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NOTES AND COMMENTS

Injustice Revisited: Did Ivan the Terrible Get Away Again?

I. INTRODUCTION

"The annihilation of six million Jews, carried out by the German state under Adolf Hitler during World War II, has resisted understanding."¹ Guards at extermination camps shot babies, the elderly, and those unable to walk to their deaths, and forced thousands of people into gas chambers. Who would become one of these guards?

In 1975, the Immigration and Naturalization Service ("INS"), the agency responsible for enforcing U.S. immigration law, received a list of suspected Ukrainian Nazi collaborators at large in the United States.² In 1976, John Demjanjuk was identified for the first time as "Ivan the Terrible," the man who operated the gas chambers in Treblinka, a Nazi death camp located fifty miles from Warsaw.³ Demjanjuk's name was on this list, as he was sought for having allegedly: (1) trained in Trawniki, Poland, a facility that trained Nazi camp guards to systematically murder Jews in the extermination camps; (2) served as a *Wachmann* ("Guardsmen") with the German *Schutzstaffel* ("SS") in the town of Sobibor,⁴ an extermination camp located one hundred miles south of Treblinka; (3) served as a guardsman in the concentration camp town of

1. LUCY S. DAWIDOWICZ, *THE WAR AGAINST THE JEWS 1933-1945*, at xxxv (1975).

2. TOM TEICHOLZ, *THE TRIAL OF IVAN THE TERRIBLE: STATE OF ISRAEL VS. JOHN DEMJANJUK* 26 (1990).

3. DAWIDOWICZ, *supra* note 1, at 135-49. Treblinka was an extermination camp where Germans killed over 850,000 Jews between July, 1942 and September, 1943. The victims reached the extermination camp by train and were separated once they arrived, with men sent to the right, and women and children sent to the left. Their belongings were immediately taken from them, and they were forced to undress. The naked mass of humanity was then herded into gas chambers. TEICHOLZ, *supra* note 2, at 8.

4. Construction of Sobibor, another death camp, began in March 1942. Over 250,000 Jews died there. DAWIDOWICZ, *supra* note 1, at 149.

Flossenbuerg, Germany; and (4) participated in the mass executions of the Jewish population in Sobibor.⁵

Although the Israeli Supreme Court found reasonable doubt regarding Demjanjuk's identity as the infamous "Ivan the Terrible" of Treblinka, the Court nonetheless found substantial evidence that Demjanjuk was a Nazi collaborator who served in other death camps, including Sobibor.⁶ "For the prosecution, the problem was not lack of evidence but the overwhelming amount of it."⁷ Such evidence includes a photo identification card, a German registry of camp guards, and eyewitness testimony. Consequently, the decision to allow Demjanjuk back into the United States after his acquittal has angered many people.

Following a discussion of the historical background leading up to Demjanjuk's trial in Israel, this Comment will first examine the Displaced Persons Act and the prosecution of Nazi war criminals in the United States. This Comment will then examine Demjanjuk's denaturalization and deportation proceedings in the United States. This Comment will then consider the extradition of Demjanjuk from the United States to Israel and the issues that were raised by this request. These issues fall into the broad categories of (1) Double Criminality, (2) Universal Jurisdiction, and (3) Doctrine of Specialty. This Comment will then examine Demjanjuk's trial in Israel, comparing how the United States would have treated newly discovered evidence, which resulted in Demjanjuk's acquittal in Israel. Finally, this Comment will address the implications of Demjanjuk's return to the United States on the U.S. role in subsequent prosecutions of alleged Nazi war criminals.

A. Background

Demjanjuk, a native of the Ukraine, was accused of murdering thousands of Jews and others at the Treblinka death camp in Poland during World War II, where he was known to inmates as "Ivan the Terrible."⁸ In 1952, under the Displaced Persons Act of 1948 ("DPA"),⁹ Demjanjuk entered the United States; he

5. TEICHOLZ, *supra* note 2, at 27.

6. Ken Myers, *Under the Demjanjuk Spotlight*, NAT'L L.J., Aug. 30, 1993, at 1.

7. TEICHOLZ, *supra* note 2, at 88.

8. *Id.* at 1.

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

became a naturalized citizen in 1958.¹⁰ On February 27, 1986, Demjanjuk was flown to Israel to stand trial for committing crimes against humanity during World War II.¹¹

In 1977, twenty-five years after his arrival in the United States, the U.S. Government charged Demjanjuk with the illegal procurement of citizenship. Specifically, the U.S. Government charged that Demjanjuk failed to disclose on his citizenship application that he was a Ukrainian who had fought in the Russian army, and served in the German SS at Trawniki, Poland, and at the Treblinka and Sobibor death camps.¹² The U.S. Government claimed that Demjanjuk's activities during the war excluded him from the DPA's definition of an "eligible displaced person."¹³ The U.S. Government also maintained that Demjanjuk's visa was invalid because he illegally procured his certificate of naturalization and the order admitting him into the United States through willful misrepresentation of material facts.¹⁴

On February 10, 1981, the *Demjanjuk* case went to trial in the Northern District Court of Ohio before Chief Judge Frank Battisti.¹⁵ At trial, the court found that Demjanjuk had misstated his place of residence from 1937 to 1948, and that he had failed to admit serving as an SS guard and soldier in a German military unit on his application for naturalization.¹⁶ In response, Demjanjuk claimed that he was a farmer in Poland until 1943 and then worked in Danzig and Munich until the end of the war.¹⁷

On June 23, 1981, Judge Battisti held that Demjanjuk had illegally procured his naturalization by concealing his service as a German SS guard at Trawniki and Treblinka, and that he subsequently made willful misrepresentations.¹⁸ The court revoked Demjanjuk's certificate of naturalization and vacated the order granting him United States citizenship.¹⁹ Within eighteen months, the Sixth Circuit Court of Appeals affirmed the district court's

10. *United States v. Demjanjuk*, 518 F. Supp. 1362, 1363 (N.D. Ohio 1981), *aff'd*, 680 F.2d 32 (6th Cir. 1982), *cert. denied*, 459 U.S. 1036 (1982).

11. TEICHOLZ, *supra* note 2, at 77.

12. *Demjanjuk*, 518 F. Supp. at 1363.

13. *Id.*

14. *Id.*

15. *Id.* at 1363-71.

16. *Id.*

17. *Demjanjuk*, 518 F. Supp. at 1379.

18. TEICHOLZ, *supra* note 2, at 69.

19. *Demjanjuk*, 518 F. Supp. at 1362.

decision denaturalizing Demjanjuk,²⁰ and the U.S. Supreme Court denied Demjanjuk's petition for certiorari.²¹

Demjanjuk, his family, and his supporters never considered that Israel would request his extradition.²² They believed that, because his identification was based on suspect Soviet-supplied evidence, the Soviet Union would deport him.²³ On April 11, 1983, Demjanjuk's deportation hearing began, based on Demjanjuk's illegal presence in the United States.²⁴ On October 31, 1983, while the deportation proceeding was before the immigration court, Israel requested the extradition of Demjanjuk²⁵ and asked the United States to issue a warrant for his arrest for murder.²⁶ By posting a \$50,000 bond, secured by the deed to his home, Demjanjuk remained free.²⁷

The extradition proceeding did not begin until the United States finished the ensuing deportation hearing. On April 15, 1985, following eighteen months of litigation, U.S. District Court Judge Frank Battisti ruled in favor of Demjanjuk's extradition to Israel.²⁸ On October 31, 1985, the U.S. Court of Appeals for the Sixth Circuit affirmed this order.²⁹ On February 24, 1986, the Supreme Court once again denied Demjanjuk's petition for certiorari.³⁰

After legal remedies were exhausted, the authorities moved Demjanjuk to the Metropolitan Correctional Center on Park Row in New York City, where he prepared for departure.³¹ On February 27, 1986, Demjanjuk made a last-minute appeal to the Attorney General, which was rejected.³² On the same day, the State Department authorized Demjanjuk's extradition, and Demjanjuk arrived in Israel on February 28, 1986.³³ Israel

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

21. *Demjanjuk v. United States*, 459 U.S. 1036 (1982).

22. TEICHOLZ, *supra* note 2, at 73.

23. *Id.*

24. *Id.* at 74.

25. *In re Extradition of Demjanjuk*, 603 F. Supp. 1463, 1464 (N.D. Ohio 1984).

26. TEICHOLZ, *supra* note 2, at 74.

27. *Id.*

28. *In re Extradition of Demjanjuk*, 612 F. Supp. 544, 571 (N.D. Ohio 1985).

29. *Demjanjuk v. Petrovsky*, 776 F.2d 571, 578 (6th Cir. 1985).

30. *Demjanjuk v. Petrovsky*, 475 U.S. 1016 (1986).

31. TEICHOLZ, *supra* note 2, at 77.

32. *Id.*

33. *Id.*

charged Demjanjuk with crimes against humanity, war crimes, and crimes against the Jewish people under the Nazi and Nazi Collaborators Law.³⁴ He was also charged with murder under the penal code of the State of Israel.³⁵

The request to extradite Demjanjuk marked Israel's first formal request for extradition of a suspected Nazi war criminal from the United States.³⁶ Moreover, Demjanjuk's trial was the first trial of a Nazi war criminal in Israel since the trial of Adolf Eichmann in 1961.³⁷ While Eichmann was tried as the "master planner" of the extermination of the Jews, Demjanjuk was accused of being one of the most sadistic murderers of the Jews as the alleged operator of the gas chambers at the Treblinka death camp.³⁸ Demjanjuk's trial in Israel has set the stage for additional proceedings involving not only the United States, but also other countries that have extradition treaties with Israel.³⁹ Israel's request "appears to be a test case that could determine whether Israel pursues other suspects. This creates the opportunity for at least a tacit admission of Israel's special position with regard to war crimes against Jews anywhere in the world."⁴⁰

B. *The Displaced Persons Act*

In 1948, Congress enacted the Displaced Persons Act to enable millions of European refugees, many of whom were survivors of Nazi concentration camps or people driven from their homelands, to emigrate to the United States.⁴¹ The DPA prohib-

34. Nazi and Nazi Collaborators (Punishment) Law, Aug. 1, 1950, 4 Laws St. Isr. No. 64, at 154. "This particular legislation is totally different from any other legislation usual in criminal codes . . . and the reason for its difference lies in the nature of the crimes it deals with." See HANNAH ARENDT, *EICHMANN IN JERUSALEM, A REPORT ON THE BANALITY OF EVIL* 254 (1963).

35. TEICHOLZ, *supra* note 2, at 88.

36. Ian Black, *Ivan: A Case of Trial and Error*, *GUARDIAN*, July 30, 1993, at 2.

37. TEICHOLZ, *supra* note 2, at 4. For an in-depth discussion of Adolph Eichmann's trial in Jerusalem, see ARENDT, *supra* note 34, at 36.

38. TEICHOLZ, *supra* note 2, at 4.

39. Israel has extradition treaties with Australia, Austria, Belgium, Canada, France, Italy, Luxembourg, the Netherlands, South Africa, Sweden, Switzerland, the United Kingdom, and the United States. Steven Lubet & Jan Stern Reed, *Extradition of Nazis from the United States to Israel: A Survey of Issues in Transnational Criminal Law*, 22 *STAN. J. INT'L L.* 1, 3 (1986).

40. Yoram Kessel, *Israel, in a Test Case, Seeks To Extradite Suspected Nazi War Criminal from U.S.*, *WALL ST. J.*, Nov. 25, 1983, at 16.

41. *United States v. Demjanjuk*, 518 F. Supp. 1362, 1378 (N.D. Ohio 1981).

ited the entry into the United States of any person "who advocated or assisted in the persecution of any person because of race, religion, or national origin."⁴² Nevertheless, many Nazi war criminals entered the United States under this special immigration law by lying about their activities during the period from 1933 to 1945. Nazi war criminals also entered the United States under other immigration laws that did not specifically exclude persons who assisted the Nazis in persecuting civilians.⁴³ On March 28, 1979, the Justice Department formed the Office of Special Investigations ("OSI") within its Criminal Division to locate, investigate, and institute legal proceedings against Nazi war criminals in the United States.⁴⁴

C. Prosecuting Nazi War Criminals

Criminal proceedings cannot be brought against Nazi criminals in the United States.⁴⁵ Because the Nazi crimes did not take place in the United States, the United States does not have federal criminal jurisdiction over Nazi cases.⁴⁶ Two types of proceedings may be brought against Nazi criminals in the United States: (1) deportation and denaturalization proceedings pursuant to U.S. immigration law and (2) extradition.⁴⁷ A proceeding under immigration law is a two-step process involving denaturalization (revocation of citizenship) and deportation (expulsion from the United States).⁴⁸ Although denaturalization and deportation proceedings are both governed by immigration law, they are

42. Displaced Persons Act § 13.

43. Jeffrey N. Mausner, *Apprehending and Prosecuting Nazi War Criminals in the United States*, 15 NOVA L. REV. 747, 764 (1991).

44. *Id.* at 751. The OSI is still prosecuting Nazi criminals residing in the United States. *Id.*

45. *Id.* at 761.

46. *Id.* In other words, no statutory basis exists under current U.S. law for the assertion of federal criminal jurisdiction over Nazi cases, especially because the crimes were committed beyond the territorial boundaries of the United States. Any attempt to amend the federal criminal code to include such cases would conflict with the Constitution's proscription against *ex post facto* legislation. See U.S. CONST. art. I, § 9. The Office of Special Investigations' only recourse has been to institute denaturalization proceedings against suspected war criminals who have acquired U.S. citizenship and, if successful, institute separate deportation proceedings against them. If the individual never became a naturalized U.S. citizen, the government may proceed with deportation proceedings. TEICHOLZ, *supra* note 2, at 313.

47. Mausner, *supra* note 43, at 761.

48. *Id.*

distinct actions. In addition, deportation proceedings cannot begin until denaturalization proceedings and all appeals have been concluded.⁴⁹

The second type of proceeding that may be brought against a Nazi criminal is extradition.⁵⁰ Extradition may occur only if it is established that (1) a valid treaty is in effect between the surrendering and requesting countries; (2) the person before the court is the same individual who is charged in the requesting country; and (3) the acts charged constitute an extraditable offense.⁵¹ The government of the foreign country must also ask the U.S. Government to send the person to the foreign country to stand trial for crimes allegedly committed in that country or under that country's jurisdiction.⁵² In an extradition proceeding, the court determines only whether there is a sufficient legal basis to warrant the return of the fugitive to the requesting country; the Secretary of State makes the ultimate decision regarding extradition.⁵³

II. DEMJANJUK'S IMMIGRATION PROCEEDINGS

A. Denaturalization

In 1981, the U.S. Government brought an action in federal district court under section 1451(a) of the Immigration and Nationality Act ("INA") of 1952⁵⁴ to revoke Demjanjuk's certificate of naturalization and to vacate the order admitting him into the United States.⁵⁵ The denaturalization trial took fourteen days during February and March of 1981. The government's case consisted of four broad themes: (1) the history of Operation Reinhard,⁵⁶ (2) the Trawniki identification card, (3) Treblinka eyewitness identifications, and (4) Demjanjuk's immigration. The district court determined that Demjanjuk's illegally procured

49. *Id.*

50. *Id.* at 769.

51. Lubet & Reed, *supra* note 39, at 6.

52. Mausner, *supra* note 43, at 769.

53. Lubet & Reed, *supra* note 39, at 6.

54. 8 U.S.C. § 1451(a) (1986).

55. *United States v. Demjanjuk*, 518 F. Supp. 1362, 1363 (N.D. Ohio 1981).

56. RESPONSE: THE WIESENTHAL CENTER REPORT No. 3, DEMJANJUK RETURNS TO U.S.—CENTER PETITIONS CLINTON, RENO 11 (1993-94) [hereinafter RESPONSE]. "Operation Reinhard" was the plan to annihilate Polish Jewry at the concentration camps of Treblinka, Belzec, and Sobibor. *Id.* at 12.

certificate of naturalization had to be canceled.⁵⁷ The Sixth Circuit Court of Appeals affirmed the denaturalization decision, and the U.S. Supreme Court denied Demjanjuk's petition for certiorari.⁵⁸

In 1939, Demjanjuk lived in Dub Macharenzi, where he worked as a collective farmer and as a tractor driver.⁵⁹ In 1940, Demjanjuk was conscripted into the Russian army.⁶⁰ On June 22, 1941, Germany invaded the U.S.S.R. and, in 1942, the German Army captured Demjanjuk.⁶¹ The Soviet prisoners of war ("POWs") were then moved to German POW camps, including Rovno, in the Western Ukraine, and Chelm, Poland.⁶² Demjanjuk testified that, although he did not remember the exact dates of this translocation, he was in Rovno from 1942 to 1943 and in Chelm until 1943 or 1944.⁶³ The U.S. Government believed that Demjanjuk was next transferred to the SS training camp in Trawniki and was sent from there to Treblinka, Poland, where he allegedly assisted in the persecution and extermination of the concentration camp victims.⁶⁴

Throughout the trial, Demjanjuk contended that the Trawniki document was not authentic, and suggested the possibility of forgery.⁶⁵ In addition to offering the Trawniki document as evidence of Demjanjuk's occupation as an SS guard, the Government offered the testimony of surviving Jewish prisoners from Treblinka. The prisoners identified Demjanjuk as "Ivan the Terrible," the man who actually ran the gas chambers at Treblinka, where hundreds of thousands of civilians were murdered.⁶⁶ The Government also produced the videotaped testimony of Otto Horn, a German guard at Treblinka who identified Demjanjuk's Trawniki photo as Ivan.⁶⁷

57. *Demjanjuk*, 518 F.Supp. at 1386.

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

59. *Demjanjuk*, 518 F. Supp. at 1365.

60. *Id.*

61. *Id.* at 1363.

62. *Id.*

63. *Id.*

64. *Demjanjuk*, 518 F. Supp. at 1362.

65. *Id.* at 1366. At no time during the trial, however, was any evidence introduced to substantiate this claim. *Id.*

66. *Id.* at 1369.

67. TEICHOLZ, *supra* note 2, at 111.

Demjanjuk denied ever serving the Germans as a guard at Trawniki, Treblinka, or any other location between 1942 and 1943.⁶⁸ He testified that after being captured by the Germans in the Crimea, he was taken first to a POW camp at Rovno and then to a POW camp at Chelm, Poland, and remained there until 1943 or 1944.⁶⁹ Demjanjuk testified that he was then taken to Graz, Austria and, after three to four weeks, transferred to a location known to him as Oelberg, Austria.⁷⁰ Demjanjuk also testified that he was placed by the Germans in a Russian National Army unit assigned to guard a captured Russian general, and he claimed that, aside from this duty, he did not engage in any other military action.⁷¹

In 1948, Demjanjuk initiated procedures to immigrate to the United States.⁷² In his application, Demjanjuk neither disclosed his service with the German SS at Trawniki and Treblinka, nor revealed, as he testified at trial, that he had served in a German military unit in 1944 and 1945.⁷³ In October 1950, Demjanjuk made these same misrepresentations when he applied to the Displaced Persons Commission for consideration to immigrate to the United States.⁷⁴ In his application, Demjanjuk stated that he had been a farmer at Sobibor, Poland from 1936 to 1943; worked at the harbor of Danzig, Germany from 1943 until May 1944; and worked in Munich, Germany from May 1944 to May 1945.⁷⁵ In his application for an immigration visa, Demjanjuk made similar misrepresentations.⁷⁶ Demjanjuk testified that he made these misrepresentations during the immigration proceedings to avoid being repatriated to the U.S.S.R. because of his prior service in the Russian army.⁷⁷ On February 9, 1952, Demjanjuk was granted a visa and entered the United States for legal residence.⁷⁸

68. *Id.* at 1376.

69. *Demjanjuk*, 518 F. Supp. at 1376.

70. *Id.*

71. *Id.* at 1376.

72. *Id.* at 1379.

73. *Id.*

74. *Demjanjuk*, 518 F. Supp. at 1376.

75. *Id.*

76. *Id.* at 1379.

77. *Id.*

78. *Id.*

In 1958, Demjanjuk applied to the INS for naturalization as a U.S. citizen.⁷⁹ On November 14, 1958, the U.S. District Court for the Northern District of Ohio, without knowledge of Demjanjuk's true activities and whereabouts during the war, naturalized Demjanjuk.⁸⁰

Section 340(a) of the Immigration and Nationality Act provides that a naturalized citizen may be denaturalized if the naturalization was "illegally procured" or "procured by concealment of a material fact or by willful misrepresentation."⁸¹ In the denaturalization proceeding brought against Demjanjuk, the district court viewed *Fedorenko v. United States*⁸² as dispositive of the issue of whether Demjanjuk illegally procured his visa and his citizenship.⁸³ In *Fedorenko*, an admitted guard for the German SS at both Trawniki and Treblinka concealed this information from immigration officials and obtained a visa.⁸⁴ The Supreme Court held that Fedorenko's failure to reveal his service as an armed guard at Treblinka made him ineligible as a matter of law for a visa under the DPA.⁸⁵

Section 10 of the DPA provides that "any person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States."⁸⁶ This provision applies to willful misrepresentations concerning material facts. A misrepresentation is considered material if "disclosure of the true facts would have made the applicant ineligible for a visa."⁸⁷ The Court concluded that Fedorenko's failure to reveal his past service as an armed guard at Treblinka was material under section 2(b) of the DPA because service as a concentration camp guard would have prevented anyone from obtaining a visa.⁸⁸

In Demjanjuk's 1981 trial, the district court found that the Government had shown by clear and convincing evidence that Demjanjuk served in the German SS as a guard at both Trawniki

79. *Demjanjuk*, 518 F. Supp. at 1380.

80. *Id.*

81. 8 U.S.C. § 1451(a) (1986).

82. 449 U.S. 490 (1981).

83. *Demjanjuk*, 518 F. Supp. at 1381.

84. *Fedorenko*, 449 U.S. at 490.

85. *Id.*

86. Displaced Persons Act § 10.

87. *Fedorenko*, 449 U.S. at 509.

88. *Id.*

and Treblinka from 1942 to 1943 and willfully misrepresented this service on his visa application for the purpose of gaining benefits under the immigration and naturalization laws.⁸⁹ Harold Henrikson, the vice-consul responsible for processing Demjanjuk's visa application, testified:

If an applicant had told him either (1) that he had served in a training camp such as Trawniki run by the German SS for the purpose of training guards for duties at extermination camps or (2) that he had served as a guard at an extermination camp, [he] would have denied such individual a visa under the DPA.⁹⁰

Therefore, had Demjanjuk's wartime activities been known, his petition for naturalization would have been denied.⁹¹ In light of Demjanjuk's testimony and the U.S. Supreme Court's opinion in *Fedorenko*, the district court found that Demjanjuk's failure to disclose his service under the German SS at Trawniki and his later service as an armed guard at Treblinka were material misrepresentations under sections 2(b) and 10 of the DPA, which made him an ineligible displaced person.⁹² Since Demjanjuk was ineligible for a visa under the DPA, his citizenship had to be revoked because he failed to satisfy a statutory prerequisite of naturalization.⁹³

The district court also found that Demjanjuk's certificate of naturalization had to be canceled as it was procured by "concealment of a material fact or by wilful misrepresentation."⁹⁴ Section 1451(a) of the INA provides for the denaturalization of citizenship based on: (1) proof of a material misrepresentation in the course of procuring citizenship, or (2) proof that citizenship was illegally procured.⁹⁵ Proof of either of these grounds must be by "clear, unequivocal, and convincing evidence" that does "not leave the issue in doubt."⁹⁶ This burden is "substantially identical with that

89. *Demjanjuk*, 518 F. Supp. at 1381.

90. *Id.*

91. *Id.*

92. *Id.* at 1382.

93. *Id.*

94. *Demjanjuk*, 518 F. Supp. at 1383.

95. 8 U.S.C. § 1451(a) (1986).

96. *Fedorenko v. United States*, 449 U.S. 490, 504-05 (1981). "Any less exacting standard would be inconsistent with the importance of the right that is at stake in a denaturalization proceeding." *Id.*

required in criminal cases—proof beyond a reasonable doubt.”⁹⁷ The U.S. Supreme Court has held that this provision contains four requirements: (1) the naturalized citizens must have misrepresented or concealed some fact; (2) the misrepresentation or concealment must have been willful; (3) the fact must have been material; and (4) the naturalized citizen must have procured citizenship as a result of the misrepresentation or concealment.⁹⁸

The Supreme Court defined “materiality” under section 1451(a) of the INA in *Chaunt v. United States*.⁹⁹ In *Chaunt*, the Court stated that to prove misrepresentation or concealment of a material fact, the Government must prove by clear, unequivocal, and convincing evidence that either: (1) the suppression of facts, if known, would have warranted denial of citizenship, or (2) the disclosure of suppressed facts might have been useful in an investigation possibly leading to the discovery of other facts warranting a denial of citizenship.¹⁰⁰ In this case, the Government charged that Chaunt had procured his citizenship by concealing and misrepresenting his record of arrests in the United States in his application for citizenship and that the arrest record was a “material” fact within the meaning of the denaturalization statutes.¹⁰¹ The Supreme Court concluded that the nature of his arrests, the crimes charged, and the disposition of the cases did not amount to clear, unequivocal, and convincing evidence that naturalization was illegally procured within the meaning of section 340(a) of the INA.¹⁰² The *Chaunt* Court held that the materiality standard under section 340(a) pertained to false statements in applications for citizenship and that it did not apply to Chaunt because the arrests that he failed to disclose took place after he came to the United States. Chaunt’s situation, unlike Demjanjuk’s,

97. *United States v. Kowalchuk*, 571 F. Supp. 72, 73 (E.D. Pa. 1983).

98. *Kungys v. United States*, 485 U.S. 759, 767 (1988); see also *United States v. Schellong*, 547 F. Supp. 569 (N.D. Ill. 1982), *aff'd*, 717 F.2d 329 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). In *Schellong*, the defendant lied on his citizenship application about his service as a concentration camp guard. He was denaturalized based on this misrepresentation. *Id.* at 574-75.

99. 364 U.S. 350, 355 (1960).

100. *Id.*

101. *Id.* at 350.

102. *Id.* at 351. Section 340(a) of the Immigration and Nationality Act of 1952 requires revocation of U.S. citizenship that was “illegally procured or . . . procured by concealment of a material fact or by willful misrepresentation.” 8 U.S.C. § 1451(a) (1986).

presented no question concerning the lawfulness of his initial entry into the United States.¹⁰³

An applicant must answer questions about his or her past in order to become a U.S. citizen. In Demjanjuk's application for citizenship, question 23 asked whether Demjanjuk had given false testimony for the purpose of obtaining any benefits under the immigration and nationality laws. By denying that he had ever given false testimony to obtain his visa, Demjanjuk suppressed facts relating to his activities during the war which, if known, would have warranted denial of his petition for naturalization.¹⁰⁴ The district court determined that Demjanjuk's certificate of naturalization must be revoked because it was procured by willful misrepresentation of material facts.¹⁰⁵ The Sixth Circuit Court of Appeals affirmed the denaturalization decision, and the Supreme Court denied Demjanjuk's petition for certiorari.¹⁰⁶

B. Deportation

Any person who assisted the Nazis in persecution and then entered the United States under the DPA is deportable.¹⁰⁷ Nevertheless, a number of Nazi criminals entered the United States under other immigration laws that did not specifically prohibit immigration by persons who aided Nazis. As a result, the INA was amended to require the deportation of all persons who assisted in the persecution of civilians, regardless of the immigration law governing entrance into the United States.¹⁰⁸

103. *Demjanjuk*, 518 F. Supp. at 1383.

104. *Id.*

105. *Id.*

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

107. 8 U.S.C. § 1251(a)(1) (1989).

108. Immigration and Nationality Act § 241(a)(19), 8 U.S.C. § 1251(a)(19) (1989).

This amendment is known as the "Holtzman Amendment" and provides for the deportation of any person who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with: the Nazi Government of Germany; any government in any area occupied by the military forces of the Nazi Government of Germany; any government established with the cooperation of the Nazi Government of Germany; or, any government which was an ally of the Nazi Government of Germany, ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion. A person who is found deportable under the Holtzman Amendment for assisting Nazis in persecuting civilians must be deported.

Mausner, *supra* note 43, at 764-65.

On December 6, 1982, the INS began deportation proceedings against Demjanjuk based on his illegal presence in the country. While the deportation proceeding was pending before the Immigration Court, Israel filed an extradition request.¹⁰⁹

III. DEMJANJUK'S EXTRADITION PROCEEDINGS

The ability of any foreign country to request the extradition of a fugitive from the United States, and the responsibility of the United States to surrender the fugitive, depends on the existence of an extradition treaty between the United States and the requesting nation.¹¹⁰ Israel sought Demjanjuk's extradition pursuant to the treaty signed by the United States and Israel on December 10, 1962, which became effective on December 5, 1963.¹¹¹ In Israel's complaint, the charge of murdering Jews was equated with specific criminal offenses enumerated in the treaty: murder, malicious wounding, and infliction of grievous bodily harm.¹¹²

The pertinent portions of the treaty between the United States and Israel, found in the first three articles, are as follows:

Article I

Each Contracting Party agrees, under the conditions and circumstances established by the present Convention, reciprocally to deliver up persons found in its territory who have been charged with or convicted of any of the offenses mentioned in Article II of the present Convention committed within the territorial jurisdiction of the other, or outside thereof under the conditions specified in Article III of the present Convention.

Article II

Persons shall be delivered up according to the provisions of the present Convention for the prosecution when they have been charged with, or to undergo sentence when they have been convicted of, any of the following offenses:

1. Murder.
2. Manslaughter.
3. Malicious wounding; inflicting grievous bodily harm.

Article III

109. *In re* Extradition of Demjanjuk, 603 F. Supp. 1463 (N.D. Ohio 1984).

110. *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933).

111. Convention of Extradition, Dec. 10, 1962, U.S.-Isr. arts. I-III, 14 U.S.T. 1717. The request for Demjanjuk's extradition was the first ever filed by Israel to extradite a Nazi war criminal from the United States. See Ian Black, *supra* note 36, at 2.

112. *Demjanjuk v. Petrovsky*, 776 F.2d 571, 578 (6th Cir. 1985).

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

The words "territorial jurisdiction" as used in this Article and in Article I of the present Convention mean: territory, including territorial waters, and the airspace thereover belonging to or under the control of one of the Contracting Parties, and vessels and aircraft belonging to one of the Contracting Parties or to a citizen corporation thereof when such vessel is on the high seas or such aircraft is over the high seas.¹¹³

In 1950, the Israeli Parliament, known as the Knesset, passed the Nazi and Nazi Collaborators Law, which granted Israel universal jurisdiction to try war crimes and crimes against humanity.¹¹⁴ The Nazi and Nazi Collaborators Law makes certain crimes against the Jewish people and against humanity, and war crimes committed during the Nazi period, criminal acts punishable under Israeli law.¹¹⁵ By passing the Nazi and Nazi Collaborators Law, the Knesset affirmed both Israel's commitment to the prosecution of the perpetrators of the Holocaust and its moral authority to stand in judgment of them.

In December 1946, the United Nations General Assembly ("U.N.") recognized the laws of the international court of Nuremberg concerning war crimes and the concept of crimes against humanity.¹¹⁶ The U.N. also affirmed that genocide was a crime punishable by international law.¹¹⁷ The Knesset adopted and incorporated the Charter of the Nuremberg trial into the Nazi and Nazi Collaborators Law of 1950.¹¹⁸ At the time of the Eichmann trial, the Israeli Supreme Court upheld the right of Israel to enact such a law and to try criminals under this law, even though it was enacted after the Holocaust, as it was in accordance with the law of nations and international law.¹¹⁹

113. Convention of Extradition, *supra* note 111, at arts. I-III.

114. Nazi and Nazi Collaborators (Punishment) Law, Aug. 1, 1950, 4 Laws St. Isr. No. 64, at 154.

115. *Id.*

116. TEICHOLZ, *supra* note 2, at 101.

117. *Id.*

118. *Id.*

119. Attorney General v. Eichmann, 36 INT'L L. REP. 277 (S. Ct. Isr. 1962), *reprinted* in 2 FRIEDMAN, THE LAW OF WAR 1657-87 (1972).

Israel described Demjanjuk's offenses under the Nazi and Nazi Collaborators Law in the extradition request, which specifically charged that Demjanjuk:

murdered tens of thousands of Jews, as well as non-Jews, killing them, injuring them, causing them serious bodily and mental harm and subjected them to living conditions calculated to bring about their physical destruction. The suspect committed these acts with the intention of destroying the Jewish people and to commit crimes against humanity.¹²⁰

In the extradition proceedings, the Israeli government had to establish that there was probable cause to believe that the person demanded pursuant to the treaty was the person before the court. The Israeli government satisfied its burden of identification in two ways: (1) independent eyewitness identifications of Demjanjuk as "Ivan the Terrible;" and (2) the "Trawniki card" that had a picture identification of Demjanjuk and stated that he was employed as a guard in the SS. Based on this evidence, the district court found probable cause to believe that Demjanjuk was "Ivan the Terrible." The court held that the positive identification of Demjanjuk by Treblinka survivors and the Trawniki card established positive identification.¹²¹ This low threshold standard of identification enabled the Israeli government to meet its burden of showing probable cause.

A. Double Criminality

Demjanjuk contended that the district court's finding of jurisdiction to consider Israel's request for extradition violates the requirement of "double criminality" in international extradition cases.¹²² Demjanjuk maintained that the crime he was charged with was not included in the list of offenses set out in the extradition treaty.¹²³ He argued that, because the crime of "murdering tens of thousands of Jews and non-Jews" was not a specific crime in the United States, the extradition request should be denied.¹²⁴

A fundamental requirement of international extradition is that

120. *In re Extradition of Demjanjuk*, 603 F. Supp. 1463, 1467 (N.D. Ohio 1984).

121. *In re Extradition of Demjanjuk*, 612 F. Supp. at 554.

122. Francine Strauss, *Demjanjuk v. Petrovsky: An Analysis of Extradition*, 12 MD. J. INT'L L. & TRADE 65, 71 n.34 (1987).

123. *Demjanjuk v. Petrovsky*, 776 F.2d 571, 579 (1985).

124. *Id.* at 576.

the crime for which extradition is sought is one included in the treaty between the requesting and the surrendering nations.¹²⁵ Section 487(c) of the Restatement of Foreign Relations Law of the United States provides that extradition of an accused offender is not allowed "if the offense with which he is charged or of which he has been convicted is not punishable as a serious crime both in the requesting and in the requested state."¹²⁶

The court of appeals found that the double criminality requirement was met in this case, based on the principle set out in *Collins v. Loisel*.¹²⁷ In *Collins*, the petitioner contended that the crime of cheating, the charge by the requesting state, was dissimilar to the crime of obtaining property under false pretenses, the charge in the surrendering state, and, therefore, the extradition was improper. The U.S. Supreme Court held that an offense is extraditable only if the acts charged are criminal according to the law of both countries.¹²⁸ As the Court stated in *Collins*:

The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions.¹²⁹

Relying on the principle set out in *Collins*, the *Demjanjuk* court held that if the acts upon which charges of the requesting country are based are also proscribed by a law of the surrendering nation, the requirement of double criminality is satisfied.¹³⁰ The court held that the test for double criminality required the same act, not the specific crime.¹³¹ *Demjanjuk's* charge of unlawfully killing one or more persons is equivalent to an act of murder. The fact that there is not a separate offense for mass murder or murder of tens of thousands of Jews in the United States is irrelevant.

125. *Demjanjuk v. Petrovsky*, 776 F.2d 571, 579 (6th Cir. 1985); see also *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925).

126. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 487(c) (Tentative Draft No. 5, 1984) [hereinafter RESTATEMENT OF FOREIGN RELATIONS LAW].

127. 259 U.S. 309, 311 (1992).

128. *Id.*

129. *Id.* at 312.

130. *Demjanjuk v. Petrovsky*, 776 F.2d at 580.

131. *Id.*

Thus, the court denied Demjanjuk's claim of lack of double criminality.¹³²

B. Universal Jurisdiction

U.S. international extradition powers are governed by 18 U.S.C. § 3184 which requires the extradition complaint to charge the person sought to be extradited with having committed crimes "within the jurisdiction of any such foreign government."¹³³ Demjanjuk asserted that because he was neither a citizen or a resident of Israel, because the alleged crimes were committed in Poland, and because the acts charged occurred before the State of Israel came into existence, Israel lacked jurisdiction to try him for the alleged offenses.¹³⁴ The question before the *Demjanjuk* court was whether murdering Jews in a Nazi extermination camp in Poland during the period of 1939 through 1945 could be considered crimes within the jurisdiction of the State of Israel.

Article III of the extradition treaty between the United States and Israel states that, when an offense has been committed outside the territorial jurisdiction of the requesting party, "extradition need not be granted unless the laws of the requested party provide for the punishment of such an offense committed in similar circumstances."¹³⁵ Demjanjuk contended that the "need not" language of Article III prohibits an exercise of discretion in the extradition for any offense for which the laws of the United States provide no punishment under similar circumstances.¹³⁶ He maintained that, with the demise of the International Military Tribunals ("IMT"), which tried major Nazi officials at Nuremberg, no courts have jurisdiction over alleged war crimes.

The United States recognizes a number of international law principles including "universal jurisdiction" over certain offenses.¹³⁷ This principle allows a state to exercise jurisdiction to define and punish certain offenses that are of universal concern

132. *Id.*

133. 18 U.S.C. § 3184 (1982).

134. *Demjanjuk v. Petrovsky*, 776 F.2d at 580.

135. Convention of Extradition, *supra* note 111, at art. III.

136. *Demjanjuk v. Petrovsky*, 776 F.2d at 580-82.

137. *Id.* at 582. The IMT, which tried major Nazi officials at Nuremberg for committing war crimes, was based on universal jurisdiction. This tribunal system consisted of one court in Nuremberg, which tried major Nazi officials, and courts within the four occupation zones of post-war Germany, which tried lesser Nazis. *Id.*

and are recognized by the community of nations. Such crimes include piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and, perhaps, terrorism.¹³⁸ The underlying assumption is that these crimes are universally recognized and condemned by the community of nations and that the prosecuting nation is, therefore, acting on behalf of all nations. As a result, Israel, or any other nation with custody of the alleged criminal, may vindicate the interests of all nations by punishing perpetrators of such crimes.¹³⁹ Under this international doctrine, war crimes are viewed either as crimes against humanity, allowing Israel to prosecute the war criminal on behalf of all nations, or crimes that violate Israel's sovereign law and are so egregious that international law grants Israel the authority to claim jurisdiction.

The Court of Appeals held that, despite the fact that the crimes occurred in Poland, Israel was enforcing its criminal law for the punishment of Nazis and Nazi collaborators for crimes universally recognized and condemned, and that it, therefore, had the right to extradite Demjanjuk.¹⁴⁰ Furthermore, the fact that the state of Israel was not in existence when Demjanjuk committed the offenses is not a bar to Israel's universal jurisdiction because, under this doctrine, the nationality of the accused or the victim is not significant.¹⁴¹

Demjanjuk was charged under an Israeli statute¹⁴² that was designed to punish those involved in carrying out Hitler's "Final Solution."¹⁴³ Israel claimed extraterritorial jurisdiction over crimes against the Jewish people, crimes against humanity, and war crimes.¹⁴⁴ The perpetrators of these crimes are considered ene-

138. *Id.* (citing RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 126, § 404).

139. *Id.*

140. *Id.*

141. *Demjanjuk v. Petrovsky*, 776 F.2d at 582-83.

142. Nazi and Nazi Collaborators Punishment Law, Aug. 1, 1950, 4 Laws St. Isr. No. 64, at 154.

143. *Demjanjuk v. Petrovsky*, 776 F.2d at 581. According to Dawidowicz:

The Final Solution of the Jewish Question was the code name assigned by the German bureaucracy to the annihilation of the Jews. . . . The "Jewish Question" was, at bottom, a euphemism whose verbal neutrality concealed the user's impatience with the singularity of this people that did not appear to conform to the new political demands of the state. . . . The Final Solution transcended the bounds of modern historical experience. . . . Never before in modern history had one people made the killing of another the fulfillment of an ideology, in whose pursuit means were identical with ends.

DAWIDOWICZ, *supra* note 1, at xxv-xxvii.

144. *Demjanjuk v. Petrovsky*, 776 F.2d at 581.

mies of all people, and any nation with custody may punish the perpetrators according to its laws.¹⁴⁵

C. *Doctrine of Specialty*

Demjanjuk argued that the district court did not have jurisdiction to consider Israel's request for extradition because the crimes with which he was charged were not included in the list of offenses set forth in the treaty between the United States and Israel. The principle of specialty provides that a person can be tried only for the crimes on which the extradition was based.¹⁴⁶ Demjanjuk argued that, because Israel based the extradition order on murder charges, he could not be tried under the Nazi and Nazi Collaborators Law.¹⁴⁷ He argued that the specific acts of murder in the extradition order reduced the charge to common-law murder.¹⁴⁸

Specifically, Demjanjuk contended that the charge of "murdering tens of thousands of Jews and non-Jews" was not covered under the term of "murder" in the treaty.¹⁴⁹ Extradition requires that the crime for which extradition is sought be included in the treaty between the requesting and the surrendering nation.¹⁵⁰ The court determined that "murder" included the mass murder of Jews.¹⁵¹ The court held that the principle of specialty does not impose any limitation on the particulars of the charge so long as it encompasses only the offense for which extradition was granted.¹⁵²

The doctrine of specialty prevented the Israeli court from retrying Demjanjuk on other charges including: serving as an SS guard at the Trawniki training camp in Poland; serving as an SS guard at the Sobibor death camp; and serving at two forced labor camps. The charges in the warrant against Demjanjuk, under which he was extradited, were based only on allegations that he

145. *Id.* at 582.

146. TEICHOLZ, *supra* note 2, at 96.

147. *Id.*

148. *Id.*

149. Demjanjuk v. Petrovsky, 776 F.2d 571, 579 (1985).

150. See 18 U.S.C. § 3184 (1982); see also Fernandez v. Phillips, 268 U.S. 311, 312 (1925).

151. Demjanjuk v. Petrovsky, 776 F.2d at 579.

152. *Id.* at 583.

was "Ivan the Terrible."¹⁵³ International law, therefore, "forbids him from being tried on any other charges" in Israel.¹⁵⁴

Under section 216 of Israel's Criminal Procedure Law of 1982, it is possible to convict a defendant for an offense that he is shown to be guilty of committing even though the facts indicating his guilt are not stated in the indictment, provided that the defendant has been given a reasonable opportunity to defend himself.¹⁵⁵ Unfortunately, the prosecution concentrated all of its effort on Demjanjuk's service at Treblinka, and only raised his service at Sobibor and other concentration camps toward the end of the hearing. The Israeli Supreme Court refused to apply section 216 in this case because Demjanjuk did not have a reasonable opportunity to answer further allegations.¹⁵⁶ Because the application of section 216 would have required extending Demjanjuk's seven year custody, Demjanjuk was not tried on charges that were not alleged in the indictment.

IV. DEMJANJUK'S TRIAL IN ISRAEL

In April 1988, two years after Demjanjuk's extradition, the Jerusalem district court convicted Demjanjuk of crimes against humanity based on eyewitness testimony and documentary evidence, including an identification card from the SS training center at Trawniki.¹⁵⁷ During the trial, the defense argued that while Ivan the Terrible was perpetrating these atrocious crimes, the defendant was held captive for eighteen months by the Germans in the Chelm POW camp.¹⁵⁸ The court found that this contention was not credible, as the accused failed to cite any evidence describing the camp at Chelm.¹⁵⁹

On May 14, 1990, more than two years after Demjanjuk was found guilty and sentenced to death by the Jerusalem district

153. Stephen Labaton, *An Appeals Court States Demjanjuk Can Return to U.S.*, N.Y. TIMES, Aug. 4, 1993, at A1.

154. *Id.*

155. RESPONSE, *supra* note 56, at 11.

156. *Id.*

157. Israel v. Demjanjuk, Criminal Case (Jerusalem) 373/86 (Dist. Ct. Jerusalem 1988).

158. TEICHOLZ, *supra* note 2, at 288.

159. *Id.* In light of Demjanjuk's contention that he was held at the Chelm camp for a period of eighteen months, it was surprising that he could not describe any part of the camp or those who lived with him, when he was able to remember details of his service in camps where he lived for a much shorter period of time. *Id.*

court, Demjanjuk's appeal to the Israeli Supreme Court began.¹⁶⁰ While this appeal was pending, Israeli prosecutors obtained information from the former Soviet Union inculcating an operator of the gas chambers named Ivan Marchenko as "Ivan the Terrible," and, therefore, tending to exculpate Demjanjuk from those specific crimes.¹⁶¹ These Russian documents either identified "Ivan the Terrible" as Ivan Marchenko, or placed Demjanjuk as a guard at another death camp.¹⁶²

In light of this new evidence, a panel of the U.S. Sixth Circuit Court of Appeals reopened the extradition proceedings and appointed a special master, Judge Thomas A. Weisman, Jr., to determine whether the U.S. Government had defrauded the court by concealing evidence relating to Marchenko.¹⁶³ The Special Master found that the government attorneys who participated in the proceedings against Demjanjuk had "acted in good faith" and that each of Demjanjuk's allegations of fraud was without merit.¹⁶⁴

On July 29, 1993, Israel's Supreme Court overturned Demjanjuk's conviction ruling that sufficient evidence existed to cast "reasonable doubt"¹⁶⁵ as to whether Demjanjuk was the notorious Treblinka guard known as "Ivan the Terrible."¹⁶⁶ The Court found that the new evidence from the former Soviet Union, which was obtained long after the trial, contained statements of other Treblinka guards referring to the operator of the gas chamber at Treblinka "as another Ukrainian, Ivan Marchenko, whose appearance, biography and record differed significantly from

160. Peter Ford, *Israeli Supreme Court Overturns Conviction*, CHRISTIAN SCI. MONITOR, July 30, 1993, at 6.

161. Alex Kozinski, *The Case of Ivan Demjanjuk: Sanhedrin II: Israel's Supreme Court*, B'NAI B'RITH MESSENGER, Sept. 10, 1993, at 1, 10.

162. *Id.*

163. See Report of the Special Master, *Demjanjuk v. Petrovsky*, No. 85-3435 (6th Cir. June 30, 1993).

164. *Id.* at 206.

165. The Israeli Supreme Court and the U.S. Supreme Court do not share the same standards of proof. The Israeli Supreme Court reversed Demjanjuk's conviction and ordered his acquittal on the ground of reasonable doubt, not on the ground that there was conclusive evidence of his "actual innocence," as the U.S. Supreme Court would require. See Alan Dershowitz, *We Would Have Executed Ivan*, JERUSALEM POST, Aug. 2, 1993, at 1.

166. Asher Felix Landau, *The End of the Demjanjuk Case*, JERUSALEM POST, Aug. 20, 1993, at 1.

what is accepted about Demjanjuk's record."¹⁶⁷ On June 8, 1992, the prosecution's case crumbled because they could not establish proof beyond a reasonable doubt that Demjanjuk was at Treblinka.

The Israeli Supreme Court was troubled that the trial court had dealt primarily with the Ivan the Terrible charge, while the Trawniki and Sobibor charges were more like afterthoughts.¹⁶⁸ The Court held that Demjanjuk did not have a "reasonable opportunity of defending himself properly" against these other charges.¹⁶⁹ To give Demjanjuk such an opportunity would mean reopening the procedures, an action that the court found unreasonable.¹⁷⁰

A. *Evidence That Demjanjuk Was At Trawniki*

At the same time that the Court admitted this new evidence regarding Ivan Marchenko, the Israeli Supreme Court found "clear and unequivocal evidence that Demjanjuk served as a guard at the Trawniki training camp based on the Trawniki identification card."¹⁷¹ Trawniki was the site of a training camp for Russian POWs who had volunteered to act as guards to assist the Germans in "Operation Reinhard."¹⁷² The SS and the German police controlled the camp. At Trawniki, the Soviet prisoners were trained to participate in each step of the Jews' extermination: "to serve as ghetto policemen, to liquidate ghettos, to round up Jews, to load them into trains, to accompany the transports, and finally, to serve in the death camps."¹⁷³ Of the 5,000 volunteers assem-

167. *Id.* One problem for the defense, however, was Demjanjuk's listing of his mother's maiden name as Marchenko when he applied for his U.S. visa. Demjanjuk's attorney argued successfully that the choice of this name was mere chance and that "identity is the heart of the case," while everything else is irrelevant. Black, *supra* note 36, at 2.

168. Kozinski, *supra* note 161, at 10.

169. *Id.*

170. *Id.* The Israeli Supreme Court may have acquitted Demjanjuk for many reasons, including: (1) it may have felt that retrying Demjanjuk on the lesser charge would be perceived as desperate, petty, and vindictive; (2) there may have been no reason to single out Demjanjuk from among many thousands who served as concentration camp guards; and (3) it may have thought that continuing to stir up memories of the Holocaust was not fair to the survivors, many of whom were in their last years. *Id.*

171. Landau, *supra* note 166, at 1.

172. RESPONSE, *supra* note 56, at 12.

173. TEICHOLZ, *supra* note 2, at 167.

bled by the Germans at Trawniki, only 500 would be selected as death camp guards and receive the rank "SS Wachmann."¹⁷⁴

The Trawniki card stated that it was issued to someone named Ivan Demjanjuk, and it listed his birthdate, birthplace, the name of his father, and physical characteristics concerning the color of his eyes, the color of his hair, and his height.¹⁷⁵ Demjanjuk contended that no such card had been issued, and that the certificate that the prosecution relied upon was a forgery by the K.G.B.¹⁷⁶ To contradict this assertion, Dr. Wolfgang Sheffler, a West German Professor and Operation Reinhard expert, testified that "in the past twenty or twenty-five years, we have not come across a single document that comes from Nazi sources or Nazi files . . . that would have been forged. Not a single one."¹⁷⁷ After considering the evidence from the experts, the appellant's own references to the certificate, and the right of the Court to rely on its own examination of the document, the Israeli Supreme Court accepted the finding that the Trawniki document was authentic.¹⁷⁸ The Israeli Supreme Court held that "contentions with regard to the forgery of the Trawniki certificate in the light of the experts" testimony and in the light of the other evidence are reduced to zero.¹⁷⁹

B. Evidence That Demjanjuk Was At Treblinka

The Treblinka extermination camp was located in Warsaw, Poland, and it operated from July, 1942 until September, 1943.¹⁸⁰ The Trawniki identification card, coupled with witnesses who identified Demjanjuk from photographs of guards dressed in Nazi uniforms, gave the Israeli Government a remarkably powerful case against Demjanjuk. By the end of the OSI's investigation, no fewer than thirteen witnesses, including Treblinka survivors from around the world, identified Demjanjuk's photograph as depicting a Ukrainian guard at the death camp.¹⁸¹ Eliahu Rosenberg, who

174. RESPONSE, *supra* note 56, at 12.

175. TEICHOLZ, *supra* note 2, at 168.

176. *Id.* at 167.

177. *Id.* at 170.

178. Landau, *supra* note 166, at 1.

179. *Id.*

180. United States v. Demjanjuk, 518 F. Supp. 1362, 1369 (1981).

181. Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985).

spent eleven months at Treblinka, testified against Demjanjuk.¹⁸² Rosenberg initially worked as a corpse carrier at Treblinka and then became one of the *Bandemeisters* (“shower cleaners”), who washed the gas chambers and cleaned the ramp between exterminations.¹⁸³

Rosenberg, Bourkas, Epstein and Reichman, survivors of the concentration camps, testified that they worked near Demjanjuk and lived in fear of his deeds.¹⁸⁴ The Government also offered the testimony of Otto Horn, a Nazi guard who saw Ivan after the uprising at Treblinka,¹⁸⁵ as well as the deposition of Ignat Terentyevich Danylchenko, another guard who testified at the trial that he had met Demjanjuk in March, 1943 at Sobibor and remembered him as an “excellent *Wachmann*.”¹⁸⁶ Danylchenko also testified that Demjanjuk served with him at Flossenbuerg.¹⁸⁷ Based on the evidence provided by eye-witnesses who had testified about Demjanjuk’s identity before the Israeli district court, or whose statements had been admitted as evidence, the Israeli district court found the witnesses’ identification to be reliable.¹⁸⁸

According to Israeli Supreme Court Justice Menachem Elon, who presided over Demjanjuk’s case, “the decision . . . has enormous value in that witnesses who were within Treblinka itself testified. Their testimony is on the record, and it’s an important

182. TEICHOLZ, *supra* note 2, at 122-24.

183. *Id.* at 123. Rosenberg testified:

When the victims were inside, the first ones did not know where they were going, it was so very well decoyed and camouflaged. . . . But by the time the [gas] chambers had filled up, I would start hearing at the other end a most ghastly scream, crying, weeping . . . the screams, the shouts were terrible. Then these screams died down. And then I heard moaning, groans, and that, too, subsided until it became quiet. Often I saw inside [the gas chambers] strong young people . . . fighting and trying to get their heads above the others in order to get a tiny bit of air.

Id. at 123-24.

184. TEICHOLZ, *supra* note 2, at 111.

185. *Id.* at 287. The laborers at Treblinka realized that they would be kept alive only as long as the Nazis needed them. Thus, the Jewish leaders of the camp planned an escape on August 2, 1943. Jews ran for the woods and swamps, but the revolt was not successful. “Of the eight-hundred-fifty inmates . . . only three-hundred-fifty to four hundred were thought to have made it to the surrounding woods. Of those, two hundred were apprehended and summarily shot. Of those who escaped . . . only fifty survived the war’s end.” *Id.* at 13-15.

186. *Id.* at 280.

187. *Id.* at 240.

188. Israel v. Demjanjuk, Criminal Case (Jerusalem) 373/86 (Dist. Ct. Jerusalem 1988).

bulwark against Holocaust-deniers.”¹⁸⁹ On appeal, however, the additional statements from the former Soviet Union, inculcating an operator of the gas chambers named Ivan Marchenko as “Ivan the Terrible,” created reasonable doubt that Demjanjuk was the operator of the gas chambers in the extermination camp at Treblinka. Demjanjuk was therefore acquitted despite the eyewitnesses’ testimony.¹⁹⁰

C. *How the United States Would Have Tried the Case*

The Israeli Supreme Court’s summary of the evidence discloses that, despite the passage of almost fifty years, the attorney general of Israel was able to construct a remarkably powerful case against Demjanjuk. No fewer than thirteen witnesses identified Demjanjuk from contemporary photographs of guards dressed in Nazi uniforms. Five witnesses identified Demjanjuk in court as Ivan the Terrible and remained convinced of this despite extensive cross-examinations. Our own Supreme Court likely would have reached a different result had Demjanjuk been prosecuted in the United States.¹⁹¹

Based on the U.S. Supreme Court’s decision in *Herrera v. Collins*,¹⁹² the Court probably would not have admitted the statements of other Treblinka guards referring to the operator of the gas chambers as Ivan Marchenko. In *Herrera*, the defendant was convicted and sentenced to death for the murder of two Texas police officers.¹⁹³ In addition to eyewitness testimony, the evidence introduced at trial against Herrera included his social security card found within feet of one of the victims, his jeans and wallet stained with blood of one victim’s type, and a handwritten letter that strongly implied that he had committed the murders.¹⁹⁴ In 1992, more than ten years after his trial, the defendant attempted to admit exculpatory evidence that consisted of affidavits, mostly from friends and family members, stating that Herrera’s dead brother had confessed to being the actual murder-

189. Netty C. Gross, *In the Tradition of Justice*, JERUSALEM POST, Feb. 5, 1994, at 15.

190. Landau, *supra* note 166, at 1.

191. Dershowitz, *supra* note 165, at 1; *see also* Alex Kozinski, *Sanhedrin II*, 16 NEW REPUBLIC, Sept. 13, 1993, at 16.

192. 113 S. Ct. 853 (1993).

193. *Id.*

194. *Id.* at 856.

er.¹⁹⁵ The U.S. Supreme Court held that the new evidence was not sufficiently persuasive of Herrera's actual innocence to justify a new trial because the government had no opportunity to cross-examine the brother, the new evidence had been presented eight years after Herrera's trial, and Herrera's showing of actual innocence fell short of the threshold showing required for habeas corpus relief.¹⁹⁶

It is highly doubtful that an American court would have admitted the KGB statements which ultimately exonerated Demjanjuk had they been presented at trial, much less on appeal. The new evidence that the Israeli Supreme Court considered regarding Ivan Marchenko became available years after Demjanjuk's trial.¹⁹⁷ Furthermore, it consisted largely of hearsay statements of dead Nazi collaborators.¹⁹⁸ The statements themselves were taken by the KGB, and the declarants were not subject to cross-examination or impeachment.¹⁹⁹ Therefore, there was no way to know how these statements were produced or whether they were authentic.²⁰⁰ Demjanjuk's situation, like Herrera's, would probably be decided according to precedent, which states that claims of actual innocence based upon newly discovered evidence are not cognizable in federal habeas litigation.²⁰¹ To obtain relief, Demjanjuk probably would have had to assert a separate constitutional violation.²⁰²

Why, then, did the Israeli Supreme Court set Demjanjuk free? The Court's decision to free Demjanjuk rests on two key rulings.²⁰³ The first concerns the sufficiency of the evidence that Demjanjuk was Ivan the Terrible. The Court held that this was

195. *Id.*

196. *Id.* at 865. Specifically, the U.S. Supreme Court held that where a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the constitutional presumption of innocence disappears. Because Herrera did not seek relief from a procedural error that would allow him to bring an independent constitutional claim challenging his conviction, but rather argued that he was entitled to habeas relief because new evidence showed his conviction was factually incorrect, his claim was denied. *Id.* at 854.

197. Dershowitz, *supra* note 165, at 1.

198. *Id.*

199. *Id.*

200. *Id.*

201. Vernon E. Googe, III, *Herrera v. Collins: Federal Habeas Corpus Review and Claims of Actual Innocence*, 27 GA. L. REV. 971 (1993).

202. *Id.*

203. Kozinski, *supra* note 191, at 16.

not proved beyond a reasonable doubt. Second, the Court decided not to pursue the lesser charges that Demjanjuk served as a guard at the extermination camp at Sobibor and the concentration camps at Flossenbuerg and Regensbuerg. The Court felt that it could not dismiss the KGB statements and could not come up with a satisfactory explanation for their existence.²⁰⁴ These statements established a reasonable doubt that Demjanjuk was Ivan the Terrible.²⁰⁵

In reaching this conclusion, the Court adopted a standard much more rigorous than that normally employed in the United States.²⁰⁶ "An appellate court [in the United States] would look at the evidence in the light most favorable to the prosecution and ask itself whether a rational jury *could* have convicted; it would reverse only if the evidence absolutely required an acquittal."²⁰⁷ Because the KGB statements came into the record with no opportunity to cross-examine the declarants, no proof of authenticity, and nothing that would make the statements reliable enough to be admitted under ordinary circumstances, it was impossible for the prosecution to deal with them. Under *Herrera*, these statements probably would not be sufficiently persuasive of Demjanjuk's innocence in the United States. Because Congress has categorically barred aliens who assisted in Nazi persecution from the United States,²⁰⁸ the judicial finding that Demjanjuk served at the SS camp at Trawniki and the death camp at Sobibor should be sufficient to require his exclusion from the United States.

V. THE IMPLICATIONS OF DEMJANJUK'S RETURN ON THE UNITED STATES ROLE IN SUBSEQUENT PROSECUTIONS OF ALLEGED NAZI WAR CRIMINALS

Demjanjuk's acquittal raises questions about the efficacy of pursuing suspected war criminals nearly half a century after the event. Specifically, as the memories of aging witnesses who faced excessive trauma fade, it becomes increasingly difficult to successfully prosecute Nazi war criminals. For this reason, Demjanjuk's

204. *Id.* at 17.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985).

extradition to Israel may have been the last major trial of an alleged Nazi war criminal.

Before 1975, no systematic effort to investigate allegations of Nazi war criminals living in the United States existed. On March 28, 1979, Congress created the OSI. The sole purpose of the OSI is to locate, investigate, and institute legal proceedings against Nazi criminals in the United States.²⁰⁹ The OSI is part of the Criminal Prosecution Division of the U.S. Justice Department,²¹⁰ has a budget of approximately three million dollars, and has a committed staff of historians, researchers, investigators, and litigators.²¹¹

Some of the OSI's critics claim that the United States should not continue to allocate money and resources to identify, denaturalize, and deport alleged Nazi war criminals who have resided in the United States for many years as law-abiding individuals.²¹² These critics support the imposition of a statute of limitations on charges brought by the OSI.²¹³ In essence, those who support abolishing the OSI call for forgiveness of the perpetrators of the Holocaust.²¹⁴ Another argument, made in support of the abolition of the OSI, is the belief that society should forgive, forget, and show mercy toward the perpetrators of the Holocaust.²¹⁵ Finally, there is a potentially high and incalculable cost to the Government's efforts to identify and prosecute those who the Government believes assisted the Nazis in persecuting civilians.²¹⁶

Several arguments have also been advanced in support of retaining the OSI. One argument emphasizes the special responsibility of the United States for its own past acts. The United States may have a special responsibility to locate and prosecute Nazi criminals because the United States erred in permitting Nazi collaborators to enter the country.²¹⁷ By returning the defen-

209. Mausner, *supra* note 43, at 751.

210. *Id.*

211. Rena Hozore Reiss, *The Extradition of John Demjanjuk: War Crimes, Universality Jurisdiction, and the Political Offense Doctrine*, 20 CORNELL INT'L L.J. 281, 286 n.22 (1987).

212. Stephen J. Massey, *Individual Responsibility for Assisting the Nazis in Persecuting Civilians*, 71 MINN. L. REV. 97, 149 (1986).

213. *Id.*

214. *Id.*

215. *Id.* at 151.

216. *Id.*

217. *Id.*

dants to the countries where their crimes were committed and allowing those countries to prosecute these criminals, the United States could make amends for concealing the perpetrators' pasts.²¹⁸

Retributivist theories also support retaining the OSI. These theories are based on one or more of the following premises: (1) a person is punishable if, and only if, he or she has committed an offense; (2) a person who has committed an offense deserves punishment; (3) the justification for punishment is derived from the justice of imposing on those who have committed offenses the treatment they deserve; and (4) punishment is proper when it is proportional to the wickedness of the offense.²¹⁹ Assuming that this retributivist framework is logical, the issue then becomes whether the punishment the OSI imposes on Nazi war criminals in the form of denaturalization and deportation suits is proportional to the moral wrong of the defendants' offenses. The Nazis uprooted Jewish families from their homes and packed them into ghettos. From the ghettos, Jews were crowded into cattle cars. Those Jews who survived the grueling trip, often made in freezing cold or oppressive heat, were ultimately carried to their deaths. Because the Nazis stripped the Jews of their citizenship, denaturalizing and deporting those who assisted the Nazis may be an appropriate response.²²⁰

Finally, the OSI's continued existence can be justified on the ground that prosecuting Nazi criminals will deter others from acting in a similar manner.²²¹ Although the OSI has made noble attempts to bring Nazi collaborators to justice, the record of the U.S. Government prior to the OSI's existence is unimpressive. Even Germany and some South American countries have done very little to ensure that Nazis are caught and punished.²²²

In spite of the minimal deterrent effect that the OSI's efforts may have, it is important to remember that Nazi war criminals committed the crime of genocide, not murder.²²³ Because the

218. *Id.*

219. *Id.* at 157 n.319.

220. *Id.* at 159.

221. *Id.*

222. *Id.*

223. See ARENDT, *supra* note 34, at 272. Arendt notes:

These mass murderers must be prosecuted because they violated the order of mankind, and not because they killed millions of people. . . . Nothing is more

crimes of alleged Nazis transcended the bounds of moral decency, the United States should continue to investigate and institute legal proceedings against alleged Nazi war criminals. Simon Wiesenthal, the legendary pursuer of Nazi war criminals, argues that criminal justice is not the purpose of his quest. "These crimes can't really be punished anyway. I see what I am doing as a warning to the murderers of tomorrow. A warning to them . . . that they will never rest in peace."²²⁴

The message communicated by the OSI's efforts to locate, investigate and institute legal proceedings against Nazi war criminals continues to be a powerful one. This message is probably not capable of articulation without the OSI's continued existence. Abolishing the OSI would suggest that the acts of Nazi war criminals were not serious wrongs against innocent victims. The central purpose of capturing Nazis and putting them on trial, however, is to educate the world about the importance of fighting evil when it first begins. The OSI's efforts forcefully and emphatically communicate to Nazi war criminals and society that the United States will not tolerate the moral injustice of the offenses committed by Nazi war criminals.

VI. CONCLUSION

Following failed appeals to the Israeli Supreme Court to keep Demjanjuk in Israel so he could be tried for his roles at Sobibor and the concentration camps of Flossenbuerg and Regensbuerg, Demjanjuk returned to his Cleveland home. Shortly after his return to the United States, a federal appeals court dismissed the prior extradition order.²²⁵ The U.S. Justice Department, however, has reopened the legal battle against Demjanjuk.²²⁶ The U.S. Justice Department believes Demjanjuk should be deported because its original case cited activities at death camps in addition

pernicious to an understanding of these new crimes . . . than the common illusion that the crime of murder and the crime of genocide are essentially the same, and that the latter therefore is no new crime properly speaking. The point of the latter is that an altogether different order is broken and an altogether different community is violated.

Id. at 272.

224. Jordan Bonfante, *Where Have All the Nazis Gone?*, TIME, Aug. 9, 1993, at 38.

225. See generally *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993).

226. *Demjanjuk on His Way Out of the U.S.*, B'NAI B'RITH MESSENGER, Jan. 14, 1994, at 16.

to his service at Treblinka.²²⁷ Two motions have been filed in Ohio federal courts. In one motion, the Justice Department is appealing a court order overturning his extradition to Israel. In the other motion, the Justice Department seeks to reopen the original denaturalization proceedings.²²⁸

In spite of the pending denaturalization and deportation proceedings, the evidence heard in Demjanjuk's case, publicized throughout the nation, remains unanswerable, stark, and extremely convincing. Trials of alleged Nazi war criminals are often intended as a lesson or reminder for those too young to remember the Holocaust. Despite the obstacles in prosecuting crimes that occurred almost fifty years ago, far away from the United States, Nazi criminals in the United States should be brought to justice. Considering that the OSI was not created until 1979, more than thirty years after more than six million Jews and millions of other innocent people were murdered during World War II, the OSI continues to make up for the lost time in bringing war criminals to justice.

*Cheryl Karz**

227. *Id.* Attorney General Janet Reno has stated that the U.S. Justice Department's objective is to bring about Demjanjuk's prompt removal from the United States. "We want there to be no doubt that Mr. Demjanjuk served in [N]azi death camps and concealed that fact when he applied to become a U.S. citizen." *Id.*; see also Andrew Wolfberg, *Demjanjuk's Appeal is a Waste of Time*, L.A. DAILY J., Nov. 19, 1993, at 7.

228. *Id.*

* The author wishes to thank all of her family members for their unconditional support throughout her college and law school career. The author also dedicates this Comment to her grandmother, who lost most of her family in Auschwitz during World War II.