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The OSI and the Nazis: America's Struggle to Expel Nazi War Criminals and Their Allies Decades After the Second World War

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The OSI and the Nazis: America's Struggle to Expel Nazi War Criminals
and Their Allies Decades After the Second World War

by

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Abstract

This thesis examines the history of the Office of Special Investigations' campaign to identify, denaturalize, and deport Nazis and Nazi collaborators. By analyzing documents from the work of the Office's predecessor, the Special Litigations Unit, in 1977, up to and including the case of George Lindert in 1995, this research aims to provide an understanding of the Office's origins, methods, and motivations. This work was done through the consultation of court records, internal memos, letters, an official government report on the Office's activities, other literature written on this topic, and interviews conducted by the author with two former members of the Office of Special Investigations. This paper finds that while the Office did manage to bring numerous persecutors to justice, and greatly contributed to the broader understanding of the inner-workings of the Holocaust, the long delay before the United States undertook these proceedings, the lack of clarity in the law regarding the subject, and the highly political nature of this public effort all resulted in inconsistent and sometimes questionable outcomes. Going forward, proactive investigations and clear legislation could aid in avoiding such difficulties in the future.

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Timeline

1948 – Displaced Persons Act

1953 – Refugee Relief Act

1973 – Case of Hermine Braunsteiner Ryan

1977 – Formation of the Special Litigation Unit

1978 – Passage of the Holtzman Amendment

1978 – Start of Fedorenko Case

1979 – OSI Created; Takes Over Fedorenko Case

1984 – Fedorenko Deported to the USSR

1987 – Fedorenko Executed by the USSR

1992 – Start of Lindert Case

1995 – OSI loses Lindert Case

Introduction

In 1979, the US Attorney General signed off on the creation of a new section within the Department of Justice's Criminal Division dedicated solely to the identification, denaturalization, and deportation of Nazis and their collaborators who had immigrated to the United States in the wake of the Second World War. This marked the inception of the Office of Special Investigations (OSI).

The government made this decision in response to growing cultural and political outrage at the previously underappreciated presence of potentially hundreds of Nazi war criminals hiding in plain sight in American society. In an effort to assuage this panic and send a message that the United States intended to pursue justice no matter the obstacles posed by the time and distance from such heinous acts, the OSI quickly sprang into action to investigate and prosecute as many cases as could be found as expeditiously as possible.

Aware of the multitudes desperate for sanctuary after the Second World War, Congress passed both the 1948 Displaced Persons Act (DPA) and the 1953 Refugee Relief Act (RRA) that allowed the admission and resettlement of several hundred thousand European migrants. Given that these refugees had been created by the circumstances of the war, it only made sense to include language that excluded those who had created those circumstances. As such, the acts prohibited the entry of those who personally engaged in or assisted in persecution. This specific aspect of the law formed the crux of the OSI's charge.

The OSI faced the practical pressure of time as it not only made investigations more difficult by eroding potential evidence of the alleged incidents, but the advanced age of the respondents also threatened to allow them to avoid justice as they either became incompetent to

stand trial or even passed away before they could face the court. Geography worsened matters as the investigators were forced to reach overseas to gather evidence from countries with varying relationships with the US that often offered only selective access to their records.

Additionally, the political momentum that created the Office also demanded that it prove its worth through satisfying results. Politicians and the US Government wanted a justification for the effort of creating the Office, while the public, particularly Jewish-American organizations, needed a release valve for their frustrations regarding the perceived lack of accountability for war criminals. This outside pressure weighed on the OSI's motivation and, as explored in this analysis, may have spurred an over-emphasis on victory instead of accuracy and ethical practice.

The OSI argued that demonstrating the inherent brutality of the group their defendants had been a part of was sufficient to claim assistance in persecution. This approach enabled them to pursue cases in which their ability to discern and establish personal details was weakened by time and the disarray of the immediate post-war era—so long as historical data could be used to place the defendants within the Nazi wartime structure.

The two main cases examined here display opposing trajectories for determining legally meaningful assistance in persecution: those of Feodor Fedorenko and George Lindert. The 1978 case of Feodor Fedorenko laid the groundwork for the OSI's future successful prosecutions. Fedorenko was a Ukrainian drafted into the Red Army, captured by the German Wehrmacht, and pressed into service as a guard for both a Jewish ghetto and the Treblinka death camp. He admitted that he at least half-heartedly obeyed his orders, but claimed he had only done so out of fear since he was a prisoner himself and was only doing what he had to do to give himself the best chance of survival in the situation. Three years and a Supreme Court decision after the first

hearing of his case, the court found Fedorenko accountable for his contribution to the oppressive system in which he participated.

In the 1992 case of George Lindert—a man who willingly joined an organization, the SS, solely dedicated to the oppression and murder of members of groups targeted by the Nazis—the government failed to convince the judge of Lindert’s bad nature due to the lack of direct evidence that he followed the orders assigned to his group despite the fact that he managed to hold his job as a guard until the end of the war.

The reasons for the discrepancy between these verdicts largely sprang out of the difficulty of presenting compelling cases to individual judges faced with finding certainty among an uncertain collage of stories. Provided with the Supreme Court’s broad interpretation of personal assistance in persecution as any action that tangentially facilitated the Nazis’ crimes, there was no objective metric to determine the limits of culpability. Somehow, the ethnic German who willingly joined the SS was deemed fit to remain a US citizen, while the Ukrainian captured and coerced into service was deported to the USSR and executed.

The first chapter will examine the circumstances of the OSI’s creation, the obstacles that shaped the organization’s strategy, and present sample cases that highlight the Office’s tactics. The next chapter looks at the story of Feodor Fedorenko, how his case became a defining milestone for the government, and the legacy of his fate. After Fedorenko, George Lindert’s case will provide insight into the later work of the Office and question how the system enabled this man to escape retribution for his wartime actions. Finally, the epilogue will explore the reasons for the two radically different conclusions in these cases and look for answers on how we can avoid the pitfalls the OSI encountered.

The OSI

In his influential work *The Magic Mirror*, legal scholar Kermit Hall attributes a sharp rise in legal filings between 1960 and 1980 to a combination of a “brittle social order and rapid technological advancement” that led Americans to turn to the law for solutions.¹ The beginnings of the OSI reflect this outlook as they represent an attempt to resolve the deep moral questions of the Holocaust by focusing purely on the law.

The denaturalization case of Hermine Braunsteiner Ryan, who “served as a guard supervisor at a Nazi death camp,” along with media reflections on the Holocaust during the 1970s, drew the public eye to the issue of Nazi persecutors living in America.² Soon, dissatisfaction with the Immigration and Naturalization Service’s (INS) investigatory capacity led to the push for a new entity to take over these cases on a national level.³ An internal INS task force designated the “Special Litigation Unit” (SLU) sprang into existence and carried out this task for about a year before the OSI took over.⁴ However, the lack of any statutory basis for the deportation of naturalized Nazi persecutors and collaborators prior to this outcry hampered the SLU’s work. To assist their mission, Congress passed H.R. 12509, known as the Holtzman amendment, making it illegal for those “who persecuted any person...under the direction of the Nazi government” to gain admission into the country.⁵ As an amendment to the Immigration and Nationality Act, this gave the government the ability to retroactively claim that a defendant’s naturalization was illegal, and therefore invalid.

¹ Hall, Kermit L. *The Magic Mirror: Law in American History*, (New York: Oxford University Press, 1989), 287.

² Feigin, Judy, “The OSI: Striving for Accountability in the Aftermath of the Holocaust.” United States Department of Justice, Criminal Division. December 2006, p. 2.

³ *Ibid*, p. 2.

⁴ *Ibid*, p. 4.

⁵ 95th Congress. “Public Law 95-549.” October 30, 1978.

Although it did not argue any landmark cases to completion, the guidelines laid out in the SLU's handbook created the formula for constructing and arguing cases that the OSI inherited when it took over in 1979. The Special Litigation Unit explicitly instructed that denaturalization could only be pursued if the government could confidently allege that the subject "procured [naturalization] by concealment of a material fact or willful misrepresentation or procured [naturalization] illegally."⁶ In addition to dishonesty, the "lack of a good moral character" required for obtaining naturalization, as demonstrated through participation "in heinous acts and crimes," would be considered disqualifying.⁷

Since the OSI lacked the ability to prosecute the defendants for war crimes committed in foreign land on non-Americans, it is important to note that all of these cases came before courts as "civil matters."⁸ As such, there was no requirement to persuade a jury of the defendants' guilt beyond a reasonable doubt. Despite this, the SLU anticipated a high bar for any judge to accept the government's argument and instructed its agents to seek a level of "clear and convincing evidence" in their cases which the courts had determined to be functionally equivalent to the standard of beyond reasonable doubt.⁹

The founders of the OSI believed "that time [was their] greatest enemy."¹⁰ As memories weakened, witnesses passed on, and defendants became frail, it became harder to build vigorous

⁶ Special Litigation Unit, "Denaturalization and Deportation Proceedings Handbook," p. 1. 2015.310.1, Box T-22, Folder 12, The Walter Rockler Papers, United States Holocaust Memorial Museum Archives, Washington, DC.

⁷ Ibid, p. 4.

⁸ Feigin, p. 33.

⁹ Special Litigation Unit Handbook, p. 5 and Elizabeth B. White, "History in the Courthouse: The Presentation of World War II Crimes in U.S. Courts Sixty Years Later," in *Nazi Crimes and the Law*, ed. Nathan Stoltzfus and Henry Friedlander, (Washington DC: Cambridge University Press), p. 176.

¹⁰ Heyman, Philip B., "Letter to Bertram H. Gold." May 1980, p. 1. 2015.310.1, Box T-22, Folder 9, The Walter Rockler Papers, United States Holocaust Memorial Museum Archives, Washington, DC.

cases. Additionally, the fact that the allegations required the OSI to convincingly place the accused in various regions along the brutal Eastern Front of WWII that were now divided up among numerous governments—usually lying behind the Iron Curtain—added the additional challenge of sending expeditions to gather whatever concrete evidence had not been lost in the chaos of the war’s aftermath and persuade various foreign entities to release them to the US for these proceedings. Beyond historical documentation, the US had to rely on these nations’ investigatory prowess for on-the-ground fact-finding and witness interviews and verify that the evidence supplied had not been fabricated or corrupted to advance the Communists’ political agenda. As former OSI historian Judit Schulman shared in an interview, some governments, including the Hungarian government she interacted with as a part of her research, were reluctant to provide documents that the United States might use for political advantage. This added extra diplomatic demands and drained manhours that could otherwise have been devoted to preparing cases.

In order to avoid entanglement and failure in the United States’ robust appeals system, the OSI needed to ensure they had reliable sourcing for their evidence. To this end, they had to come to clear agreements with partnering countries about quality in the content and gathering of evidence. In control of most of the territory where witnesses and evidence resided, the Soviet Union agreed to have face-to-face negotiations with the OSI shortly after the office’s formation.¹¹ In a three-day meeting facilitated by the American embassy, Director Rockler and Deputy Director Allan Ryan met with their counterparts at the Procurator’s office in Moscow at

¹¹ “Unofficial Record of Discussions re Nazi War Criminals in the United States.” American Embassy in Moscow. March 1, 1980, p. 1. 2015.310.1, Box T-22, Folder 9, The Walter Rockler Papers, United States Holocaust Memorial Museum Archives, Washington, DC.

the end of January 1980 to determine the feasibility of a joint investigative effort between the two Cold War rivals.¹² Fortunately, their mutual animus towards Nazis, strengthened by the shared experience of the Nuremburg trials, led to both sides taking earnest steps to find a way to cooperate.¹³

While the Soviets agreed to share whatever witnesses the US required, they assessed that not more than “one in ten” could travel to the United States due to their age and the logistics of such a trip, and so the US courts needed to rely on testimony through taped depositions or cumbersome “commissioner” questioning by a US representative.¹⁴ Additionally, Soviet officials firmly denied the Americans’ request to borrow original documents, as these primary sources were crucial for the USSR’s own prosecution of war crimes.¹⁵ Instead, the Americans had to settle for sending experts to remotely view and analyze the data.¹⁶

The OSI also needed to consider the importance of appeasing their friendlier partners to avoid straining their working relationship. In particular, leadership made a point to keep close ties with Israel as a major ally in the hunt for Nazi war criminals. Immediately after his meeting in Moscow, Rockler travelled to Israel and spent several days introducing himself to ministers and visiting museums and historical sites to show respect.¹⁷ This close bond continued upon the succession of Allan Ryan to the directorship in May of 1980, as shown in the intimate letter the Chief Superintendent of the Israeli police sent to him as congratulations for the promotion with

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid, p. 4.

¹⁵ Ibid, p. 5.

¹⁶ Ibid.

¹⁷ “Visit to Israel of Mr. Walter Rockler and Mr. Alan Ryan and Mrs. Rockler.” January 31st-February 5, 1980. 2015.310.1, Box T-22, Folder 9, The Walter Rockler Papers, United States Holocaust Memorial Museum Archives, Washington, DC

the promise that his department would do “all in [its] power” to aid the OSI in their “mutual dedication” to the cause of pursuing Nazis.¹⁸

Adaptation

Faced with the daunting task of establishing the context of each defendant’s wartime activities, the OSI bolstered its ranks with a cadre of dedicated historians, and additionally reached out to experts in relevant subjects to give expert testimony when needed. In a management review on June 5, 1980, the government accounted for eighteen attorneys, ten investigators, and five historians within the OSI.¹⁹

Political involvement on the part of Congress also shaped much of the movement in the office early on. Congresswoman Elizabeth Holtzman, the original and foremost advocate for the creation of a Nazi-deporting task force, took an active interest in the progress of the budding office. She boasted of the Office’s work and used its progress to increase its support and argue her broader agenda of increasing watchfulness on the matter of wrongfully admitted persecutors.²⁰

This publicity-focused attitude created friction with Director Rockler upon his succeeding Martin Mendelsohn, who was originally appointed by INS General Counsel David Crosland to run the SLU prior to its transformation into the new office.²¹ Like Crosland before him, Rockler

¹⁸ Russek, Menachem. “Letter to Allan A. Ryan.” May 1980. 2015.310.1, Box T-22, Folder 9, The Walter Rockler Papers, United States Holocaust Memorial Museum Archives, Washington, DC

¹⁹ Ryan, Allan A. Jr., “Memo Re: Follow Up Questions for Management Review” June 5, 1980. Attachment A. 2015.310.1, Box T-22, Folder 9, The Walter Rockler Papers, United States Holocaust Memorial Museum Archives, Washington, DC

²⁰ Feigin, pp. 2-4, 9, 11.

²¹ Ibid, p. 4.

looked with disfavor upon Mendelsohn's close, independent relationship with Holtzman, and the Congresswoman's adamant defense of Mendelsohn led Rockler to believe that she and her political backers were more interested in having a responsive administrator rather than an effective one.²² He felt that Holtzman placed too much emphasis on obtaining satisfying results without bothering to familiarize herself with the process. Holtzman supported Mendelsohn so much that she co-signed a letter to the Attorney General with 45 other Representatives to request Mendelsohn's reinstatement, though to no avail.²³

As the OSI pursued these cases, an issue emerged as the letter of the law ran into reality. The time and distance between these trials and the alleged incidents made it difficult to gather unambiguous evidence that one individual had definitively persecuted others. It was only when the Supreme Court stepped in that the OSI received clear directions through the murky nature of these unique cases. When deciding against Feodor Fedorenko on January 21, 1981, the Supreme Court stated "that an individual's service as a concentration camp armed guard—whether voluntary or involuntary—made him ineligible for a visa," thus nullifying his naturalization.²⁴ The precedent established in this case meant that the OSI need not account for the actions of the individual, so long as they could prove membership in an organization known to have been dedicated to persecution.

²² Ibid, pp. 5, 9.; Rockler, Walter J. "Letter to Chairwoman Elizabeth Holtzman." Washington D.C. January 21, 1980. 2015.310.1, Box T-22, Folder 9, The Walter Rockler Papers, United States Holocaust Memorial Museum Archives, Washington, DC

²³ Congressman Christopher Dodd et al. "Letter to Attorney General Benjamin R. Civiletti." Congress of the United States, House of Representatives. Washington D.C. February 19, 1980. 2015.310.1, Box T-22, Folder 9, The Walter Rockler Papers, United States Holocaust Memorial Museum Archives, Washington, DC

²⁴ "Fedorenko v. United States." United States Supreme Court. January 21, 1981. Section b.

Even with the bar lowered this way, the OSI still needed to establish a basic foundation of facts upon which they could build their case. The struggle of admitting evidence from the Soviet Union is well-encapsulated in the 1981 case of Juozas Kungys, a Lithuanian man accused of assisting the Nazis in the mass murder of Jews living in occupied territory. Kungys' sister-in-law confirmed his identity from before and after his move to the United States, and confirmed that he lived in the area where his alleged crimes occurred.²⁵ Jonas Dailide affirmed Kungys as a fellow member of the Lithuanian Riflemen Society that collaborated with the Germans to massacre Jews while under occupation.²⁶ Vladislav's Silverstrvicius, a truck driver who brought Jews to the ditch where they were murdered, identified the same Kungys as the man who organized the shooting.²⁷ Another, who claimed to have been forced to guard the execution at the risk of being shot himself, independently corroborated Silverstrvicius' description of the event, though he could not identify Kungys.²⁸

Confident they had painted a convincing portrait of the defendant's wartime activities, the OSI presented these damning statements, along with others, as proof that Juozas Kungys was unfit to enter and remain in the United States. The prosecutors' worst fears were realized when the court dismissed the depositions as tainted by their origin, the manner in which they were

²⁵ United States of America v. Juozas Kungys. "Deposition of Juzes Rudzeviciene." District Court of New Jersey, April 20, 1982, p. 20. RG-06.023, Reel 5, Juozas Kungys Case United States Holocaust Memorial Museum Archives, Washington, DC

²⁶ United States of America v. Juozas Kungys. "Deposition of Jonas Dailide." District Court of New Jersey, April 19, 1982, pp. 13-18. RG-06.023, Reel 1, Juozas Kungys Case United States Holocaust Memorial Museum Archives, Washington, DC

²⁷ United States of America v. Juozas Kungys. "Deposition of Vladislavas Silverstrvicius." District Court of New Jersey, April 21, 1982, pp. 10-11. RG-06.023, Reel 6, Juozas Kungys Case United States Holocaust Memorial Museum Archives, Washington, DC

²⁸ United States of America v. Juozas Kungys. "Deposition of Stasys Narusevicius." District Court of New Jersey, 1982, pp. 10-12. RG-06.023, Reel 4, Juozas Kungys Case United States Holocaust Memorial Museum Archives, Washington, DC

conducted, and the fact that the Soviets notably refused to release earlier testimonies by the same witnesses.²⁹ The court oversaw a settlement of the case in 1988, and Kungys remained in the United States.³⁰ Although the courts did not always dismiss testimony from the USSR as unreliable, that very unpredictability marked much of the OSI's tenure, as it was a simple fact that one could rarely prove, without a trace of doubt, what someone had done in a warzone decades ago in a region now controlled by an adversarial foreign government.

Researchers needed to not only find corroborating evidence between the East and the West to match subjects with their past lives, but also needed to provide as much redundancy as possible to demonstrate with extreme confidence that the current target of investigation was indeed the same person mentioned in the records.³¹ This “burdensome” protocol absorbed much of the Office's time with cases that led nowhere due to a lack of sufficient corroboration, and even then there were still cases of mistaken identity, such as in the infamous case of John Demjanjuk.³²

Following the initial filing of denaturalization proceedings against John Demjanjuk in 1977, the SLU and later the OSI investigated the case, relying heavily on eyewitness testimony, before taking it to trial in 1981.”³³ This was despite one of the two attorneys assigned to the case expressing concern about the “contradictory and inconclusive” evidence the OSI was relying

²⁹ Feigin, p. 128.

³⁰ Ibid, pp. 131-132.

³¹ Elizabeth White, former Chief Historian at the OSI, in an interview with the author. July 2018.

³² Ibid.

³³ Feigin, pp. 151-153.

on.³⁴ Nonetheless, the court found the government’s position compelling and ultimately sent Demjanjuk to Israel in 1986 “to face murder charges.”³⁵

Intended to be a landmark case as the OSI’s first extradition to Israel to face justice for his crimes against the Jewish people as “Ivan the Terrible,” John Demjanjuk awaited execution per the 1988 order of an Israeli court, and languished on death row.³⁶ That was until the collapse of the Soviet Union provided access to documents that revealed he was definitively not the man the OSI claimed, leading to his acquittal by the Israeli Supreme court in 1993, ending his seven-year stay in the nation.³⁷

This failure shook the OSI and spurred the organization to tighten its practices, but although Demjanjuk became considered an embarrassing aberration, the Office’s other work bears the marks of the same philosophy that permitted such an occurrence. The legal team’s decision to withhold eventually consequential information from the defense counsel—later deemed an “unacceptable...fraud on the court” by the Sixth Circuit Court of Appeals—mirrors steps undertaken at the end of the Fedorenko case.³⁸

³⁴ Ibid, p. 153.

³⁵ Ibid, p. 155.

³⁶ Ibid, p. 156-157

³⁷ Ibid, pp. 157-159.

³⁸ Ibid, p. 161.

Fedorenko

The SLU initiated its suit against Feodor Fedorenko in 1978. Unfortunately for Fedorenko's defense, he had already disclosed his membership among the death camp guards during the Second World War, so his argument then shifted to convincing the court that the nature of his service and the circumstances surrounding it was not sufficient to indicate a lack of good moral character.

Born in the "town of Sivasch, Crimea," Fedorenko presented the tale of a young man caught in the currents of powers beyond his understanding.³⁹ As a Ukrainian, Fedorenko became a subject of the Soviet Union at a young age. He found a role in his small town's agricultural economy as a "truck driver" carrying produce to market.⁴⁰ When the war broke out, the Soviet military "mobilized" Fedorenko and his truck to serve as logistical support without any military training.⁴¹

Fedorenko described himself as victim of German cruelty just like any other prisoner. Captured by the Germans after only a few weeks in service, Fedorenko spent months in prison camps where he and thousands of other captured Soviets were forced to work with "no water...no well" and "no food" while enduring abuse at the hands of the German soldiers.⁴² After some time, Fedorenko was among several hundred soldiers taken to the "Trawnicki" camp to continue their labor.⁴³ When asked if he could have refused the work, he said those who

³⁹ United States v. Feodor Fedorenko. Southern District of Florida, 1978, p. 1254. RG-06.029, Box 12, Folder 12, United States Department of Justice, Office of Special Investigations Denaturalization Cases Transcripts and Decisions, United States Holocaust Memorial Museum Archives, Washington, DC

⁴⁰ Ibid, p. 1258.

⁴¹ Ibid.

⁴² Ibid, p. 1263.

⁴³ Ibid, p. 1276.

answered no when asked to go were “[shot]...down like a dog,” and they were never given an explanation of why they were being moved.⁴⁴

Over the course of his continued mundane labor at Trawnicki, his overseers eventually issued Fedorenko a new uniform, showed him how to operate and disassemble a rifle, taught him to count in German, and trained him to march, though he never knew “the purpose.”⁴⁵ While once permitted to leave the camp for a short walk down the street, it was with understanding that the Germans were prepared to “immediately execute” anyone who tried to flee.⁴⁶ It was in this same pattern of coercion that Fedorenko was brought to guard the Lublin Ghetto and the Treblinka death camp.⁴⁷

There, Fedorenko served the Germans “as a guard with weapons...a black uniform” and “had several other guards underneath” him.⁴⁸ Despite his segregation from, and inferiority to, the regular German forces due to his nationality, he nonetheless “assisted the Germans in the persecution of the civil population.”⁴⁹ To minimize the severity of his role, Fedorenko provided details in an attempt to prove that he had not been acting with the intent of aiding the Germans in their goal. He claimed to have “prevented...Jewish prisoners from being beaten” on at least one occasion and indicated he had no interest in the Nazi ideology he was enforcing.⁵⁰

The defense approached the case by emphasizing the lack of agency Fedorenko had in his wartime experience. Passed from one unbending authority to the other, every stage of his descent

⁴⁴ Ibid.

⁴⁵ Ibid, pp. 1264, 1286.

⁴⁶ Ibid, p. 1286.

⁴⁷ Ibid, pp. 1298 and United States v. Feodor Fedorenko. Southern District of Florida, 1978, p. 1360. RG-06.029, Box 12, Folder 13.

⁴⁸ United States v. Feodor Fedorenko. Southern District of Florida, 1978, p. 139. RG-06.029, Box 11, Folder 1.

⁴⁹ Ibid.

⁵⁰ United States v. Feodor Fedorenko. Southern District of Florida, 1978, p. 1328. RG-06.029, Box 12, Folder 12.

into the machinery of persecution came with the threat of severe punishment and even death if he resisted. In short, he pled that his state of duress should excuse his role as a guard.

Additionally, his defense aimed to defeat the charge of his lacking good moral character by providing testimonials to his attitude and lifestyle in America. A supervisor from Fedorenko's job shared that he was a good employee and had never had a complaint about his "job performance" over the years.⁵¹ Friends indicated that Fedorenko frequently spoke about his "gratitude" towards his American residency and the opportunities it afforded him.⁵² Others, including one Spiridon Semenek, gave personal anecdotes about how Fedorenko was "always good" to them and seemed an honest and trustworthy man.⁵³

The prosecution used this opportunity to provide Semenek with a description of Fedorenko's service as a camp guard during the war, of which Semenek was unaware. When confronted with this information, Semenek conceded that Fedorenko "was not good" at the time he committed these acts.⁵⁴ This reaction undermined the defense by re-directing the focus of the court to the wartime activity of the defendant, which was the only matter at issue.

This was a key example of the government's process, as they did not need to prove that men like Fedorenko possessed bad moral character after their immigration. Since one of the requirements for obtaining a visa and citizenship was a showing of good moral character, the prosecution could argue that he was ineligible at the time—even if he had changed over the years—and his visa and subsequent citizenship were ipso facto invalid.

⁵¹ United States v. Feodor Fedorenko. Southern District of Florida, 1978, p. 97. RG-06.029, Box 11, Folder 1.

⁵² Ibid, p. 23.

⁵³ Ibid, p. 25.

⁵⁴ Ibid, p. 36.

As it was beyond dispute that Fedorenko had provided incomplete information to the government for his immigration and naturalization, the defense had to turn to justifying these actions, rather than denying them. Using the testimony of an individual born in a then-Soviet state who had lied about his place of birth to avoid potential deportation, the defense argued that Fedorenko reasonably feared “forced repatriation” and “[had] to lie” to emigrate and escape this fate like “thousands” of other Soviet citizens who feared being sent to the infamous gulags in Siberia for some perceived treachery.⁵⁵

When the prosecution brought forth Fedorenko’s naturalization examiner as a witness and presented him with the previously unknown facts of Fedorenko’s time as a camp guard, the witness stated that those were appropriate grounds to deny Fedorenko’s request for citizenship due to a lack of “good moral character” and reached the conclusion that he had not been “properly admitted” and was therefore “deportable from the United States.”⁵⁶

Fedorenko in the Supreme Court

The government initially lost in District Court, but later won in Appellate Court. Then the Supreme Court ended up strengthening the OSI’s positions beyond expectations, as the Court decided that “denaturalization [was] mandatory” if the visa was “improperly procured” no matter the extenuating circumstances.⁵⁷ The SLU’s head, Martin Mendelsohn, had expressed the view that there were only two types of people involved in the Holocaust: “killers or victims” with no

⁵⁵ Ibid, pp. 68-70.

⁵⁶ Ibid, p. 148 and “Feodor Fedorenko Deportation Hearing,” New Haven, Connecticut, 1981, p. 126. RG-06.029, Box 13, Folder 18, United States Department of Justice, Office of Special Investigations Denaturalization Cases Transcripts and Decisions, United States Holocaust Memorial Museum Archives, Washington, DC

⁵⁷ Feigin, p. 59.

ground in between.⁵⁸ In its decision on Fedorenko, the Supreme Court read the text of the Displaced Persons Act similarly and felt that the text of the statute made no distinction between voluntary or involuntary assistance in persecution.⁵⁹

The decision hinged on the DPA's definition of a displaced person or refugee. The act cited the constitution of the United Nations' International Refugee Organization which excluded those who can be shown "to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations."⁶⁰ The Court noted that the first category outlined in the statement does not include the term "voluntarily" while the second does.⁶¹ The majority took this as a specific decision to withhold refugee status from any who had assisted in persecuting civilians, regardless of their willingness, and Fedorenko fit this description.⁶²

Justice John Paul Stevens led the dissent in the 7-2 decision, calling the majority's holdings "depressing" and criticizing the view that "past involuntary conduct" could be used to strip a person's citizenship.⁶³ He felt that it was illogical to read the DPA so openly, as it could expose any victim of forced labor to the same punishment as their oppressors.⁶⁴

⁵⁸ Ibid, p. 53.

⁵⁹ Ibid. p. 56.

⁶⁰ International Refugee Organization. *Constitution of the International Refugee Organization*. December 15, 1946. p. 300.

⁶¹ Fedorenko v. United States, 449 U.S. 490 (1981).

⁶² Ibid.

⁶³ Fedorenko v. United States, 449 U.S. 490 (1981).

⁶⁴ Ibid.

It is important to remember at this point that although the OSI could technically pursue charges against anyone who made misrepresentations, they predominantly focused only on pursuing those they felt they could convincingly demonstrate had committed atrocious crimes.⁶⁵ The outcome of the Fedorenko case lightened this burden by allowing the OSI to present evidence of there being only the possibility of war crimes, making it easier to extend guilt by group association.

The government eventually deported Fedorenko back to the USSR. Prior to his return, the OSI received a memo from the US Embassy in the USSR alerting them to the “recent trial and execution” of a man with a similar history to Fedorenko’s.⁶⁶ Despite the Embassy recommending that the OSI alert Fedorenko of this ominous development, the OSI refused, and he was deported in 1984.⁶⁷ Fedorenko was arrested, tried, and finally executed in 1987 by the USSR.⁶⁸

Fedorenko’s Legacy

Seizing on the momentum of their victory in the Fedorenko case, the OSI filed a deportation suit against a man with a similar record in 1985. Leonid Petkiewytsch, a Polish-born immigrant whose family had controlled their hometown during the German occupation, found himself in the sights of the OSI after admitting in his 1982 citizenship application to having served as a guard at a Gestapo-run labor education camp towards the end of the war.⁶⁹ On the heels of the courts dismissal of Fedorenko’s defense of serving under duress, Petkiewytsch’s

⁶⁵ A stance reiterated by Elizabeth White, former Chief Historian of the OSI, in a July 2018 interview with the author.

⁶⁶ Feigin, p. 58.

⁶⁷ Ibid. When asked in her interview with the author, Elizabeth White denied knowledge of this exchange.

⁶⁸ Feigin, p. 59.

⁶⁹ Feigin, p. 134.

prospects looked grim as he had willingly fled to Austria before being assigned to his work in Germany and could not claim the same lack of agency that Fedorenko had.⁷⁰ Therefore, it came as a shock to the OSI when the court ruled that Petkiewytsch's service was not disqualifying, as the court found he had served with reluctance and that there was no evidence he had ever personally engaged in abusive behavior unlike Fedorenko.⁷¹ The Board of Immigration Appeals reversed this decision, but the Sixth Circuit followed up by reverting to the original position.⁷² In its 1991 ruling, the Sixth Circuit reiterated the lack of evidence regarding any alleged persecution on the part of Petkiewytsch, and—echoing the sentiment of Justice Stevens' dissent in the Fedorenko case—went on to emphasize its belief that the Holtzman amendment was designed to target “true war criminals,” not men like Petkiewytsch who existed on the moral periphery of the Holocaust.⁷³ Though an unnerving blow to the Office, who largely relied on proving guilt through membership and association rather than direct personal action, the case of Petkiewytsch proved to be such a narrow alignment of issues that it held virtually no influence over future cases and marked a deviation from the norm.⁷⁴ If anything, Petkiewytsch's story serves to further expose the problem of the ambiguity of the law that it could find a long-term Nazi collaborator less responsible for the crimes of the Third Reich than a prisoner forced to work under the threat of death.

The precedent of the Fedorenko decision came up again in the 2009 Supreme Court Case of Daniel Girmai Negusie, an Eritrean man seeking refuge in this country after engaging in

⁷⁰ Ibid.

⁷¹ Ibid, p. 135.

⁷² Ibid, pp. 135-136.

⁷³ Ibid, p. 136.

⁷⁴ Ibid, p. 138.

coerced persecution in his own.⁷⁵ Throughout the process, the government had acted under the impression that Fedorenko unequivocally bound them to disregard the circumstances and intent of one's persecutory action.⁷⁶ The Court rebuffed this view by reminding the Board of Immigration appeals that Fedorenko's case dealt with the omission of the word voluntary in one section of the 1948 DPA in contrast with its inclusion in a later section of the same act.⁷⁷ As Negusie had not entered the country under the DPA, the Court held that the government had misapplied Fedorenko as a blanket rule for immigration.⁷⁸ This ruling established that Fedorenko cannot be used as the ultimate authority on coercion in persecution, and each case must be reviewed based on the applicable statutes.

⁷⁵ Negusie v. Holder, 555 U.S. 511 (2009).

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

Lindert

In 1992, the OSI filed its suit against George Lindert. By this point, the Office had honed its practice of focusing on the defendants' wartime environment, rather than on the individuals themselves. So much so that the judge herself felt almost overwhelmed by the "tremendous amount of evidence" the prosecution had devoted to proving that the Nazis had, as a group, persecuted people despite the judge's insistence "there [was] no question about that" fact.⁷⁹ By establishing the nature of the Nazi regime, the nature of Mauthausen camp where Lindert worked, and the nature of the "Death's Head unit of the SS"—of which Lindert was an admitted member—the government aimed to prove that "the defendant carried out...duties which were indispensable to perpetrating the persecution" regardless of whether or not he directly persecuted anyone himself.⁸⁰

Living in a small Romanian town under Hungarian occupation in the throes of the war, Lindert faced the choice of joining the SS or inevitably being drafted into the Hungarian army in a few years, and he chose "the German side because [he was] German-speaking" and anticipated a better experience in that system.⁸¹ As a native speaker of a German dialect, Nazi racial ideology identified Lindert as "Volksgenossen," meaning that he was classified as ethnically and culturally German, even though he lived outside of the nation's borders.⁸² As a minor by

⁷⁹ United States v. George Lindert. Northern District of Ohio, 1995, pp. 4, 5. RG-06.029, Box 29, Folder 1, United States Department of Justice, Office of Special Investigations Denaturalization Cases Transcripts and Decisions, United States Holocaust Memorial Museum Archives, Washington, DC

⁸⁰ Ibid, pp. 26, 27 and United States v. George Lindert. Northern District of Ohio, 1995, p. 1148, RG-06.029, Box 29, Folder 8.

⁸¹ United States v. George Lindert. Northern District of Ohio, 1995, p. 1072, RG-06.029, Box 29, Folder 8.

⁸² United States v. George Lindert. Northern District of Ohio, 1995, p. 110, RG-06.029, Box 29, Folder 1.

Hungarian standards, Lindert had to “obtain parental permission” to volunteer for the Waffen SS and his willingness to take this extra step showed the certainty of his decision.⁸³

After joining, Lindert underwent “introductory ideological training and indoctrination” as a part of his preparation for duty, the completion of which suggested that he took to the Nazi belief system well enough to be trusted to help carry out genocide.⁸⁴ By emphasizing the fact that Lindert “volunteered for the SS”—a political organization generally known for being “loyal to Hitler” and the Nazi cause moreso than most—and served “until the collapse of Nazi Germany,” the prosecution aimed to erode whatever sympathy the court may have initially possessed for a young man faced with a seemingly difficult decision.⁸⁵ As an ethnic German, Lindert had much to gain from the success of the Nazi regime, and his constant exposure to propaganda during recruitment and throughout his training and service made it reasonable to infer that he began to see his fate as parallel to that of the Reich, as opposed to Fedorenko who maintained it was only his immediate survival that dictated his actions.

From the time Lindert entered the camp system in 1942, until the Third Reich fell in 1945, Lindert testified “he never saw anybody mistreated” at the death camps.⁸⁶ This common refrain used by defendants like Lindert intended to exploit the lack of general knowledge about how guards fit into the camp system, along with the lack of surviving eyewitnesses whose testimony could tie individual perpetrators to the crimes committed at the camps. His defense pushed this point by emphasizing that as a perimeter sentry, he worked “outside the

⁸³ United States v. George Lindert. Northern District of Ohio, 1995, p. 235, RG-06.029, Box 29, Folder 2.

⁸⁴ Ibid, p. 253.

⁸⁵ United States v. George Lindert. Northern District of Ohio, 1995, pp. 26, 174, RG-06.029, Box 29, Folders 1 and 2.

⁸⁶ United States v. George Lindert. Northern District of Ohio, 1995, p. 6, RG-06.029, Box 29, Folder 1.

concentration camp,” and was thereby removed from the war crimes occurring within the walls he guarded.⁸⁷

Lindert’s defense counsel fell back on the terms of the Refugee Relief Act which prohibited immigration to those who “personally advocated and assisted” persecution.⁸⁸ Based on this language and the vague description of Lindert’s activities, this label could not stick to Lindert, the defense argued.

The prosecution countered by confirming through an expert witness, Dr. Charles Sydnor, that perimeter guards had standing orders to “shoot [any] prisoner” attempting to flee the compound.⁸⁹ This demonstrated that although there was no direct evidence of Lindert performing any persecutory actions himself, and he was not directly involved in the brutality within the camp, he was part of an organization that primarily existed to ensure successful persecution.

Going further, the government cited Fedorenko’s case in Lindert’s to claim that any personnel at a concentration camp can be said to “have assisted in persecution” in some capacity, even going so far as to assert that a “barber” could be accused of such.⁹⁰ Though no barber himself, Lindert placed himself as tangential to the persecution. He was not one of the personnel within the camp responsible for carrying out the persecution, nor did he devise the exhaustive schedules that drove the prisoners to collapse. Nonetheless, he served as an element crucial to the success of the operation and “represented the oppression” of those who could not escape under his watch.⁹¹

⁸⁷ Ibid, p. 34.

⁸⁸ Ibid, p. 7.

⁸⁹ Ibid, p. 95.

⁹⁰ United States v. George Lindert. Northern District of Ohio, 1995, p. 1042, RG-06.029, Box 29, Folder 8.

⁹¹ Ibid, p. 1045.

The prosecution used Dr. Sydnor's testimony to walk the court through the elements of the Holocaust. He highlighted Reinhard Heydrich's directive approving "the brutal liquidation of such elements in society" who did not support the Nazi vision and the use of "protective custody" to send individuals so identified to the concentration camps.⁹² Lindert "fit in the camp system" as a part of its mission. Much like a German mechanic on the Western Front was working towards the defeat of the Allies despite his minor role, so too was Lindert working towards the murder and erasure of any deemed unworthy in the Nazis' eyes.⁹³

Based on his willing participation in this inhumane plot, the prosecution asserted that Lindert "lacked the good moral character necessary to [achieve] naturalization" under the laws applicable at the time of his petition.⁹⁴ Additionally, since Lindert's application "required a full disclosure" of his military service, they accused him of "false testimony" on his visa application, and "material misrepresentation" due to his failure to disclose his membership in the SS Death's Head unit.⁹⁵

The Waffen SS had a "different administration from the German Army" and so, the prosecution reasoned, Lindert's broad claim to have served "with the German Army" during his time with the SS, was a clear falsehood meant to mislead the government.⁹⁶ Although SS membership "was no longer a *per se* visa disqualifier" at the time of his entry under the RRA, the government believed he still had a duty to provide that information for consideration.⁹⁷

⁹² United States v. George Lindert. Northern District of Ohio, 1995, p. 109, RG-06.029, Box 29, Folder 1.

⁹³ Ibid, p. 26.

⁹⁴ Ibid, p. 25.

⁹⁵ Ibid, pp. 30-31 and United States v. George Lindert. Northern District of Ohio, 1995, p. 898, RG-06.029, Box 29, Folder 7.

⁹⁶ United States v. George Lindert. Northern District of Ohio, 1995, p. 179, RG-06.029, Box 29, Folder 2 and Feigin, p. 64.

⁹⁷ Feigin, p. 65.

In this case, the judge found that even though Lindert had been given the order to shoot to kill anyone attempting escape, and thereby serve as a function of persecution, that evidence only proved “the order’s bad moral character.”⁹⁸ Essentially, the court concluded it was not fair to transfer the immorality of the order onto an individual without evidence that the individual obeyed that order. With this, the prosecution failed to convince the judge of their case.

Regarding the two charges of Lindert’s dishonesty on his visa applications, the court dismissed the first charge on account of *res judicata*, as another court had found the dishonesty insufficient to undermine a finding of good moral character.⁹⁹ On the second, the court did not see evidence that Lindert “was ever asked” about his Death’s Head membership as a detail beyond the general disclosure of German military service he had provided, nor was that information “required to be volunteered,” and therefore there was no material misrepresentation of the facts.¹⁰⁰ In Lindert’s case, the court found that “the forms he completed were ambiguous” and he could not be held to account for providing unclear answers.¹⁰¹

⁹⁸ United States v. George Lindert. Northern District of Ohio, 1995, p. 1044, RG-06.029, Box 29, Folder 8.

⁹⁹ Ibid, p. 1037.

¹⁰⁰ Ibid.

¹⁰¹ Feigin, p. 65.

Epilogue

Feodor Fedorenko's case provides an interesting contrast to Lindert's. Both men lived in small towns in disputed territory, were faced with choices that thrust them into the war either way, served as camp guards, and knowingly withheld information from US authorities so they could seek a better life in America. The main differences that marked the relevant parts of their biographies were that one served as a volunteer while the other was a conscript under duress. Much of the substance of Fedorenko's wartime experience seemed much less damning than that of Lindert's willing service in the SS. However, his failure to share even the incomplete account of military service that Lindert provided sealed Fedorenko's fate as one who willfully misrepresented the facts of his case.

As the Supreme Court concluded in his case, Fedorenko's fate came as a result of the fact that it was not the government's current obligation to determine whether the facts of his service were unacceptable, but to hypothesize what the most likely response of the admitting authorities would have been upon his petition to enter the United States, based on what information he had withheld. Because he failed to provide any information about his time as a camp guard, the government inferred that the visa-issuer would not have found that history permissible, if given the chance to investigate. Lindert, on the other hand, had presented enough information to fulfill his obligation to give the government a chance to investigate his life, and so the government lost its right to retroactively deny his visa as it had already missed its chance.

The conclusion of Fedorenko's experience with the justice system raises questions about the ethics of deporting a man to a hostile foreign power over factual misrepresentations while ignoring the mitigating factors that may have served to temper the punishment he deserved.

Although the facts of his case did clearly mark him ineligible for citizenship according to the text of the law, he was not ultimately being tried for war crimes, but for improperly procuring citizenship. With this in mind, the fact that his deportation to the USSR carried an almost certain risk of trial and execution based on the government's knowledge of similar cases and a general understanding of the authoritarian Soviet regime's ruthless justice system, one must consider if the United States' decision to deport him was effectively equivalent to passing a death sentence on him. With that consideration in mind, the question becomes if his wartime actions were indeed worthy of death. Given that the United States did not have the jurisdiction to judge him for these actions, and certainly did not try him as if it was a case of such severity, it seems duplicitous to disown responsibility for the foreseeable result of the prosecution's actions and instead focus on his deportation as the only part that mattered.

If an action as innocuous as cutting hair could be seen as persecutory under the Supreme Court's decision on Fedorenko, then it seems blatantly inconsistent for the judge in Lindert's case to have ruled based on whether it could be proven that Lindert had personally followed through on orders to shoot escapees from the concentration camp he was guarding. Under the Supreme Court's ruling, it stands to reason that if Lindert had done anything as simple as cleaning up his barracks, carrying supplies around, or checking the fences to see if they were intact at any point during his three years of service, then surely that could just as validly count as assisting in persecution by ensuring the smooth operation of the camp.

Although Fedorenko had only joined the Nazi system under duress and was not a member of any part of the regime's regular forces, he was found to be lacking the good moral character that Lindert was perceived by his judge to have managed to preserve. The distinction was simply

that Fedorenko made the mistake of admitting to carrying out persecutory actions, even though he claimed it was all a performance to avoid the wrath of his Nazi overseers. With Fedorenko's admission, the prosecution had proof that he had followed the orders of the persecuting authority, and thereby the immorality of those orders could be transferred to Fedorenko. As implausible as Lindert's denial of any knowledge of the camp's mistreatment of prisoners may have been, it was this attitude that ultimately gave the judge enough doubt to rule in his favor.

While one could attribute these disparate outcomes to any number of circumstances, it must not be forgotten that the OSI initially lost the Fedorenko case in court, and only turned it into a landmark victory on appeal. This doggedness is on its surface commendable and is certainly befitting a force tasked with a righteous mission. The problem is that this zeal did not present itself in Lindert's case. Despite facing the same initial defeat as in Fedorenko's case, the OSI chose not to recommend appeal, despite the far more convincing evidence of Lindert's abominable participation in persecution. The distinction was one of the government's political need.

Fedorenko's case came before the Supreme Court in 1980. The OSI inherited it from the SLU as one of its first cases and grappled with it as the Office was trying to put itself together. The Office needed to justify its existence to the public and the Congress that had summoned it forth, and it needed proof for its own sake of the feasibility of its mission and the means by which it should pursue it. Fedorenko provided just the opportunity. The OSI would always look fondly on the case that secured their mandate and gave them the pathway to continue their work with a clear vision of success. While less eager to associate themselves with the ultimate fate of

Fedorenko, the OSI could proudly bear his name as the most significant strike of their opening salvo.

Lindert, on the other hand, came to deal with the OSI in 1995. Public pressure had died down, politicians had lost interest, and the OSI was well into the flow of its work. Without needing to prove themselves or test out their theories, they could not muster the vigor of years past. Upon their defeat, the Office felt no need to engage in the exhausting uphill battle of appeal. Lindert had arrived too late to attract the Office's righteous fury.

It should be acknowledged that the OSI did its duty by bringing the Lindert case to district court, and the failure there highlights the inadequacy of the law itself when it came to addressing cases of such nuance. Because the concept of personal assistance was ill-defined in the original refugee acts, it became a matter of subjectivity that could too easily vary from judge to judge. Since dealing with old foreign war crimes is such a niche matter of law, it is fair to say that Congress was not adequately prepared for the challenges of drafting the initial refugee acts and should take from the lessons of the OSI when approaching such a matter in the future.

Beyond the language of the law, the practical effects of these prosecutions further complicate the situation and raises uncomfortable ethical questions. For each individual, deportation could have no further consequences, or could lead to further imprisonment and even death. Going forward, we cannot disassociate ourselves from these consequences and must be willing to make the difficult judgement of whether it is worth pursuing a case in which the life of the defendant will be left in the hands of an authoritarian regime.

Whenever talking about the Holocaust, it is important to keep the perspective that the Holocaust was not some great heist committed by a rogue group of misanthropes. It was the culmination of a collective failing of a large portion of Western Civilization to quell the spread of bigotry and hate until too many people arrived in a place where they were willing to ignore or even support a campaign of discrimination, oppression, and eventual mass murder. As the Holocaust did not confine itself to the courtroom, neither can Society's response. Retroactive accountability for a select few is not a substitute for the collective work required of humanity to prevent such atrocities in the first place.

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