The letter did not have the desired effect. The judge, assuming that Dr. Kremer was "an informant and potential witness for the Government," recused himself from the case.

> Although ordinarily I would discount ex parte remarks and accusations, I am of the belief that due to the sensitive nature of this case it would be impossible to maintain the appearance of judicial fairness in that the contents of this letter constitute an outright intentional attempt to influence the decision of this court.[59]

Director Ryan urged the court to reconsider. Ryan assured the judge that the government had had nothing to do with the letter, had no advance notice of it, and "dissassociate[d itself] from everything in it." Moreover, Ryan opined that the next judge assigned might receive a similar letter since the parties to the case could not "exercise any influence or control over the letter-writing of this private citizen."[60] The court declined to reconsider its decision and a new judge was assigned.

The government anticipated that it would take two months to try the case. They expected to introduce hundreds of exhibits. The case was complex, both because Romanian politics were complicated (Romania began as an Axis partner but joined the Allies in 1944), and because the anticipated defense was sophisticated. Trifa could argue that he had been a victim himself, since he had spent time in German concentration camps; the government needed to establish that he

had been more a guest than a political prisoner. And if he argued that the government which crushed the Iron Guard also persecuted Jews, the government needed to show that this did not mean that the Iron Guard wasn't itself anti-Semitic. OSI was prepared to present a long and detailed explanation of Romanian politics. Preparing for the case, an OSI historian wrote a 500 page report outlining the relevant political and cultural issues.[61]

Among the most dramatic evidence the government planned to present was a series of postcards and letters found in the West German archives. They were sent in 1942 by Trifa from various German resorts and spas to his Iron Guard leader comrades. The correspondence supported the government's theory of the case – that Trifa, because of his high-level position with the Iron Guard, had been more a political refugee than a political prisoner.

Although Trifa's handwriting was on the correspondence – and the government had a handwriting expert to so testify – Trifa claimed they were a Communist forgery. Using then brand-new laser technology, the FBI identified Trifa's latent fingerprint on one of the documents. The identification of a 40-year-old print was extraordinary; it was, and remains to this day, the oldest latent print ever matched by the Bureau. Indeed, a blowup of the print is on display at FBI headquarters for tourists to view.[62]

Last minute pre-trial settlement negotiations came to naught[63] and trial began in October 1982. The government opened its case with two days of testimony by an historian who discussed Trifa's role in the Iron Guard. Through him, the government introduced numerous articles written and edited by Trifa. On the morning of the third day, defense counsel offered to settle. Trifa conceded that he had been a member of the Iron Guard and that he had concealed that background when he entered the United States. He agreed to depart the United States within 60

days of receiving permission to enter another country. He designated Switzerland as the country to which he would like to be deported. He wanted, at all costs, to avoid returning to Romania which had convicted him *in absentia* and sentenced him to life imprisonment in 1941.

As part of the settlement, the United States agreed that if Switzerland refused to accept him, Trifa and the U.S. would have two years to find another country. If, at the end of that two year period no other country would accept him, the U.S. would seek to deport him to Romania. From the government's perspective, this "ensured[d] that in no way would the Department ever find itself in a position where we were sheltering him from possible return to Romania, in the event that no other country would accept him."[64] The potential two-year hiatus was acceptable to the government since it was shorter than the likely duration of an appeal had the trial proceeded to verdict.[65]

Trifa's attorneys claimed that his abrupt abandonment of the case was due to the fact that he was "old and ill."[66] Trifa himself claimed that he wanted "an end to this. I feel victimized by the fact that things are picked up and enlarged in such a way as to mean completely different things."[67] The court entered an order of deportation in October 1982. It was the first judicial order of deportation litigated by OSI.

It was not easy finding a country to which Trifa could be sent. Switzerland refused to accept him. The United States made inquiries of Italy and (West) Germany. They too were opposed. Romania, the back-up country according to the settlement agreement, expressed extreme reluctance.[68]

Worried that Trifa might remain in the United States by default, the Justice Department sought to persuade Israel to extradite and prosecute him under a 1950 law punishing "crimes

against the Jewish people" committed during World War II. OSI Acting Director Sher went to Israel to discuss the matter.[69] The following week, DAAG Richard planned to meet with the Israeli Attorney General to continue the discussions. However, at the direction of the State Department, DAAG Richard cancelled the meeting when he learned that it was to be held in East Jerusalem; U.S. policy did not recognize Israel's annexation of that sector of the city. The cancellation received national coverage,[70] and sparked debate about the wisdom and propriety of sending Trifa to Israel. Some, including Teleford Taylor, former chief U.S. prosecutor at the Nuremberg war crimes trials, felt that it violated legal notions of fairness to deport someone to a country where he had never been, to be tried for crimes committed before that country had been established.[71]

In the end, the question was moot. After a rescheduled meeting held in another sector of Jerusalem, Israel declined to accept Trifa.[72]

OSI considered another alternative which they dubbed "The Berlin Option." This involved deporting Trifa to the American-occupied sector of Berlin.[73] As OSI saw it:

> We would not only fulfill our commitment to deport him; but we would also serve notice to our entire cast of defendants and subjects that deportation is not an idle threat. Moreover, there is great appeal in sending this Nazi war criminal to the former seat of the Third Reich; the symbolism should not be overlooked.
>
> . . . [B]y establishing this precedent, we can increase significantly the chances of negotiating more deportations.[74]

The Justice Department was skeptical. DAAG Richard was concerned that it would distort OSI's mandate. Having announced that the United States was unable to bring criminal prosecutions against OSI defendants, it should not suddenly change course without compelling legal justification.[75] AAG Trott thought "dumping the body in Germany" was a "very hostile

act."[76] The State Department too was unenthusiastic about the proposal and it never gained momentum.

While he awaited resolution of the matter, Trifa became ever more expansive with the press. He expressed skepticism as to whether any Jews had been killed during the war since he "didn't see any bodies."[77] Reflecting on his activities, he concluded: "With what I even know today, I wouldn't do differently than what I did" and warned that "all this talk by the Jews about the Holocaust is going to backfire. . . [b]e it legislative or whatever, against the Jews." He was sanguine about deportation.

> You know, I'm not looking for any place too hot. Or too cold. I will not stay in a grass hut in the middle of Africa, either. I will be 70 in June. I'm looking for a place with a high standard of living, with culture.[78]

He found it. In August 1984, Portugal issued him a visa. Though Portugal later claimed that it had been unaware of Trifa's background when it issued the papers,[79] he was allowed to remain there until his death in 1987.

Trifa's followers brought his body back to the United States. He was buried on the grounds of the Romanian Episcopate in Michigan, where he had lived for so many years. There was no longer any basis upon which the U.S. could exclude him.[80]

Litigation concerning his wartime activities did not end even with his death. Pursuant to statute, the United States terminated Trifa's social security payments as soon as he was deported.[81] Trifa challenged the termination on several grounds, one of which was his claim that he had an "informal" agreement with OSI that would allow him to retain his benefits after he left the country. He also argued that there was new evidence establishing that he should not have been deported.

He died while these issues were still in litigation, and his executor persevered on behalf of the estate. A court ruled that the claims were merely an "an inappropriate attempt to go behind the order of deportation." As such, the claims were denied.[82]

1. Unless otherwise noted, the Romanian history is taken from a 500 page, fully sourced report on "Viorel Trifa and the Iron Guard," prepared by OSI Historian Peter Black, Feb. 1982 (hereafter The Black Report).

2. Trifa changed his name from Viorel to Valerian after he came to the United States.

3. As reported in the Dec. 12, 1940 edition of the Romanian newspaper *Buna Vestire* in an article entitled "December 10 Under the Sign of Justice."

4. *E.g.*, a November 24, 1940 piece complained that the "kikes" had no interest in a pro-Axis policy because they wanted Romania "to be at the orders of Paris and London where the kikes were strong."

5. A front-page story in a Swiss newspaper referred to "extremists of the Iron Guard, whose uninhibited rule of terror the Romanian people is no longer willing to bear." "Die innere Lage Rumäniens," (The Internal Situation in Romania), *National-Zeitung* (Basel), Jan. 3, 1941. Franklin Mott Gunther, the U.S. Minister to Romania, described the Iron Guard's "entire history [as] shot through with assassinations and terrorism." Feb. 5, 1941 report to the Secretary of State re "The Iron Guard Revolution of January 21 to 23: A Summary of Its Causes, Course and Results," p. 3 (hereafter Gunther Report).

6. Gunther Report, *supra*, n. 5 at pp. 3-5.

7. Trifa maintained that he did not write the manifesto although he conceded that he did not oppose its issuance. Trifa Deposition, Jan. 25, 1977, p. 42; Trifa FBI interview, Dec. 1955. OSI never developed any independent evidence as to whether he was the actual author.

8. "The Rallies of the Legionary [Iron Guard] Movement on Sunday: The Movement's Leaders Delivered Addresses on the Subject of 'The Struggle of Germany and Italy for the establishment of a New European Order,'" *Universul* (Romanian newspaper), Jan. 21, 1941.

9. Franklin Gunther to State Department, No. 89, Jan. 30, 1941.

10. The Gunther Report, *supra*, n. 5, gave official figures of 236 killed, of whom 118 were Jews. Gunther thought this figure too low, but found "no good support for figures running beyond 300 to 400." Jewish groups gave much higher numbers. The JTA reported on Jan. 30, 1941 that 1,000 Jews were killed in Bucharest alone and another 1,000 in the countryside. "2,000 Jews Slain in Rumanian Terror; Eyewitness Tells Brutalities." *The Canadian Jewish Weekly* claimed that as many as 6,000 Jews were killed. "Nazi Murderer of 6,000 Jews Bishop in Cleveland Church," July 23, 1953.

11. Von Bolschwing was prosecuted by OSI in 1981. *See* pp. 259-270.

12. In 1946, he was again tried *in absentia* (by a new Romanian government) and sentenced to death for crimes amounting to genocide under the Romanian penal code. U.S. Emb. Bucharest to

Sec'y of State, No. 2280, Apr. 12, 1979.

13. The IRO Manual for Eligibility Officers stated that Iron Guard members were "*prima facie* outside the mandate"of the IRO. As such, they were ineligible to emigrate under the DPA.

14. "Court Holds 5 in Contempt in Bishop Row," *The Philadelphia Enquirer*, Apr. 30, 1952.

15. CIC Report, Jan. 16, 1950, Ref. No. 8-50-17.

16. Aug. 6, 1951 report to DOS Division of Security.

17. Redacted Mar. 3, 1953 INS memorandum re "Trifa, Viorel."

18. Feb. 7, 1975 memorandum to Regional Commissioner, Northwest from District Director, Detroit, re "Valerian D. Trifa aka Viorel Trifa."

19. Nov. 16, 1973 memo to Trifa file from D.L. Milhollan (INS); Feb. 7, 1975 memo from INS District Director (Detroit) to INS Regional Commissioner (Northwest).

20. Mar. 3, 1953 INS memorandum re "Trifa."

21. Broadcast, May 29, 1955; *AP* column, June 4, 1955. Pearson attacked Trifa again in 1963. "3 War Criminals Remain in U.S.," *The Washington Post*, May 22, 1963. (The other two criminals were Andrija Artukovic, discussed at pp. 239-258 and Nicolae Malaxa, who died in 1972, before OSI's founding.)

22. The INS had so advised Michigan Senator Homer Ferguson and Michigan Congressman George Dondero in letters dated June 28, 1951.

23. Nov. 29, 1978 memo to Martin Mendelsohn, Chief SLU, from trial attorney Eugene Thirolf. Mendelsohn wondered whether the FBI was protecting Trifa. The Bureau denied that he had ever been an asset or informant. Declassified FBI memorandum of Apr. 6, 1979 re "United States vs. Valerian Trifa;" Declassified and redacted FBI memorandum of Mar. 5, 1980 re "Valerian Trifa."

24. June 22, 1962 memorandum from Detroit Naturalization Examiner Sidney Freed to the Assistant Commissioner of Naturalization, Washington, D.C.

25. Apr. 9, 1974 letter from INS General Counsel Charles Gordon to James F. Greene, Deputy Commissioner.

26. Recorded interview with Allan Ryan, June 10, 2003.

27. "Bishop Admits Past Pro-Fascist Ties," by Hiley H. Ward, *The Detroit Free Press*, Aug. 27, 1972.

28. Dec. 14, 1972 memorandum from Sol Marks, INS District Director, New York to the Associate Commissioner of Operations, Central Office.

29. Oct. 1, 1973 letter to Deputy Attorney General William Ruckelshaus from Robert Morse, U.S. Attorney, E.D.N.Y.

30. "Bishop Under Inquiry on Atrocity Link," by Ralph Blumenthal, *The New York Times*, Dec. 26, 1973. Trifa made similar admissions to *The Detroit News*. "12 Witnesses May Tie Bishop to War Crimes," by Michael Wendland, June 2, 1974.

31. "Bishop is Facing Expanded Inquiry," by Ralph Blumenthal, *The New York Times*, Apr. 5, 1974.

32. "Rep. Holtzman Calls U.S. Lax on Nazi Inquiries," by Ralph Blumenthal, *The New York Times*, May 21, 1974; letter of same date from Holtzman to INS Commissioner Chapman. In February, 1975, she went to INS' offices to review various case files, including Trifa's. Feb. 14, 1975 memo from INS District Director (New York) to INS Regional Commissioner (Northeast).

33. Sept. 30, 1974 letter from INS Acting Deputy Commissioner Carl Wack, Jr. to Kremer (referencing an Apr. 1974 meeting between Kremer and the INS General Counsel); "12 Witnesses May Tie Bishop to War Crimes," *supra*, n. 30.

34. Feb. 7, 1975 memo; Feb. 20, 1975 memo to Assistant Attorney General for the Criminal Division from L.F. Chapman, Jr. INS Commissioner.

35. Recorded interview with Mendelsohn, May 23, 2001.

36. Kremer provided the SLU with 186 documents he believed relevant to the prosecution. Dec. 20, 1978 memo from Thomas Fusi, SLU Criminal Investigator, to File, re "Interview with Dr. Charles Kremer on 12/15/78 in the case of Viorel Trifa." Overall, Dr. Kremer's evidence "tended to be more misleading than helpful" in that it suggested that Trifa was directly involved in the murder of Jews; in fact the government found no reliable evidence to substantiate that charge. Recorded interview with former OSI Chief Historian Peter Black, June 24, 2003.

37. Recorded interview with Gene Thirolf, June 13, 2003.

38. Apr. 3, 1980 memo from Thirolf to OSI Director Allan Ryan; June 22, 1979 testimony of Rep. Holtzman before the House Ways and Means Subcommittee on Trade.

Communist bloc countries were usually willing to help the United States pursue an alleged Nazi war criminal, though they were often slow to respond. Some speculated that the unusual recalcitrance in this case was due to fear that Trifa and his supporters might retaliate by revealing that some Iron Guard members were currently serving in the postwar Communist government. "U.S. Aide Says Rumania Fails to Help in Fascist's Trial," by David Binder, *The New York Times*, June 11, 1979.

39. May 8, 1980 memorandum from Thirolf to OSI Director Allan Ryan re "Our History of Contacts with the Government of Romania" (hereafter Thirolf memo).

40. "U.S. Aide Says Rumania Fails to Help in Fascist's Trial," by David Binder, *The New York Times*, June 11, 1979.

41. Statement before the House Subcommittee on Trade, House Ways and Means Committee, June 22, 1979. Rep. Holtzman acknowledged that cooperation with OSI did "not fall explicitly within the ambit of the freedom of emigration requirements." Nonetheless it was a reflection on Romania's willingness to work with the United States on a matter "of mutual concern."

42. "Romania Will Aid U.S. in Trifa Trial," by Susan Morse, *The Detroit Free Press*, July 6, 1979.

43. Holtzman interview, June 12, 2002.

44. Thirolf memo, *supra*, n. 39. A year later, when Romania's MFN status was again up for renewal, Holtzman asked the subcommittee to "strongly remind the Romanian government that its continued cooperation is expected." Submitted statement before the subcommittee, June 10, 1980 (emphasis in original).

45. Kremer was head of the Romanian Jewish Federation of America, and later the Committee to Bring Nazi War Criminals to Justice in U.S.A., Inc.

46. Oct. 9, 1979 redacted memorandum from FBI Washington Field Office.

47. Black Report, *supra*, n. 1, at ch. IX, p. 55, n. 133.

48. Recorded interview with Thirolf, Feb. 22, 2002. According to Thirolf, the photograph had come from someone in the opposing faction of the Romanian church. The SLU had submitted the photograph to the FBI for analysis. They were unable to determine whether it had been altered. Mar. 13, 1979 report from FBI to Thomas Fusi, Investigator SLU.

Long after the Trifa litigation was complete, an official in the Romanian intelligence service, who had since defected, claimed that the Romanian premier had ordered evidence be manufactured against Trifa. *Red Horizons, Chronicles of a Communist Spy Chief*, by Ion Pacepa (Regnery Publishing).

49. The government issued a subpoena to reporter Ralph Blumenthal. Although *The Times* originally contemplated litigating the validity of the subpoena, the Department of Justice and the newspaper agreed without litigation on the parameters of Blumenthal's testimony. The government would call on Blumenthal to testify about Trifa's statements only if Trifa did not himself admit he had made the statements to Blumenthal and the government was not able to prove the admissions by independent means. Aug. 15, 1980 memo to AAG Heymann from Director Ryan re "New York Times Subpoena in United States v. Trifa;" July 2, 1980 memo to AAG Heymann from Ann Fleisher Hoffman, Executive Assistant to the Attorney General re

"Subpoena to the New York Times."

50. Radio Free Europe was founded in the 1950s and broadcast into Eastern Europe. It was originally run by the CIA as a propaganda organ for the United States. In 1971, control was turned over to The Board for International Broadcasting, an independent federal agency funded and overseen by Congress.

51. *See e.g.*, "A Government Blunder," *The St. Petersburg Times*, Dec. 16, 1979; "Trifa Case: Fire White House Aide," *The Miami Herald*, Dec. 14, 1979; Commentary on WEAM Radio, Dec. 19, 1979; Commentary by Jack Anderson on *Good Morning America*, ABC-TV, Dec. 6, 1979; "RFE's Bishop is Probed," Jack Anderson, Feb. 20, 1980; "Outrageous Program is At Issue," Jack Anderson, Feb. 20, 1980; "Broadcast by Clergyman Accused of Killing Jews Is Drawing Criticism," *The Washington Star*, Dec. 12, 1979.

52. June 11, 1979 letter to Mendelsohn from William Buell, Senior Vice President, RFE responding to a phone call from Mendelsohn; Nov. 14, 1979 letter to Buell from Mendelsohn.

53. "Legislator Assails Radio Free Europe," by David Binder, *The New York Times*, May 17, 1979. After two RFE workers who complained about the broadcast were fired, Rep. Holtzman directed the Subcommittee on Immigration to open an investigation into the matter. She also urged the president to fire a White House aide who defended the broadcast. (The aide survived the furor.) "Solon: Two RFE Workers Fired for 'Whistleblowing,'" *The Birmingham News*, Dec. 21, 1979; Dec. 20, 1979 letter from Holtzman to Congressman Dante Fascell, Chair of the Subcommittee on International Operations (which had oversight over RFE); "Note by Rep. Holtzmann [sic] Bids Carter Oust an Aide," *The New York Times*, Dec. 7, 1979. Rep. Holtzman also raised the issue on the House floor. Cong. Rec. Jan. 30, 1980, H. 425. At her urging, the Attorney General expressed support for an investigation into Trifa's broadcast. Jan. 17, 1980 letter from Attorney General Civiletti to Cong. Holtzman; Dec. 31, 1979 letter from the Attorney General to John Gronouski, Chairman, Board for International Broadcasting.

54. The show was broadcast on ABC's *News Closeup*, Jan. 13, 1980. At the time, ABC was one of only three nationally broadcast stations.

55. Sept. 8, 1980 memo from Thirolf to files re "U.S. v. Trifa;" and June 13, 2003 telephone conversation with District Judge George Woods, who was Trifa's attorney during the denaturalization phase.

56. Recorded interviews with Peter Black (June 24, 2003) and Eugene Thirolf (June 13, 2003). It is unclear why the denaturalization complaint had not been revised to reflect this thinking, as Thirolf recalls viewing Trifa early on as a propagandist rather than a murderer (recorded interview Feb. 22, 2002). Black's treatise, *supra*, n. 1, which provided the definitive analysis for the government, was written after the denaturalization case had settled.

57. OSI did not at first rely on the recently-enacted Holtzman Amendment which provided for deportation of persons who assisted Nazi Germany or its allies by ordering, inciting, assisting or

otherwise participating in the persecution of persons because of their race, religion or political opinion. As Romania had not entered the war on behalf of the Axis until June 22, 1941, there was concern that Trifa's activity six months earlier might not come within the scope of amendment. However, OSI established that Romania had requested a military mission from the Germans in September 1940 and had joined the Axis Tripartite Pact two months earlier. The government thereafter amended its papers to add a "Holtzman count." The advantage of adding this count was that, if proven, it eliminated the possibility of Trifa's getting a waiver to preclude deportation.

58. Dec. 24, 1981 letter to Imm. Judge Anthony Petrone.

59. Jan. 4, 1982 order *In the Matter of Valerian Trifa.*

60. Jan. 12, 1982 letter to Imm. Judge Petrone from Ryan.

61. Black Report, *supra*, n. 1.

62. Court TV's series *Forensic Files* ran an episode about the print. *See* www.courttv.com/press/unholy_vows.html (last visited Nov. 2005).

63. Sept. 27, 1982 memo to DAAG Richard from Director Ryan re "Viorel Trifa."

64. Nov. 9, 1982 memo to The File from DAAG Richard re "Trifa Prosecution – Deportation to Romania."

65. Aug. 14, 1984 news conference with AAG Trott and Director Sher.

66. "U.S. to Deport Archbishop Accused as a Nazi Ally," *The New York Times*, Oct. 7, 1982. Trifa was 68 years old at the time.

67. "U.S. Seeks to Deport 10 Other Nazis," by Francis X. Clines, *The New York Times*, Oct. 9, 1982.

68. Mar. 14, 1983 letter to the Assistant Legal Advisor, Consular Affairs, State Department from Neal Sher, Deputy Director, OSI.

69. "U.S. Asks Israel to Try Ex-Nazis Being Deported," by Edward Walsh, *The Washington Post*, Apr. 29, 1983. Dr. Kremer, identifying himself as the president of the Committee to Bring Nazi War Criminals to Justice in U.S.A., Inc., had already implored the Israelis to accept Trifa. He received a non-committal handwritten response on stationery from the "Residence of the President of Israel." Jan. 11, 1983 letter from Kremer to Israeli President Yitzchak [sic] Navon and Jan. 28, 1983 response thereto.

70. *E.g.*, "U.S. Aide, in Israel on Nazi Cases, Rejects Meeting in East Jerusalem," by David Shipler, *The New York Times*, June 3, 1983; "Office Site Snags U.S.-Israeli Talks on Nazi

Cases," by Edward Walsh, *The Washington Post*, June 3, 1983.

71. "Steps to Deport Nazi Backers Cause Legal Concern," by Stuart Taylor, Jr., *The New York Times*, May 9, 1983.

72. One of the problems in the Trifa case was that the Israeli law applied to those in countries hostile to the Allies at the time the crimes were committed. Since Romania had not officially declared war on the Allies when Trifa was involved in his incendiary activities, some felt the case would not be prosecutable. Ultimately, the Israelis decided that the first OSI defendant they would take would be John Demjanjuk, then (mis)identified as Ivan the Terrible. *See* pp. 150-174. According to DAAG Richard, Demjanjuk was a test case for the Israelis. They anticipated seeking extradition of other OSI defendants if that prosecution went well. It did not and no other OSI defendant has since been extradited to Israel.

73. Following World War II, Berlin was divided into four sectors by the victorious powers. The U.S., the U.S.S.R., England and France each occupied one sector.

74. Apr. 6, 1983 memo to DAAG Richard from Acting OSI Director Sher re "Trifa Deportation to United States Occupation Sector or Berlin."

75. Oct. 26, 2000 discussion with DAAG Richard.

76. Aug. 23, 1983 buck slip from AAG Trott to Associate Attorney General D. Lowell Jensen re "Trifa Deportation."

77. "Trifa Speaks Out: 'I Was Not a War Criminal,'" by Stephen Franklin, *The Detroit Free Press*, July 17, 1983. Most of the Romanian Jews who died during the Holocaust did in fact die outside of Romania; they died in ghettos and concentration camps to which they had been deported. However, there were still many Jews who died within the country. In addition to those murdered during the January 1941 uprising, approximately 10,000 others were killed in the summer of 1941 during a pogrom in Jassy, Romania.

78. "Stateless Rumanian Archbishop Looks for a Country," by Howard Blum, *The New York Times*, Feb. 2, 1984.

79. "Deported Bishop Flies to Portugal," by Stuart Taylor, Jr., *The New York Times*, Aug. 15, 1984.

80. Before the body was returned to the United States, Director Sher contacted the State Department to learn if there was any way to prevent its return. He was told that the only bases of exclusion were (1) if the body were not properly embalmed; or (2) the person died of a communicable disease.

81. 42 U.S.C. § 402(n).

82. *Sibisan v. Bowen*, 1989 WL 281921 (N.D. Ohio) (unpub'd).

Ferenc Koreh – A Lifetime of Propaganda

There is a measure of irony in the prosecution of Ferenc Koreh for his propagandist activities on behalf of the Nazis in that once he emigrated, Koreh devoted himself to propaganda on behalf of the United States. In the United States, Koreh inveighed against Communism; as a Nazi propagandist, he incited the populace to revile innocent civilians and exhorted the government to promote policies of discrimination and subjugation.

Koreh was born in Transylvania, a region which was part of Hungary at the time of his birth, but which was incorporated into Romania after World War II. During the war Hungary (as well as Romania) was allied with the Axis powers. Between 1941 and 1944, Koreh served as the "Responsible Editor" of a privately owned Hungarian daily.[1] His duties included writing, reading and editing articles, meeting with government officials to discuss the paper's content, publishing news stories received from the government, and assuring that the government's political policy was reflected in the paper.[2] During his tenure, the newspaper published dozens of pieces advocating the persecution of Jews as well as defeat of the Allies. Articles alleged that Jews had promoted and funded the war,[3] raped innocent Hungarian girls,[4] tarnished the professions,[5] and wantonly slaughtered military officers.[6] Scurrilous pieces which appeared under Koreh's byline covered the threat to commerce from Jewish immigrants because of their "unfair" practices;[7] Jewish sabotage and prayer "for the failure of the aspiration of every Hungarian;"[8] and the failure of the Hungarian press to cover adequately the theories of race philosophers.[9]

From 1944 to the end of the war, Koreh was Press Information Officer and Deputy Chief of the Information Section at the Hungarian Ministry of Propaganda. His responsibilities

included preparing radio broadcasts, reviewing speeches, and monitoring Hungarian press coverage of various issues, including "the Jewish question." For a portion of his time at the Ministry of Propaganda, he also served as Responsible Editor of a government-owned weekly. That newspaper, like the privately owned one with which he was associated, was pro-Axis in its coverage. In 1946, the People's Court of Budapest found Koreh guilty of war crimes. The conviction was based on Koreh's work for the government publication. He was sentenced to a year in prison, to be followed by five years' suspension of his political rights.[10]

Koreh came to the United States in 1950. His visa application stated that he had written "cultural and literary" material for a private newspaper. Nothing indicated that he had been the paper's Responsible Editor nor that he had worked at the Ministry of Propaganda or been editor-in-chief of a government publication. Although he acknowledged being sentenced to a year in prison, he described this as political incarceration based on his anti-Communist stance. He denied having been a member of, or having participated in, any movement hostile to the United States.

In 1956, Koreh became a United States citizen. He was an outspoken critic of the Communist regimes in Hungary and Romania. From 1951 until 1974, he was a broadcast journalist with Radio Free Europe. He remained with RFE on a freelance basis until 1989. Beginning in 1965, he also hosted a two-hour weekly radio program, a portion of which was devoted to the issue of Hungarians within Romania. He also helped organize demonstrations against the Romanian government and served for a period of time as president of an anti-Communist emigré organization.

In early 1977, *Dreptatea*, a Romanian language newspaper published in New York, ran

an article identifying Koreh as "Chief of the Nazi [Iron Cross] party and of all the political publications appearing in Northern Transylvania from 1940 to 1944." In addition, the piece held Koreh responsible for mass murders and reported that he had hunted his victims from horseback and had been condemned to death *in absentia* by a Hungarian court. A few months later, a similar article was published in *The United Israel Bulletin*, another New York paper. Koreh sued both publications and their editors for libel. The case settled in 1979 when the newspapers retracted all statements other than the ones holding Koreh responsible for mass murder.[11]

The SLU first learned about Koreh from an article in *The United Israel Bulletin*.[12] OSI inherited the investigation and filed a denaturalization complaint in 1989, charging that Koreh's visa should not have been issued because he had (1) assisted in the persecution of Jews through his position as Responsible Editor of the privately owned newspaper; (2) been a member of, or participated in, a movement hostile to the United States through his employment as a press officer in the Hungarian Ministry of Propaganda; (3) given "voluntary assistance" to enemy forces by his employment in the Ministry; and (4) failed to list his conviction as a war criminal.[13] The case received publicity, in part because (unbeknownst to OSI before the filing), one of Koreh's daughters was an FBI agent. Three days after the filing, an unidentified person threw an object through a window in Koreh's home with a note stating "Dog – You Will Die."[14]

The fact that Koreh's daughter was an FBI agent both complicated and slowed the prosecution. Colleagues in her New York office [NYO] elected, without any discussion with OSI, to analyze the case. Relying in part on material which had been prepared by Koreh for his earlier libel suit, they concluded that the government's case was based on documents fabricated by the Communist Romanian government.[15] In August 1989, they advised DOJ that it appeared

OSI had been duped by a hostile intelligence service.[16] The New York agents suspected that Koreh had been targeted because he was an outspoken opponent of the Romanian president and an on-air employee of Radio Free Europe. They alerted FBI headquarters that they were preparing a report "recommending an investigative course of action" because they foresaw possible criminal violations stemming from the OSI filing. These included the making of false statements (to OSI) and obstruction of justice.[17]

FBI headquarters was skeptical that there was any predicate for either a counterintelligence or criminal investigation. They were concerned too about a potential conflict of interest because the report was being prepared by an agent who was romantically involved with Koreh's daughter.[18]

The boyfriend (later spouse) prepared a 46 single spaced page report. Its essence was that the Romanian intelligence services sought to discredit RFE employees and Romanian emigrés who had been active in anti-Communist activities. More than a third of the document discussed OSI's prosecution of Archbishop Trifa, who, like Koreh, had opposed the Communist regime. The report depicted Trifa as the victim of a Romanian disinformation campaign and saw the Koreh and Trifa cases as having "striking similarities."[19] The significance of the Trifa case, according to the report, was that it demonstrated the propensity of the Romanian intelligence community to engage in a disinformation campaign.

The document asserted flatly that "[m]ethods used in Mr. Koreh's case and in other instances include forged documents." In fact, however, none of OSI's evidence came from Romania. The case was based entirely on admissions made by Koreh (some of them in his deposition during the libel suit), newspapers from Hungarian archives, and Koreh's conviction

for war crimes by a Hungarian court.

Even though nothing in the report discredited the evidence upon which OSI based its case, its very existence created problems for OSI. The FBI's questioning whether the case was based on false documentation raised potential discovery and legal issues.

In preparation for trial, the defense wanted all government documents which would assist in their claim that Koreh had been set up by the Romanian government; this included the unredacted FBI report. However, the government was concerned that material in the report was privileged. The court agreed, approving a stipulation which gave the defense the essence of the classified material without revealing state secrets.[20] The stipulation stated that unnamed sources represented that the Romanian Intelligence Service (RIS) targeted many prominent Hungarian organizations and Hungarians, including Koreh, in the mid to late 1980s. The RIS wanted information about their private lives which could be used against them. However, the stipulation stated that there was no evidence that such information had in fact been collected about Koreh.

Sparring over the report – its preparation and defense access to it – took three years.[21] The court finally reached the merits of the denaturalization case in June 1994. It acknowledged being torn by the defendant's situation.

> [T]he court has had to resolve certain difficulties in its own mind and thus has dragged its judicial feet in hopes that the case would be disposed of in ways other than this. On the one hand, the court is faced with a defendant who will be 85 years of age in September, 1994 and who has been in this country for 44 of those years working until his retirement and apparently with some distinction for Radio Free Europe; producing and broadcasting a Hungarian language radio program; and writing for and/or editing a Hungarian newspaper, a Hungarian magazine, and a Hungarian news quarterly. Importantly, there is no suggestion that defendant personally committed or supervised the commission of any of the atrocities that one typically sees in cases in which the United States seeks denaturalization; indeed, had the conduct in which he concededly engaged and the anti-Semitic and

> anti-Allied articles he is alleged to have written and admittedly published occurred in this country, that conduct and those articles would most likely be protected by the First Amendment. On the other hand, defendant's admitted and undisputed activities during the discrete periods of time to which the United States points . . . warrant denaturalization as a matter of law.[22]

The court relied only on facts which were stipulated or otherwise not in dispute. Thus, any articles written at a time when the defendant claimed he was away from the newspaper were excluded. So too were all articles printed under his name because the defendant ("most belatedly" according to the court) claimed these were Romanian forgeries. Even with all these exclusions, there were 55 articles to be considered. The court described them thus:

> The "alien-character" of the Jews was emphasized and Jews were described as constituting a separate and distinct race; Jews were portrayed as "traitorous, unscrupulous, cheating" . . . and a consistently dangerous element in Hungarian society responsible for the socioeconomic problems afflicting Hungary and the world; a portion of an article from the National Socialist German Workers Party publication was reprinted . . . concluding that . . . "everyone in Hungary is aware of the fact that a final solution may be achieved only by deporting Jewish elements". . . . [I]n the impoverished and poorly educated region which *Szekely Nep* reached, more than forty articles published while defendant was present blamed the Jews for the economic and social problems and the misery of the people in that region . . . and called for harsher restrictions and punishments, including the suggestion that the homes of Jews be taken away.[23]

The court concluded that as Responsible Editor of a privately owned newspaper, Koreh gave "assistance in the persecution" of Hungary's Jews; his work amounted to "advocacy" of such persecution, fostering a climate of anti-Semitism which conditioned the Hungarian public to acquiesce, encourage and carry out anti-Semitic policies. Moreover, his work on the paper constituted membership and participation in a movement hostile to the United States. For all these reasons, he should have been denied a visa to enter the United States. His citizenship was therefore revoked; the Third Circuit affirmed.[24]

The government filed a deportation action but settled the case before trial because of Koreh's failing health. Koreh admitted responsibility for publishing anti-Semitic articles, conceded his deportability and designated Hungary as the country to which he should be sent. In January 1997, the court entered an order of deportation. The government agreed not to effect the order unless Koreh's health improved. It did not. He died three months later, at age 87.[25]

1. There were some short gaps in this period of service, but they are irrelevant to the issues presented.

2. *U.S. v. Koreh*, 856 F. Supp. 891, 896 (D.N.J. 1994).

3. "Blood and Gold: The Role of Jewish Capital in the Present World War;" Jan. 31, 1942; "How the World's Jews Forced the American People to Go to War;" Feb. 15, 1942.

4. "Is It Possible for Szekely Maids to Continue to Serve in Jewish Homes?" (reporting that "it frequently occurs that some ugly Jewish man pursues and propositions the defenseless girls who find themselves in a situation of dependency"), Mar. 21, 1942.

5. "The Need to de-Jewify the Legal Profession," July 18, 1942.

6. "Jews Were the Murderers of the Polish Officers Killed in the Soviet Union," Apr. 16, 1943.

7. "We Are Demanding an Investigation," Aug. 5, 1941.

8. "Hucksters," Sept. 20, 1941.

9. "Subversives," Oct. 11, 1942.

10. He served seven months in jail.

11. Sept. 21, 1979 transcript of proceedings before the Hon. Thomas Griesa, Case No. 77 Civ. 2613 (S.D.N.Y.).

12. Chronology of events in Koreh Investigation/Litigation prepared by OSI. The chronology references an Apr. 24, 1978 memo by the SLU about an article in *The United Israel Bulletin* concerning Koreh and Trifa. Simon Wiesenthal notified the SLU about Koreh in a July 21, 1978 letter to SLU chief Martin Mendelsohn.

13. Although OSI had investigated a range of allegations, including those leveled by the newspapers, in the end the government concluded that charges of murdering Jews and leading the Iron Cross were not sustainable. The documents connecting Koreh to the Iron Cross were photocopies. Although an FBI forensics examiner opined that Koreh "cannot be eliminated as the possible writer," he was unable to make a definitive determination absent the original documents. OSI was never able to get the originals from Romania and that part of the investigation was accordingly abandoned.

14. "Threats, Vandalism at Koreh Home," by David Voreacos, *New Jersey Record*, June 27, 1989; "Nazi Apologist in Engelwood? Daughter Denies U.S. Claim," by Ron Hollander, *New Jersey Record*, June 22, 1989. (The newspaper incorrectly reported the note as saying "You dog, you will die." A June 30, 1990 FBI teletype from Newark to FBI headquarters, re "Vandalism at 83 Grove Street, Englewood, NJ" makes clear what the note actually said.)

15. May 2, 1991 memorandum to File from Susan Siegal, then OSI Senior Trial Attorney re "Interview with John Schiman" Schiman was the NYO Assistant Special Agent in Charge of Terrorism.

16. Apr. 26, 1991 memorandum to File from Siegal re "discussion with Mary Lawton." Lawton was chief of the Justice Department's Office of Intelligence Policy and Review (OIPR).

17. Sept. 12, 1989 teletype from NYO to HQ.

18. Sept. 29, 1989 teletype from HQ to NYO. Regulations precluded – absent a written waiver by a supervisor – participation in a criminal investigation by anyone with a personal relationship with a person he knows has a "specific or substantial interest that would be directly affected by the outcome of the investigation or prosecution." 28 C.F.R. 45.735. The boyfriend did report the potential conflict to his supervisor but received only an oral waiver.

19. Although Trifa voluntarily surrendered his citizenship shortly before his denaturalization trial, and agreed to be deported in the midst of the deportation proceedings, the report did not see this as giving credence to the Justice Department's case. Instead, it attributed this to Trifa's desire "to avoid further embarrassment for his church and family and to eliminate protracted and costly litigation."

20. Both the magistrate and district court rulings are published at *United States v. Koreh*, 144 F.R.D. 218 (D.N.J. 1992).

21. The FBI had first presented its concerns to DOJ in Aug. 1989. The final court ruling on state secrets was in Sept. 1992.

22. *U.S. v. Koreh*, 856 F. Supp. at 893.

23. *Id.* at 898.

24. *United States v. Koreh*, 856 F. Supp. 891 (D.N.J. 1994), *aff'd, United States v. Koreh*, 59 F.3d 431 (3d Cir. 1995).

25. The case had repercussions for others beyond the defendant. As early as 1992, OSI reported its concerns about Koreh's daughter and her husband to the FBI/OPR (Office of Professional Responsibility). OSI was concerned about the propriety of the then-boyfriend working on a report about the defendant, and noted that at the same time as the report was being prepared, both the daughter and boyfriend were assisting the defendant in preparing his case. (Indeed, when deposed about the matter, the daughter described herself as part of the defense "support team" and asserted attorney-client privilege in response to some questions.) OSI questioned whether this presented a conflict of interest, whether there had been unauthorized disclosure of FBI information to defense counsel, and/or an attempt to sabotage a DOJ prosecution.

A month after OSI raised these issues, the husband wrote to DOJ/OPR complaining about the conduct of Director Sher and OSI attorney Susan Siegal. They had interviewed him in

July1991 when trying to sort out the merits in the allegations of the report. It was an admittedly tense session and the husband described their conduct as "reprehensible, professionally unethical and not, in any way, keeping with the high standards of DOJ attorneys." As he saw it, the OSI representatives were not seeking information but rather presenting him with "vitriolic rhetoric and self-serving narrative that could only be described as passionate zealotry." June 19, 1992 letter to Michael E. Shaheen, Jr., DOJ/OPR.

In June 1996, DOJ/OPR issued its findings. It found no misconduct by OSI. Acknowledging that "some of Mr. Sher's comments may have included words and phrases that could be colorful, his overall 'message' . . . was clearly one that needed conveying."

The FBI never authorized the criminal investigation called for in the New York report. FBI/OPR ultimately censured Agent Koreh and suspended her husband for seven days. (Many of the FBI supervisors involved in preparation of the report were no longer with the Bureau and were therefore immune from OPR review.)

Senior Officials

Andrija Artukovic – Justice Interminably Delayed

No case spawned as much litigation or extended over as long a period of time as that of Andrija Artukovic, the highest ranking Nazi collaborator ever found in the United States. Extradition proceedings were begun in 1951 – long before the creation of OSI; Artukovic was extradited in 1986. Collateral matters related to the case are still pending.

He was born in 1899 in Croatia, then a region within the Austro-Hungarian empire. Yugoslavia, created after World War I, was an amalgam of nations, including perennial enemies Serbia and Croatia. In April 1941, Germany invaded Yugoslavia and dismembered the young republic. One of the newly-created states was the "Independent State of Croatia," a Nazi puppet regime run by the fascist Ustasha party. The new government declared war on the United States in December 1941.

Artukovic served the Ustasha government in various capacities, including Minister of the Interior and Minister of Justice and Religion. In these positions, he promoted policies that victimized Serbs, Jews, Gypsies, Orthodox Christians and Communists. Among other things, he issued a series of decrees mandating internment of these undesirables, empowering summary courts to impose death sentences, calling for execution of Communist hostages, confiscating Jewish businesses, and limiting state and academic employment to Aryans. In a speech to the Croatian State Assembly, he described Jews as having:

> prepared the world revolution, so that through it the Jews could have complete mastery over all the goods of the world and all the power in the world, the Jews whom the other people had to serve as a means of their filthy profits and of its greedy, materialistic and rapacious control of the world.[1]

Approximately 25,000 Jews, 250,000 Serbs, and numerous Gypsies, Orthodox Christians and Communists perished in the Independent State of Croatia between April 1941 and May 1945. After the war, Communists who had fought the Ustasha regime assumed power. They reunited Croatia with the rest of Yugoslavia and placed Artukovic's name on the United Nations War Crimes Commission list of war criminals. He was referenced in the Communist press as "The Butcher of the Balkans."

Artukovic entered the United States in 1948 on a 90-day visitors visa issued to him under an assumed name. He settled in California and began working for a construction company owned by his wealthy brother. His visa was twice extended, the second extension expiring in April 1949. In an effort to ensure his continued presence in the United States, his Congressman introduced a private bill to retroactively bestow lawful admission on Artukovic and his family.[2] Although no action was taken on the measure – which identified him by his proper name – it triggered the government's investigation.

Artukovic's problems began when the bill was routinely sent to INS for review. INS' inquiries led to the realization that Artukovic had been unlawfully admitted under a false name and that he was wanted in Yugoslavia for war crimes. There were two options available for removing him from the United States – deportation and extradition. Both were pursued.

The two proceedings were filed in 1951. The deportation case began first. Artukovic did not challenge his deportability; he had, incontrovertibly, entered the United States under a false name and his visitors visa had long since expired. However, he sought refuge under a statutory provision that suspended deportation proceedings in cases where the defendant could show he was of "good moral character" and that deportation would impose "serious economic

detriment."[3] Artukovic was at that time the father of four, the youngest of whom had been born in the United States. The child was therefore a U.S. citizen. Artukovic argued that deportation would impose a severe economic hardship on his infant daughter.

Rather than litigating the economic issue, INS contended that Artukovic was ineligible for the exemption because he lacked good moral character. The government presented evidence to show that, as a cabinet minister, Artukovic had been a major Nazi collaborator, responsible for the deaths of innocent Serbs and Jews. The immigration judge agreed and the ruling was upheld on appeal.

> There appears to be little doubt (1) that the new Croatian state, at least on paper, pursued a genocidal policy in Croatia with regard to Jews and Serbs; (2) that Artukovic helped execute this policy in that, as Minister of Interior, he had authority and control over the entire system of Public Security and Internal Administration; and (3) that during this time there were massacres of Serbs and, perhaps to a lesser extent, of other minority groups within Croatia.
>
> [I]t is difficult for us to think of any one man, other than [the Croatian president] who could have been more responsible for the events occurring in Croatia during this period than was [Artukovic].[4]

Having failed to get the proceedings suspended, Artukovic next sought a stay of deportation by claiming that he himself would be the victim of persecution if he were returned to the communist country of Yugoslavia. In making this argument, he acknowledged that as a Cabinet minister he had authorized the persecution of communists. The judge postponed ruling on the stay application pending resolution of the extradition request.

The extradition was predicated on a Yugoslav indictment charging Artukovic with having murdered, or caused to be murdered, 22 persons, including the Archbishop of Sarajevo. As is customary in extradition proceedings, Artukovic was arrested pending the outcome of the

hearing. Although defendants are rarely released on bail in such circumstances, the court made an exception for Artukovic. The court felt he presented no flight risk and the judge was skeptical about the merits of the case.

> I am impressed by the date of the alleged offenses, 1941; and the fact that Yugoslavia was invaded by Germany on April 6, 1941, and thereafter occupied by Germany until 1945 and that the whole world and especially that portion of the world, was in a terrible turmoil. . . . I cannot help but think that it might be possible, if extradition treaties with various countries were carried out to the letter in connection with charges that might be made, they might demand the extradition of every person who was a member of any armed forces against them and charge them with having committed murder, because surely people who are members of armed forces do kill other people, and they kill them just as dead as they would if they privately did it and certainly with as much intention.[5]

Artukovic argued that the U.S. courts should not address the extradition request because (1) the treaty of extradition – entered into in 1902 between the Kingdom of Serbia and the U.S. – was no longer valid; and (2) the charges against him were political and therefore could not form the basis for extradition in any event.

The district court agreed with the first argument.. The court did not reach the issue of whether the crimes would be extraditable if there were a treaty.[6]

Up until this point, Yugoslavia had outside counsel representing its interests in court. The U.S., however, was concerned about the ruling as it was against the U.S. interest to have a judicial ruling that a change in government abrogates treaties. Accordingly, the U.S. joined Yugoslavia in successfully appealing the order. The Ninth Circuit reversed and sent the case back for a determination as to whether Yugoslavia's charges against Artukovic were political.[7]

The district court concluded that they were. It pointed to the "animus which has existed between the Croatians and the Serbs for many hundreds of years, as well as the deep religious

cleavage known to exist among the peoples in the Balkans." This ruling, affirmed by the Ninth Circuit, was vacated by the Supreme Court.[8] The matter then returned, yet again, to the district court, this time for a determination as to whether there was probable cause to believe Artukovic had committed extraditable offenses under the 1902 treaty.

The many appeals, reversals and remands had dragged on for eight years by the time the district court found no probable cause to believe that Artukovic had committed an extraditable offense.[9] It based this ruling on the fact that there was:

> no evidence . . . presented that the defendant himself committed murder. [Yugoslavia] relies entirely upon their evidence that members of the 'ustasha' committed murders upon orders from the defendant.

Although there was evidence that Artukovic had ordered internment, deportation, and in some cases killing, of civilians, the court analogized this to U.S. policy.

> It was common practice during World War II to intern anyone who was even suspected to be an enemy or possible enemy of the government in power. Our own government saw fit to intern all Japanese on the west coast, men, women and children of all ages, immediately following Pearl Harbor.

In the end, the court rejected the Nuremberg concept that leaders are accountable for decrees signed by them but carried out by others.

> To so hold would probably result in failure to find any candidate who would accept the responsibilities of such a position if he was going to be held to answer for crimes committed by his underlings without more definite proof that they were acting under his orders.

The request for extradition was denied. By law, the order could not be appealed.

Artukovic received more welcome news four months later. His long-pending application for a stay of deportation was granted. INS agreed with him that deportation to Yugoslavia would subject him to persecution because he had opposed the Communists when he was a

Cabinet minister. However, INS warned him that the stay was "subject to revocation at any time upon written notice to you." As it developed, it was 18 years before the government sought to lift the stay.

During that interval, Artukovic was not completely out of the public eye. In 1961, his name surfaced during Israel's prosecution of Adolf Eichmann. Witnesses in that case testified about the deportation and slaughter of Yugoslavian Jews at Artukovic's behest; one described futile pleas to Artukovic to spare the lives of children about to be deported to death camps.[10]

INS reviewed the matter periodically. As late as 1974, it solicited the State Department's views as to whether it was still likely that Artukovic would suffer persecution if he were sent back to Yugoslavia. The State Department concluded that the threat of persecution remained.[11]

The case resurfaced in 1977 when a delegation from the House Judiciary Committee went on an East European fact finding trip. They reported that Yugoslavia was "disappointed and revolted" by the fact that Artukovic had neither been deported nor extradited. The Yugoslavs wanted to try Artukovic for war crimes; they assured the lawmakers that the trial would be open to the public and would comport with U.S. standards of due process.[12]

Shortly thereafter, an INS Regional commissioner notified Artukovic that his stay would not be further extended unless he could provide new justification for an extension within 30 days. Rather than doing so, Artukovic sued the government to enjoin it from acting. He won at least a temporary reprieve when the court ruled that the government could not summarily lift the stay; the matter would have to be decided by the immigration courts.[13]

Before the matter returned to court, a change in the law substantially enhanced the government's position. The 1978 Holtzman Amendment eliminated the possibility of a stay of

deportation for aliens who had "assisted or otherwise participated in the persecution of persons because of race, religion, national origin, or political opinion on behalf of the Nazis and their allies."

After its founding in 1979, OSI's first court filing was a motion to lift Artukovic's stay on the ground that it was precluded by the Holtzman Amendment. In June 1981, the BIA granted OSI's request, concluding that the Holtzman Amendment applied to Artukovic because he had assisted in persecution. In reaching this result, the Board referenced its 1953 findings that Artukovic had been instrumental in persecution and therefore lacked good moral character. The BIA ordered Artukovic deported to Yugoslavia.[14]

Artukovic appealed and got yet another reprieve. The Ninth Circuit held that it was improper to rely on the 1953 finding to justify deportation in 1981. The Circuit reasoned that the underlying issue considered in the 1950s – whether Artukovic could establish that there would be economic hardship to his daughter if he were deported – was different from whether the government could show that he fit within the parameters of the newly-enacted Holtzman Amendment. Although in fact the evidence presented in the 1950s concerned Artukovic's involvement in persecution, it would not suffice. The government would have to ask an immigration judge to hold a new hearing on the question of Artukovic's involvement in persecution.[15] The government did so in February 1984 and the new hearing was set for January 1985.

Meanwhile, the Yugoslav government had been signaling its interest in filing a new extradition request. (There is no bar to filing an extradition request after an earlier one has been denied.)

In 1981, shortly after the BIA revoked the stay of deportation, and again in 1982 when the Ninth Circuit ordered a new hearing, Yugoslav officials met with their counterparts from the State Department and the Department of Justice to discuss the mechanics of extradition.[16] The following year, Martin Mendelsohn, former Deputy Director of OSI, and now a private practice attorney representing Yugoslavia, reiterated his client's interest. As OSI understood it from Mendelsohn, Yugoslavia "would welcome an indication from the US that [an extradition] request would be appropriate."[17] In July 1983, DAAG Richard, along with Acting OSI Director Sher and Murray Stein, Associate Director of the Department of Justice's Office of International Affairs (OIA – which handles extraditions), went to Yugoslavia to discuss the procedures involved.

At the same time that the Department of Justice was working with Yugoslavia on a possible extradition request, OSI was preparing for the new deportation hearing. In November 1983, an OSI historian went to Yugoslavia to do research. He found documents pertinent to the deportation case in the Yugoslav archives and asked that they be sent to OSI.

Yugoslavia submitted a formal request for extradition in August 1984, this time asserting that Artukovic was responsible for thousands of murders. Artukovic was arrested in November 1984 and his request for bail was denied. The deportation case was taken off calendar pending the outcome of the extradition hearing. Unlike the 1950s extradition hearing, this time the U.S. represented Yugoslavia in court. Lead counsel for the government was from the Los Angeles U.S. Attorney's office. He was assisted by OIA and OSI.

Artukovic at first attempted to block the hearing by asking another judge to hold the government in contempt. Artukovic claimed that extradition was an end run around deportation, designed to deprive him of the greater procedural safeguards and defenses available in a

deportation proceeding. His claim was summarily dismissed.

The first issue facing the extradition court was whether Artukovic was mentally competent to understand the proceedings and to assist his counsel. He was by this time 84 years old and suffering from a variety of ailments. Faced with conflicting testimony on the subject, the court appointed its own doctor to make an evaluation. Although this neutral expert found Artukovic incompetent and suggested delaying the proceedings while Artukovic underwent drug therapy, the court refused to do so. Based on his observation of Artukovic in court, the judge concluded that the defendant had good days and bad days. Accordingly, he fashioned a procedure to deal with the problem: a doctor was to prepare a daily report on Artukovic's condition. Court was convened on alternate half-days, Artukovic's health permitting.[18]

After losing the competency issue, the defense next contended that federal officials had impermissibly encouraged Yugoslavia to request extradition. Although such encouragement is not itself improper, Artukovic argued that the extraordinary time lag – it had been 25 years since the first extradition request had been denied – worked to his disadvantage and thereby deprived him of due process. The magistrate ordered Director Sher to court, warning that "If it develops that some politician was trying to run for higher office by railroading Mr. Artukovic back to Yugoslavia, that would be impermissible."[19] After hearing from Sher, the magistrate concluded that there had been no wrongful conduct by the Justice Department, and that the extradition had been at the behest of the Yugoslavs.[20]

Finally, on the merits of the extradition itself – Yugoslavia's claim that Artukovic was responsible for thousands of murders – the government submitted statements from 52 affiants. The court relied on the only two that presented eyewitness accounts of Artukovic's involvement

in the murder of civilians.

The first was from Franjo Trujar, a police official in the Ustasha regime. When interviewed in 1984, he signed an affidavit saying that he had been interviewed once previously – in July 1952 – and that his memory now was insufficient. His 1984 affidavit relied on his earlier statement for pertinent details. That document stated that Trujar had witnessed Artukovic ordering the death of an outspoken former member of the Yugoslav parliament.

The second alleged eyewitness affidavit was from Bajro Avdic, who had been a member of an elite Ustasha motorcycle escort assigned to Artukovic. Advic's 1984 affidavit said that he had heard Artukovic order thousands of deaths, including: (1) the machine-gun firing of approximately 450 men, women and children for whom there was no room in a concentration camp; (2) the killing of all the inhabitants of a town and its surrounding villages; (3) the murder of approximately 5,000 persons near a monastery; and (4) the machine gun execution of several hundred prisoners who were then crushed by moving tanks.

The magistrate ordered Artukovic extradited for the crimes set forth in the Trujar and Avdic affidavits.[21] That order was adopted in full by the district court.[22] Five days later, the Court of Appeals denied Artukovic's request for an emergency stay.[23] At 1:00 AM, February 12, 1986, just minutes after then Associate Justice William Rehnquist refused a request to delay the extradition order, Artukovic was flown to Yugoslavia.[24] He had been in custody since November 14, 1984.[25]

The deportation caused enormous consternation within the Croatian community, which had always seen the case as a Cold War issue. They feared that the Communists would not provide a fair forum for trial.[26] In Canada, a Croatian national set himself on fire in front of the

U.S. consulate as more than 2,000 people demonstrated to protest the deportation.[27]

Yugoslavia tried Artukovic two months after his arrival. The timing was dramatic because the history of wartime Yugoslavia was just then receiving worldwide attention from revelations that former U.N. Secretary General Kurt Waldheim had served as an intelligence officer in the Balkans. His unit had been involved in reprisal killings of partisans and Waldheim had been awarded a medal by the Ustasha regime.[28]

Artukovic's trial was broadcast on Yugoslav state television. Due to the tension between the Serb and Croat communities, Artukovic was kept behind bulletproof glass in the courtroom. Streets around the courthouse were blocked to traffic and policemen patrolled with machine guns and muzzled dogs.[29]

Trujar and Avdic both testified. Trujar had difficulty recalling any pertinent events; Avdic provided new details not mentioned in his earlier affidavit.[30] After four weeks of trial, Artukovic was convicted on all counts. Under international extradition practice, his conviction was limited to those crimes for which he had been extradited. Nonetheless, the Yugoslav court made clear that it believed him responsible for running two dozen concentration camps where between 700,000 and 900,000 Serbs, Jews, gypsies and other prisoners were tortured and killed.[31] He was sentenced to death by firing squad. Due to his failing health, the death penalty was later commuted;[32] he died in a prison hospital in January 1988.

As complicated and drawn out as the above proceedings were over 35 years, they were not the only litigation involving Artukovic. His case spawned several tangential lawsuits. In 1984, a class action was filed against him by Yugoslav Jews who themselves had served time in Croatian concentration camps or had close relatives murdered during the Ustashi regime. The

plaintiffs sought compensatory and punitive damages, claiming Artukovic had violated the Hague and Geneva conventions, international law and the Yugoslavian criminal code. The suit was dismissed, the court ruling that it lacked jurisdiction as to some matters, while others were barred by the statute of limitations.[33] In addition, Artukovic himself filed suit to enjoin his extradition and to recover $10 million in damages on the ground that the Justice Department had conspired with the government of Yugoslavia to deprive him of his civil and constitutional rights. That case too was dismissed, both because there was no legal basis to support the monetary claim, and because the extradition made the request for an injunction moot.[34] And finally, as trial began in Yugoslavia, the family of the parliamentarian whose murder Trujar had discussed, sought, unsuccessfully, to freeze Artukovic's U.S. assets.[35]

The issues surrounding Artukovic did not end with his death. In 1988, Artukovic's son sent a 135-page treatise to OSI, alleging that his father's extradition had been based on fraudulent documents.[36] He also filed a complaint with the Justice Department. His most serious allegation involved the Trujar and Avdic affidavits.[37] The son claimed that DOJ had improperly withheld documents that would have disproven the allegations contained in those documents. He pointed to earlier, somewhat contradictory affidavits by Trujar and Avdic as well as affidavits by others familiar with the incidents described by the two men. He also cited official Yugoslav reports from the 1950s questioning the reliability of the Trujar and Avdic accounts. None of these materials had been provided to the defense or the court, yet they arguably cast doubt on the accuracy of the affidavits filed in the 1985 extradition proceeding. Some of the doubt was due to minor discrepancies in recollection; some was more substantial, including a 1952 Yugoslav government report which said that Avdic "could not be used as a witness."

The son learned of this additional material from a variety of sources. Some documents came to light when a historian hired by the Artukovic family visited the Croatian Archives. He found the allegedly inconsistent documents, and discovered that some of them had been reviewed (or at least identified) by an OSI historian during his October 1983 visit to the archives. Moreover, at the OSI historian's request, these documents had been copied and sent to OSI. The son contended, therefore, that OSI should have been aware of the inconsistencies and known that the documents submitted in court were "fraudulent," especially since the same OSI personnel were working on the deportation and extradition matters.

The son pointed also to a 1988 book published by a former legal adviser in the Yugoslav Foreign Ministry. The author claimed that the events recounted by Avdic "never took place."[38] Although the book was published after the extradition was completed – and thus DOJ could not be held accountable for not knowing its contents – the son argued that OSI should itself have determined the veracity of Avdic's allegations. He pointed to OSI's oft-repeated claim that it gave close scrutiny to Communist-sourced material,[39] and questioned why no such scrutiny had been given in this case. An outside historian who had worked with OSI on the case gave some credence to the son's claims, publicly questioning the veracity of the 1984 Avdic affidavit.[40]

The son's allegations were referred to OPR for investigation. The charges – and the fact that OPR was investigating them – was given much play in the press.[41] Unfortunately for OSI, media coverage of the story tied it to charges of malfeasance surrounding the explosive *Demjanjuk* case.[42]

Reviewing its files to respond to the son's claims, OSI discovered that some (though not all) of the documents referenced were indeed in its files although they had never been reviewed

or analyzed. That was due to the fact that they had been ordered from the Croatian archive as part of the deportation case. They arrived shortly before the deportation case was placed on hold pending the extradition outcome. OSI therefore did not review the new documents but simply left them in a file cabinet.

While there were some inconsistencies between the material submitted to court and the additional material cited by the Artukovic family, OSI maintained that none of it was significant enough in any event to alter the outcome of the case. Moreover, one of the key documents which the son argued should have been provided had actually been introduced into evidence in the 1951 extradition proceeding. It therefore was, or should have been, known to the defense at the time of the 1984 extradition hearing.

More importantly, OSI argued that it was under no obligation to search its files for relevant material. Under established law, the U.S. government is not required to assess the validity of evidence presented by the requesting government in an extradition case. Nor is there a legal obligation to produce potentially exculpatory evidence to the defendant in an extradition proceeding.[43] The credibility of the requesting government's evidence is determined at trial abroad after the defendant is extradited. The question before the U.S. court is simply whether the requesting government's evidence is sufficient to establish probable cause that a crime has been committed and that this person committed it. OSI followed these standard procedures as it was directed to do by OIA.

Finally, OSI argued that the close scrutiny it gave to Communist-sourced evidence in Cold War era denaturalization and deportation cases was not appropriate in an extradition proceeding. In denaturalization and deportation, the evidence presented is on behalf of the U.S.

government. Therefore, the government is bound to satisfy itself about the reliability of evidence it is submitting. In extradition cases, the evidence is from, and on behalf of, the requesting government. If the United States were bound to determine the reliability of the evidence, the extradition would become a trial to resolve the guilt or innocence of the defendant. Extradition proceedings are designed to avoid that happenstance. Further details about the OPR investigation are unavailable at this writing.

The Artukovic case stands out in many respects. It was OSI's first filing. Artukovic was the only Cabinet official and the only Croat ever prosecuted by the office.[44] And he was the first OSI defendant to be extradited,[45] though he was followed just two weeks thereafter by John Demjanjuk. Artukovic matters have spanned decades. If one begins with the original INS deportation filing in 1951, the case and its progeny have been around for over half a century. By any measure, that is a testament to the arcane and labyrinthian procedures that apply in these proceedings.

1. "The Sins of the Father," by Carla Hall, *The Washington Post*, Aug. 24, 1992.

2. It was the first of eight such bills introduced between 1949 and 1961. H.R. 3504 (81st Cong.), H.R. 8186 (82nd Cong.), H.R. 6700 (83rd Cong.), H.R. 2789 and HR. 2790 (84th Cong.), H.R. 2844 and H.R. 4760 (86th Cong.), and H.R. 2185 (87th Cong.).

3. The 1978 Holtzman Amendment ended such exemptions for OSI defendants. *See* p. 40.

4. *Matter of Artukovic*, (BIA 1953).

5. Transcript of the Sept. 1951 bond hearing, as set forth in *Artukovic v. Boyle*, 107 F. Supp. 11, 34, n. 4 (S.D.CA, 1952).

6. *Artukovic v. Boyle, supra*, n. 5, 107 F. Supp. 11.

7. *Ivancevic v. Artukovic*, 211 F.2d 565 (9th Cir. 1954). *See* p. 575, n. 4 of the court decision for a discussion of the U.S. interest.

Reviewing what had happened in the Artukovic matter, DAAG Richard became convinced that in future, U.S. interests would be best served by having the U.S. represent the foreign government in extradition proceedings. Partly as a result of his urging, this became a standard feature negotiated in extradition treaties. (Specific criteria must be met before the U.S. will begin the litigation process.)

8. *Artukovic v. Boyle*, 140 F. Supp. 245 (S.D.CA, 1956), *aff'd, Karadzole v. Artukovic*, 247 F.2d 198 (9th Cir. 1957), *vacated, Karadzole v. Artukovic*, 355 U.S. 393 (1958). Decades later, the Ninth Circuit noted that its application of the "political offense" doctrine to Artukovic became "one of the most roundly criticized cases in the history of American extradition jurisprudence." With hindsight, the Circuit conceded that the doctrine should not have applied to Artukovic. *Quinn v. Robinson*, 783 F.2d 776, 798, 799-800 (9th Cir. 1986).

9. *U.S. v. Artukovic*, 170 F. Supp. 383 (S.D. Ca. 1959).

10. "Eichmann Trial Witness Shows How He Escaped Nazis' Wrath," by Homer Bigart, *The New York Times*, May 20, 1961.

11. July 23, 1974 letter to Milton Karchin, President, National Taxpayers Ass'n from INS Deputy Commissioner James F. Greene.

12. "Human Rights and U.S. Consular Activities in Eastern Europe," Report of the House C'tee of the Judiciary, 95th Cong, 1st Sess., Based on a Factfinding Mission to Four Eastern European Nations, pp. 47-48.

13. Although Artukovic had been told in 1959 that the stay could be lifted "at any time upon written notice," INS regulations had since modified the procedures for lifting a stay.

14. *In re Artukovic*, A7 095 961 (BIA 1981).

15. *Artukovic v. INS*, 693 F.2d 894, 899 (9th Cir. 1982).

16. Sher testimony at extradition hearing, Feb. 13, 1985.

17. Mar. 10, 1983 buck slip to Director Ryan from Deputy Director Sher.

18. "Nazi Suspect's Case Delayed," UPI, *The New York Times*, Feb. 26, 1985; "Court Orders Artukovic Sent to Yugoslavia," by William Overend, *The Los Angeles Times*, Mar. 5, 1985. Operating on this schedule, a five-day hearing extended over several weeks.

19. "U.S. Is Ordered to Respond in Yugoslav Extradition Case," *The Washington Post*, Feb. 12, 1985.

20. After the initial ruling, Artukovic asked the magistrate to reconsider the issue. Relying on a recently published book by a Yugoslav parliamentary official, he accused Sher of perjury. The book, *Ustashi - Minister of Death*, by Gojko Prodanic, stated that Justice Department officials had prodded the Yugoslavs to file a new extradition request. "Official May Have Lied," by Bill Farr, *The Los Angeles Times*, May 29, 1985. The motion to reconsider was denied.

21. The magistrate at first ordered the extradition only for the one murder described in the Trujar affidavit. Although he found probable cause to believe that the massacres described by Avdic had occurred at Artukovic's behest, they did not match any charges in the pending Yugoslavian indictment. They could therefore not form the basis of an extradition order. The magistrate gave Yugoslavia 60 days to amend its indictment to conform to information in the Avdic affidavit. It did so, and Artukovic was then ordered extradited for trial involving thousands of deaths.

22. *Artukovic v. Rison*, 628 F. Supp. 1370, 1378 (C.D. Ca. 1986). The district court opinion contains the full text of the magistrate's order.

23. *Artukovic v. Rison*, 784 F.2d 1354 (9th Cir. 1986).

24. "Nazi War Crimes Suspect Extradited," by Mary Thornton, *The Washington Post*, Feb. 13, 1986; "Artukovic Flown to Yugoslavia," by James Carroll and Larry Keller, *The Press-Telegram* (Long Beach, CA), Feb. 13, 1986; "Croatian War Criminal Sentenced to Firing Squad," by Michael Kaufman, *The New York Times*, May 15, 1986.

25. At one point, it looked as if he might be released on bail. Several months after his Nov. 1984 arrest, a different magistrate was assigned to consider whether Artukovic should be released on bail pending the outcome of the extradition hearing. The magistrate was favorably inclined, opining that it was "cruel and unusual punishment" to incarcerate someone with Artukovic's medical problems. "Man Accused of War Crimes is Scheduled to Have Bail Set," *AP*, *The New York Times*, June 29, 1985. Shortly after that statement was made, the case was sent back to the original magistrate and bail was denied. "Magistrate Sympathetic to Artukovic's Bail

Removed," by William Overend, *The Los Angeles Times*, July 10, 1985.

26. *See e.g.*, "Extradition Request by Belgrade Scored," *The New York Times*, Sept. 4, 1951; "Move 'Made Farce' of U.S. Justice, Backers Claim," by Susan Pack, *The Press-Telegram* (Long Beach, CA), Feb. 13, 1986.

The Cold War aspects of the case took some unexpected turns. In the 1980s, Yugoslavia granted passage to a terrorist wanted for planning the hijacking of a U.S. ship (the Achille Lauro) and the murder of one of its U.S. citizen passengers. In part, Yugoslavia justified its action by pointing to the U.S. delay in extraditing Artukovic, whom they deemed a terrorist. "Yugoslavs of Two Minds on Battling Terrorism," by David Binder, *The New York Times*, Dec. 19, 1985. Artukovic's attorneys maintained that the U.S. should retaliate by releasing Artukovic. Oct. 16, 1985 telegram from Artukovic attorney Gary Fleischman to Secretary of State George Shultz.

27. "Man Sets Himself on Fire at Protest of Artukovic Deportation," *AP*, Feb. 24, 1986.

28. *See* pp. 310-329.

29. "Yugoslav Court Refuses Delay of Artukovic Trial," by Carroll Lachnit, *The Orange County Register*, Apr. 15, 1986. "At Collaborator's Trial, Yugoslavs Face Their Past," by Michael Kaufman, *The New York Times*, Apr. 16, 1986; "Croat Becomes Confused at War Crimes Trial," *The New York Times*, Apr. 19, 1986.

There had been palpable tension in the U.S. proceedings as well. In 1959, the court made note of this in its ruling. *U.S. v. Artukovic*, 170 F. Supp. at 384. And in 1984, a Justice Department attorney from OIA was sufficiently concerned for her personal safety that she withdrew her name from a court filing. Nov. 7, 1984 memo to files re "Artukovic," from Murray Stein, Associate Director OIA.

30. "Artukovic Witness Confused," by Carroll Lachnit, *The Orange County Register*, Apr. 23, 1986. "For the First Time, a Witness Says Artukovic Killed Several Prisoners," by Carroll Lachnit, *The Orange County Register*, Apr. 30, 1986.

31. "Croatian War Criminal Sentenced to Firing Squad," by Michael Kaufman, *The New York Times*, May 15, 1986. "Artukovic, Extradited As Nazi War Criminal," by Ted Rohrlich, *The New York Times*, Jan. 18, 1988.

32. "Ailing Former Nazi Artukovic May Not Be Executed After All," by Carroll Lachnit, *The Orange County Register*, Apr. 25, 1987.

33. *Handel v. Artukovic*, 601 F. Supp. 1421 (C.D. Ca. 1985).

34. Artukovic had tried to fashion a right to be free from extradition in order to avail himself of the procedural safeguards which apply to deportation proceedings. *Artukovic v. U.S. Dep't of Justice, et al.*, No. 85-2135 (D.D.C. 1986). Once Artukovic was extradited, the parties agreed to dismiss the pending appeal.

35. "Yugoslavs Try to Freeze Collaborator's Assets," *The New York Times*, Apr. 17, 1986.

36. "Artukovic's Son Challenges U.S. Officials to Admit Error," *AP, The Los Angeles Times*, Feb. 13, 1988.

37. The other allegations, raised over a period of years, included charges that DOJ had improperly instigated the extradition request; that Sher had perjured himself in describing the government's contacts with Yugoslavia; that the government had misrepresented facts relating to the case in response to Congressional inquiries; that DOJ had abused the Freedom of Information Act by not turning over certain documents requested by the son; and that DOJ had not acted appropriately on his misconduct complaint.

38. "U.S. Nazi Hunters Target of Inquiry," by Jay Mathews, *The Washington Post*, May 8, 1990.

39. *See* pp. 538-539.

40. "U.S. Nazi Hunters Railroaded 'War Criminal,' Experts Say, by Michael Hedges, *The Washington Times*, Sept. 24, 1990.

41. *See e.g.*, "U.S. Nazi Hunters Target of Inquiry," by Jay Mathews, *The Washington Post*, May 8, 1990; "U.S. Nazi Hunters Railroaded 'War Criminal' Experts Say,"*supra*, n. 40; "Justice Department is Reviewing a 1986 War Crimes Case," by Jacques Steinberg, *The New York Times*, June 13, 1992.

42. *See e.g.*, "The Sins of the Father," by Carla Hall, *The Washington Post*, Aug. 24, 1992; "Ray of Hope in Son's Crusade," by Davan Maharaj, *The Los Angeles Times*, June 14, 1992; "U.S. Nazi Hunters Railroaded 'War Criminal,' Experts Say, *supra*, n. 40.

43. As discussed on p. 161, the Sixth Circuit did hold that there is such an obligation. *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993). However, that ruling is not controlling in other Circuits. The *Artukovic* proceedings were in the Ninth Circuit. Moreover, *Demjanjuk* was decided years after Artukovic had been extradited; OSI could not be expected to have foreseen its holding.

44. Others identified as Croatians and prosecuted by the office were in fact ethnic Germans (born in Croatia to German parents and self-identifying as German) *e.g.*, Anton Tittjung, Ferdinand Hammer, Michael Gruber and John Hansl. Moreover, changing borders made nationality ambiguous. In the case of Hammer, for example, the area in which he was born was part of Croatia only from 1941 to 1944, when it was annexed by the Independent State of Croatia. Croatia refused to recognize him as a Croatian or to accept him as a deportee. He ultimately was deported to Austria.

OSI did assist Croatia in bringing its own war crimes prosecution. In 1998, Croatia extradited from Argentina Dinko Sakic, the commandant of Jasenovac, Croatia's most notorious World War II concentration camp. OSI located a document in the National Archives that was used by the Croatian government at trial to establish the number of deaths at the camp. OSI also

provided the Croatian prosecutors with background material from the Artukovic file and the names of survivor witnesses who could testify about conditions at Jasenovac. In addition, a delegation from the Croatian judiciary met with the State Department's Special Ambassador on War Crimes and then with members of OSI's legal and historical staff to discuss the presentation of war crimes cases.

Croatia charged Sakic with crimes against humanity in the deaths of more than 2,000 Jews, Romani (gypsies), Serbs and Croatians. He was convicted of torture, abuse and murder, and sentenced to twenty years in custody. "Croat Convicted of Crimes at World War II Camp," *The New York Times*, Oct. 5, 1999; "Supreme Court Upholds 20-Year Sentence for War Criminal," *BBC*, Oct. 10, 2000.

45. The only previous extradition of a Nazi war crimes suspect was Hermine Braunsteiner Ryan in 1973, before OSI's founding. As noted on p. 2, that case was handled by INS.

Because of Cold War tensions and due process concerns about Soviet judicial procedures, the U.S. had no extradition treaty with the U.S.S.R. The U.S. therefore routinely rejected Soviet extradition requests. According to the State Department, there were 8 such requests between 1945 and 1977. Sept. 19, 1977 letter to Rep. Joshua Eilberg, Chairman, House Subctee on Imm., Cit. and Internat'l Law, from Douglas Bennet, Jr., Ass't Sec'y for Congressional Relations, State Dep't, reprinted in Vol. 1, "Alleged Nazi War Criminals," Hearing before the Subctee, Aug. 3, 1977, p. 55. As of this writing, there is still no treaty of extradition with Russia. However, a Mutual Legal Assistance Treaty (MLAT), providing for closer law enforcement coordination between the two countries, was approved by the Senate in Dec. 2001.

Otto von Bolschwing – An Eichmann Associate Who Became a CIA Source

Otto von Bolschwing worked with Adolf Eichmann and helped devise programs to persecute and terrorize Germany's Jewish population. As the chief SS intelligence officer, first in Romania and then in Greece, he was the highest ranking German prosecuted by OSI.

Von Bolschwing was an aristocrat who spoke several languages and had studied at the London School of Economics. He joined the Nazi party in 1932 and was a member of the Allgemeine SS, the racial elite of the National Socialist Movement. The Allgemeine SS formed the recruiting pool for the Gestapo and the SD, the intelligence-gathering arm for the Nazis. Von Bolschwing's career path was with the SD. From 1935 until 1937 he worked as its liaison in Palestine; from 1937 to 1939 he worked in its Jewish Affairs Office. That office collected statistical, economic and cultural information on Jews for use by the Nazi government. "The Jewish Problem," a report submitted by von Bolschwing in January 1937, proposed ridding Germany of Jews by forcing them to emigrate.[1]

> The Jews in the entire world represent a nation which is not bound by a country or by a people but by money. . . .
>
> The leading thought . . . is to purge Germany of the Jews. This can only be carried out when the basis of livelihood, i.e., the possibility of economic activity, is taken away from the Jews in Germany.

The report recommended extensive use of propaganda to make the populace recognize the pernicious impact of the Jews. Once people were informed, their anger could be harnessed to:

> take away the sense of security from the Jews. Even though this is an illegal method, it has had a long-lasting effect. . . . [T]he Jew has learned a lot through the pogroms of the past centuries and fears nothing as much as a hostile atmosphere which can go spontaneously against him at any time.
>
> Von Bolschwing recommended making passports in such a manner that the authorities

could "determine immediately whether the passport holder is a Jew." He recognized that this procedure was risky, however.

> It is expressly emphasized that such an identification can only be effected internally in order to avoid that foreign consulates refuse the issuance of a visa to the holder of such a passport.

He also urged denying passports to Jews for any purpose other than emigration and limiting the amount of money that emigrating Jews could take out of the country.

His later memos elaborated on these plans. His suggestions included having Jewish organizations assisting with emigration deal only with the SD and having foreign currency remittances from Jewish organizations abroad go directly to the SD rather than to Jewish organizations. In a letter to Eichmann (salutation "Dear Adolf"), von Bolschwing reported on snippets of an overheard conversation between two Jews and discussed ways to block their access to Germans who might assist them. The letter closed with "Heil Hitler."[2]

In 1939, the work of the Jewish Affairs Office was transferred to the newly formed Reich Security Main Office (RSHA). Von Bolschwing began working for this new organization which unified under one jurisdiction the SD, the Gestapo and the Criminal Police.

For a little over a year, beginning in January 1940, he served as chief of the SD agents in Romania. Von Bolschwing provided sanctuary to several Romanian Iron Guard leaders (including Trifa) after their January 1941 rebellion and helped arrange their escape to Germany.[3]

Near the war's end, he moved to Austria and allied himself with the underground and the Allies. He won accolades from the U.S. military. One U.S. officer credited him with:

> materially assist[ing] the armed forces of the United States during our advance through Fern Pass and Western Austria prior to the surrender of the German Army.

During our occupation, he personally captured over twenty high ranking Nazi officials and SS officers and led patrols that resulted in the capture of many more.[4]

In 1946, von Bolschwing was hired by the Gehlen organization, a group of former Nazi intelligence operatives who came under the aegis of the U.S. Army after the war. The group had provided Germany with data and sources useful in the war on the Eastern front; the U.S. wanted to develop and expand this material for use during the Cold War. Gehlen needed von Bolschwing to provide contacts among ethnic Germans and former Iron Guardsmen in Romania.[5]

In 1949, the CIA hired some members of the Gehlen organization; von Bolschwing was among those chosen.[6] The CIA knew about his Nazi party and SD connections. They also knew that he had supported the Iron Guard uprising and had helped leaders of that rebellion escape from Romania. He portrayed himself, however, as a Nazi gadfly[7] and the agency apparently accepted this characterization.[8] The agency was unaware that he had worked in the Jewish Affairs Office and that he had been associated with Eichmann.[9]

Although he never developed into a "first-class agent," the CIA was sufficiently grateful to help him emigrate to the United States in 1954.[10] The CIA advised INS about his past as they understood it. INS agreed to admit him nonetheless.[11] He entered under the INA as part of the German quota. Once here, he worked as a high-ranking executive for various multi-national corporations; he did no further work for U.S. intelligence agencies.[12]

Even before von Bolschwing emigrated, however, the CIA was concerned that he might have difficulty obtaining citizenship.

Grossbahn [von Bolschwing's code name] has asked a question which has us fairly well stumped. What should his answer be in the event the question of NSDAP [Nazi party] membership arises <u>after</u> his entry into the U.S., for example,

on the citizenship application forms? We have told him he is to deny any party, SS, SD, Abwehr [German military intelligence], etc. affiliations. Our reason for doing so runs as follows: his entry into the U.S. is based on our covert clearance. In other words, in spite of the fact he has an objectionable background, [ ] is willing to waive their normal objections based on our assurance that Grossbahn's services . . . have been of such a caliber as to warrant extraordinary treatment. Should Grossbahn later, overtly and publicly, admit to an NSDAP record, it strikes us that this might possibly leave [ ] with little recourse than to expel him from the U.S. as having entered under false pretenses. . . . At the same time, we feel such instructions might give Grossbahn a degree of control against us, should he decide he wants our help again at some future date – an altogether undesirable situation. What has Headquarters' experience been on this point? Have we instructed Grossbahn incorrectly? Cabled advice would be appreciated, as time to the planned departure date is running short.[13]

The response urged that von Bolschwing tell the truth.

Assuming that he has not denied Nazi affiliations on his visa application form, he should definitely not deny his record if the matter comes up in dealing with US authorities and he is forced to give a point-blank answer. Thus, if asked, he should admit membership, but attempt to explain it away on the basis of extenuating circumstances. If he were to make a false statement on a citizenship application or other official paper, he would get into trouble. Actually Grossbahn is not entering the US under false pretenses as [ ] will have information concerning his past record in a secret file.[14]

It is unclear precisely what the State Department knew at the time of von Bolschwing's entry. He himself told them that he had been a member of the Nazi party and the Waffen SS (the military wing of the SS). In fact he had not been with the Waffen SS, but with the Allgemeine SS. A handwritten (but unsigned) note in the CIA files suggests that the CIA may have told the State Department that von Bolschwing was a member of the SD.

Although the INS generally keeps all immigration records in one "A-file," von Bolschwing had a secret second file. A memo in his A-file references that file containing a January 13, 1954 letter which has "no bearing on immigration status." By the time OSI was interested in von Bolschwing, INS could not locate the secret file. However, the CIA had a

January 13, 1954 letter addressed to the Commissioner of INS; this was presumably a copy of the letter in the missing file. The letter stated that von Bolschwing had been employed by the CIA, a full investigation had been conducted, and there was no reason to believe he was inadmissible or a security risk. The letter made no mention of von Bolschwing's Nazi background and urged that his entry be expedited.

Von Bolschwing applied for citizenship in 1959 without revealing his membership in the Allgemeine SS, the Nazi party, the SD or the RSHA, even though such information would have been responsive to questions on his naturalization application. However, he did send a letter to the INS which suggested that he had intentionally withheld certain information which might be relevant to his application for citizenship.

> With regard to incomplete information on my application form . . . I spoke over the telephone to the information officer at your office . . . and was advised by him that my record, at your office, would contain such information which I am unable to give, and that I should submit my application as is pending subsequent explanation to be given by me verbally to your examiner.
>
> I am ready to give any additional information which you may require.[15]

The SLU first became aware of von Bolschwing while investigating the wartime activities of Valerian Trifa. The office recognized almost immediately that von Bolschwing might "be guilty of acts more heinous than anyone else currently under investigation."[16] In June 1979, just as OSI was getting established, attorney Eugene Thirolf interviewed von Bolschwing.[17] He denied membership in the SS. Although he acknowledged helping arrange for the escape of Iron Guard leaders, he described this simply as an effort to "create a peaceful settlement between the two warring parties."

OSI Deputy Director Martin Mendelsohn wrote to the CIA asking a series of pointed

questions.

(1) was there any objection to the initiation of proceedings and would von Bolschwing be able to "blackmail" the agency;

(2) would the CIA testify for him;

(3) had the agency known the full truth, would it would have assisted his entry into the U.S.;

(4) had the agency told von Bolschwing to reveal his Nazi background on his naturalization application;

(5) what information had the CIA given INS; and

(6) had von Bolschwing worked for the agency after coming to the United States.[18]

The answers were varied. The CIA did not oppose the case filing nor feel vulnerable to blackmail. While von Bolschwing had been valuable, and they would so testify, they would also make clear what information he had given (and what he had not) concerning his World War II activities. They would not testify that he had misrepresented his past although they were unclear as to whether they would have aided his entry into the United States if they had known everything. Although headquarters had directed that von Bolschwing be told to answer truthfully all naturalization questions, it was unknown whether that message (negating previous counsel) had been passed on to von Bolschwing. The agency had no role in von Bolschwing's obtaining citizenship and he had not worked for them since he came to the United States.[19]

It was clear to the OSI investigating team that von Bolschwing had withheld relevant and pertinent information both when he applied for a visa and again when seeking citizenship. Yet

the legal case was murky for a variety of reasons.[20] First was the problem of the secret file. Since it was missing, von Bolschwing might claim that all the omitted information must be in that folder. OSI could not rule out the possibility that this had occurred, although it seemed unlikely. While the CIA had only the January 1954 letter in its files, they could not be certain that other written and oral communications had not been made at the time of the visa application.

A separate problem existed with regard to naturalization. Von Bolschwing's 1959 letter to INS alluded to additional information which might be in a file and which von Bolschwing would amplify in an interview. There was no information in the files (although again the missing file could be key) but OSI needed to learn if there had been any verbal explanation offered. They spoke with the examiner who interviewed von Bolschwing as part of his naturalization process. After reviewing his notations in von Bolschwing's file, the examiner was confident that von Bolschwing had not provided any of the relevant and missing information. Thirdly, von Bolschwing might claim (and ultimately did) that his lack of candor was at the behest of the Agency. Von Bolschwing's CIA contact had since died so there was no way to determine whether he had ultimately been told to be candid about his background.

Despite these problems, Ryan believed the case was winnable and should be filed because von Bolschwing "played a significant role in the SD's program of persecution of Jews in the late 1930's."[21] He originally proposed charging misrepresentation both in the visa application and during the naturalization process. However, DAAG Richard feared that there were "too many potential defenses available to a charge that [von Bolschwing] materially misrepresented his background on entry to this country to warrant going forward on that basis."[22] He therefore directed OSI to prepare a complaint focused solely on the naturalization process.[23] Since the CIA

was not involved in the citizenship application, von Bolschwing alone could be accountable for any misstatements and concealments at that stage. AAG Trott agreed with this strategy.[24]

OSI filed a three-count complaint in May 1981 alleging (1) that von Bolschwing had procured his naturalization by concealment or misrepresentation since he failed to reveal his wartime activities and associations as part of his naturalization application; (2) that these memberships and activities were evidence of lack of good moral character requisite for citizenship; and (3) that his swearing to the truth of his naturalization application, when in fact the application was not truthful, was further evidence of lack of good moral character. The filing received much publicity. Von Bolschwing denied the charges, telling the press that he had been working for the OSS (predecessor agency to the CIA) during the war.[25]

By the time the case was filed, von Bolschwing was in a nursing home suffering from a progressive neurological disorder which impaired his memory and intellectual functioning. There were questions as to his capacity to understand and assist in the proceedings. Even before the filing his attorneys had sought to settle the case in light of this problem.[26] Ryan was amenable since he thought "serious due process questions" would be raised if the government tried to deport someone unable to understand or assist in his defense.[27] DAAG Richard supported the disposition. Given the circumstances, he viewed surrender of von Bolschwing's naturalization certificate as "a significant victory."[28]

The district court approved the settlement. Von Bolschwing made no admissions about his work in the Jewish Affairs Office, but did acknowledge concealing his membership in the Nazi Party, the SS and the SD at the time he applied for citizenship. He agreed not to contest the denaturalization and the United States agreed not to proceed with deportation proceedings

unless his medical condition improved. He was to be reexamined annually. A consent judgment was entered on December 22, 1981.[29] Von Bolschwing died 10 weeks later. He was 72 years old.

1. The report in OSI's files is not signed by von Bolschwing, though a cover letter contains a signature space with his name. Moreover, two SD memoranda referencing the report attribute it to him. Jan. 12, 1937 "Opinion on the write-up 'The Jewish Problem,'" by SS Senior Platoon Leader Kröder; unsigned Apr. 26,1937 memo re "Party Leader von Bolschwing (informer II 112)."

2. Nov. 20, 1937 letter from von Bolschwing to Eichmann.

3. *See* pp. 204-205.

4. June 7, 1945 memo "To Whom It May Concern" from Lt. Col. Ray F. Goggin, U.S. Army, 71st Inf. *See also*, Aug. 18, 1945 memo "To Whom It May Concern" from Capt. Edward Denges, U.S. Army, Inf., S-2, also released by the CIA in 2001 under the Nazi War Crimes Disclosure Act.

5. "The CIA and Eichmann's Associates," by Timothy Naftali, ch. 13 in *U.S. Intelligence and the Nazis*, by Richard Breitman, Norman Goda, Timothy Naftali and Robert Wolfe (published by the National Archives Trust Fund, May 2004), p. 346 (hereafter Naftali).

6. Naftali, *supra*, n. 5 at p. 349.

7. Von Bolschwing's Sept. 14, 1949 Statement of Life History submitted to the CIA.

8. *See e.g.*, undated memo for Director of Security from Chief, EE re "Request for Aid in Facilitating US Entry for Agent."

9. Sept. 17, 1980 prosecution memo from Ryan to DAAG Richard, pp. 7-8. The von Bolschwing-Eichmann nexus did not come to light until 1960. Following Eichmann's capture that year by the Israelis, Germany reinstituted an active investigation of him. Reviewing captured war records in the U.S., the Germans found reference to von Bolschwing. This information was shared with the U.S. authorities and the Israelis. Feb. 2, 1961 memo to Chief/CI/ [ ] re "Otto Albrecht Alfred von Bolschwing." (The blank brackets indicate information not released when the document was declassified and approved for release by the CIA in 2001 pursuant to the Nazi War Crimes Disclosure Act.)

10. Naftali, *supra*, n. 5 at p. 352. *See also*, Nov. 25, 1953 memorandum from American Consulate General, Munich, Germany to Department of State; undated memo to Director of Security from Chief, EE, re "Request for Aid in Facilitating US Entry for Agent."

11. As set forth in a CIA memorandum declassified in 2001 under the Nazi War Crimes Disclosure Act:

> The true story, as CIA then knew it, was made known to them and they agreed after consultation with our Alien Affairs Staff, to make the administrative decision to admit [von Bolschwing] as an immigrant. CIA did not provide a

> sponsor but we are on record with I and NS [sic] as vouching for [von Bolschwing] and providing all assurance that he was not a security hazard. His entry was in effect accomplished by the CIA statement that his services on our behalf were of such a nature as to override his otherwise undesirable background as defined by the McCarran Act.

Undated and untitled memorandum found in vol. 2 of CIA "Name File on Otto von Bolschwing."

12. CIA files released under the Nazi War Crimes Disclosure Act indicate that von Bolschwing was "instructed to refrain from applying for sensative [sic] jobs with the United States government which will entail a thorough investigation."

13. Oct. 29, 1953 memo to Chief, EE from Chief, Salzburg, re "Grossbahn - Termination."

14. Nov. 24, 1953 memo to Chief, Salzburg from Chief, EE re "Grossbahn Termination." The blank brackets indicate information not released when the document was declassified and approved for release by the CIA in 2001 pursuant to the Nazi War Crimes Disclosure Act.

A responsive memo advised that Grossbahn would be instructed "immediately" to answer "any and all such questions truthfully." Dec. 10, 1953 memo to Chief EE from Chief Salzburg re "Grossbahn - Termination."

15. Jan. 24, 1959 letter from von Bolschwing to INS, New York.

16. Feb. 28, 1979 memo from SLU Chief Mendelsohn to AAG Egan.

17. Thirolf described von Bolschwing as a dashing "Gary Cooper sort of character." Interview with Thirolf, Feb. 22, 2002.

18. Nov. 30, 1979 letter from Mendelsohn to the CIA.

19. Jan. 15, 1980 memo to Director Rockler and Deputy Director Ryan from OSI attorney Jeffrey Mausner re "Addition to Status Report on Bolschwing." The memo documents a Jan. 9, 1980 meeting at the CIA between officials of OSI and the CIA. *See also*, undated letter to Ryan from Joseph Kimble, a member of the CIA's Office of General Counsel. The Kimble letter was attached to Ryan's prosecution memo.

20. Prosecution memo, pp. 18-19.

21. *Id.*, p. 23.

22. Apr. 28, 1981 buck slip from DAAG Richard to AAG Lowell Jensen.

23. Apr. 22, 1981 memo to DAAG Richard from Ryan re "Otto A. von Bolschwing."

24. May 14, 1981 buck slip from AAG Trott to DAAG Richard approving the "modified complaint."

25. *See e.g.*, "California Man Accused of Nazi Crimes," by Robert L. Jackson, *Los Angeles Times*, May 28, 1981; "Probers Reject Nazi Suspect's Story," by Wayne Wilson, *The Sacramento Bee*, June 1, 1981.

26. Mar. 9, 1981 memo to file from Director Ryan.

27. Apr. 6, 1981 memo from Ryan to D. Lowell Jensen, Assistant Attorney General Designate for the Criminal Division.

28. Apr. 10, 1981 cover memo from DAAG Richard to AAG Jensen, forwarding the Ryan memo of Apr. 6. It is unclear whether DAAG Richard's concerns were directed at problems in the case itself (which had made him reluctant about the filing, *see* Dec. 3, 1980 memo from DAAG Richard to AAG Heymann) or the health issues, or both.

29. While the United States felt the settlement was justified because of the defendant's deteriorating health, the Soviet government called the settlement "a blatant outrage to the memory of millions of victims of the Fascists." "They Conceal Criminals," *Tass News Agency*, Dec. 26, 1981.

Karl Linnas – Cold War Politics and OSI Litigation

Karl Linnas, chief of a Nazi concentration camp in Estonia, was one of the highest ranking Nazi collaborators ever found in the United States. As the head Estonian in the camp, he ordered guards to fire on prisoners kneeling along the edge of an anti-tank ditch; the dead fell directly into their graves. His persecution of civilians was the crux of both the denaturalization and deportation cases filed against him.

The legal proceedings, begun in November 1979, were one of the first OSI filings. Linnas never seriously contested the facts. He refused to participate in the deposition of Soviet witnesses on the ground that their testimony – taken in the presence of Soviet authorities – would be inherently unreliable.[1] He also defied the court's order to answer certain questions at his own deposition and presented no evidence countervailing any offered by the government.[2]

Linnas was denaturalized in 1982 and ordered deported two years later.[3] His case illustrates, arguably better than any other OSI matter, the impact of the Cold War on OSI prosecutions.

Linnas was born in Estonia, a nation forcibly annexed by the Soviet Union in 1940. The United States did not recognize the legitimacy of the Soviet annexation and yet, as a practical matter, until 1992 Estonia no longer existed as an independent country. Therefore, in the 1980s, whether and how someone could be deported to Estonia presented a political conundrum. The issue was complicated by the fact that the Soviets had charged Linnas with having taken an active part in the killing of 12,000 persons during the war.[4] He had been convicted and sentenced to death *in absentia* by the Soviet Union in 1962. Deportation to Estonia (on Soviet soil as a result of the annexation) therefore could have life or death consequences as well as

significant repercussions on foreign affairs.[5]

When the U.S. immigration court ordered Linnas to designate a deportation designation, he chose "the free and independent Republic of Estonia," explaining that this should not be confused with "the puppet government formed by the Soviet occupiers of Estonia." For Linnas, the free and independent Republic referred to the government "still recognized by the United States." That was a government-in-exile, led by Estonian emigrés and operating out of offices in New York City.[6]

The immigration court did not address the issue of "the Free Republic of Estonia." It simply ordered Linnas deported to Estonia or, if that country were unwilling to accept him, then to the U.S.S.R. The U.S.S.R. was chosen by the immigration court because it was the country in which Linnas' place of birth – Estonia – was situated.[7]

Linnas and his supporters challenged the ruling both in the court of public opinion and judicially. In both arenas they stressed Cold War concerns. Thus, his daughters argued in a letter to the Estonian community that:

> . . . U.S. government offices have been infiltrated by Soviet supporting activists.
>
> The creation of the Office of Special Investigations (OSI) in the Justice Department is one typical example. The persecution of so called "war criminals," 40 years after it supposedly happened, is just an attempt to silence anticommunist groups by leading Soviet style court cases in the U.S. and to promote communism in the free world.
>
> The denaturalization of our father . . . by [a judge] who accepted Soviet supplied "witnesses and documents" in U.S. courts is only the continuation of the 1962 Soviet "show trial". . . . As a final measure, the immigration judge . . . also accepted the Soviet "information". . . .[8]

While Linnas' judicial appeal raised a variety of issues, only one resonated with the BIA.

That was that designation of the U.S.S.R. was unreasonable in light of the United States' refusal to recognize the legitimacy of the Soviet annexation of Estonia. The BIA ordered a new deportation hearing. The immigration judge was told to "consider the implications of the United States' refusal to recognize the Soviet annexation of Estonia, [to] designate a country of deportation pursuant to the appropriate [statutory] provisions . . . and [to] articulate the statutory basis for selection, whichever country is designated."

OSI contacted West Germany (FRG) to determine whether it would accept Linnas. The basis for the request was that Linnas had resided in the FRG from 1945 to 1951 and had embarked for the United States from Munich. However, the FRG remained steadfast in the position it had adopted in the *Trifa* case: it would admit only German citizens.[9] Linnas did not qualify.

In preparation for a new hearing before the immigration judge, the Justice Department sought input from the State Department. State was not anxious for a deportation to the Soviet Union. In light of the "special sensitivity" of the question, the State Department felt it would be "in the interest of the United States" to "more fully . . . explore the feasibility . . . of deporting Linnas to another country."[10] The State Department asked U.S. embassies to make overtures to 17 nations: Brazil, Colombia, Czechoslovakia, Germany, Greece, Israel, Italy, the Philippines, South Africa, Sri Lanka, Sweden, Switzerland, Thailand, Turkey, Venezuela, the United Kingdom and the U.S.S.R.[11] OSI reached out to the Canadians, Germans, Israelis and Russians. Of all the nations contacted, only the U.S.S.R. responded affirmatively.

After discussing the matter with the White House (NSC staff), the State Department prepared a declaration for submission to the deportation judge.[12] It stated that since no country,

other than the U.S.S.R., was willing to accept Linnas, a deportation to that country "would not as a matter of law contravene the longstanding and firmly held United States policy of nonrecognition of the forcible incorporation of Estonia into the U.S.S.R."

Linnas urged the court to consider the consequences of sending him to the Soviet Union. He pointed out – correctly – that his death sentence had been reported in the Soviet press even *before* his 1962 trial *in absentia* had taken place.[13] He argued that this demonstrated the impossibility of getting a fair trial in the Soviet Union. He also contended that his deportation "would lead the Soviets, as well as others, to believe that the United States can be indifferent to the process by which the Gulag acquires its inhabitants; that our concern for the religious, political and ethnic dissidents in Soviet camps, jails, insane asylums and internal exile is but a passing fancy to be ignored." Linnas accused OSI of having an "urge to kill" him and questioned whether the State Department (which he saw as a "rubber stamp" for OSI) had made sincere efforts to find an alternative deportation destination.[14]

Although the U.S. argued that a deportee's treatment in the receiving state is "legally irrelevant" to determining the appropriate country of deportation,[15] the government was fairly confident that Linnas' earlier conviction and death sentence would not be binding. As early as August 1984, officials from the Soviet embassy had assured DAAG Richard and Director Sher that a new trial was "most likely."[16]

Before the new deportation proceeding began, Linnas galvanized political support. United States Senator Alfonse D'Amato (R-NY) and Congressman Don Ritter (R-Pa.) both argued that deportation to the Soviet Union would violate U.S. policy against recognizing Soviet incorporation of Estonia. They suggested he be sent to Israel for prosecution.[17] This, however,

was not a viable option. Years earlier the Israelis had told DAAG Richard and Director Sher that they would not accept Linnas because the critical incriminating evidence against him came from the Soviet Union. Since Israel did not have diplomatic relations with the U.S.S.R., it lacked access to the evidence.[18]

At Linnas' new deportation hearing, several people from the Baltic emigré community testified on the importance of the non-recognition doctrine. The immigration court was not persuaded. The court held that deportation to "the free Republic of Estonia" would be fruitless, since that entity, housed in the United States, lacked the authority to accept him. The court rejected the argument that the U.S.S.R. was not a proper designation because Linnas' conviction there did not comport with U.S. notions of due process. The court concluded that the U.S.S.R. was the proper destination both because it was the country within which his place of birth was now situated and because it was the only country willing to accept him.

Although this was a victory for OSI, it was not in accordance with the very constrained mandates of the State Department, as set forth in their carefully worded declaration. The declaration had sanctioned deportation to the Soviet Union only because it was the sole country willing to accept Linnas. By citing an alternative basis for deportation, the court had arguably given credence to the Soviet position that Estonia was now part of the U.S.S.R. This was a cause of concern to the State Department. Since Linnas was appealing the ruling, OSI had an opportunity for judicial reconsideration of the basis for deportation. At the State Department's request, OSI argued that deportation to the U.S.S.R. was appropriate *only* on the ground that it was the sole country willing to accept Linnas.[19]

The BIA accepted the argument. Although the panel acknowledged that Linnas had been

sentenced to death "in what appears to have been a sham trial," it was not persuaded by his argument that deportation to the Soviet Union would deprive him of life without due process of law.

> [T]he Constitution does not extend beyond our borders to guarantee the respondent fairness in judicial proceedings in the Soviet Union. Moreover, under our immigration laws there is no requirement that a foreign conviction must conform to our constitutional guarantees.

Linnas appealed to the Second Circuit. Rudolph Giuliani, then the U.S. Attorney for the Southern District of New York, argued the case.[20] Shortly after the argument, OSI learned that Linnas had begun having his Social Security payments deposited directly into his account rather than sent to his home. Fearing that Linnas was planning to flee, INS began surveillance of his home, his workplace, the home of one of his daughters, and the home of an acquaintance. He was not seen at any of the sites. Sher worried that Linnas, as the "poster boy" for anti-Soviet sentiment, might have an underground support network which would help him flee to Canada.

Before the Second Circuit issued its ruling, the U.S. Attorney's Office asked Linnas' attorney to bring his client to a meeting to discuss custody. Linnas and his attorney appeared at the requested time, whereupon Linnas was arrested. His attorney was outraged and accused OSI of having masterminded this perceived perfidy.[21]

While Linnas was in custody, the Second Circuit affirmed the deportation order. The court scoffed at Linnas' designation of "an office building in New York" as a deportation destination, saying it amounted to "wasting the opportunity to choose a proper place of deportation." The court acknowledged that there might be circumstances where the fate awaiting a deportee was so inimical to the court's sense of decency as to warrant judicial

intervention. This, however, was not such a case.

> The foundation of Linnas' due process argument is an appeal to the court's sense of decency and compassion. Noble words such as "decency" and "compassion" ring hollow when spoken by a man who ordered the extermination of innocent men, women and children kneeling at the edge of a mass grave. Karl Linnas' appeal to humanity, a humanity which he has grossly, callously and monstrously offended, truly offends this court's sense of decency.

The planned deportation was attacked from a variety of quarters. Amnesty International was opposed because Linnas faced the death penalty in the U.S.S.R.[22] White House advisor Patrick Buchanan, emphasizing that he was speaking personally rather than institutionally, stated that it was "Orwellian and Kafkaesque to deport an American citizen to the Soviet Union to stand trial for collaboration with Adolf Hitler when the principal collaborator with Hitler in starting World War II was that self-same Soviet government."[23] Others urged the passage of legislation allowing alleged World War II war criminals to be charged criminally in the United States.[24]

Linnas' daughters also renewed their pleas for help in a letter addressed to "Concerned Americans."[25]

> Civil trials do not permit juries, cross-examination of the witnesses, nor equal access to the records. This particular kind of civil matter well illustrates how our father has been denied the basic Constitutional right to due process: cross-examination, jury trial, and access to court appointed counsel. This kind of proceeding has brought forth a criminal death sentence to our father who has been denied a criminal trial!
>
> It is difficult to politically criticize the OSI without the risk of being branded anti-Semitic or nazi sympathizer. However, in a free society, we are able to question and challenge any government institution. *It is urgent that we now put aside our fears and inhibitions and bombard the Congress, the Senate, and the Executive branch of government with telephone calls and letters expressing our disapproval of OSI methods.*

(italics in original)

In addition to these appeals to the court of public opinion, Linnas asked the Supreme

Court to review his case. He also replaced his counsel with Ramsey Clark, who had been Attorney General of the United States during the Lyndon Johnson administration.[26] The key argument presented in the Supreme Court petition was that the pending death sentence in the Soviet Union made it an improper destination for deportation.

The government did not see this as an impediment. Officials at the Soviet Embassy had again assured the office of the "strong" likelihood that Linnas would be retried. Moreover, they indicated that the proceeding would be open to the public.[27] The Soviets "made it very clear that out of all of OSI's defendants, Linnas was the person who they most thought was deserving of criminal punishment and who they were most interested in having back on their territory." They felt his deportation would be the "crowning achievement" in their relationship with OSI.[28] The U.S. was confident its own evidence –"solid [and] irrefutable" – would be used by the Soviets, thereby precluding a sham conviction.[29]

In anticipation of a denial of certiorari, OSI began to plan the details of deportation. At the time there were no direct flights to the Soviet Union. There would have to be a stopover, and OSI did not want this to be in a Western country where a request for asylum might lead to new proceedings. Sher believed that Eastern European countries, knowing the Soviet's intention to get Linnas within their territory as quickly as possible, would not be receptive to an asylum request.

OSI contacted various Warsaw Pact nations. In the end, Czechoslovakia was the pass-through nation. But in an unusual circumstance, Poland too had granted permission for a stopover.

Bruce Einhorn, then Deputy Director for Litigation, went to the Polish Embassy in