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*NAZI CONCENTRATION CAMP GUARD SERVICE EQUALS  
"GOOD MORAL CHARACTER"?: UNITED STATES V. LINDERT*

*By K. Lesli Ligorner\**

Fetching the newspaper from your porch, you look up and wave at your elderly neighbor across the street. This quiet man emigrated to the United States from Europe in the 1950s. Upon scanning the newspaper, you discover his picture on the front page and a story revealing that he guarded a notorious Nazi concentration camp. How would you react if you knew that this neighbor became a naturalized citizen in 1962 and that naturalization requires "good moral character"?

The systematic persecution and destruction of innocent peoples from 1933 until 1945 remains a dark chapter in the annals of twentieth century history. Though the War Crimes Trials at Nürnberg<sup>1</sup> occurred over fifty years ago, the search for those who participated in Nazi-sponsored persecution has not ended. Prosecutors around the world continue to investigate the perpetrators of those atrocities.

The Department of Justice Office of Special Investigations ("OSI"),<sup>2</sup> charged with seeking the Nazi-sponsored persecutors who immigrated to the United States,<sup>3</sup> recently sought the denaturalization of former Nazi concentration camp guard George Lindert.<sup>4</sup> Lindert, a Youngstown, Ohio resident, entered the United States in 1954<sup>5</sup> and obtained United States citizenship in 1962.<sup>6</sup> Decades later,

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\* © K. Lesli Ligorner. J.D. candidate 1997, Washington College of Law, American University; B.A. Honours 1991, McGill University. My appreciation and sincere gratitude go to everyone who made this Note possible.

1. *Nürnberg Trial*, 6 F.R.D. 69 (IMT 1946). This Note uses the traditional German spelling of the city; several of the articles cited herein, however, use the English spelling "Nuremberg." See, e.g., JANIS, *infra* note 28; WILLIS, *infra* note 20; Fogelson, *infra* note 29.

2. See *infra* note 39 and accompanying text.

3. Transfer of Functions of the Special Litigation Unit Within the Immigration and Naturalization Service of the Department of Justice to the Criminal Division of the Department of Justice, Att'y Gen. Order No. 851-79 (1979).

4. *United States v. Lindert*, 907 F. Supp. 1114 (N.D. Ohio 1995).

5. *Lindert*, 907 F. Supp. at 1121. The United States Displaced Persons Commission ("DPC") rejected Lindert's application in 1951 because he served in the "Waffen SS" ("armed SS"), then automatically considered a "movement hostile to the United States or its form of government." Displaced Persons Act of 1948 § 10, 62 Stat. 1013 [hereinafter DPA] (codified at 50 U.S.C. app. § 1962); *Lindert*, 907 F. Supp. at 1121. See *infra* note 99.

6. *Lindert*, 907 F. Supp. at 1122.

however, the OSI recovered documents that identified Lindert as a Nazi concentration camp guard.<sup>7</sup> As a result, the OSI filed a three-count complaint in the United States District Court for the Northern District of Ohio on July 7, 1992.<sup>8</sup>

In September 1995, however, the District Court for the Northern District of Ohio declined to revoke Lindert's naturalized citizenship.<sup>9</sup> In so doing, the *Lindert* court erred in its expressed "task of determining the contribution of a single individual to the collective wrongdoing of a nation or group."<sup>10</sup>

Domestically, the *Lindert* court's decision represents a sharp division between the jurisprudence of the Sixth Circuit and the other federal Courts of Appeals regarding alleged Nazi persecutors. The *Lindert* court effectively ruled that one's former service as a concentration camp guard in one of the more notorious camps does not establish his/her lack of "good moral character." This message affronts every Nazi concentration camp survivor<sup>11</sup> and every individual who believes that the commission of a crime against humanity should result in some form of sanction.

Internationally, the *Lindert* court's message reinforces the resolve of those individuals who seek to shut down prosecution units that target individuals who participated in Nazi-sponsored persecution. If the United States, the nation most vigilant against Nazi perpetrators, does not find former concentration camp guards deserving of denaturalization, then foreign courts with less political resolve will be discouraged to investigate and prosecute persons who engaged in Nazi-sponsored persecution. The *Lindert* decision reaffirms the fifty-percent budget reduction of the Canadian unit that investigates participants in persecution spearheaded by the Nazi regime.<sup>12</sup> It supports the British government's decision not to renew the budget for its investigative unit, which ceased to operate in May 1995.<sup>13</sup> It fortifies

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7. See *id.* at 1120. The OSI discovered Lindert's past as a concentration camp guard because his name appeared on the roster dated August 4, 1944, which the United States military forces obtained when they liberated Mauthausen in May 1945. The roster is an attachment of the "Cohen Report." *Id.* at 1121. See also *United States v. Tittjung*, 753 F. Supp. 251, 253 (E.D. Wis. 1990) (indicating that OSI learned of Tittjung's name from another roster included in the "Cohen Report").

8. Complaint, *United States v. Lindert*, 907 F. Supp. 1114 (N.D. Ohio 1995) (No. 4:92CV1365) [hereinafter *Lindert* Complaint]. See 8 U.S.C. § 1451(a) (1995) (instructing and authorizing United States Attorneys to institute denaturalization proceedings where good cause for such action arises).

9. *Lindert*, 907 F. Supp. 1114.

10. *United States v. Schmidt*, 923 F.2d 1253, 1258 (7th Cir. 1991). Note, however, that *Lindert* does not employ this legal standard.

11. See Marcy Oster, *Lindert, Camp Guard for SS, Retains American Citizenship*, *Cleveland Jewish News* reprinted in *Community News Rep.*, Oct. 20, 1995, at 3 (arguing that the *Lindert* decision offends the sensibilities of Mauthausen survivors and calling it *per se* "irrational") (quoting Cliff Savren, Regional Director of the Anti-Defamation League).

12. Dan Fesperman, *Nazi Criminals May Escape Into History*, *DALLAS MORNING NEWS*, May 21, 1995, at 24A.

13. *Id.*

the Australian government's decision three years ago to dismantle its special investigative unit.<sup>14</sup>

This Note evaluates the recent decision of *United States v. Lindert*.<sup>15</sup> Part I of this Note outlines the Nürnberg decision, presents the basis for jurisdiction to prosecute perpetrators of Nazi-sponsored persecution globally and in the United States, and explains the general mechanics of denaturalization and its application to alleged participants in Nazi-sponsored persecution. Part II introduces the facts of *United States v. Lindert*. Part III critiques the District Court's legal conclusions that affirm Lindert's naturalization despite the prosecution's "thorough, diligent and exhaustive effort."<sup>16</sup> Part IV analyzes the government's decision not to appeal and recommends that all United States courts apply international law and precedent to cases involving participants in Nazi-sponsored persecution. This section asserts that the United States, by means of its judiciary, must show the international community this country's clear unwillingness to provide a safe haven for individuals who have committed crimes against humanity at any time during their lives.

## I. BACKGROUND

### A. BASIS FOR WAR CRIMES TRIALS AND NÜRNBERG

Upon discovering the extent of the atrocities committed by the Nazi regime from 1933 through 1945, the Allied countries promulgated the London Agreement of August 8, 1945.<sup>17</sup> The London Agreement established the jurisdiction for the prosecution and punishment of the major war criminals from the European Axis powers and set forth the Charter of the International Military Tribunal ("the Charter").<sup>18</sup> The Charter<sup>19</sup> established binding law for the International Military Tribunal ("the IMT" or "the Tribunal") in the War Crimes Trials.<sup>20</sup> The Nürnberg Trial,

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14. *Id.*

15. 907 F. Supp. 1114 (N.D. Ohio 1995).

16. *United States v. Lindert*, 907 F. Supp. 1114, 1117 (N.D. Ohio 1995).

17. Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and North Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, August 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter London Agreement], reprinted in U.S. DEP'T OF STATE, Pub. No. 8484, 3 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, 1238-47 (1969) [hereinafter TREATIES].

18. *Id.*

19. 59 Stat. 1546, 82 U.N.T.S. 284 (1945) [hereinafter Charter]. Although the Charter exists within the London Agreement, its significance warrants a separate citation in this Note.

20. *Nürnberg Trial*, 6 F.R.D. 69, 78, 107 (IMT 1946). Article 6 of the Charter ultimately defined three crimes with which the Allies charged the defendant Nazi war criminals:

the result of the London Agreement, manifested the world's condemnation of the unfathomable acts committed by Nazi Germany.<sup>21</sup>

The Nürnberg Trial established crucial international precedent based on legal and moral foundations.<sup>22</sup> The Charter targeted individuals and groups.<sup>23</sup> It stripped government agents of the immunity generally enjoyed by such officials, despite

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- (a) *Crimes Against Peace*: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing ... ;
  - (b) *War Crimes*: namely, violations of the laws or customs of war. Such violations shall include, but are not limited to, murder, ill-treatment or deportation for slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;
  - (c) *Crimes Against Humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.

Charter, *supra* note 19, at 1547, 82 U.N.T.S. at 288, *reprinted in* TREATIES, *supra* note 17, at 1241-42.

Controversy existed regarding what law to use and what crimes to charge at a war crimes trial. Letter from Henry L. Stimson to John J. McCloy accompanying Memorandum on Aggressive War by Colonel William Chanler (Nov. 28/30, 1944), *in* BRADLEY F. SMITH, *THE AMERICAN ROAD TO NUREMBERG* 68-74 (1982). The Americans wanted to include a charge of "crimes against peace," which essentially translates into waging aggressive war, a charge that never before existed. *Id.* *C.f.* T. J. LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* 311 (7th ed. 1923) (distinguishing only between offensive and defensive parties without mentioning aggression); JAMES F. WILLIS, *PROLOGUE TO NUREMBERG* 175-76 (1982) (explaining Justice Jackson's belief that aggression qualified as an uncodified war crime because it violated the Kellogg-Briand Pact of August 27, 1928, 6 F.R.D. at 107). *But see* H. WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 368, 373-74 (8th ed. 1866) (stating that, once a war commences, each warring party possesses "all the rights of war as against each other" and no distinction exists between a just or unjust war).

21. *Nürnberg Trial*, 6 F.R.D. at 69 (incorporating the Charter). Britain, the Soviet Union, France and the United States all participated in the trial pursuant to the London Agreement. London Agreement, *supra* note 17. The Nürnberg Trial adjudicated the convictions of twenty-three defendants, all high-ranking Nazi officials. *See Nürnberg Trial*, 6 F.R.D. at 69 (naming the defendants).

22. *See* Report from Robert Jackson, Associate Justice, United States Supreme Court, to Harold S. Truman, President of the United States (Oct. 7, 1946), *reprinted in* ROBERT JACKSON, *INTERNATIONAL CONFERENCE ON MILITARY TRIALS* 439 (DEPT. ST. PUBL'N 3080 1945) (asserting that "the Nürnberg trial may constitute the most important moral advance to grow out of [the Second World] [W]ar"). Justice Jackson served as a prosecutor for the United States in the Nürnberg Trial. *Nürnberg Trial*, 6 F.R.D. at 74.

23. Charter, *supra* note 19, at 1548, 82 U.N.T.S. at 290.

the fact that they acted pursuant to orders of their superiors.<sup>24</sup> Their official positions within the Nazi organization sufficed to warrant punishment.<sup>25</sup> Additionally, the Charter eliminated the defendants' ability to blame their superiors but provided that adherence to superior orders might mitigate punishment.<sup>26</sup> In order to condemn the actions of and membership in certain inimical organizations, the Charter permitted courts to try members of certain groups *as* members and to declare these groups criminal organizations.<sup>27</sup>

The London Agreement's progeny bind the United States. Common law comprises the vast body of United States law, and United States courts incorporate international law as a unique body of common law.<sup>28</sup> International law should be binding upon all American courts,<sup>29</sup> and some judges in the United States have un-

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24. *Id.* at 1548, 82 U.N.T.S. at 288 (establishing that defendants' official governmental positions did not immunize them from or mitigate punishment).

25. *Id.*

26. *Id.*

27. *Id.* at 1548, 82 U.N.T.S. at 290. *Accord, Nürnberg Trial*, 6 F.R.D. at 143 (indicting the *SS Totenkopf* (Death's Head) as part of the SS, a criminal organization created for, *inter alia*, persecution, enslavement, and genocide).

The IMTs could declare certain groups criminal organizations but lacked authority to pass judgment on individuals. U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 48 (1992) [hereinafter U.N. WAR CRIMES COMM'N] (characterizing this power to adjudicate organizations as declaratory and inapplicable to individuals). Competent national and local courts had the responsibility to adjudicate individuals based on "the 'declaratory judgment' of the Nuremberg Tribunal." *Id.* The "declaration of criminality" established the criminal nature of a group and estopped a defendant from questioning this determination. *Id.* Thus, in the case of individual members, the "declaration of criminality" created a rebuttable presumption of guilt, thereby shifting the burden of proof to the defendant to prove a lack of individual guilt. *Id.* For further discussion of the "tests" submitted by the prosecution, see *infra* note 170.

28. See *Filartiga v. Peña-Irala*, 630 F.2d 876, 880, 890 (2d Cir. 1980) (holding that United States law encompasses the law of nations and, therefore, an individual who committed state torture in another country could face action under the Alien Tort Statute); MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 99 (2d ed. 1993) (declaring that international law derived from non-treaty sources assimilates into United States law as "a special form of the common law itself").

29. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425-26 (1964), *superse- ded by statute on other grounds*; *The Paquete Habana*, 175 U.S. 677, 700 (1900) (Gray, J.) (asserting that "international law [exists as] part of [United States] law," and thus the courts "must ... ascertain and administer [international laws]...."); *Siderman de Blake v. Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) (explaining that "the universal and fundamental rights of human beings identified by Nuremberg" descend from the universal, fundamental norms known as *jus cogens*); *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979); H.R. REP. NO. 95-1542, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. at 4707 (necessitating adoption and application of international law's "crime(s) against humanity" maxim in United States domestic law); JANIS, *supra* note 28, at 99 (implying that municipal courts should acknowledge the validity of international law), 247 (characterizing Nürnberg's goal as establishing that public international rules of law should and do govern

ambiguously recognized this canon.<sup>30</sup> The IMTs established the international legal precedent generally for war crimes cases<sup>31</sup> and specifically for cases involving Mauthausen Concentration Camp guards.<sup>32</sup> Though the United States played a leading role in the institution and mechanics of the Nürnberg Trials,<sup>33</sup> the Northern District of Ohio failed to incorporate the principled Nürnberg doctrine into *United States v. Lindert*.<sup>34</sup>

#### B. JURISDICTION IN THE UNITED STATES TO PROSECUTE PERSONS WHO PARTICIPATED IN NAZI-SPONSORED PERSECUTION

The Nürnberg principles provide the model for prosecution of Nazi-sponsored

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individual action); see also U.N. GAOR, 1st Sess., pt. 2, 55th plen. mtg. at 1144, U.N. Doc. A/236 (1946) (unanimously affirming the "Nürnberg principles" as "principles of international law" and directing their codification).

A *jus cogens* canon is one that the international community accepts without permitting any deviation from it. Committee of United States Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988) (citing Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, U.N. Doc. A/Conf. 39/27, 8 I.L.M. 679). The Ninth Circuit finds a *jus cogens* nonderogable and of "the highest status within international law" as exemplified by the theories underlying the judgments of the Nürnberg trials. *Siderman de Blake*, 965 F.2d at 715; JANIS, *supra* note 28, at 65. The Court of Appeals for the District of Columbia recognized that *jus cogens* norms bind all countries. *Princz v. Federal Republic of Germ.*, 26 F.3d 1166, 1181 (D.C. Cir. 1994) (extensively detailing the application of *jus cogens* norms in domestic law). But see generally Steven Fogelson, Note, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 833-49 (1990) (arguing that American courts grant inadequate respect to the international law established in the Nuremberg Charter).

30. See *Quinn v. Robinson*, 783 F.2d 787, 799-800 (9th Cir. 1986) (holding that "crimes against humanity...violate international law") (citing M. BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW & PRACTICE ch. VIII, at ss. 2-80, 2-83 (1983) and Manuel R. Garcia-Mora, *Crimes Against Humanity and the Principle of Nonextradition of Political Offenders*, 62 MICH. L. REV. 832, 939 (1964) (citing Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, T.I.A.S. No. 1021, 78 U.N.T.S. 277)); *Filartiga*, 630 F.2d at 890 (applying international law as a body of American law in a case involving a defendant who allegedly committed state torture in another country).

31. See U.N. WAR CRIMES COMM'N, *supra* note 27, at 49 (stating that "the judgment of a Tribunal [IMT] which has not tried individual members has effect in the proceedings of courts trying them").

32. *United States v. Altfuldtsch*, No. 000-50-5, 3192, 3509-10 (DJAWC, Dachau 13 May 1946).

33. Exec. Order No. 9,547, 3 C.F.R. 378 (1943-1948) (appointing Supreme Court Justice Jackson to forge American efforts at developing a plan to prosecute the Axis criminals). The French, the Soviets and subsequently the British all supported a trial on the condition that the United States assume the burden of formulating an operable plan. Memorandum to Judge Rosenman from Lord Simon (Lord Chancellor), reprinted in SMITH, *supra* note 20, at 149-52. For a detailed discussion on the history and policy behind the Nürnberg Trial, see Fogelson, *supra* note 29.

34. 907 F. Supp. 1114 (N.D. Ohio 1995).

oppressors living in the United States. The Charter's provision for the charge of "crimes against humanity"<sup>35</sup> supplied the basis for the rationale behind the United States government's commitment to exclude these outlaws.<sup>36</sup> Although the *Ex Post Facto* provision of the United States Constitution precludes criminal prosecution of such individuals,<sup>37</sup> civil deportation and denaturalization proceedings<sup>38</sup> embody

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35. *Supra* note 20 and accompanying text (providing the definition of "crimes against humanity").

36. 124 CONG. REC. 31,648 (daily ed. Sept. 26, 1978) (statement of Rep. Fish) (noting that the Immigration and Naturalization Act in force in 1978 did not require the exclusion or deportation of persons who persecuted under the Nazi government's orders and finding it necessary to do so as a "long overdue" statement of United States policy "to condemn such conduct").

37. See D.C. BAR ASSOCIATION ET AL., *GERMAN LAW IN THE 20TH CENTURY: WEIMAR, THE NAZI ERA, NUREMBERG AND BEYOND* pt. 6, § I, at 2-3 (Dec. 28, 1995) [hereinafter *GERMAN LAW*] (explaining that the United States government may not institute criminal actions against alleged participants in Nazi-sponsored persecution because the United States cannot constitutionally assert jurisdiction over crimes occurring outside its borders); see also Jeffrey N. Mausner, *Apprehending and Prosecuting Nazi War Criminals in the United States*, 15 NOVA L. REV. 747 (1991) (discussing the subject further); Eli M. Rosenbaum, *The Investigation and Prosecution of Suspected Nazi War Criminals: A Comparative Overview*, 21 PATTERNS OF PREJUDICE 17, 17-18 (1987) (explaining the inability to institute criminal proceedings given the *Ex Post Facto* Clause in the United States Constitution). Thus, persons who participated in Nazi persecution enjoy exemption in the United States from all criminal proceedings against them based upon their persecutory conduct in Europe during World War II. *GERMAN LAW, supra*, at 3.

Other countries have chosen a different path to hold accountable those individuals who participated in Nazi-sponsored persecution. Canada, for example, amended its Criminal Code in September 1987 to permit present prosecution of residents implicated in war crimes and crimes against humanity abroad, whether committed before or after the law's enactment. *Id.* § II, at 1. See *Regina v. Finta*, 112 D.L.R. 4th 513 (Can. 1994) (charging the defendant with violating Criminal Code, R.S.C. 1985, c. C-46, as amended by R.S.C. 1985, c. 30 (3d Supp.), s. 1, the provision permitting the prosecution of Canadian residents charged with crimes against humanity committed abroad). Interestingly, the law passed constitutional muster against *Ex Post Facto* challenges by virtue of the Canadian Supreme Court's decision in *Finta*. *GERMAN LAW, supra*, at 2.

Australia has also instituted criminal proceedings against alleged perpetrators of Nazi-sponsored persecutory acts. *Id.* at 5. Upon allegations that people who participated in Nazi-sponsored persecution had fled to Australia, the national government established a Special Investigations Unit ("SIU") to handle the prosecutions. Under the War Crimes Act of 1945, the SIU charged three alleged participants in Nazi-sponsored persecution with criminal complicity. *Id.* at 5-6. All three prosecutions ended without success. *Id.* at 5. When the SIU dissolved in June 1992, the government replaced it with the War Crimes Prosecution Support Unit, which dissolved in January 1994 after declining to initiate any new cases. *Id.* at 6.

Recognizing that participants in Nazi-sponsored persecution had entered Britain and still lived there, the British government enacted the War Crimes Act in 1991 to confer jurisdiction over "acts of murder and manslaughter, or culpable homicide" in Germany or German-occupied territories between 1933 and 1945. *Id.* at 7. In July 1995, the government instituted its first criminal case against the alleged former police chief in Minsk, Belarus, Szymon



the spirit of Nürnberg.

In 1979, the Attorney General established the Office of Special Investigations (the "OSI"), which assumed responsibility for the civil enforcement of United States immigration and citizenship laws against alleged participants in Nazi-sponsored persecution.<sup>39</sup> The OSI enforces these laws<sup>40</sup> against numerous persons who, acting on behalf of or in association with the Third Reich or its allies, served in organizations that persecuted civilians and prisoners of war.<sup>41</sup> These acts constitute crimes against humanity under Article 6(c) of the Charter.<sup>42</sup>

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Serafinowicz, for collaborating in the annihilation of Jews in 1941 and 1942. *Id.*; Fred Barbash, *Britain Launches Its First Nazi War-Crime Case*, WASH. POST, July 14, 1995, at A24. In Scotland, however, due to the unlikely prospects of collecting sufficient evidence against potential suspects, the war crimes investigation team dissolved in 1994 after a three-year existence. GERMAN LAW, *supra*, pt. 6, § II, at 7. The office in Scotland operated separately from that in Britain. *Id.* For a discussion on the history of Canadian, Australian and British Nazi war crimes prosecutions, see generally Rosenbaum, *supra*.

38. Denaturalization and deportation cases follow separate tracks and government attorneys may not combine the two actions. Due to the structure of denaturalization laws and the liberty interest involved, the process takes a considerable amount of time. CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 100.02[4][d][vi] (1995).

Federal prosecutors institute denaturalization cases in district court. 8 U.S.C. § 1451(a) (1994). Either party may appeal the verdict to the Court of Appeals and subsequently to the Supreme Court, which might grant *certiorari*. GORDON ET AL., *supra*, § 81.05[2][f]. A deportation case commences with an administrative hearing before an immigration judge. *Id.* § 1.03[6][c]. The alien may appeal to the Board of Immigration Appeals ("BIA"). 8 C.F.R. § 242.21 (1996). Either party may appeal the BIA's decision to the Court of Appeals and ultimately to the Supreme Court. *Id.*

39. See Att'y Gen. Order No. 851-79 (1979) (forming the Office of Special Investigations (the "OSI")). The Order vested the OSI with the exclusive mission of investigating individuals who, prior to and during the Second World War, contributed to the Nazis' persecution of others "because of race, religion, national origin or political opinion." *Id.* After identifying and investigating United States residents who once participated in Nazi-sponsored persecution, the OSI then institutes denaturalization and deportation proceedings against such individuals. *Id.*; GERMAN LAW, *supra* note 37, pt. 6, § I, at 3. The OSI also facilitates the extradition of Nazi criminals to stand criminal proceedings in other countries. *Id.*

40. The OSI principally enforces three statutes: (1) 8 U.S.C. § 1451(a) (1995), revoking naturalization based on concealment of a material fact or willful misrepresentation; (2) 8 U.S.C. § 1182(a)(3)(E) (1995), excluding participants in the Nazi persecution; and (3) 8 U.S.C. § 1251(a)(4)(D) (1995), deporting aliens who engaged in genocide or assisted in Nazi persecution. GERMAN LAW, *supra* note 37, pt. 6, § I, at 5.

41. See *supra* note 39 and accompanying text (explaining the OSI's jurisdiction and responsibilities); see generally ALLAN A. RYAN, JR., QUIET NEIGHBORS (1984) (outlining the OSI's specific history and role in prosecuting perpetrators of Nazi-sponsored persecution).

42. See *supra* note 20 and text accompanying notes 36-37.

## C. THE ART OF DENATURALIZATION CASES

Successful denaturalization proceedings remove the benefit of citizenship from unlawfully naturalized United States citizens.<sup>43</sup> Once denaturalized, the alien may then face deportation proceedings.<sup>44</sup> Thus, after successfully bringing denaturalization proceedings against the naturalized American citizen, the OSI commences a deportation case against that individual.<sup>45</sup>

Grounds for denaturalization arise when a defect in the original naturalization process surfaces.<sup>46</sup> The basis for denaturalizing Nazi-sponsored criminals depends primarily upon (1) the statute under which the individual entered the country,<sup>47</sup> and (2) whether the immigrant possessed a legally valid visa upon first entering the United States.<sup>48</sup>

The OSI frequently brings actions based on the immigrant's (1) illegal procurement of citizenship;<sup>49</sup> (2) willful and material misrepresentations or concealments during the naturalization application process;<sup>50</sup> and/or (3) failure to possess the requisite characteristic of good moral character.<sup>51</sup> Thus, a denaturalization case may develop with charges that the individual illegally procured United States citizenship by concealing or materially misrepresenting persecutory activities conducted during World War II.<sup>52</sup> Moreover, the government might charge that this

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43. GORDON ET AL., *supra* note 38, § 100.02[5].

44. *Id.*

45. See discussion *supra* note 38 (clarifying the process of denaturalization and deportation).

46. Fedorenko v. United States, 449 U.S. 490, 506 (1981).

47. See, e.g., *id.* at 514-15 (declaring that failure to fulfill a statutory condition at the time of the petition for naturalization renders the procurement illegal); United States v. Breyer, 41 F.3d 884, 891 (3d Cir. 1994) (same); United States v. Demjanjuk, 518 F. Supp. 1362, 1382 (N.D. Ohio 1981) (same), *aff'd*, 680 F.2d 32 (6th Cir. 1982) (*per curiam*).

48. United States v. Leprich, 666 F. Supp. 967, 968 (E.D. Mich. 1987) (recognizing that an invalid immigrant visa renders subsequent naturalization as illegally procured).

49. See 8 U.S.C. § 1451(a) (1995) (authorizing the revocation of naturalization where the alien attained citizenship illegally).

50. See *id.* (authorizing the revocation of naturalization based on concealment of a material fact or willful misrepresentation); Immigration and Nationality Act §§ 101(f)(6), 340(a) (codified as amended at 8 U.S.C. §§ 1101(f)(6), 1451(a) (1994)) (mandating the revocation of citizenship if the court finds that the defendant gave false testimony in applying for immigration benefits).

51. See 8 U.S.C. § 1427(a)(3) (1995) (requiring the applicant to be "of good moral character, attach[ed] to the principles of the Constitution, and favorable disposition to the United States").

52. Miscommunication about war atrocities generally constitutes a material misrepresentation. Compare United States v. Dercacz, 530 F. Supp. 1348, 1351-53 (E.D.N.Y. 1982) (finding that Dercacz materially misrepresented his wartime activities on his naturalization papers by reporting work as a dairy farmer instead of truthfully reporting his service as a Ukrainian police officer who aided the Nazis in transferring and enslaving Jews) and United States v. Linnas, 527 F. Supp. 426, 439 (E.D.N.Y. 1981) (holding that Linnas mate-

individual's actions during the Second World War prove his/her lack of good moral character and that he/she thus entered the country on an invalid immigrant visa.

The Displaced Persons Act of 1948 ("DPA"),<sup>53</sup> the original statutory precedent for OSI cases, incorporated a provision of the Constitution of the International Relief Organization ("IRO")<sup>54</sup> forbidding the issuance of immigration visas to persons who had "assisted the enemy in persecuting civil[ians]" or "voluntarily assisted the enemy forces."<sup>55</sup> The provision also proscribed the granting of visas to former members of "movements hostile to the United States."<sup>56</sup> The United States government established "Inimical Lists,"<sup>57</sup> for example, as a means of facilitating

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rially misrepresented information by falsely claiming to be a university student from 1940-1943, though he actually served as Chief of Tartu Concentration Camp), *aff'd*, 685 F.2d 427 (2d Cir. 1982) with *United States v. Kungys*, 571 F. Supp. 1104 (D.N.J. 1983) (deeming a lie about one's birthplace an immaterial misrepresentation), *rev'd*, 793 F.2d 516 (3d Cir. 1986), *rev'd & remanded*, 485 U.S. 759, 775 (1988).

53. DPA of 1948, ch. 647, 62 Stat. 1009. With a swelling number of refugees in the camps run by the United States Army in cooperation with the International Relief Organization, *infra* note 54, President Truman suggested the enactment of immigration legislation that would permit the entry of 200,000 refugees. 7 FOREIGN REL. OF THE U.S. 644, 703 (1946); RYAN, *supra* note 41, at 15. This marked the birth of the DPA which Congress enacted two years later. *Id.* For a discussion of the reasons for the ease with which Nazi collaborators and war criminals entered the United States under the DPA, see RYAN, *supra* note 41, at 16-28 and EFRAIM ZUROFF, OCCUPATION: NAZI HUNTER: THE CONTINUING SEARCH FOR THE PERPETRATORS OF THE HOLOCAUST 32-48 (1994). For a discussion of the admitted impossibility of accurately identifying and denying visas to Nazi perpetrators at the refugee camps, see *Hearings Before the Special Subcomm. on Amendments to the Displaced Persons Act, Senate Comm. on the Judiciary*, 81st Cong., 1st & 2nd Sess. 493 (1950), *microformed on* CIS No. 928 (Congressional Info. Serv.) (statement of Edward M. Glazek) [hereinafter McCarran Hearings].

54. Compare DPA § 10, 62 Stat. 1013 (utilizing the language from the IRO's constitution), with Constitution of the International Relief Organization, *opened for signature* Dec. 16, 1946, annex I, pt. II, 62 Stat. 3038, 3051-52, T.I.A.S. No. 1846 (providing the language for Section 10 of the DPA). In 1946, the United Nations formed the IRO as a "vehicle for resettlement." *Id.* The IRO, a temporary specialized agency, established and managed a network of camps to house the displaced and homeless until negotiations regarding their resettlement provided a future. *Id.* The IRO Constitution required that each supporting nation—the United States, Canada, Australia, and the free countries of western Europe—admit a portion of the group of displaced persons for permanent residence. *Id.*; ROBERT A. DIVINE, AMERICAN IMMIGRATION POLICY, 1924-1952 112 (1957).

55. *Fedorenko v. United States*, 449 U.S. 490, 495 (1981).

56. *Id.*

57. Declaration of German Atrocities, *reprinted in* 9 DEP'T ST. BULL., Nov. 1943, at 310-11. The United States government issued rosters called "Inimical Lists" in order to enforce Section 10 of the DPA. *Id.* The Moscow Declaration of November 1, 1943, signed by Roosevelt, Stalin and Churchill, signified the first attempt to issue compilations of names of war criminals and thus served as a predecessor to the "Inimical Lists." *Id.*

Although the government no longer uses "Inimical Lists," the Immigration and Naturalization Service currently utilizes "watchlists" that list individuals identified for exclusion.

the identification of ineligible visa recipients, although inclusion in these lists is not necessary to a "movements hostile" finding. Inimical Lists identified organizations, including the SS Death's Head Battalions,<sup>58</sup> whose purposes or activities rendered their members inadmissible to the United States. The DPA, therefore, mandated categorical visa ineligibility to, *inter alia*, individuals who participated in any listed organizations.<sup>59</sup> Moreover, the OSI may denaturalize and subsequently deport any persons wrongly admitted into the United States, for lawful naturalization requires lawful entry.<sup>60</sup>

Upon the DPA's expiration in 1952, Congress enacted the Refugee Relief Act ("RRA").<sup>61</sup> The RRA altered the DPA's standard, creating new immigration possibilities for participants in Nazi-sponsored persecution.<sup>62</sup> Thus, some applicants

See GERMAN LAW, *supra* note 37, pt. 6, § I, at 1 (mentioning the number of persons whom OSI has placed on "watchlists").

58. *Nürnberg Trial*, 6 F.R.D. 69, 143 (IMT 1946) (naming the SS, including the Death's Head, as a criminal organization); see discussion, *supra* Part I.A. "SS" stands for the German word *Schutzstaffel* (protection squad), a Nazi organization formed to serve Hitler. *United States v. Lindert*, 907 F. Supp. 1114, 1118 (N.D. Ohio 1995). Hitler accorded the SS the responsibility of policing Nazi-occupied territories. *Id.* The SS always existed as a branch of the Nazi Party. Record at 169, 594, *United States v. Lindert*, 907 F. Supp. 1114 (N.D. Ohio 1995) (No. 4:92CV1365) [hereinafter *Lindert Record*] (testimony of historian Charles Sydnor, Jr.). By the outbreak of World War II, the SS grew into one of the largest and most powerful institutions in the Third Reich and constituted the dynamic core of the National Socialist State. *Id.* at 172.

The SS always existed as a separate entity from the German army (*Wehrmacht*). *Id.* at 179. Different commanders led the *Wehrmacht*, and they wore distinct uniforms. *Id.* Those who served in the *Waffen* (Armed) SS knew their services differed from those serving in the *Wehrmacht*. *Id.* at 185-86. See cases cited *infra* notes 267, 282 (illustrating examples of defendants who knew that service in the *Waffen SS* had different repercussions than did service in other units).

59. The DPA also barred the admission of aliens from other Nazi organizations not named on the Inimical Lists where those organizations assisted Axis enemy forces or participated in persecution. *United States v. Kowalchuk*, 773 F.2d 488, 496 (3d Cir. 1985).

60. 8 U.S.C. § 1451(a) (1995) (directing United States Attorneys to institute proceedings to revoke and set aside naturalization orders where immigrants "illegally procured [such certificates] or ... procured [them] by concealment of a material fact or by willful misrepresentation"). See, e.g., *id.*, 571 F. Supp. 72 (E.D. Pa.), *aff'd*, 773 F.2d 488 (3d Cir. 1985) (denaturalizing a member of the Ukrainian militia for concealing this fact); *United States v. Schellong*, 547 F. Supp. 569 (N.D. Ill. 1982), *aff'd*, 717 F.2d 329 (7th Cir.), *aff'd*, 718 F.2d 1104 (7th Cir. 1983) (denaturalizing a member of the *Waffen SS* for concealing or misrepresenting this fact); *United States v. Koziy*, 540 F. Supp. 25, 33 n.15 (S.D. Fla. 1982) (denaturalizing a former member of the Organization of Ukrainian Nationalists for misrepresenting and concealing this fact), *aff'd*, 728 F.2d 1314, 1317, 1321-22 (11th Cir. 1984).

For a discussion of American knowledge that the DPA easily facilitated the immigration of Nazi persecutors, see RYAN, *supra* note 41, at 12-28.

61. Pub. L. No. 751, 67 Stat. 401, as amended by Act of Aug. 31, 1954, 68 Stat. 1044 (expired Dec. 31, 1956) [hereinafter RRA].

62. Compare RRA § 14, *supra* note 61 (prohibiting entry to any alien who "personally advocated or assisted in the persecution of any person or group of persons because of race,

whose affiliations with the Nazi regime caused earlier rejections under the DPA managed to enter the United States under the RRA.<sup>63</sup>

Upon realizing that the United States immigration statutes lacked a provision specifically providing for the deportation of those individuals residing in the United States who participated or assisted in Nazi-sponsored persecutory conduct, Representative Elizabeth Holtzman inspired Congress to rectify the problem. Her efforts resulted in the passage of the Holtzman Amendment in 1978.<sup>64</sup> According to Department of State officials, the Holtzman Amendment<sup>65</sup> mandates the deportation of aliens who either served in Nazi units that carried out acts of persecution or assisted or participated in such persecution,<sup>66</sup> just as the DPA and RRA mandate the exclusion of such persons.

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religion or national origin," discontinuing the legal exclusion on former Nazis) (emphasis added) with DPA § 10, *supra* note 53 and discussion in Part I.C (explicitly barring former Nazi persecutors from obtaining immigration visas). To overcome the different burden of proof, the OSI elicits testimony from State Department officials who issued visas under the RRA and testify that they had the authority to deny visas based on the undesirability of the applicant; this basis justified the exclusion of people who participated in Nazi-sponsored persecution. See RYAN, *supra* note 41, at 248. Ryan explains that officials used Communism as the "litmus test" for eligibility instead of checking applicants' war records. *Id.* at 327. See also *Petkiewytch v. INS*, 945 F.2d 871, 876 (6th Cir. 1991) (discussing the problem in the RRA and the response provided by the 1978 Holtzman Amendment, *infra* note 64).

63. See RYAN, *supra* note 41, at 327 (explaining the problem in the INA); *United States v. Schellong*, 547 F. Supp. 569 (N.D. Ill. 1982), *aff'd*, 717 F.2d 329 (7th Cir. 1983) (denaturalizing Schellong, who, after rejection under the DPA, entered the United States under the RRA), *aff'd*, 718 F.2d 1104 (7th Cir. 1983).

For criticism of the RRA based on its allegedly lower standard, see RYAN, *supra* note 41, at 327.

64. Holtzman Amendment of 1978, Pub. L. No. 95-549, 92 Stat. 2065 (codified at 8 U.S.C. § 1251 (a)(19)). Section 103 provides in pertinent part for the deportation of aliens who aided Nazi government in Germany in any manner from 1933 until 1945. 8 U.S.C. § 1182(a)(3)(E) (1995). The Amendment eliminated both the possibility of a former Nazi persecutor obtaining a visa and the authority of the Attorney General to admit him/her as a temporary non-immigrant. *Id.* Additionally, the Attorney General may not block a deportation proceeding by issuing a waiver, though he/she may do so for non-Nazi applicants. *Id.*

65. See *supra* note 62 and accompanying text (discussing operative provisions of the DPA and RRA).

66. H.R. REP. NO. 95-1542, at 2 (1978), reprinted in 1978 U.S.C.C.A.N. at 4702. *E.g.*, *Kulle v. INS*, 825 F.2d 1188, 1192 (7th Cir. 1987) (finding that armed guard service at a Nazi concentration camp *per se* constitutes assistance in persecution and therefore affirming deportation of the defendant); *Schellong v. INS*, 805 F.2d 655, 661 (7th Cir. 1986) (same); *United States v. Tittjung*, 753 F. Supp. 251, 257 (E.D. Wis. 1990) (same), *aff'd*, 948 F.2d 1292 (7th Cir. 1991); *In re Blach*, No. A10 629 292, at 24 (Immigr. Ct., Los Angeles, Apr. 27, 1987) (remarking that any concentration camp guard, "by virtue of his position," participated in persecution), *aff'd*, Nos. A10 629 292 & A24 198 399 (B.I.A. Feb. 8, 1990); *In re Fedorenko*, 19 I. & N. Dec. 57, 59 (B.I.A. 1984) (same).

## II. UNITED STATES V. LINDERT

## A. LINDERT'S PERSONAL HISTORY

George Lindert was born in Passbuch, Romania on January 3, 1923.<sup>67</sup> In 1942, the *Waffen SS*, the elite armed guard and intelligence unit of the Nazi Party of Germany, recruited him into its ranks.<sup>68</sup> He received his SS training in Poland,<sup>69</sup> where he learned to handle weapons and perform guard duty.<sup>70</sup>

After Lindert completed training, the SS assigned him to Mauthausen Concen-

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67. Lindert Complaint, *supra* note 8, at 2. But see *United States v. Lindert*, 907 F. Supp. 1114, 1118 (N.D. Ohio 1995) (reporting Lindert's year of birth as 1922).

68. *Id.* at 1119. *Waffen SS* members personally traveled to the villages of northern Transylvania and recruited Lindert and his brother, among others. Lindert Record, *supra* note 58, at 1069 (testimony of Lindert). Rather than forcefully recruit German men eligible for the draft, *id.* at 224 (testimony of Sydnor), *Waffen SS* members induced potential recruits with financial incentives and marketed the advantages of service in the SS. *Id.* at 249.

Before the *Waffen SS* could recruit from the ethnic German population in Hungary, Germany needed permission from the Hungarian government. *Id.* at 226-28. On January 14, 1942, the Hungarian government granted the *Waffen SS* qualified permission to recruit 20,000 volunteers; the Hungarians allowed recruitment only of "ethnic German volunteers" between the ages of eighteen and thirty, and only where the individual volunteer presented "a written declaration of [parental] agreement." *Id.* at 228-233. All volunteers would receive German citizenship. *Id.*

In sum, an ethnically German male living in Hungary in 1942 and physically qualified for military service could choose among three options: he could (1) join the *Waffen SS* with the written consent of his parents; (2) join the Hungarian Army with the written consent of his parents, as the age of majority was twenty-four years of age; or (3) wait until the Hungarian Army drafted him in five years. *Id.* at 233-34. No historical documentation provides any evidence that the ethnic Germans from Transylvania faced threats of physical harm for refusing to join the SS. *Id.* at 251.

The *Lindert* court noted that the SS recruited Lindert over his parents' objections. *Lindert*, 907 F. Supp. at 1119. The court presumably included this finding of "fact" to underscore a theme of involuntariness, however, the Supreme Court deems involuntariness an implausible defense. *Fedorenko v. United States*, 449 U.S. 490, 511 (1981) (noting that the "deliberate" failure to include the word "voluntary" in § 2(a) of the Holtzman Amendment disqualifies all who assisted in persecution from receiving immigrant visas under the RRA). In *Fedorenko*, the United States Vice-Consul, a government witness, testified that he had good reason to discount the possibility of any concentration camp guard's involuntary service. *Id.* at 499 n.14. He stated that guards regularly answered the question about their reasons for beginning and continuing as guards by admitting their free, voluntary choice. *Id.* Further, as mentioned *infra* note 164, considerable evidence indicates that individuals could avoid camp guard service by requesting a transfer.

69. *Lindert*, 907 F. Supp. at 1119. The SS Troop Training Camp at Debica, Poland, where Lindert trained, was the main training center for reserve and replacement SS volunteers. Lindert Record, *supra* note 58, at 251-52 (testimony of Sydnor).

70. *Lindert*, 907 F. Supp. at 1119.

tration Camp,<sup>71</sup> where he served from approximately the late spring of 1942 until the summer of 1943.<sup>72</sup> As a guard at Mauthausen, Lindert always carried a loaded rifle.<sup>73</sup> Moreover, he wore the Death's Head uniform, which included a skull and crossbones insignia on the collar;<sup>74</sup> indeed, no other *Waffen* SS unit distinguished itself with this insignia.<sup>75</sup> Lindert's watchtower guard duties at Mauthausen required him to prevent the prisoners' escape and ensure that they did not approach the barbed wire surrounding the entire camp.<sup>76</sup> Lindert testified that he served in the concentration camps only as a "perimeter guard, with an occasional opportunity to escort non-prisoners past the quarry."<sup>77</sup>

71. *Id.*

72. *Id.* at 1120; Lindert Record, *supra* note 58, at 1076-77, 1079, 1171 (testimony of Lindert).

73. Lindert Deposition, Apr. 18, 1991, at 68, United States v. Lindert, 907 F. Supp. 1114 (N.D. Ohio 1995) (No. 4:92CV1365). In response to a deposition question, Lindert admitted that he carried his weapon all the time while on duty. *Id.*

74. Lindert Record, *supra* note 58, at 180-82 (testimony of Sydnor). The government admitted into evidence a photograph depicting Lindert in the Death's Head uniform with the aforementioned markings indicating his rank of private at the time of the picture. *Id.* at 180-81. The customary skull and crossbones insignia distinguished Death's Head members. See United States v. Leprich, 666 F. Supp. 967, 967 (E.D. Mich. 1987) (noting that Leprich's Death's Head uniform at Mauthausen incorporated the skull-and-crossbones symbol); United States v. Tittjung, 753 F. Supp. 251, 253 (E.D. Wis. 1990) (noting that Tittjung, who also served at Mauthausen, wore the organization's symbol on his collar), *aff'd*, 948 F.2d 1292 (7th Cir. 1991); United States v. Schmidt, 923 F.2d 1253, 1255 (7th Cir. 1991) (mentioning that Schmidt wore the skull and crossbones of the Death's Head on his SS uniform).

75. Lindert Record, *supra* note 58, at 180-82 (testimony of Sydnor).

76. *Id.* at 1183-86 (testimony of Lindert). See Lindert Deposition, Apr. 18, 1991, at 68-69, Lindert (No. 4:92CV1365) (admitting that he "mostly work[ed] guarding the quarry"). The immigration judge further noted that a guard's sole purpose was to persecute targeted individuals. *Id.* See also *In re Blach*, A10 629 292, at 24 (Immigr. Ct., Los Angeles, Apr. 27, 1987) (labeling concentration camp guards as mere "part and parcel of a criminal system"), *aff'd*, (B.I.A. Feb. 8, 1990).

77. United States v. Lindert, 907 F. Supp. 1114, 1120 (N.D. Ohio 1995). Lindert contradicted himself by testifying that he guarded outside terrain though no imminent threat of attack existed:

Lindert: Well, we actually guarded just the outside terrain. We didn't actually have nothing to do with prisoner at all. Actually, we didn't even—we weren't even—even allowed to talk to the people.

OSI: But you were supposed to watch to make sure that they did not approach the fence?

Lindert: Oh, they didn't approach.

OSI: And your duty was to make sure that they didn't approach the fence?

Lindert: Well, that's—well, yes.

OSI: Was there any danger at Mauthausen in 1942 or 1943, of anyone attacking the camp from outside?

Lindert: In Mauthausen?

OSI: In Mauthausen?

The Mauthausen "extermination camp,"<sup>78</sup> designated by the SS as the *harshest* of all camps,<sup>79</sup> served as a slave labor camp where enemies of the Reich faced punishment.<sup>80</sup> Both a crematorium and a gas chamber existed at Mauthausen.<sup>81</sup> An outer-perimeter fence, that surrounded the entire camp,<sup>82</sup> incorporated electrified wires and guard towers from which the guards could see each other.<sup>83</sup> A large granite quarry existed inside the barbed wire.<sup>84</sup> Guards led prisoners daily to the quarry, forcing them to transport large boulders up one hundred eighty-six steps.<sup>85</sup> Lindert stated that he stood guard in the quarry's surrounding watchtowers, from which he could see the prisoners and a part of the quarry floor.<sup>86</sup>

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Lindert: No danger about this.

Lindert Record, *supra* note 58, at 1184 (testimony of Lindert). Arguably, Lindert's existence at Mauthausen aided a grander scheme. He admitted that he guarded the perimeter fence and that no danger of attack existed. Hence, he must have known that his mere presence aided in the prisoners' persecution and that he carried a weapon solely to intimidate and shoot at inmates.

78. United States v. Altfuldisch, No. 000-50-5 (Dachau 13 May 1946).

79. Lindert Record, *supra* note 58, at 141-42, 144 (testimony of Sydnor) (emphasis added).

80. United States v. Leprich, 666 F. Supp. 967, 967 (E.D. Mich. 1987).

81. Lindert, 907 F. Supp. at 1119; Lindert Record, *supra* note 58, at 144 (testimony of Sydnor). A special chamber, an execution corner, was located next to the crematorium and adjacent to the gas chamber. *Id.* at 390-91. The guards placed prisoners against the wall and shot them in the napes of their necks through an opening in the wall. *Id.*

82. Lindert, 907 F. Supp. at 1119.

83. *Id.*

84. *Id.* The quarry, Vienna Ditch, operated as an economic enterprise of the SS. Lindert Record, *supra* note 58, at 278 (testimony of Sydnor). The government expressly designed the quarry so that slave labor could extract stone for construction purposes. *Id.* at 120. The majority of Mauthausen prisoners worked in the quarry. *Id.* at 283. Guards patrolled the quarry floor at all times, "[b]ut the most important aspect of the guard duty around the quarry involved manning those towers [outside the wire fence surrounding the quarry] and walking that perimeter fence." *Id.* at 828-29.

85. Lindert, 907 F. Supp. at 1119-20; Lindert Record, *supra* note 58, at 305, 812 (testimony of Sydnor). Guards forced prisoners to carry heavy stones up and down the stairs as punishment or merely for the guards' enjoyment. Lindert, 907 F. Supp. at 1119-20. From the towers, the guards shot those prisoners physically unable to make the trip. Lindert Record, *supra* note 58, at 305, 812 (testimony of Sydnor). Guards pushed prisoners or forced them to jump over the cliff surrounding the quarry, a recreational activity known as the "parachute jump." *Id.* at 339. Slayings of the prisoners occurred "again and again" — so often that people who lived in the neighboring countryside complained of the "inaccurately shot" half-dead prisoners being left to die "next to the dead for hours or even days." Letter of the Mauthausen Gendarmerie Post to the State Council in Perg re: Complaint by Eleonore Gusenbauer pertaining to inhuman treatment of the concentration camp prisoners, 27 Sept. 1941, in AUSZUG AUS WIDERSTAND UND VERFOLGUNG IN OBERÖSTERREICH 1934-1945 (RESISTANCE AND PERSECUTION IN UPPER AUSTRIA) (on file with the American University Journal of International Law and Policy).

86. Lindert Record, *supra* note 58, at 1080, 1090, 1101, 1183 (testimony of Lindert). Some of the posts in the watchtowers included vantage points from which a guard could see



Mauthausen consisted of a main camp and many sub-camps.<sup>87</sup> The main camp included an enclosed protective custody camp, set off by a stone wall, where the Germans housed the prisoners.<sup>88</sup> Within the protective custody camp existed the "Appelplatz" area, where the guards took roll calls every morning and evening.<sup>89</sup> SS personnel administered brutalities during these mandatory roll calls and counted the living bodies as well as the dead.<sup>90</sup> The fact that the SS supervised roll call makes it highly improbable that an SS guard never witnessed one.<sup>91</sup>

In the late summer of 1943, the SS transferred him to the Loibl-Pass sub-camp<sup>92</sup> of Mauthausen.<sup>93</sup> Lindert's duties included guarding the outside of the tunnel, the main work site at Loibl-Pass.<sup>94</sup> At Loibl-Pass, he witnessed the prisoner roll call inside the camp every day.<sup>95</sup>

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portions of the quarry and the steps leading down into the quarry. *Id.* at 1183. Guards monitored the quarry only while prisoners worked. *Id.* at 1184-85.

87. *Lindert*, 907 F. Supp. at 1119.

88. *Id.*

89. *Id.*

90. *Id.*; *Lindert Record*, *supra* note 58, at 284, 451 (testimony of Sydnor).

91. *Lindert Record*, *supra* note 58, at 452-53 (testimony of Sydnor).

92. *Lindert*, 907 F. Supp. at 1120. Loibl-Pass, located in the Karawanken Mountain Range that separated Austria from then-Yugoslavia (now Slovenia), *id.*, was strategically crucial to the Germans during the war because German forces occupied the Balkan peninsula. *Lindert Record*, *supra* note 58, at 418 (testimony of Sydnor). For this reason, the Germans resumed construction of a tunnel through the mountain range during the summer of 1943. *Id.* at 418-19. The Nazis used a substantial number of the Mauthausen prisoners for this work. *Id.* at 419-20; *Lindert*, 907 F. Supp. at 1120. The Third Reich contracted with a private construction company for the project, and the contract explicitly called for the use of slave labor and SS guards from Mauthausen. VERTRAG FÜR DEN BAU DES LOIBLTUNNELS (CONTRACT FOR THE CONSTRUCTION OF THE LOIBL TUNNEL) 1, 4, 45-51, 56-58 (31 Mar. 1944).

93. *Lindert Record*, *supra* note 58, at 1110, 1112, 1171 (testimony of Lindert).

94. *Lindert*, 907 F. Supp. at 1120; *Lindert Record*, *supra* note 58, at 1193-94 (testimony of Lindert). The only wire and watchtowers at Loibl-Pass existed on the perimeters of the north and south protective custody camps. *Id.* at 1194, 1195; *id.* at 633-35 (testimony of Franc Vidmar, a Loibl-Pass survivor). Loibl-Pass's ratio of camp guards to prisoners exceeded that of other camps. *Id.* at 433 (testimony of Sydnor). The higher ratio existed because of the SS's inability to fence off a security zone at the tunnel construction site. *Id.* In addition, the work details congregated prisoners in a larger single mass than in other camps. *Id.* at 433-434. Regulations for SS who guarded concentration camps required the ratio for outside work details to be at least one guard for every four prisoners. DIENSTVORSCHRIFT FÜR KONZENTRATIONSLAGER (SERVICE REGULATIONS FOR CONCENTRATION CAMPS) 27 (1941) (on file with *American University Journal of International Law and Policy*). The regulations required escort guards for outside details to wear gray service uniforms, caps, carry a rifle or submachine gun, bayonet and live ammunition. *Id.* The regulations also ordered guards to remain within six paces of a prisoner at all times, enabling them to utilize their weapons "without hindrance." *Id.*

95. *Lindert Record*, *supra* note 58, at 1186-87 (testimony of Lindert). The court failed to recognize that an *Appelplatz* existed at Loibl-Pass, citing only that of Mauthausen. *Lindert*, 907 F. Supp. at 1119; *Lindert Record*, *supra* note 58, at 638 (testimony of Vidmar)

Lindert surrendered to the British in 1945<sup>96</sup> and lived in various prisoner of war camps until his release in 1947, when he returned to his family in Austria.<sup>97</sup>

#### B. LINDERT'S IMMIGRATION AND NATURALIZATION

In June 1951, Lindert completed a questionnaire<sup>98</sup> and Military History Statement as part of his application for immigration to the United States under the amended DPA.<sup>99</sup> Because his service in the *Waffen SS* qualified as participation in a movement inimical to the United States, however, the Displaced Persons Commission ("DPC")<sup>100</sup> rejected Lindert's application.<sup>101</sup> In light of an alteration in the criteria for admission under the DPA,<sup>102</sup> the DPC interviewed Lindert on February 25, 1952 as part of a review process that began in December 1951 to redetermine his eligibility.<sup>103</sup> Former SS Death's Head concentration camp guards, however,

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According to one Loibl-Pass prisoner's testimony, beatings occurred during the roll calls at Loibl-Pass. *Id.* Guards sprayed some prisoners with cold water and made them stand in the winter cold for extended periods of time. *Id.* at 452 (testimony of Sydnor). Guards jumped on prisoner's chests and stomped on their Adam's apples. *Id.* In the winter as well as the summer, roll calls sometimes exceeded two hours in length and sometimes included calisthenics as torture. *Id.*

96. *Lindert*, 907 F. Supp. at 1120. After the Germans surrendered, the British took many of the Loibl-Pass SS guard personnel into custody. Lindert Record, *supra* note 58, at 458-59 (testimony of Sydnor). The Allies did not liberate Loibl-Pass. Rather, the camp merely disintegrated, and the guard personnel simply disappeared from the vicinity of the camp. *Lindert*, 907 F. Supp. at 1121.

97. *Lindert*, 907 F. Supp. at 1120. Lindert was one of thousands of German soldiers detained in various prisoner of war camps in Italy. Lindert Record, *supra* note 58, at 1117, 1120, 1121, 1131-32 (testimony of Lindert). The British later transferred Lindert to a camp in England for approximately one year. *Id.*

98. Lindert Record, *supra* note 58, at 939 (testimony of David Jelinek, former Vice-Consul in Salzburg, Austria). These questionnaires, written in German, provided United States officials with rudimentary information to determine each applicant's eligibility for a visa and admissibility to the United States. *Id.* The Consular official would then corroborate the applicant's data with documentation provided by the applicant. *Id.* at 952-53. In completing this questionnaire, Lindert concealed his service in the *Totenkopf*, falsely stating that he served in a different unit. *Id.* at 1172-73.

99. See Act of June 16, 1950, Pub. L. No. 81-555, § 13, 64 Stat. 219, 227 (1950) (codified at 50 U.S.C. app. § 1962 (Supp. 1950)) [hereinafter Section 13]. Through this amendment, Congress added the specific exclusion of visa applicants who "advocated or assisted in the persecution of any person because of race, religion or national origin ...." *Id.*

100. See DPA § 13, 62 Stat. at 1014 (creating the DPC to investigate whether applicants participated in "movement[s] ... hostile to ... the United States ...").

101. *United States v. Lindert*, 907 F. Supp. 1114, 1121 (N.D. Ohio 1995).

102. See *supra* note 99 and accompanying text (explaining the amendment to the DPA that altered visa eligibility from categorical ineligibility to targeting and thereby excluding those who advocated or assisted in persecution).

103. *Id.* Instruction Memorandum 242, issued in November 1951, lifted the per se excludability of members of certain SS units, but left in tact the per se excludability of former *Waffen SS Totenkopfverband* (Death's Head Unit) members.

remained excludable.<sup>104</sup>

In June 1954, Lindert filed a new questionnaire to apply for an immigrant visa under the RRA.<sup>105</sup> Lindert ultimately received a visa in Salzburg, Austria on January 14, 1955.<sup>106</sup> The United States government failed to learn of Lindert's service as an SS concentration camp guard before it issued him his visa.<sup>107</sup> Within one month of receiving his visa, Lindert moved to the United States with his wife.<sup>108</sup>

On September 29, 1961, Lindert initiated the application process for United States citizenship by filing an N-400 Form.<sup>109</sup> In order to thoroughly examine Lindert's file, the naturalization examiner suspended the case for eleven months.<sup>110</sup> On December 6, 1962, Lindert received his Certificate of Naturalization, granting him the privilege of United States citizenship.<sup>111</sup> His application omitted all refer-

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104. See 8 C.F.R. § 702.8 (1950, 1951) (excluding, *inter alia*, Nazis, members of movements hostile to the United States and its form of government, and those who advocated or assisted in persecution based on race, religion, or national origin). See generally *United States v. Breyer*, 41 F.3d 884 (3d Cir. 1994) (affirming the denaturalization of a former *Waffen SS Totenkopf* member who never revealed this membership on his 1951 application under the DPA's altered standards); *United States v. Tittjung*, 753 F. Supp. 251, 253 (E.D. Wis. 1990) (revoking naturalization of a former *Waffen SS Totenkopf* member who served at Mauthausen), *aff'd*, 948 F.2d 1292 (7th Cir. 1991).

105. *Lindert*, 907 F. Supp. at 1121. Upon receipt of a questionnaire, the Consulate typically established a file on an applicant. *Lindert Record*, *supra* note 58, at 938 (testimony of Jelinek). The Consulate then informed the applicant of documentation and procedures required for the processing of the application. *Id.* After gathering further documentation, such as the applicant's birth certificate, travel document, police certificate or military discharge certificate, the Consulate referred the case to the Investigations Relief Program ("IRP") for investigation. *Id.* at 952-53. The IRP, the investigative arm of the Refugee Relief Program, executed the security and investigative provisions of the RRA. *Id.* at 890-91 (testimony of Wolfgang Lehmann, an assistant investigator at the Department of State charged with implementing the RRA's security provisions). The IRP used the security investigation to verify the applicant's representations or develop any potentially adverse information. *Id.* at 909. Applicants rejected under the amended DPA were able to receive *de novo* consideration under the RRA. 22 C.F.R. § 44.3(g) (1954).

106. *Lindert*, 907 F. Supp. at 1121.

107. *Id.* at 1122. See discussion *infra* Parts III.B-III.C (illustrating that the revelation of such information would have negated Lindert's chances of obtaining a visa).

108. *Lindert*, 907 F. Supp. at 1122.

109. *Id.* According to the standard operating procedures in effect in 1961 and 1962, after receipt of the N-400 Form, the Immigration and Naturalization Service ("INS") would interview the applicant and obtain sworn testimony concerning the applicant's qualifications for citizenship. *Lindert Record*, *supra* note 58, at 661-62 (testimony of Frank Siracusa, former naturalization examiner). In order to verify each assertion made by the applicant on his/her N-400 Form, the examiner would question the applicant without any other witnesses present. *Id.* at 662-68.

110. *Lindert Record*, *supra* note 58, at 682-84 (testimony of Siracusa).

111. *Lindert*, 907 F. Supp. at 1122 (citing Mahoning County Common Pleas Ct., Pet. No. 26492, Certificate No. 7914531, *Lindert's* naturalization proceeding).

ence to his service as a Death's Head guard at Mauthausen or Loibl-Pass.<sup>112</sup>

### III. UNITED STATES DISTRICT COURT'S MISAPPLICATION OF PRECEDENT IN *UNITED STATES V. LINDERT*

The District Court for the Northern District of Ohio failed to acknowledge that international precedent directly applies to Lindert's case.<sup>113</sup> In response to the first count of the OSI's three-count complaint, the court found that Lindert did possess good moral character; this finding negated the government's argument that the lack of this prerequisite made his citizenship illegal.<sup>114</sup> In response to the second count, the court held that the government failed to establish that Lindert illegally procured United States citizenship through false testimony given for the purpose of obtaining immigration and naturalization benefits.<sup>115</sup> Lastly, the court concluded that Lindert did not procure his citizenship by concealment or willful misrepresentation.<sup>116</sup> In reaching these conclusions, the court failed to apply apposite international precedent and principles from Nürnberg. Consideration of such precedent requires a finding contradictory to that of the Northern District of Ohio.

#### A. LINDERT ILLEGALLY PROCURED HIS CITIZENSHIP BECAUSE HE LACKED GOOD MORAL CHARACTER

##### 1. The District Court's Holding in *Lindert*

The district court held one's mere service as a concentration camp guard, absent direct contact with prisoners and particular acts of brutality, insufficient to establish his lack of good moral character.<sup>117</sup> Although finding that superiors gave Lindert perpetual "orders to shoot [to kill] escaping prisoners"<sup>118</sup> and that he always carried a weapon to execute those orders, the court remained unconvinced of

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112. *Id.* See Lindert Record, *supra* note 58, at 699-700 (testimony of Siracusa) (testifying that the standard operating procedures in effect in 1961 and 1962 would have prevented the naturalization examiner from recommending citizenship for an applicant known to have Lindert's Death's Head history); see also *id.* at 483-84 (testimony of Sydnor) (indicating that the British would have scrutinized Lindert as a Prisoner of War ("POW") more intensely had information indicated that he served in a camp and not in an SS field division).

113. See *United States v. Altfuldisch*, No. 000-50-5, 3192 (DJAWC, Dachau 13 May 1946) (holding the concentration camps' nature sufficiently criminal to warrant a finding of culpability and criminal responsibility of the individual *Waffen SS* members).

114. *United States v. Lindert*, 907 F. Supp. 1114, 1125-26 (N.D. Ohio 1995).

115. *Id.* at 1126.

116. *Id.* at 1128. *Cf.* *United States v. Tittjung*, 753 F. Supp. 251, 254 (E.D. Wis. 1990) (finding that nondisclosure of membership in *Waffen SS Totenkopf*, whether willful or inadvertent, constituted grounds for immigration ineligibility), *aff'd*, 948 F.2d 1292 (7th Cir. 1991).

117. *Lindert*, 907 F. Supp. at 1125-26.

118. *Id.* at 1125.

this link to a judgment of Lindert's moral character. Instead, the court noted the government's failure to establish that Lindert himself shot at a prisoner.<sup>119</sup>

Unlike the majority of courts that have considered cases brought by the OSI,<sup>120</sup> the *Lindert* court declined to use general conclusions about the camp to infer the nature of the individual's role in it. Instead, the court separated its analysis by first characterizing concentration camps generally,<sup>121</sup> and then exploring Lindert's personal history as a guard.<sup>122</sup> The former analysis describes the extreme persecutory conduct that often occurred.<sup>123</sup> The court distinguished areas of more extreme persecution where Lindert testified he did not enter;<sup>124</sup> that is, the court's portrayal of the facts supported Lindert's claims that he really operated independently from the places where the "hands-on" persecution occurred. By framing the facts in this manner, the court minimized Lindert's participation in the persecution that occurred in and around Mauthausen. In effect, the *Lindert* court unilaterally rebutted the applicable presumption of guilt laid down by the IMT.<sup>125</sup>

## 2. International and United States Cases Provide Guidelines for *Lindert*

### a. Cases Involving Nazi Collaborators

The principles bequeathed by Nürnberg<sup>126</sup> certify that courts must hold perpetrators of crimes against humanity responsible for their actions,<sup>127</sup> even after decades have passed.<sup>128</sup> Since the OSI's creation, American courts have discerned that

119. *Id.* at 1125-26.

120. *See infra* note 129 and accompanying text (indicating holdings that the duties associated with the defendant's service during World War II qualified as aiding persecution).

121. *Lindert*, 907 F. Supp. at 1117-18.

122. *Id.* at 1119-20.

123. *Id.* at 1117-18. *See* discussion *supra* Part II.A (providing some explicit details of such conduct).

124. *See Lindert*, 907 F. Supp. at 1119-20 (citing the *Appelplatz*, the protective custody camp, and the floor of the *Wiener Graben*, Vienna Ditch, or quarry floor).

125. *See supra* text accompanying note 27 (explaining how the IMT standard allowed indictments based merely on membership in a criminal organization).

126. *See supra* note 27 (relating the axioms provided by the Nürnberg trials).

127. *Id.*; *see Nürnberg Trial*, 6 F.R.D. 69, 108, 143 (IMT 1946) (indicting every member of the *SS Totenkopf* and attributing knowledge of the organization's criminal programs to each member).

128. *See* ALAN S. ROSENBAUM, PROSECUTING NAZI WAR CRIMINALS 119-21 (1993) (maintaining that the "passage of time" argument lacks merit). Rosenbaum accurately calls the passage of time ... irrelevant to the determination of criminal or moral responsibility. For if anything, extensive passage of time between the commission of war crime and its legal redress should be regarded as *borrowed* or privileged freedom and count against, not for, the "war crime" defendant. Evasion of justice is never a moral defense or excuse.

*Id.* at 121.

an individual organization's persecutory nature, evidenced by the duties required by its members and its collaboration with the Nazi program, renders members ineligible for immigration benefits, for mere membership with such responsibilities equals assistance in Nazi-sponsored persecution.<sup>129</sup> In many of the OSI's cases,<sup>130</sup> the courts never reached the issue of whether the defendants personally committed identifiable acts, finding such proof irrelevant under the statutes.<sup>131</sup> Nevertheless, the courts found that these Nazi collaborators did assist in Nazi-sponsored persecution by virtue of the service they performed in units or organizations that functioned primarily to carry out Nazi criminality.<sup>132</sup>

Other cases involving alleged participants in Nazi-sponsored persecution support the contention that the *Lindert* court erred. These cases, involving various types of immigration and naturalization situations, illustrate the types of analysis

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129. See, e.g., *Kalejs v. INS*, 10 F.3d 441, 444 (7th Cir. 1993) (contending that the general nature of the individual's role in the war, performing as part of a unit, may presume assistance in persecution), *cert. denied*, 114 S. Ct. 1305 (1994); *United States v. Schmidt*, 923 F.2d 1253, 1259 (7th Cir. 1986) (same); *Schellong v. INS*, 805 F.2d 655, 660 (7th Cir. 1986) (same); *United States v. Kowalchuk*, 773 F.2d 488, 491 (3d Cir. 1985) (holding that if the government had known Kowalchuk served in a Nazi-affiliated militia, he would not have received an entry visa); *United States v. Linnas*, 685 F.2d 427, 429 (2d Cir. 1981) (contending that the general nature of the individual's role in the war, performing as part of a unit, may presume assistance in persecution); *United States v. Breyer*, 829 F. Supp. 773, 778 (E.D. Pa. 1993) (finding that Death's Head membership and perimeter guard service constitutes *per se* assistance in persecution because of the nature of the guards' duties), *aff'd in part and vacated in part*, 41 F.3d 884 (3d Cir. 1994); *United States v. Baumann*, 764 F. Supp. 1335, 1337 (E.D. Wis. 1991) (holding that mere proof of service as an armed concentration camp guard equals "assistance in persecution" under Section 13 of the DPA), *aff'd*, 958 F.2d 374 (7th Cir. 1992); *United States v. Leprich*, 666 F. Supp. 967, 968 (E.D. Mich. 1987) (concluding that if the government had known Leprich served as a Mauthausen guard, it would have denied his visa application); *United States v. Osidach*, 513 F. Supp. 51, 72 (E.D. Pa.) (holding that if the government had known Osidach served in a militia supervised by the Nazis, it would have denied his visa application), *appeal dismissed on defendant's death*, No. 81-1956 (3d Cir. 1981). *But cf.* *Laipenieks v. INS*, 750 F.2d 1427, 1431 (9th Cir. 1984) (depending upon the intent of the Holtzman Amendment and compelling "active personal involvement," not "mere acquiescence or membership in an organization" to activate Section 1251(a)(19)'s deportability provision).

130. GERMAN LAW, *supra* note 37, pt. 6, § I, at 1. As of December 1995, the OSI had (1) investigated 333 individuals; (2) litigated sixteen cases; (3) placed more than 60,000 people on the "watchlist" for exclusion purposes; (4) excluded eighty people at United States ports since 1989; (5) removed forty-four individuals from the United States, including three extradited to stand trial abroad; (6) sought the denaturalization or removal of ninety-nine individuals; and (7) denaturalized fifty-two individuals.

131. Compare cases cited *supra* note 129 (finding *Totenkopf* membership equals aiding persecution because of the conduct required by its members) with *Petkiewytch v. INS*, 945 F.2d 871, 880 (6th Cir. 1991) (requiring evidence of particular acts of egregious conduct for a finding of deportability).

132. See *supra* note 129 and discussion *infra* Part III.A.1 (explaining that the conduct required by concentration camp guards amounted to assistance in persecution).

utilized by the courts to define "assistance in persecution." Though these cases involve some arguments that appear inapplicable at first glance to *Lindert*, the *Lindert* court's careful examination and application of these arguments might have created a different outcome.

In the pivotal case of *Fedorenko v. United States*,<sup>133</sup> the Supreme Court confirmed that an individual's capacity in serving the Third Reich can, in and of itself, establish the individual's involvement in Nazi-sponsored persecution and thus, his/her ineligibility for a visa under the DPA.<sup>134</sup> This determination hinges neither upon recourse to the Inimical Lists<sup>135</sup> nor proof of personal perpetration of atrocities.<sup>136</sup> In essence, the Supreme Court ratified the exclusion of former Nazi collaborators from the United States based on their wartime service in certain Nazi units.<sup>137</sup>

Many cases alleging assistance in Nazi-sponsored persecution involve men who served at Nazi concentration camps and who admit only to the performance of perimeter guard duties.<sup>138</sup> By preventing inmates from escaping their inhuman and often fatal internment, however, such SS personnel ensured the prisoners' continued subjection to heinous Nazi oppression.<sup>139</sup> The concentration camp guard cases have typically relied on the precedent of *Kungys*<sup>140</sup> or *Fedorenko*.<sup>141</sup>

Whether the specific role played by an individual included direct contact with

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133. 449 U.S. 490 (1981).

134. *Fedorenko v. United States*, 449 U.S. 490, 510-13 (1981) (determining that "the plain language of the [DPA]" deems an armed Nazi concentration camp perimeter guard ineligible for a DPA visa by virtue of *per se* assistance in persecution).

135. See *supra* note 57 and accompanying text (discussing the inimical lists).

136. See *supra* notes 128-132 (presenting the Court's view that concentration camp guard service constitutes persecution because of the nature of the conduct inherent in such service).

137. See *Fedorenko*, 449 U.S. at 490 (finding that *Fedorenko*'s wartime activities made his procurement of an immigrant visa illegal).

138. See, e.g., *id.* (reporting the petitioner's claim that he acted solely as a perimeter guard); *United States v. Breyer*, 41 F.3d 884, 890 (3d Cir. 1994) (same); *Petkiewytch v. INS*, 945 F.2d 871, 872 (6th Cir. 1991) (same); *United States v. Schmidt*, 923 F.2d 1253, 1259 (7th Cir. 1991) (same); *United States v. Kungys*, 571 F. Supp. 1104, 1119 (D.N.J. 1983) (same); *United States v. Hutyrzyk*, 803 F. Supp. 1001, 1005 (D.N.J. 1992) (same), *appeal dismissed on defendant's death*, No. 92-5659 (3d Cir. Mar. 2, 1993); *In re Kulle*, 19 I. & N. Dec. 318, 329 (B.I.A. 1985) (same), *aff'd*, 825 F.2d 1188, 1192 (7th Cir. 1987).

139. Cf. *United States v. Osidach*, 513 F. Supp. 51, 99 (E.D. Pa. 1981) (recognizing that the guards' mere presence, coupled with the demonstrated means and inclination to inflict indignities, physical abuse, or death constitutes mental persecution), *appeal dismissed on defendant's death*, No. 81-1956 (3d Cir. July 22, 1981); *Kulle*, 19 I. & N. at 332 (finding that an alleged perimeter guard, even one claiming ignorance of persecution inside the camp, cannot escape responsibility for the other guards' conduct).

140. *Kungys v. United States*, 485 U.S. 759 (1988).

141. See, e.g., *Kalejs v. INS*, 10 F.3d 488 (3d Cir. 1985) (utilizing the Supreme Court's analysis in *Kalejs* as guidance); *United States v. Kowalchuk*, 773 F.2d 488 (3d Cir. 1985) (utilizing the Court's analysis in *Fedorenko*); *Osidach*, 513 F. Supp. at 65 (same).

victims remains irrelevant. Persecution on the basis of race, religion, national origin, or political opinion constituted the very mission of the Nazi concentration camps.<sup>142</sup> Every SS enlistee who served as an armed guard worked primarily to realize that goal.<sup>143</sup> Arguably, if every concentration camp guard participated in a criminal conspiracy,<sup>144</sup> and if participation in a criminal conspiracy demonstrates bad moral character, then it follows that former employment as a concentration camp guard compels a finding of bad moral character.

The scrutiny and appraisals that courts have accorded other Nazi units and organizations provide guidance for guard cases. Courts in these cases have focused on the individual's *conduct*. Specifically, the courts have looked to the individual's involvement in Nazi-sponsored persecution, established by reference to the nature of his position and proven responsibilities within the Nazi system to determine "assistance in persecution."

In *United States v. Osidach*,<sup>145</sup> the district court found that willing, active mem-

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142. See *Nürnberg Trial*, 6 F.R.D. 69, 78-106, 117 (IMT 1946) (describing the Nazis' systematic persecution of individuals based on their race, religion or ethnicity and recounting that concentration camps existed primarily to punish those found "obnoxious to German authority"); LUCY S. DAWIDOWICZ, *THE WAR AGAINST THE JEWS: 1933-1945* (1975) (detailing the Nazi persecution of the Jews).

143. See *Nürnberg Trial*, 6 F.R.D. at 78-106 (indicting the SS for its critical role in executing the Third Reich's "Final Solution" and assigning a rebuttable presumption of guilt to its members). As proffered by one scholar:

[M]embership in such Nazi organizations [constitutes] a prima facie reason to believe in the moral and/or legal blameworthiness of each individual member proportionate to the role, behavioral consequences, and function of the organization in the Nazi system. Certainly, mere membership in a criminal organization [exists] itself [as] a criminal offense....

ROSENBAUM, *supra* note 128, at 122. Rosenbaum further proposes the moral culpability of those individuals who did not directly plan or perpetrate atrocities; for example, women in a Nazi booster club shared culpability because their indoctrinating role perpetuated the persecution. *Id.* at 96-97.

See also Michelle Leslie & Bill Sloat, *The Devil Knows Where: The Trail of John Demjanjuk*, *PLAIN DEALER* (Cleveland), Nov. 13, 1994, at 14 (quoting Werner Dubois, an SS soldier who served at Sobibor Concentration Camp and faced trial for his actions in Hagen, Germany in 1966). As Dubois explained to a West German court:

What I did was aiding in murder. If I should be sentenced, I would consider that correct ... In weighing the guilt, one should not, in my opinion, consider the specific functions of the camp [personnel]. Wherever we were posted there, we were all equally guilty. The camp functioned in a chain of functions. If only one element in that chain is missing, the entire enterprise comes to a stop.

*Id.* Dubois' profound comments imply the appropriateness of applying conspiracy doctrine to cases involving crimes against humanity. See discussion *infra* Part III.A.2.b (applying conspiracy theory of criminality to Nazi concentration camp guard cases). For a discussion of Dubois' functions at Sobibor, see YITZHAK ARAD, *BELZEC, SOBIBOR, TREBLINKA: THE OPERATION REINHARD DEATH CAMPS* 29, 370, 400 (1987).

144. See *supra* note 113; *infra* note 160; discussion *infra* Part III.A.2.b.

145. 513 F. Supp. 51, 72 (E.D. Pa.), *appeal dismissed on defendant's death*, No. 81-



bership in the Nazi-controlled Ukrainian police warranted a finding of visa ineligibility under the DPA, even absent proof of the defendant's personal participation in atrocities.<sup>146</sup> The court ruled that Osidach's job of patrolling the streets while armed and wearing the dreaded Ukrainian Police's uniform established participation in "mental persecution" under "the plain language of the statute."<sup>147</sup>

Similarly, another district court that applied *Fedorenko* found that "everyone associated with the *schutzmannschaft*" must have been cognizant of the "harsh repressive measures" they executed as affiliates of the Nazi program of persecution.<sup>148</sup> This court recognized that the responsibilities assigned to auxiliary forces outside of Germany enabled the Nazi government to advance its mandate.<sup>149</sup> Specifically, the Nazis used indigenous personnel in the Ukraine to wage their campaign and to enforce their edicts.<sup>150</sup> The personnel comprising these auxiliary forces assisted in persecutory conduct by performing duties assigned by the Nazis, thereby permitting the Nazi program to flourish.<sup>151</sup> This finding rendered the defendant ineligible for a visa under the DPA, despite the lack of definitive proof that the visa-issuing officer would have denied the defendant's 1949 visa application had the truth surfaced.<sup>152</sup>

Courts have also held that a naturalization applicant's concealment of service in a Nazi-sponsored persecutory unit constitutes a "material" concealment or misrepresentation that independently warrants denaturalization.<sup>153</sup> In fact, defendants in

1956 (3d Cir. July 22, 1981).

146. *United States v. Osidach*, 513 F. Supp. 51, 72 (E.D. Pa.), *appeal dismissed on defendant's death*, No. 81-1956 (3d Cir. July 22, 1981).

147. *Id.* at 72, 99 (recognizing that mental persecution resulted from the "conspicuous [and regular] public display of armed force and uniformed authority ... over a long period of time in a repressive [environment]").

148. *United States v. Kowalchuk*, 571 F. Supp. 72, 81-82 (E.D. Pa. 1983), *aff'd*, 773 F.2d 488, 491 (3d Cir. 1985).

149. *Id.*

150. *Id.*

151. *Id.* These routine duties included:

enforc[ing] martial law restrictions imposed by the Germans, including beating Jews found outside the ghetto after curfew, beating or severely reprimanding Jews who failed to wear the required insignia, assisting the Germans in confiscating valuables from the Jewish inhabitants, arresting and participating in the harsh punishment of persons involved in black-market activities or subversive activities hostile to the German occupation forces.

*Id.* at 81. Additionally, testimony during the trial made apparent that members of the Ukrainian militia joined German gendarmes who rounded up individuals for forced labor or arrested them for alleged infractions and witnessed a multitude of executions of these individuals shortly thereafter. *Id.*

152. *Id.*

153. *See Fedorenko v. United States*, 449 U.S. 490, 509-514 (1981) (finding willful concealment of Treblinka service material and worthy of visa ineligibility); *accord*, *United States v. Schellong*, 547 F. Supp. 569, 575 (N.D. Ill. 1982) (asserting the materiality of a failure to reveal former service as a guard supervisor at Dachau Concentration Camp), *aff'd*, 717 F.2d 329 (7th Cir. 1983), *aff'd*, 718 F.2d 1104 (7th Cir. 1983). *Cf. Kalejs v. INS*, 10

OSI cases were able to enter the United States by fraudulently concealing or misrepresenting their assistance in Nazi-sponsored persecution for the purpose of gaining entrance to the United States and United States citizenship.<sup>154</sup>

In the case of *Kalejs v. INS*,<sup>155</sup> the Seventh Circuit upheld the deportation of an alien under the Holtzman Amendment for assistance in persecution.<sup>156</sup> *Kalejs* had been a member of the notorious "Arajs Kommando," an indigenous Latvian police unit sponsored and controlled by the Nazis.<sup>157</sup> The court determined whether an individual assisted in persecution by examining the characteristics of the person's service under the Third Reich.<sup>158</sup> More specifically, the court focused on what responsibilities corresponded to the person's position and what duties the person would have performed.<sup>159</sup> Furthermore, the court analogized a concentration camp to a criminal conspiracy, attributing liability to all participants.<sup>160</sup> Essentially, the court applied Article 9 of the Charter,<sup>161</sup> without expressly employing its language, to defendant *Kalejs* as a member of an inimical conspiracy.<sup>162</sup>

### b. Cases Involving Concentration Camp Guards

Internationally, prosecutors and legislative bodies have explicitly or implicitly acknowledged that the invidious Nazi agenda served as the *raison d'être* for certain organizations, groups and units and have therefore pursued their individual members.<sup>163</sup> In analyzing service in concentration camp guard detachments and other persecutory units, German courts deem the former concentration camp

F.3d 441, 445-47 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1305 (1994) (finding that failure to indicate service in a German mobile killing unit warranted deportation).

154. See cases cited *supra* note 153 (providing examples of those who both participated in Nazi-sponsored persecution and fraudulently concealed said participation).

155. 10 F.3d 441 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1305 (1994).

156. *Kalejs v. INS*, 10 F.3d 441, 444 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1305 (1994).

157. *Id.*

158. *Id.*

159. *Id.* at 444 (citing *Fedorenko v. United States*, 449 U.S. 490, 512 n.34 (1981)).

160. *Id.* at 445-47 (citing *Kalejs*, 981 F.2d 937, 943 (7th Cir. 1992)).

161. See discussion *supra* Part I.A and *supra* notes 17-19 and accompanying text (providing background information about the Charter and the London Agreement).

162. *Kalejs*, 10 F.3d at 444 (attributing the entire unit's atrocities "to the individual [because of] his membership and seeming participation").

163. See, e.g., [Austl.] Att'y Gen.'s Dep't, Report of the Investigations of War Criminals in Australia 125 (Austl. Gov't Pubs. Serv. 1993) ("From the evidence at hand [one cannot easily] imagine that anyone who served with the [12th Lithuanian Police] Battalion was not implicated in its genocidal patterns of behaviour."); Criminal Code, R.S.C. 1985, c. C-46, as amended by R.S.C. 1985, c. 30 (3d Supp.), s. 1 (permitting the Canadian government to prosecute residents who allegedly participated in Nazi war crimes and crimes against humanity); *supra* note 37 (discussing the British government's enactment of the War Crimes Act in 1991 to confer jurisdiction over "acts of murder and manslaughter, or culpable homicide" in Germany or German-occupied territories between 1933 and 1945 and the first case brought under this act in 1995).

guards' failure to request reassignment a critical factor that supports conviction and may justify a longer prison sentence.<sup>164</sup>

In adjudicating the eligibility for immigration and naturalization of OSI's subjects, American jurisprudence has developed a similar understanding of the criminal program executed by the Nazi system. For example, in *Kairys v. INS*,<sup>165</sup> another case involving a former Nazi concentration camp guard, the Seventh Circuit explained why such service constituted "assistance in persecution":

If [courts treated] the operation of such a camp ... as an ordinary criminal conspiracy, the armed guards, like the lookouts for a gang of robbers, would be deemed *co-conspirators, or if not, certainly aiders and abettors of the conspiracy*; and no more should be required to satisfy the noncriminal provision of [the Holtzman Amendment] that makes assisting in persecution a ground for deporta-

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164. *E.g.*, Germany v. Swidersky, Provincial Ct. Weiden, Upper Palatinate (LG 1971), 295 (convicting the defendant for his awareness of and complicity in the commission of crimes at the concentration camp and noting his lack of effort to transfer); Germany v. Kübler, Provincial Ct. Weiden, Upper Palatinate (LG 1957), 41 (same); Germany v. Fischer, Ct. of Assizes, St. Ct. Weiden, Upper Palatinate (LG 1956), 10 (underscoring the ability to request an alternative assignment to concentration camp duty and acknowledging the readily available option of transferring to the front); GIDEON HAUSNER, JUSTICE IN JERUSALEM 384 (1986) (quoting former *Waffen SS* General Erich von dem Bach-Zelewski, who similarly testified in the Eichmann trial in Jerusalem that transferring presented an alternative to concentration camp service and created no danger to the transferees' lives); Henry Friedlander, *Responses to World War Two War Criminals and Human Rights Violators: National and Comparative Perspectives*, 8 B.C. THIRD WORLD L. J. 3, 5-6 (1988) (asserting that "[i]n forty years of judicial proceedings, ... no one has ever proved that [refusal] to carry out a criminal order" resulted in punishment). Friedlander noted that, conversely, refusal to execute orders did not terminate career paths or possibilities for promotion. *Id.* See generally Daniel Goldhagen, *The "Cowardly" Executioner: On Disobedience in the SS*, 19 PATTERNS OF PREJUDICE 19 (1985) (citing orders issued by Himmler permitting SS members to request transfers to avoid killing). In direct contradiction German scholar Adalbert Rückerl asserts:

The inability to adduce any single case to show that refusal to carry out criminal orders resulted in injury to life and limb does not appear so astonishing when one bears in mind that non-compliance with an order entailing a special degree of severity was not regarded pursuant to SS ideology (as enunciated by Himmler personally) as disloyalty but as personal weakness. It merely barred the person concerned from further promotion within the SS.

ADALBERT RÜCKERL, THE INVESTIGATION OF NAZI CRIMES 1945-1978: A DOCUMENTATION 81-82 (Derek Rutter trans., 1979). But see David H. Kitterman, *Those Who Said "No!" Germans Who Refused to Execute Civilians During World War II*, 11 GERM. STUD. REV. 241 (1988) (citing cases of SS-men who gained promotions and even earned medals after refusing to obey criminal orders). Cf. United States v. Schiffer, 831 F. Supp. 1166, 1174 (E.D. Pa. 1993) (recognizing a transfer from concentration camp guard duty as a viable alternative to continuing collaboration in persecutory acts), *aff'd*, 31 F.3d 1175 (3d Cir. 1994).

165. 981 F.2d 937, 943 (7th Cir. 1992).

tion.<sup>166</sup>

The court did not require proof of personal perpetration of individual atrocities.<sup>167</sup> Instead, the court claimed that a camp guard, by definition, assisted in persecution regardless of whether he mistreated an inmate "beyond [behavior] implicit in serving as a guard at such a camp ...".<sup>168</sup> The holding essentially states that because Nazi concentration camps were places of persecution and guards at those camps held prisoners captive and threatened them with death for failing to follow orders, the guards aided in persecution.<sup>169</sup> By reaching its analogy of the bank robber conspiracy theory, the *Kairys* court indirectly applied the Nürnberg principle regarding criminal cooperation.<sup>170</sup> Simple membership in the conspiracy equals "assistance in persecution" and therefore requires sanctioning.<sup>171</sup> Many courts have reached similar results.<sup>172</sup>

Trials of concentration camp guards administered by the American military tribunals immediately after the Second World War resulted in convictions of 885 individuals out of 1,021 accused.<sup>173</sup> The OSI has successfully prosecuted thirty-four cases against former Nazi concentration camp guards.<sup>174</sup> Of these thirty-four

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166. *Kairys v. INS*, 981 F.2d 937, 943 (7th Cir. 1992) (citing the Holtzman Amendment, *supra* note 64) (emphasis added).

167. *Id.*

168. *Id.*

169. *Id.* (citing *Schellong v. INS*, 805 F.2d 655, 661 (7th Cir. 1986)).

170. See U.N. WAR CRIMES COMM'N, *supra* note 27, at 50 (establishing tests, submitted by the prosecution, for creating a rebuttable presumption of guilt). The IMT held:

A criminal organization is analogous to a criminal conspiracy in that the essence of both is co-operation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter.

*Id.* See also *supra* note 27 and accompanying text (discussing how the Charter indicted organizations with the purpose of creating a presumption of criminality applicable to all members of the indicted organizations in later prosecutions).

171. See *supra* note 27 and accompanying text.

172. See cases cited *supra* note 129 (treating membership in the indicted units as *per se* assistance in persecution because of the duties assigned to these units).

173. RÜCKERL, *supra* note 164, at 27.

174. *Fedorenko v. United States*, 449 U.S. 490 (1981) (affirming the denaturalization of a former SS guard at Treblinka); *United States v. Schiffer*, 31 F.3d 1175 (3d Cir. 1994) (affirming the denaturalization of a former SS guard who served at Sachsenhausen, Majdanek, Hersbrueck and the SS training camp at Trawniki); *Kalejs v. INS*, 10 F.3d 441 (7th Cir. 1993) (deporting an officer of the Arajs Kommando and guard supervisor at the Salaspils Concentration Camp near Riga, Latvia), *cert. denied*, 114 S. Ct. 1305 (1994); *Kairys v. INS*, 981 F.2d 937 (7th Cir. 1992) (affirming the deportation of a former guard and guard platoon leader at Treblinka Labor Camp and guard at the Trawniki SS Training Camp and its detachment in Lublin, Poland); *United States v. Tittjung*, 948 F.2d 1292 (7th Cir. 1991) (affirming the denaturalization of a former SS guard at Mauthausen and its sub-camp, Gross Raming); *United States v. Schmidt*, 923 F.2d 1253 (7th Cir. 1991) (affirming

the denaturalization order of a former SS guard at Sachsenhausen); *In re Kulle*, 825 F.2d 1188 (7th Cir. 1987) (affirming the denaturalization of an individual who once served as an SS guard, guard leader and SS instructor with the SS Death's Head at the Gross-Rosen Concentration Camp); *United States v. Schellong*, 717 F.2d 329 (7th Cir.) (denaturalizing a former SS guard who served in various SS guard companies, first as a guard and later as a company commander, at the Sachsenburg and Dachau Concentration Camps), *aff'd*, 718 F.2d 1104 (7th Cir. 1983); *United States v. Linnas*, 685 F.2d 427 (2d Cir. 1982) (affirming the denaturalization of a former chief and commander of the guards at the concentration camp in Tartu, Estonia); *United States v. Demjanjuk*, 680 F.2d 32 (6th Cir. 1982) (affirming the denaturalization of a former SS guard at Treblinka, Sobibor and the Trawniki training and base camp, all located in Poland); *United States v. Hammer*, No. 94-CV-74985-DT (E.D. Mich. 1996) (denaturalizing former armed SS guard at Auschwitz and Sachsenhausen Concentration Camps and SS guard on inmate transports to and from Auschwitz and Sachsenhausen and Mauthausen, who later transferred to the Flossenbuerg Concentration Camp); *United States v. Rydlinski*, No. 94-7341 (N.D. Ill. July 21, 1995) (denaturalizing, pursuant to default judgment, an individual who worked as an armed SS guard of prisoners and SS dog handler in Auschwitz and Buchenwald); *United States v. Breyer*, 841 F. Supp. 679 (E.D. Pa. 1993) (denaturalizing a former SS guard at Buchenwald in Germany and Auschwitz), *aff'd in part and vacated in part*, 41 F.3d 884, 890 (3d Cir. 1994); *United States v. Hutyczzyk*, 803 F. Supp. 1001 (D.N.J. 1992) (denaturalizing a former guard and guard leader at the Koldyczewo Concentration Camp in Belorussia), *appeal dismissed on defendant's death*, No. 92-5659 (3d Cir. Mar. 2, 1993); *United States v. Bless*, No. 92-2075 (D.D.C. Dec. 18, 1992) (denaturalizing a former SS guard at Auschwitz); *United States v. Ziegler*, No. 90-3064 (C.D. Cal. 1991) (denaturalizing, pursuant to default judgment, a former SS guard at the Kaunas Concentration Camp in Lithuania and at the Stutthof and Gotenhafen Concentration Camps in Poland); *United States v. Zultner*, No. 90-1825 (D.D.C. Oct. 25, 1990) (reporting that an SS guard at the Schwechat, Floridsdorf and Moding subcamps of Mauthausen renounced his citizenship); *United States v. Habich*, No. 87-9546 (N.D. Ill. Mar. 14, 1990) (deporting, pursuant to consent agreement, a former concentration camp guard who transferred prisoners from Gleiwitz subcamp of Auschwitz to Mauthausen); *United States v. Reger*, No. 87-4906 (D.N.J. Sept. 8, 1988) (denaturalizing a former SS guard at Auschwitz II (Birkenau)); *United States v. Quintus*, No. 87-70950 (E.D. Mich. June 29, 1988) (denaturalizing, pursuant to a consent agreement, a former SS guard at the Majdanek Concentration Camp in Poland); *United States v. Bartsch*, No. 86-2375 (N.D. Ill. May 29, 1987) (denaturalizing a former Mauthausen guard); *United States v. Leprich*, 666 F. Supp. 967 (E.D. Mich. 1987) (permitting the voluntary departure of a former SS guard at Mauthausen after revoking naturalization); *United States v. Leili*, No. 86-1370 (D.N.J. Dec. 30, 1986) (denaturalizing a former Mauthausen guard on a motion for summary judgment); *United States v. Wieland*, No. 86-1750 (N.D. Cal. 1986) (denaturalizing, pursuant to default judgment, a former SS guard at Mauthausen); *United States v. Denzinger*, 530 F. Supp. 1348 (E.D.N.Y. 1982) (denaturalizing, pursuant to a default judgment, a former SS guard at Auschwitz, Mauthausen, Oranienburg, the Torgau subcamp of Buchenwald, Plaszow, and the St. Georgen subcamp of Mauthausen); *In re Deneul*, A10 324 808 (Immigr. Ct., Miami, May 6, 1994) (deporting a former Gusen Concentration Camp guard who, along with other duties, guarded prisoners on a transport from a camp in Poland to Mauthausen); *In re Mueller*, A10 339 377 (Immigr. Ct., Phoenix, Apr. 14, 1994) (recognizing voluntary relinquishment of United States citizenship by a former SS guard at Natzweiler Concentration Camp in Alsace, France and at Schorzingen subcamp of Natzweiler in Wuertemberg, Germany); *In re Schweidler*, A14 342 976 (Immigr. Ct.,

cases, the case of *United States v. Lindert* represents the first case to date in which the government has not succeeded.<sup>175</sup>

### c. Sixth Circuit's Deviation in *Lindert*

Unlike the majority of circuits that have examined the implications of Death's Head Battalion service on United States immigration and naturalization, the Sixth Circuit does not find service as a concentration camp guard, *per se*, tantamount to assisting in persecution.<sup>176</sup> The discrepancy lies in the Sixth Circuit's interpretation of the term "assisted" in the Holtzman Amendment.<sup>177</sup> A large body of jurisprudence attempts to define "assisted" in cases involving participants in Nazi-sponsored persecutory acts. In looking for guidance to determine the meaning, courts have utilized the useful *per se* rule defined in *United States v. Fedorenko*.<sup>178</sup> In *Fedorenko*, the Court delineated a spectrum where an armed concentration camp guard clearly stood at one end, "assisting in persecution," and someone who cut prisoner's hair before execution stood at another.<sup>179</sup> By defining the spectrum in this manner, the Court eliminated all ambiguity regarding concentration camp guards and explicitly declared their service as aiding persecution because of the

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Miami, Dec. 13, 1993) (ordering the deportation of a former Mauthausen SS guard); *In re Hazners*, A11 229 347 (Immigr. Ct., Cleveland, Oct. 22, 1992) (deporting a former SS guard at Auschwitz pursuant to consent agreement); *In re Dorth*, A8 194 183 (Immigr. Ct., Chicago, Sept. 17, 1990) (instituting deportation proceedings against a former SS guard at Auschwitz, terminated due to his death); *In re Ensin*, A10 226 043 (Immigr. Ct., Boston, June 20, 1990) (holding former SS guard deportable); *In re Eckert*, A10 631 698 (Immigr. Ct., Los Angeles, Sept. 27, 1988) (deporting a former SS guard pursuant to consent agreement); *In re Blach*, A10 629 292 (Immigr. Ct., Los Angeles, April 27, 1987) (denaturalizing a former SS guard and dog handler at both Dachau in Germany and Wiener Neudorf in Austria), *aff'd*, (B.I.A. Feb. 8, 1990); *In re Lipschis*, A10 682 861 (Immigr. Ct., Chicago, Dec. 23, 1982) (deporting a former SS guard at Auschwitz and Birkenau pursuant to a consent agreement).

175. Indeed, the *Lindert* court referenced the unique perspective of Sixth Circuit law five separate times during the trial. *Lindert Record*, *supra* note 58, at 314, 315, 510, 732, 1648.

176. *Petkiewytch v. INS*, 945 F.2d 871, 871 (6th Cir. 1991); *accord*, *United States v. Osidach*, 513 F. Supp. 51, 70 (E.D. Pa.) (providing in dicta that the interpretation of the Holtzman Amendment's usage of "participation" and "assistance" exist only where the guard performs "some personal activity involving persecution"), *appeal dismissed on defendant's death*, No. 81-1956 (3d Cir. July 22, 1981). *But see* ROSENBAUM, *supra* note 128, at 101 (proposing that "an individual [victimizes others] not only when he or she actively participates in an act of persecution or actively supports those who do, but also when an individual gives no indication that he or she may disapprove of the offense to universal standards") (emphasis added); *cf.* *Kalejs*, 10 F.3d at 444 (holding that the court may presume one's assistance from the general nature of his/her role as part of a unit), *cert. denied*, 465 U.S. 1007 (1994).

177. *See supra* note 64.

178. 449 U.S. 590, 512 n.34 (1981) ("Other cases may present more difficult line-drawing problems but we need decide only this case.").

179. *Fedorenko v. United States*, 449 U.S. 490, 512 n.34 (1981).

nature of the duties they performed.

Courts finding for the defendant in OSI cases have ignored the Charter's rebuttable presumption of criminality<sup>180</sup> and looked instead to distinguish the *per se* concentration camp guard rule defined by the Supreme Court in *Fedorenko*. Such courts have split hairs to deny the rule's application to an armed concentration camp guard who never admitted to the personal commission of a persecutory act. Consequently, those judges dissatisfied with the Court's failure to define adequately "assistance in persecution" have delved beyond the Holtzman Amendment's plain language to determine legislative intent.<sup>181</sup>

The House of Representatives hosted considerable debate on the Amendment. Representative Holtzman, basing her definition of "persecution" on the Nürnberg trials, asserted that Congress "intended [the bill] to cover active participation and not mere acquiescence by the population as a whole."<sup>182</sup> Although Representative Holtzman clearly found mere membership in the Nazi party distinguishable from active participation<sup>183</sup> because as the Amendment's author, she specifically elected not to employ the term "active." The precedent set by the Nürnberg trials, referred to in the Congressional debate, accomplished this distinction by indicting the organizations with links to "active participants."<sup>184</sup>

In reaching its decision, the *Lindert* court relied heavily on *Petkiewytch v. INS*,<sup>185</sup> a labor education camp case in which the Sixth Circuit distinguished Petkiewytch's service from the *per se* holding of *Fedorenko*<sup>186</sup> and altered the principles of statutory interpretation vis-à-vis the Holtzman Amendment.<sup>187</sup> In so doing, the *Lindert* court followed suit in misreading *Fedorenko* and fostering the unusual precedent set forth by *Petkiewytch*.

In *Petkiewytch*, the Sixth Circuit reversed the Board of Immigration Appeals ("BIA") and terminated deportation proceedings, finding that the defendant did not "assist" in persecution within the meaning of the Holtzman Amendment.<sup>188</sup> In accordance with Supreme Court precedent, the court focused on the specific duties and conduct of the defendant. Like *Fedorenko*,<sup>189</sup> Petkiewytch had worn his

180. See *supra* note 27.

181. E.g., *Laipenieks v. INS*, 750 F.2d 1427, 1431 (9th Cir. 1985) (relying on the intent of the Holtzman Amendment and requiring "active personal involvement" to activate the deportability provision of Section 1251(a)(19)); *Petkiewytch*, 945 F.2d at 879-880 (same); *Maikovskis v. INS*, 773 F.2d 435, 435 (2d Cir. 1985) (same).

182. 124 CONG. REC. 31,649 (1978) (statement of Rep. Holtzman).

183. *Id.*

184. See *supra* note 27 (directing courts to use the precedent set by the Nürnberg trials to determine the elements of "persecution"); see also H.R. REP. NO. 95-1452, at 3 (1978), reprinted in 1978 U.S.C.C.A.N. at 4706 (same).

185. 945 F.2d 871, 880 (6th Cir. 1991) (reversing the BIA's affirmation of the decision to deport Petkiewytch).

186. *Fedorenko v. United States*, 449 U.S. 490, 512 n.34 (1981).

187. See *supra* note 64.

188. *Petkiewytch*, 945 F.2d at 881.

189. *Fedorenko*, 449 U.S. at 512 n.34.

Death's Head Battalion insignia and carried an armed weapon at all times under standing orders to shoot to kill escaping prisoners.<sup>190</sup>

The court distinguished this case, however, by finding that Petkiewytch served only as a civilian guard at one of "the least punitive" of Nazi camps.<sup>191</sup> Importantly, though, the court did agree with the BIA's characterization of Kiel-Hassee,<sup>192</sup> the labor education camp which Petkiewytch guarded, as a place of persecution where "deprivations, torture and executions" took place.<sup>193</sup> The court further noted that Petkiewytch often viewed mistreatment of prisoners.<sup>194</sup> With these acknowledgments, however, the court's attempt to mitigate Petkiewytch's culpability by finding this camp "less punitive" than others defies logic and sensibility. The camps functioned because guards performed their duties.<sup>195</sup> Internment of prisoners existed because guards enforced the rules.<sup>196</sup> The court failed to recognize that guards formed indispensable links in the chain of persecution and should therefore face liability.

To distinguish *Fedorenko* precedent clearly from the *Petkiewytch* case, the *Petkiewytch* court interpreted the Holtzman Amendment contrary to well-established principles of statutory construction. When a question arises as to a statute's interpretation, courts should look at the statute's "plain language" to remove any doubt.<sup>197</sup> The Holtzman Amendment specifically calls for the deportation of individuals who, in association with the Nazi government, "ordered, incited, assisted, or otherwise participated in the persecution of any person, because of race, religion, national origin, or political opinion."<sup>198</sup> Thus, the Amendment sets out the standard of proof of "assistance" in persecution.<sup>199</sup> Congress' express and deliberate use of the term "assisted" implies that courts should not discern and define varying degrees of assistance among admitted SS guards. The statute's unambiguous inclusion of the term "assist" encompasses all guards because all guards performed guard duty which inherently entailed enforcing the persecution that occurred within the camps.<sup>200</sup> The *Petkiewytch* court essentially wrote the term "assisted" out of the statute to reach its holding.

In order to conclude that serving as an armed camp guard who claims that he

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190. *Petkiewytch*, 945 F.2d at 880.

191. *Id.* at 881.

192. Although the reported decisions spell "Kiel-Hassee" differently, the spelling used herein is correct.

193. *Petkiewytch*, 945 F.2d at 875-76.

194. *Id.* at 872-3.

195. Lindert Record, *supra* note 58, at 853 (testimony of Sydnor).

196. *Id.* at 517.

197. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (certifying that statutory interpretation commences with "the language [of the statute] itself"); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (assuming that the "ordinary meaning of the words used" accurately expresses the legislative purpose).

198. See *supra* note 27 (emphasis added).

199. See *supra* text accompanying note 64 and discussion Part III.A.1.

200. See discussion *infra* Part III.A.2.c.



never personally beat or shot at prisoners<sup>201</sup> differs from "active persecution," the court determined that the Holtzman Amendment only applied to "Nazi war criminals" and those who "engaged in war crimes."<sup>202</sup> The court determined that the Holtzman Amendment requires "active participation in persecution going beyond 'assistance.'"<sup>203</sup> The court deemed the record lacking in evidence of such "active persecution" and hence asserted that Petkiewytch's deportation "would not further the goal of the Holtzman Amendment and would carry out no discernible policy of the United States."<sup>204</sup> The court ignored the rudimentary doctrine that statutory language comprises "[t]he starting point in statutory interpretation[.]"<sup>205</sup>

In determining the purpose of the Holtzman Amendment, the *Petkiewytch* court misconstrued statements found in the House of Representatives' Report<sup>206</sup> by citing incomplete phrases.<sup>207</sup> The very mandate of *SS Totenkopf* (Death's Head) service sought to persecute and extinguish groups of persons based on their race, religion, national origin, or political opinion.<sup>208</sup> The House Report states that conduct constitutes "persecution" where the conduct aims "to deliberately inflict [sic] severe harm or suffering on a particular person or group of persons."<sup>209</sup> Although the House Report on the Holtzman Amendment indicates that a determination of "persecution" depends upon case-by-case analysis,<sup>210</sup> proper application of Congress' intent dictates a finding of "assistance in persecution" in the case of a concentration camp guard who followed orders.<sup>211</sup>

Following in the footsteps of the *Petkiewytch* court, the *Lindert* court asserted that a determination of "assistance in persecution" requires the government to prove active participation.<sup>212</sup> The court held that only proof of Lindert's own individual acts of persecutory conduct would justify a finding of bad moral character.<sup>213</sup> The court found credible Lindert's testimony that he neither witnessed nor

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201. *Petkiewytch v. INS*, 945 F.2d 871, 881 (6th Cir. 1991) (reiterating the BIA's finding that he never personally committed persecutory acts).

202. *Id.* at 878-79, 881.

203. *Id.* at 880.

204. *Id.* at 881.

205. *United States v. James*, 478 U.S. 597, 604 (1986) (citations omitted).

206. H.R. REP. NO. 95-1452, at 1 (1978), reprinted in 1978 U.S.C.C.A.N. at 4700.

207. *Petkiewytch*, 945 F.2d at 879-80.

208. *Nürnberg Trial*, 6 F.R.D. at 142 (reporting the SS's instructions "to assist the Nazi Government in the ultimate domination of Europe and the elimination of all inferior races").

209. H.R. REP. NO. 95-1452, at 7 (1978), reprinted in 1978 U.S.C.C.A.N. at 4706.

210. *Id.*

211. See discussion *supra* Part III.A.1.

212. *Cf. Kulle v. INS*, 825 F.2d 1188, 1192 (7th Cir. 1987) (discounting Kulle's argument that his actions as a concentration camp guard amounted only to "gross negligence"). The *Kulle* court, following circuit precedent from *Schellong v. INS*, 805 F.2d 655, 665 (7th Cir. 1986), reiterated that proof that an individual served in a particularly notorious camp or personally committed an atrocity is not per se determinative of a finding of culpability. *Id.*

213. *United States v. Lindert*, 907 F. Supp. 1114, 1125 (N.D. Ohio 1995). *But cf. Berenyi v. INS*, 385 U.S. 630 (1967) (affirming the petitioner's denaturalization for failing to reveal his past association with the Communist Party, even though he may have been a

actively participated in the persecution of prisoners.<sup>214</sup> The opinion grants this testimony considerable weight by stating that the government failed to present evidence describing Lindert's responsibilities or service at Mauthausen.<sup>215</sup> The court ignored the precept that service as an armed concentration camp guard, as per the Supreme Court's holding in *Fedorenko*,<sup>216</sup> qualifies as "assistance in persecution."<sup>217</sup>

The *Lindert* court, however, considered Fedorenko's admission of shooting at Jewish prisoners as crossing the demarcation line between assistance and non-assistance in persecution; only the former requires the reversal of a naturalization order based on the absence of good moral character. The court found an absence of testimony or evidence linking Lindert to a specific act of persecution sufficient to discredit the government's claim that his mere service as a Mauthausen guard proved his lack of good moral character by virtue of the duties of a Mauthausen guard under Nazi direction.<sup>218</sup> Essentially, the *Lindert* court ignored the Nürnberg principle of criminal cooperation<sup>219</sup> and the co-conspirator analogy presented by the *Kairys* court,<sup>220</sup> utilizing instead the "line-drawing" analysis employed in *Petkiewytch*.<sup>221</sup>

The government argued that mere service as a concentration camp guard constitutes bad moral character.<sup>222</sup> By granting substantial credence to Lindert's testimony and concluding that he possessed good moral character,<sup>223</sup> however, the court ignored the implications behind Lindert's service as a guard.<sup>224</sup> Scholarly works directly contradict and belittle Lindert's assertions.<sup>225</sup> Moreover, neighbors

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mere a "nominal" member who joined while a student in response to Party pressures).

214. *Lindert*, 907 F. Supp. at 1125.

215. *Id.*

216. *Fedorenko v. United States*, 449 U.S. 490, 512 n.34 (1981).

217. See discussion *supra* Part III.A.1.

218. See 124 CONG. REC. 31,648 (1978) (statement of Rep. Fish) (arguing that the Holtzman Amendment represents a compromise which "restrict[s] its application to those who engaged in persecution at the direction of the Nazi government").

219. See *supra* note 27.

220. See discussion *supra* Part III.A.1.b.

221. See *Petkiewytch v. INS*, 945 F.2d 871, 878-81 (6th Cir. 1991) (analyzing the continuum drawn by the Supreme Court in *Fedorenko*, 449 U.S. at 506, 512 n.34 (1980)).

222. *United States v. Lindert*, 907 F. Supp. 1114, 1125 (N.D. Ohio 1995); *Lindert Complaint*, *supra* note 8, at 6-7.

223. *Lindert*, 907 F. Supp. at 1125.

224. Lindert joined the SS, see *supra* text accompanying note 68 (dismissing the defense of involuntariness), although his parents objected to his recruitment. *Lindert*, 907 F. Supp. at 1119. Although he must have been aware of the camps' persecutory nature, see *Nürnberg Trial*, 6 F.R.D. at 143 (attributing personal knowledge of the "criminal programs" to all members of the SS), Lindert asserted his ignorance of the other guards' actions. Lindert Record, *supra* note 58, at 1183 (testimony of Lindert) (claiming to be "outside guard chain, [unaware of] what other people did").

225. See generally GORDON J. HORWITZ, IN THE SHADOW OF DEATH: LIVING OUTSIDE THE GATES OF MAUTHAUSEN (1990) (recounting stories of the atrocities witnessed by the civilian

of Mauthausen knew of the horrors that occurred within the camp and demanded that the town's authorities discontinue "such inhuman deeds[.]"<sup>226</sup> If "those unfortunate enough to live within view of the rock quarries" became accustomed to the "sight of death,"<sup>227</sup> then the *Lindert* court's support of guard testimony declaring ignorance of persecution defies reason. If "knowledge [of the camp's happenings] made its way far beyond the walls of the camp,"<sup>228</sup> then surely Lindert, an SS guard, knew of the criminal acts that took place there regularly. Furthermore, "[n]o one honestly could deny knowing what an inmate looked like, and what it meant to be a victim in the hands of the SS."<sup>229</sup>

In contrast, the Court of Appeals for the Third Circuit has discredited the exact credibility determination made by the *Lindert* court.<sup>230</sup> In *United States v. Schiffer*, the Third Circuit recognized that persons who served as concentration camp guards "frequently claim[ed] to have served involuntarily, been stationed only on the outside of the camps themselves, unaware of any mistreatment or punishment or prisoners, unaware of [the reasons for the inmates' imprisonment] and in no way personally involved in the mistreatment of a prisoner."<sup>231</sup> In rejecting Schiffer's claims, the court further found his assertion of ignorance "completely contrary to historical facts and common sense."<sup>232</sup>

Moreover, unlike the tribunal in the Nürnberg Trial, the tribunal in *United States v. Altfuldisch*<sup>233</sup> issued a decision pertaining specifically to all Mauthausen personnel.<sup>234</sup> The IMT concluded that everyone who served at Mauthausen in any capacity understood and knew the magnitude of the horrors perpetrated there.<sup>235</sup>

population of the town of Mauthausen).

226. *Id.* at 35.

227. *Id.*

228. *Id.* at 40.

229. *Id.* at 145-46.

230. *Cf. United States v. Schiffer*, 831 F. Supp. 1166, 1185 n.9 (E.D. Pa. 1993) (discounting former concentration camp guards' testimony as "notoriously unreliable"), *aff'd*, 31 F.3d 1175 (3d Cir. 1994).

231. *Id.* (citing *Kulle v. United States*, 825 F.2d 1188, 1192 (7th Cir. 1987)).

232. *Id.* at 1181. *Accord*, *Schellong v. INS*, 805 F.2d 655, 661 (7th Cir. 1986) (disbelieving the defendant's claim of unawareness of persecution); *United States v. Schmidt*, 923 F.2d 1253, 1258 (7th Cir. 1991) (rebuking the defense of lack of knowledge of persecution where the defendant guarded prisoners wearing color-coded patches and escorted them to work sites, where they sometimes collapsed).

Lindert testified that he found the treatment of prisoners at the British Prisoner of War (POW) camps comparable to that of Mauthausen, despite the fact that Lindert worked on farms. Lindert Record, *supra* note 58, at 1133, 1196 (testimony of Lindert). One should note, however, that the British Army usually failed to guard or confine its POWs. *Id.*

233. No. 000-50-5, 3402 (DJA WC, Dachau 13 May 1946).

234. *United States v. Altfuldisch*, No. 000-50-5, 3402 (DJA WC, Dachau 13 May 1946).

235. *Id.* at 3509-10 (indicting all who served at Mauthausen). The IMT concluded:

The Court finds that the circumstances, conditions, and the very nature of the Concentration Camp Mauthausen, combined with any and all of its by camps, was of such a criminal nature as to cause every official, governmental, military

The rendered decision went further to find everyone who served there *criminally* responsible.<sup>236</sup> The IMT, through its plain and obvious language, clearly implicated perimeter guards in its holding.<sup>237</sup> In spite of the language and holdings in *Altfuldisch*, however, the *Lindert* court granted considerable credibility to Lindert's declaration that he had never stepped foot in the protective custody camp<sup>238</sup> "during his *entire* service at Mauthausen."<sup>239</sup> Similarly, the court believed that Lindert never shot at a prisoner or treated any prisoner in a hostile manner.<sup>240</sup> The *Altfuldisch* decision<sup>241</sup> and the holdings of the IMT<sup>242</sup> augment and highlight the difficulty in accepting Lindert's assertions and the district court's findings.

The *Lindert* court clearly failed to consider the application of the IMT's findings and conclusions.<sup>243</sup> Instead, the court accepted Lindert's assertions of ignorance of the persecution that occurred around him.<sup>244</sup> The Tribunal, however, never would have accepted Lindert's testimony as credible. The Tribunal explicitly attributed knowledge of the commonplace atrocities to the guards at Mauthausen, regardless of their title or rank.<sup>245</sup> No doubt can exist that the Tribunal presented a

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and civil, and every employee thereof, whether he be a member of the *Waffen SS*, *Allgemeine SS*, a guard, or civilian, to be *culpably and criminally responsible*.

...

The Court therefore declares: That any official, governmental, military, or civil, whether he be a member of the *Waffen SS*, *Allgemeine SS*, or any guard, or civil employee, in any way in control of or stationed at or engaged in the operation of the Concentration Camp Mauthausen, or any or all of its by camps in any manner whatsoever, is *guilty of a crime against* the recognized laws, customs, and practices of civilized nations and the letter and spirit of the laws and usages of war, and by reason thereof is to be *punished*.

*Id.* (emphasis added).

236. *Id.*

237. *Id.*

238. See discussion *supra* Part II.A (describing the conditions of the protective custody camp).

239. *United States v. Lindert*, 907 F. Supp. 1114, 1120 (N.D. Ohio 1995) (emphasis added).

240. *Id.* at 1120, 1125.

241. *United States v. Altfuldisch*, No. 000-50-5, 3402, 3492 (DJAWC, Dachau 13 May 1946).

242. See generally *Nürnberg Trial*, 6 F.R.D. at 78-106 (indicting twenty-three high-ranking Nazi officials).

243. See *Lindert*, 907 F. Supp. 1114 (believing the defendant's claims of innocence despite international law's presumptions to the contrary).

244. *Lindert* Record, *supra* note 58, at 1171-73 (testimony of Lindert) (testifying to his lack of knowledge of other guards' commission of persecution and of the fact that prisoners wore patches indicating their "crimes").

245. *Altfuldisch*, No. 000-50-5, at 3510 (negating assertions such as those made by Lindert and many other defendants in OSI cases). The IMT found that:

it was impossible for a governmental, military or civil official, a guard or civilian employee, of the Concentration Camp Mauthausen, combined with any or

competent forum for the trial of the Mauthausen personnel and that its judgment should apply equally to Lindert.<sup>246</sup> The *Altfuldisch* decision should collaterally estop Mauthausen personnel from denying knowledge of the persecution that occurred.

The *Lindert* court failed to apply international law and precedent.<sup>247</sup> Furthermore, it neglected to acknowledge any expert testimony<sup>248</sup> or evidence presented by the government.<sup>249</sup> The court completely discredited both a Loibl-Pass survi-

all its camps, to have been in control of, been employed in, or present in, or residing in, the aforesaid Concentration Camp Mauthausen, combined with any or all of its by camps, at any time during its existence, without having acquired a definite knowledge of its criminal practices and activities therein existing.

The Court further finds that the irrefutable record of deaths by shooting, gassing, hanging, regulated starvation, and other heinous methods of killing, brought about through the deliberate conspiracy and planning of Reich officials, either of the Mauthausen Concentration Camp and its attached by-camps, or of the higher Nazi hierarchy, was known to all of the above parties, together with prisoners, whether they be political, criminal or military.

*Id.* (emphasis added).

246. See Fogelson, *supra* note 29, at 847 (suggesting that the IMT deliberately framed its charter in "universal language" to ensure its application beyond the immediate post-World War II trials).

247. Cf. *United States v. Baumann*, 764 F. Supp. 1335, 1337 (E.D. Wis. 1991) (holding that mere proof of service as an armed concentration camp guard establishes "assistance in persecution") (citing *United States v. Schmidt*, 923 F.2d 1253, 1259 (7th Cir. 1991) ("[T]he fact of his armed, uniformed service is sufficient to establish that he assisted in persecution."), *aff'd*, 958 F.2d 374 (7th Cir. 1992); *In re Extradition of Demjanjuk*, 612 F. Supp. 544, 556 (N.D. Ohio 1985) (granting Nürnberg considerable weight in support of finding the alleged crimes subject to universal jurisdiction). In *Demjanjuk*, the court also found that the United States' substantial role at Nürnberg binds this country's courts to acknowledge the criminality of the alleged war crimes and crimes against humanity. *Id.* The court, citing the Nürnberg Trial for support, also rejected the argument that the constitutional ban on *ex post facto* laws applies to participants in Nazi-sponsored persecution. *Id.* But see *Kulle v. INS*, 825 F.2d 1188, 1193 (7th Cir. 1987) (sustaining a concentration camp guard's deportation based on statutory law). The *Kulle* court asserted that "[t]he legal principles established at Nürnberg have contributed much to certain spheres of law and to the definition of 'persecution.'" *Id.* The court noted, however, that the Nürnberg principles "have no immediate bearing on a deportation proceeding controlled by a statutory provision which ... utilizes the term 'assisted' in persecution quite liberally." *Id.* (emphasis added).

248. For example, historian Charles Sydnor, a renowned expert on the history of Nazi Germany, among other Consular and State Department officials, testified for the OSI. Lindert Record, *supra* note 58, at 44-723, 746-862 (testimony of Sydnor); *id.* at 886-934 (testimony of Lehmann); *id.* at 935-98 (testimony of Jelinek); *id.* at 999-1011 (testimony of Greener).

249. See H.R. REP. NO. 95-1452, at 7 (1978), reprinted in 1978 U.S.C.C.A.N. at 4706 (advocating for the courts' application of "international material[,] ... such as the opinions of the Nuremberg tribunals," to these situations). Recognizing the "difficult and delicate determinations" involved in denaturalizing an alleged participant in Nazi-sponsored persecutory acts, the House declared:

vor's testimony and expert testimony that all guards would have performed all duties and that no one guard served solely as a perimeter guard.<sup>250</sup> Had the *Lindert* court considered the OSI's evidence, it would have discerned that the government did not need to provide any more "particular evidence" regarding Lindert's service in the camp beyond showing that Lindert guarded slave laborers from escaping torture, gassing, starvation and execution. The court required the government to present specific testimony connecting particular responsibilities and functions to specific guards<sup>251</sup> and reproached the government for failing to offer evidence to refute Lindert's claim that he never came into "direct contact with any prisoners" because his superiors forbade him to do so.<sup>252</sup> The court additionally required the government to disprove Lindert's "credible" testimony that he "never touched, threatened, or shot at a prisoner" with evidence of "specific actions."<sup>253</sup> Requiring "specific actions" means requiring a higher standard than criminal law provides for a conspiracy charge.<sup>254</sup> Certainty as to which particular function a particular guard performed,<sup>255</sup> however, is not relevant because concentration camps could not exist without guards at all posts at all times.<sup>256</sup>

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It is an accepted precept of international law that "persecution" is a "crime against humanity", condemned by all civilized nations. Invocation of U.S. domestic law in furtherance of such an accepted international law principle should not be precluded because it may in some instances necessitate difficult determinations.

*Id.* at 4707.

250. *Lindert* Record, *supra* note 58, at 370, 851-53 (testimony of Sydnor) (asserting that all guards performed all the functions listed in the SS regulations, not just perimeter guard service). *But see id.* at 1172 (testimony of Lindert) (testifying that he served only on the outside of the camp).

251. *United States v. Lindert*, 907 F. Supp. 1114, 1120 (N.D. Ohio 1995). The court noted that guards could serve: (1) as escorts for prisoners on their way to and from work; (2) in the guard towers which lined the perimeter fence; (3) in the inner camp's towers; or (4) as escorts for non-prisoners passing through the camp. *Id.*

252. *Id.* It comes as no surprise that Lindert's superiors forbade him to mingle with the prisoners. His presence, however, assisted in perpetuating the prisoners' inhumane existences because he ensured that they could not escape. *See Kulle*, 825 F.2d at 1192 (holding that individuals who "held the prisoners captive" and forced them to work or face death effectively "assist[ed] in persecution"); *see generally* SERVICE REGULATIONS FOR CONCENTRATION CAMPS, *supra* note 94.

253. *Lindert*, 907 F. Supp. at 1120.

254. *See Klapprott v. United States*, 335 U.S. 601, 612 (1949) (citing *Schneiderman v. United States*, 320 U.S. 118, 158 (1943)) (signifying that the burden to revoke American citizenship requires clear, unequivocal and convincing evidence, a burden much higher than that in civil trials and equivalent to the prosecution's in criminal trials).

255. *Lindert*, 907 F. Supp. at 1120 ("The records do not indicate which guards performed which duties, and without specific testimony there is no way to be certain which function any particular guard performed.").

256. *See supra* notes 232-44 and accompanying text (declaring all Mauthausen personnel are criminally responsible for the persecution that occurred there) and text accompanying notes 194-95 (relating testimony that guards enabled concentration camps to exist).

Although Lindert claims he never physically touched or shot at a prisoner,<sup>257</sup> he kept the prisoners inside the camp, where guards beat them, gassed them, kept them malnourished, and forced them to endure subhuman conditions.<sup>258</sup> He guarded slave laborers.<sup>259</sup> Moreover, Lindert must have heard shots being fired at prisoners at the base of the quarry.<sup>260</sup> Lindert did admit an ability to see the quarry floor during some of his shifts as a perimeter guard.<sup>261</sup> Consequently, if Lindert knew about the persecution that he helped to perpetuate by virtue of his service in the *Totenkopf*, a court could not rationally find that Lindert possesses good moral character. *United States v. Altfuldisch* declared all Mauthausen personnel guilty of assisting in persecution.<sup>262</sup> It follows that Article 10 of the Charter<sup>263</sup> expressly demanded that the *Lindert* court apply the IMT's *Altfuldisch* holding to Lindert, resulting in the unavoidable conclusion that Lindert lacks good moral character. Furthermore, although scarce case law provides guidance for a showing of bad moral character, if refusing to expose past Communist party membership can qualify for denaturalization of an individual<sup>264</sup> and the morals of the individual's neighborhood within the United States reflect the values embodied in the standard of "good moral character,"<sup>265</sup> it follows then that Lindert's former service as a concentration camp guard signifies a lack of good moral character.

The court refused to judge Lindert by the orders issued to him to shoot at escap-

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257. *Lindert*, 907 F. Supp. at 1125. *But see* cases cited *supra* note 232 (recognizing the incredulity of Lindert's assertions).

258. *Lindert* Record, *supra* note 58, at 131-32 (testimony of Sydnor) (relating that in September 1942, the SS instructed guards to work the prisoners to death). *See* discussion *supra* Part II.A (describing the conditions at Mauthausen); *cf. In re Kulle*, 19 I. & N. Dec. 318, 332 (B.I.A. 1985) (deeming proof of a concentration camp guard's personal commission of acts of brutality unnecessary for a finding of aiding persecution and finding instead that involuntary confinement of prisoners because of religion, race or political opinion qualifies as aiding persecution).

259. *Lindert*, 907 F. Supp. at 1119-20 (relating typical guard duties and that Lindert served as a perimeter guard). One should note the court's attempt to further limit Lindert's service as a guard by characterizing the duties differently for various posts. *Id.* *See supra* text accompanying notes 253-58 (arguing the irrelevancy of distinguishing between duties among concentration camp guards and arguing that a concentration camp guard is a concentration camp guard is a concentration camp guard).

260. *See Lindert* Record, *supra* note 58, at 558 (statement by the court) (noting that a perimeter guard would have heard gunshots fired in the base of the quarry).

261. *Id.* at 1080, 1090, 1101, 1183 (testimony of Lindert). *See Lindert*, 907 F. Supp. at 1120 (repeating that SS men stationed in the towers could see part of the quarry floor).

262. *United States v. Altfuldisch*, No. 000-50-5, 3402, 3509-10 (DJAWC, Dachau 13 May 1946).

263. *See supra* note 27 and discussion Part I.A (attributing a presumption of guilt to all those who served in the SS *Totenkopf*).

264. *Berenyi v. INS*, 385 U.S. 630, 636 (1967) (affirming denaturalization based on failure to expose past Communist Party membership).

265. *In re Bespatow*, 100 F. Supp. 44, 45 (W.D. Pa. 1951) (holding that the "good moral character" standard reflects the values upheld by the alien's neighborhood).

ing prisoners.<sup>266</sup> In essence, the court refused to apply the Nürnberg principles and the holdings of similar American cases that applied those principles.<sup>267</sup> The court misinterpreted and misapplied *Fedorenko* and *Petkiewytch* to Lindert's case, declining to conclude that Lindert's service "irreparably soil[ed]" his moral character.<sup>268</sup>

#### B. LINDERT'S FALSE TESTIMONY IN VISA AND NATURALIZATION PAPERS

The second count of the Complaint charged that Lindert lacked good moral character because he submitted false testimony on his visa and naturalization papers.<sup>269</sup> The court resolved that the government failed to provide convincing evidence with the requisite amount of certitude that any of the documents pertaining to Lindert represented intentionally provided false testimony under INA § 1101(f)(6).<sup>270</sup>

On the matter of visa issuance, the government alleged that Lindert answered a question calling for "places of previous residence" with "1942-1945 German Army," although he had resided at that time with the SS at two concentration camps.<sup>271</sup> As evidenced by numerous OSI cases, individuals who served as SS guards commonly lied about this service or distorted it as "German Army" service in order to gain admission to this country.<sup>272</sup> Applicants were not supposed to rec-

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266. *United States v. Lindert*, 907 F. Supp. 1114, 1125 (N.D. Ohio 1995).

267. *See, e.g., United States v. Schmidt*, 923 F.2d 1253, 1259 (7th Cir. 1991) (finding that Schmidt's service *per se* as a Sachsenhausen Concentration Camp guard, where he restrained prisoners and exposed them to "unspeakably brutal" working conditions, constituted "clear and convincing evidence that he assisted the Nazis in persecuti[on]"); *United States v. Hutyrzyk*, 803 F. Supp. 1001, 1010 (D.N.J. 1992) (finding it irrelevant whether a perimeter guard had ever had occasion to stop anyone while on patrol); *In re Kulle*, 19 I. & N. Dec. 318, 332 (B.I.A. 1985) (holding that service as a perimeter guard constituted assistance in persecution because guards restrained prisoners within the confines of the camps). The *Hutyrzyk* court claimed that "the effect of the presence of armed guards surely must have persuaded prisoners not to attempt to leave their barracks ... ." *Hutyrzyk*, 803 F. Supp. at 1010. Since the SS men who patrolled the perimeter of the camps guaranteed that Jews did not escape, the court concluded that Hutyrzyk's duties as an armed guard alone constituted assistance in persecution. *Id.* at 1012.

268. *Lindert*, 907 F. Supp. at 1125.

269. *Lindert* Complaint, *supra* note 8, at 8. *See* INA § 1101(f)(6) (codified at 8 U.S.C. § 1101 (f)(6)) (establishing that false statements provided by an applicant indicate a lack of good moral character).

270. *Lindert*, 907 F. Supp. at 1126-27. Section 1101(f)(6) contains four elements. Specifically, the applicant's statement must be: 1) oral; 2) sworn; 3) made for the purpose of obtaining immigration or naturalization benefits; and 4) false. 8 U.S.C. § 1101(f)(6).

271. *Lindert*, 907 F. Supp. at 1126; *Lindert* Complaint, *supra* note 8, at 5.

272. *E.g., Fedorenko v. United States*, 449 U.S. 490, 496 (1981) (noting that the defendant recorded concentration camp guard service as "German Army" service); *United States v. Schmidt*, 923 F.2d 1253, 1256 (7th Cir. 1991) (same); *Kulle v. INS*, 825 F.2d 1188, 1195 (7th Cir. 1987) (same); *United States v. Breyer*, 829 F. Supp. 773, 776 (E.D. Pa. 1993) (same); *United States v. Leprich*, 666 F. Supp. 967, 970 (E.D. Mich. 1987) (same); *United*



ord *Waffen SS* service as German Army service.<sup>273</sup> One court noted the motivation behind an immigrant's misrepresenting wartime service.<sup>274</sup> Moreover, the immigrant inspector who signed Lindert's visa testified that, when interviewing applicants under oath, he made a detailed inquiry into the applicant's wartime service.<sup>275</sup> It follows that, had Lindert honestly answered the inspector, the truth about his wartime duties would have surfaced.

The court concluded, however, that the question regarding past activities and affiliations did not require information about the applicant's activities at the places of previous residence; therefore, the court held that Lindert answered honestly.<sup>276</sup> Moreover, the court conjectured that Lindert might have confused "army" with "armed forces"<sup>277</sup> or that the mistake occurred because of his poor English abilities.<sup>278</sup> Such a determination by the court necessarily nullifies a finding that Lindert intended to make a false statement for immigration or naturalization purposes.<sup>279</sup> The immigration officer who conducted the final interview and signed Lindert's visa papers testified, however, that he would have responded to Lindert's answer by questioning him about the precise details of his service.<sup>280</sup> The court ig-

*States v. Kairys*, 600 F. Supp. 1254, 1266 (N.D. Ill. 1984) (same); *United States v. Schellong*, 547 F. Supp. 569, 576 (N.D. Ill. 1982) (same); *United States v. Demjanjuk*, 518 F. Supp. 1362, 1379 (N.D. Ohio 1981) (same).

273. Lindert Record, *supra* note 58, at 948-49, 951-52 (testimony of Jelinek).

274. *Schellong*, 547 F. Supp. at 576 ("Given the widely recognized consequences to an immigrant who had been linked to the concentration camps, ... defendant had ample reasons to hide his guard service.").

275. Lindert Record, *supra* note 58, at 936 (testimony of Jelinek). Jelinek was a former Vice-Consul who issued visas during the period in question. *Id.*

In theory, the investigation should have covered a "neighborhood check," CIC security files check, United States military government records check, and Berlin Document Center check. *McCarran Hearings*, *supra* note 53, at 871.

276. Lindert, 907 F. Supp. at 1127.

277. *Id.* The court disregarded former immigration official Greener's testimony that he employed interpreters during the final interviews in order to avoid confusing those applicants unfamiliar with the English language. Lindert Record, *supra* note 58, at 1003-05 (testimony of Greener).

278. Lindert, 907 F. Supp. at 1126-27; *supra* note 277 and accompanying text.

279. Lindert, 907 F. Supp. at 1127.

280. Lindert Record, *supra* note 58, at 1003-05, 1007-08 (testimony of Greener). Furthermore, Greener testified that he would have rejected Lindert's application if Lindert had revealed the truth of his service on the forms:

OSI: If going over question 26 when you asked an applicant where he had served and in what capacity, as he stated, if he revealed that he was in the *Waffen SS Totenkopf*, what, if anything, you would have done?

Greener: It would have been grounds for refusal.

THE COURT: If he would have said he was in the *Waffen SS*, would you have inquired as to what he did while he was in the SS?

Greener: If he had said *Waffen SS* combat division, I would have asked him in what capacity and where.

*Id.* at 1008. See *Fedorenko v. United States*, 449 U.S. 490, 509-514 (1981) (approving the

nored this testimony and failed to note it in its decision. Other courts have attributed knowledge of the difference between "German Army" service and "Death's Head Battalion" service to the defendant, discounting the *Lindert* court's holding.<sup>281</sup>

Realizing the high improbability of confusion between German Army service and Death's Head Battalion service, other courts have discredited such testimony.<sup>282</sup> Moreover, Lindert himself knew that the officials had already rejected his application on the basis of his *Waffen SS* service.<sup>283</sup> Likewise, his response of "1942-1945 with German Army" to the "residence" question indicates his clear understanding that the question required information about military service.

Nevertheless, the *Lindert* court mentioned intent to perjure one's visa application<sup>284</sup> and concluded that the government failed to show that Lindert was aware of his statements' falsity.<sup>285</sup> Hence, the court found that a man once rejected for informing the United States government of his service in the *Waffen SS* later believed that he had served instead in the "German Army."

### C. LINDERT'S MATERIAL MISREPRESENTATIONS IN NATURALIZATION PAPERS

The government additionally charged Lindert with illegally procuring citizenship by willfully concealing or misrepresenting material facts.<sup>286</sup> The government

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use of testimony by former immigration officials to explain statutory procedures for emigration to the United States).

281. See *United States v. Schellong*, 717 F.2d 329, 334 (7th Cir. 1983) (upholding the district court's finding that Schellong intentionally listed "German Army" service instead of concentration camp guard service on INS Form N-400); *United States v. Schiffer*, 831 F. Supp. 1166, 1200-01 (E.D. Pa. 1993) (believing that the defendant understood the negative consequences of listing Death's Head service rather than mere "German Army" service); *In re Kulle*, 19 I. & N. Dec. 318, 335 (B.I.A. 1985) (same). Cf. *United States v. Tittjung*, 753 F. Supp. 251 (E.D. Wis. 1990) (listing "German Army" service rather than concentration camp guard service on INS Form N-400); *United States v. Schmidt*, 923 F.2d 1253, 1256 (7th Cir. 1991) (omitting concentration camp guard service from his immigration and naturalization applications).

282. Cf. *Schellong*, 717 F.2d at 333 (holding that one's attempt to conceal concentration camp guard service by listing *Waffen SS* duty but failing to mention *Totenkopf* duty constituted a material misrepresentation); *Kulle*, 19 I. & N. Dec. at 335 (calling misrepresentation of military service in the *Totenkopf* Division of the *Waffen SS* as service in the German Army materially fraudulent); see also *Schmidt*, 923 F.2d at 1256 (exemplifying deliberate failure to reveal membership in the *Totenkopf*); *United States v. Breyer*, 829 F. Supp. 773, 776 (E.D. Pa. 1993) (same); *United States v. Leprich*, 666 F. Supp. 967, 968 (E.D. Mich. 1987) (illustrating purposeful concealment of *Waffen SS* service at Mauthausen).

283. *United States v. Lindert*, 907 F. Supp. 1114, 1121 (N.D. Ohio 1995).

284. *Id.* at 1126-27.

285. *Id.*

286. *Id.* at 1127-28. As the court noted, the petitioner must willfully conceal or misrepresent material information before the court may revoke citizenship. *Id.* at 1124. See *Kungys v. United States*, 485 U.S. 759, 767 (1988) (requiring willfulness); *United States v. Tittjung*, 753 F. Supp. 251, 254 (E.D. Wis. 1990) (finding that willful or inadvertent con-

based its claim on Lindert's answer to Question 7 on his naturalization papers.<sup>287</sup> The government alleged that Lindert's omission of *Waffen SS* membership in his answer represents a material misrepresentation of the facts.<sup>288</sup>

On the naturalization form, the government alleged that Question 7, calling for all organizational memberships, required Lindert to reveal his Death's Head Battalion membership prior to obtaining citizenship.<sup>289</sup> A former naturalization examiner testified that standard operating procedure for naturalization applicants at the relevant time required the defendant to list wartime service and answer questions about it.<sup>290</sup> Ignoring the government witness' testimony, the court found instead that the question did not call for a statement of military service.<sup>291</sup> Stressing this point, the court stated that the examiner failed to satisfy the court with sufficient evidence that he would have asked Lindert about his military service.<sup>292</sup> Though the government's witnesses' testimony suggested a contrary finding,<sup>293</sup> the court determined that the naturalization forms had not squarely called for the informa-

cealment voids an entry visa).

287. *United States v. Lindert*, 907 F. Supp. 1114, 1127 (N.D. Ohio 1995). At the time of Lindert's application, Question 7 asked every applicant to list "each organization, association, foundation, club or society in the United States or in any other place that [he/she had] been a member of at any time, and the dates and membership of each." *Id.*

288. See cases cited *supra* notes 281-82.

289. Lindert Record, *supra* note 58, at 670-75 (testimony of Siracusa). The following exchange occurred at the trial:

OSI: Would membership by an applicant in the Death's Head Battalion at a concentration camp have affected your decision about whether an applicant should be naturalized?

....

Siracusa: Yes, it would have... . [M]embership in the Death's Head Battalion, as we knew at that time, was a voluntary membership in an elite arm of the German regime not connected with the army. And these type volunteers were assigned for specific duty namely political activity or guards or personnel in camps. That's what would be critical to our inquiry regarding the applicant's background.

*Id.* at 675.

290. *Id.*

291. *Lindert*, 907 F. Supp. at 1128.

292. *Id.* at 1127. *Cf.* *United States v. Fedorenko*, 597 F.2d 946, 947 (5th Cir. 1979) (characterizing the failure to reveal concentration camp guard service as "a misrepresentation by nondisclosure"). In *Lindert*, the government's witness testified that standard operating procedure regarding Question 7 directed the naturalization examiner to question the petitioner about past membership in a military organization. Lindert Record, *supra* note 58, at 669, 721-22 (testimony of Siracusa). *Cf.* *Sittler v. United States*, 316 F.2d 312 (2d Cir. 1963) (acknowledging that naturalization officials in the early 1960s focused particularly on organizational memberships and wartime activities). Since naturalization examiners at the time of Lindert's petition were focusing on the wartime activities of petitioners, it follows that the information should have surfaced at some point prior to his naturalization.

293. See *supra* note 289.

tion that Lindert failed to provide.<sup>294</sup> Moreover, the court, citing an unspecified "trail of paper records," found that the government had neglected to prove the willfulness of the posited misrepresentation.<sup>295</sup>

#### IV. RECOMMENDATIONS

The *Lindert* court failed to apply international precedent, domestic precedent and evidence admitted at the trial supporting the government's claims. Had the court applied the vast body of Nürnberg precedent and controlling cases, it would have revoked Lindert's citizenship as a matter of law. The government declined to appeal<sup>296</sup> the decision,<sup>297</sup> however, and so the legacy of *Lindert* remains.<sup>293</sup>

294. *Lindert*, 907 F. Supp. at 1128.

295. *Id.* For a brief discussion of the willfulness requirement, see *supra* note 286.

296. The OSI did not appeal the decision to the Court of Appeals for the Sixth Circuit. Close examination of the recent history of cases brought by the OSI in the Sixth Circuit suggests a possible rationale for the OSI's reticence in appealing. The first cases involve the extradition proceedings of Ivan (John) Demjanjuk.

After the United States government extradited Demjanjuk to Israel to stand trial for war crimes, the Sixth Circuit panel that heard Demjanjuk's pre-extradition appeal *sua sponte* reopened the case to determine whether the OSI committed fraud on the court. A Special Master appointed by the panel investigated and reported that the Government did not commit fraud upon the court.

The panel, however, disregarded the Special Master's conclusions and found that the OSI prosecutors did not purposely withhold information from the defense in *Demjanjuk v. Petrovsky*, 10 F.3d 338, 355 (6th Cir. 1993), but that they recklessly withheld information. The panel, in essence, retroactively applied criminal discovery rules in these civil denaturalization and extradition proceedings where such rules do not traditionally apply.

As a result, the panel vacated the extradition order for Demjanjuk, who, in the meantime, was acquitted by the Israeli Supreme Court. *Id.* The suspect nature of the Sixth Circuit's actions has not gone unnoticed. See Steven Lubet, *That's Funny, You Don't Look Like You Control the Government: The Sixth Circuit's Narrative on Jewish Power*, 45 HASTINGS L.J. 1527, 1529 (1994) (criticizing the grounds for the panel's vacating of the extradition order); Brief for Jerrold Nadler, Holocaust Survivors in Pursuit of Justice, Inc. and World Jewish Congress, *Rison v. Demjanjuk*, 115 S. Ct. 295 (1993) (No. 93-1875) (denying *certiorari*) (proposing that the Sixth Circuit "contradicted" Supreme Court and other circuit court precedent, employed "unusual legal procedures" and "incorporate[d] stereotypes of Jews that have no place in a judicial decision and create potential adverse consequences for the exercise of their right to communicate with the government").

In a separate case, *Petkewytsch v. INS*, 945 F.2d 871 (6th Cir. 1991), the Sixth Circuit carefully distinguished Supreme Court precedent and held for the defendant. See discussion *supra* Part III.A.2 (explaining how the Sixth Circuit ignored the plain language of the Holtzman Amendment and ultimately held that the Amendment applies only to those whom the government establishes actively and personally assisted in persecution).

In addition, the sentiments that exist in the Sixth Circuit towards cases involving defendants who allegedly participated in Nazi-sponsored persecution are manifest in the following excerpt. This excerpt from the oral argument held July 25, 1991, before Judges Merritt, Lively and Hull illustrates the misunderstanding of the purpose of proceedings instituted by OSI—to denaturalize and deport former Nazi collaborators:

Judge Merritt:[Discussing the differing degrees of hardship imposed at different Nazi camps.] It seems to me that we've got a matter of degree here, that there really is a difference somewhere along the line.

OSI: Your Honor, all the 7th Circuit cases, I beg to differ, but if you look at them they make a very important point, that it does not matter if you are at the most infamous concentration camp, you could be at a labor camp, at Sachsenhausen, at the labor portion of Treblinka, at —

Judge Lively:— anymore than the average stay was 56 days and the charges were things as insignificant as forgetting to wear a badge.

...

Judge Merritt: I guess we could take this all afternoon and we'd better bring it to a close. I think that we understand your argument and think this attitude of, *the notion that the Holocaust should be kept alive, but there's a difference between keeping the Holocaust alive and between culpable individuals and this involuntariness thing. We are going to have to take a good hard look at this.*

Oral argument at the Sixth Circuit, July 25, 1991, before Judges, Merritt, Lively and Hull (emphasis added). The "badge" referred to was a yellow star or triangle which signified that the prisoner was Jewish, the basis for the prisoner's incarceration. Lindert Record, *supra* note 58, at 160-61 (testimony of Sydnor) (describing the six different triangular patches and their corresponding meanings, which were taught to all guards); *id.* at 630-31 (testimony of Vidmar) (testifying that all prisoners wore patches). The persecuted did not "forget" to wear their badges, but rather attempted to elude detection by not wearing them. *But see id.* at 1174 (testimony of Lindert) (testifying that he never saw "marks" signifying different "crimes" on the prisoners).

The suggestion that the Justice Department is merely trying to keep the Holocaust "alive" minimizes the criminality carried out during the Second World War and strengthens the questionable rhetoric used by the Sixth Circuit in *Demjanjuk*. In that case, the court asserted: "It is obvious ... that the prevailing mindset at 'a division of the United States Justice Department' was that the office must try to please and maintain very close relationships with various 'Jewish' interest groups because their continued existence depended upon it." Lubet, *supra*, at 1527 (quoting *Demjanjuk*, 10 F.3d at 355). This statement feeds anti-Jewish sentiment, because, as judicial ethics expert Lubet noted, the court's "point is merely that Jewish groups were able to dictate the 'mindset' of certain federal prosecutors." *Id.* at 1528. This assertion "ultimately rested on the notion that Jews are able, through stealth or pressure, to exert unjustified sway over governmental bodies." *Id.* The court used the above-cited rationale to justify its order vacating the extradition of John Demjanjuk after an Israeli tribunal acquitted him. *Demjanjuk*, 10 F.3d at 342. Lubet argues that the Sixth Circuit embellished the facts "in a way that demonstrates, at the very least, an unconscious receptiveness to age-old images of clandestine Jewish influence and control." Lubet, *supra*, at 1535.

Nonetheless, the foundation of denaturalization cases of participants in Nazi-sponsored persecution rests on the "nature of the acts they committed: acts that the laws of all civilized nations define as criminal." *Siderman de Blake v. Argentina*, 965 F.2d 699, 715 (9th Cir. 1992). *Cf.* RYAN, *supra* note 41, at 251 (asserting that as the Director of OSI, he endeavored to keep the OSI's trials from becoming "public debates on the evils of the Holocaust"). Ryan rationalized as follows: "Trials are intended to elicit facts so that judgments—sometimes profound judgments, as in these cases—can be rendered. Only if the trials have integrity as trials can they serve any purpose afterward in illuminating the social or histori-

cal issues that give rise to them." *Id.* at 251-52.

297. There are particular problems with appeal of each count in *Lindert v. United States*. Lindert's three years of service as a Mauthausen camp guard, however, must defeat the good moral character necessary for naturalization. Nevertheless, in comparison to other courts' determinations regarding the element of good moral character, *Lindert* consists of the least compelling fact pattern. *See, e.g.*, *United States v. Schiffer*, 831 F. Supp. 1166, 1199 (E.D. Pa. 1993) (denaturalizing an armed camp guard whose service was voluntary and who guarded prisoners going to and from work sites and on "death marches" for lacking good moral character), *aff'd*, 31 F.3d 1175 (3d Cir. 1994); *United States v. Theodorovich*, 102 F.R.D. 587, 591 (D.D.C. 1984) (finding absence of good moral character where defendant was a member of the Nazi-affiliated Ukrainian police, which shot Jewish civilians), *aff'd*, 764 F.2d 926 (D.C. Cir. 1985); *United States v. Kozy*, 540 F. Supp. 25, 35 (S.D. Fla. 1982) (holding that employment as a Ukrainian police officer *per se* and participation in the murder of civilians both independently preclude a finding of good moral character), *aff'd*, 728 F.2d 1314, 1317, 1321-22 (11th Cir. 1984); *United States v. Osidach*, 513 F. Supp. 51, 103 n.31 (E.D. Pa. 1981) (interpreting and patrolling the streets for the Nazi-affiliated Ukrainian police and identifying Jews among the populace for future arrest signifies lack of good moral character); *United States v. Linnas*, 527 F. Supp. 426, 439 (E.D.N.Y. 1981) (concluding Linnas lacked good moral character by virtue of his service as the head of an Estonian concentration camp and his shooting of Jewish civilians), *aff'd*, 685 F.2d 427 (2d Cir. 1982).

Precedent exists that both agrees with and repudiates the *Lindert* court's perspective on what information the visa and naturalization forms demanded. *Compare Kungys v. United States*, 485 U.S. 759, 779-80 (1988) (reading § 1101(f)(6) literally and holding that even the "most immaterial of lies with the intent of obtaining immigration benefits" characterizes bad moral character) and *United States v. Schellong*, 717 F.2d 329, 333 (7th Cir. 1983) (noting that Schellong understood that the visa and naturalization forms required disclosure of wartime activities), *aff'd*, 718 F.2d 1104 (7th Cir. 1983) with *United States v. Kairys*, 600 F. Supp. 1254, 1267 (N.D. Ill. 1984) (dismissing the government's contention that the visa and naturalization forms required the applicant to reveal wartime service), *aff'd*, 782 F.2d 1374 (7th Cir. 1986).

Concomitantly, the manner in which the *Lindert* court drafted its opinion also presents challenging aspects for an appeal. The court's factual findings concerning the information Lindert provided on his immigration and naturalization forms, the second element, negate the element of "intent to lie to obtain immigration or naturalization." The court accepted Lindert's assertion that all of his post-war accounts of wartime service resulted from incompetent clerks taking information from previous forms without verifying their contents, despite contrary evidence showing the unlikelihood of such a claim. Similarly, the court failed to mention the third element, sworn oral testimony.

As with the false testimony count, there are cases supporting and rejecting the *Lindert* court's view of precisely what information the naturalization forms demanded as to the count of material misrepresentation. Even if the circuit court agreed with the government's view that Lindert did make a false statement, the district court's factual findings would make it difficult to show, as with the false testimony count, that Lindert had in fact *intended* to lie.

Furthermore, the *Lindert* opinion fails to cite any evidence that the government did provide. Not one reference to witnesses or exhibits presented by the government appears in the opinion. Alternatively, the court mentions substantial details of defendant's testimony. As the court couched the majority of the opinion in terms of credibility determinations and evaluations of evidence, *Lindert*, 907 F. Supp. at 1118, 1119, 1120, 1125 (attributing credibility to Lindert's testimony), it is traditionally very difficult to overturn such a decision. *See Anderson v. Bes-*

As prescribed by international law, the United States Congress, and other Federal Courts of Appeals,<sup>299</sup> the Sixth Circuit should interpret *Fedorenko* and the Holtzman Amendment differently.<sup>300</sup> A finding that service as a concentration camp guard at one of the most notorious death camps does not nullify an individual's good moral character contradicts case precedent in the United States.<sup>301</sup> The policy and principles underlying the country's foundation mandate the development of a single, uniform body of case law affirming the revocation of naturalization orders of former concentration camp guards who served in the SS *Totenkopf*.

Present conditions mandate that the United States judicial system commit to excluding participants in Nazi-sponsored persecution through denaturalization and deportation proceedings. First, the OSI has additional cases pending, filed and under investigation than it ever did since its creation sixteen years ago.<sup>302</sup> Second, the collapse of the Soviet Union has created a multitude of small, ethnically divided republics. Many of these republics suffered tremendously from the Nazi regime's persecution.<sup>303</sup> It remains questionable, however, whether these fledgling republics will develop the legal systems and corresponding expertise to accommodate or commit to trying individuals who collaborated in the Nazi program.<sup>304</sup> The emer-

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semer City, 470 U.S. 564, 573 (1985) (asserting that appellate courts defer to the initial trier of facts regarding factual findings).

298. As most of the OSI's cases do not involve Nazi persecutors who immigrated under the RRA, the ramifications of this decision for pending and future OSI cases will not be calamitous.

299. See *supra* notes 28-29 and accompanying text (discussing the applicability of international law to United States law).

300. See discussion *supra* Part III.A.1.

301. See discussion *supra* Part III.A.1 and note 296.

302. GERMAN LAW, *supra* note 37, pt. 6, § 1, at 3 (noting the "dramatic increase" that the OSI has experienced in its pending caseload because of the "recent dissolution of communist rule in eastern and central Europe" which allowed the OSI's staff to access archives that the communist governments had removed from the public domain).

303. See DAWIDOWICZ, *supra* note 142, at 397-98 (documenting how Nazi atrocities cruelly affected Russia, Belarus, Estonia, Latvia, Lithuania and Ukraine); David Friedman, *Nowhere to Run*, NEWSDAY, Feb. 23, 1995, at B4 (citing Lithuania, Latvia, Estonia and Ukraine as the locations of "some of the most notorious Nazi atrocities"). The combined Jewish population of the Baltic States of Latvia, Lithuania and Estonia was roughly 253,000 before the arrival of the Germans. DAWIDOWICZ, *supra* note 142, at 399-400. The Nazis massacred approximately 90% of the Baltic Jewish population, 66% of Belarus' pre-occupation Jewish population, and 60% of the Ukraine's Jewish populations. *Id.* at 401. The Jewish population in Russia managed a much higher survival rate of approximately 90%. *Id.*

304. See, e.g., David Talbot, *Victims of Vilnius - Lithuania*, BOSTON HERALD, Nov. 13, 1995, at 4 (remarking that Lithuania is becoming a Nazi-harboring "Paraguay of Europe" and the country is reluctant to prosecute alleged Nazi persecutors); Jay L. Chavkin, Note and Comment, *Man Without a Country: The Just Desserts of John Demjanjuk*, 28 LOY. L.A. L. REV. 769, 789-90 (1995) (stating that the former Soviet republics lack the "wherewithal and legal infrastructure necessary to effect justice" for past Nazi war crimes); Efraim Zuroff, *Nazi Untouchables*, JERUSALEM POST, Apr. 8, 1993, at Opinion (asserting

gence of ultranationalist and anti-Semitic sentiment in Russia will hamper such travails in that country.<sup>305</sup>

More notably, however, the United States needs to send a positive message because similar atrocities are occurring in Eastern Europe<sup>306</sup> and Africa.<sup>307</sup> Specifi-

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that Nazi collaborators are recognized as heroes in former Soviet republics). The OSI recently succeeded in denaturalizing Aleksandras Lileikis, a Lithuanian by birth and alleged Chief of the Lithuanian Security Police, an organization notorious for its persecutory conduct. *United States v. Lileikis*, 929 F. Supp. 31 (D. Mass. 1996). The government of Lithuania, however, declines to mete out justice for Lileikis' past persecutory conduct. *Lithuanian Accused of Delaying Case of Suspected War Criminal*, BRITISH BROADCASTING CORP., June 24, 1996 (suggesting that the Lithuanian government is purposely avoiding the prosecution of Lileikis); Talbot, *supra* (suggesting the same).

305. See, e.g., *It's Alive*, ECONOMIST, Dec. 16, 1995, at 13 (reporting that voters in Russia cast 23% of their votes, a plurality, in December 1993 for Vladimir V. Zhirinovskiy's Liberal Democratic Party which churned out ultranationalist propaganda); Vladimir Klimenko & Cynthia Scharf, *Zhirinovskiy's Success Draws Disturbing Parallels to Hitler: West May Be Handing Russia to a Teleganic Fascist by Making Country Pay for Cold War*, CHRISTIAN SCI. MONITOR, Jan. 10, 1994, at 22 (comparing the current resurgence of ultranationalist ideology in Russia to the Nazi ideology of Hitler's Germany); Justin Burke, *Germans Look to U.S. for Help in Halting Race-Related Attacks*, CHRISTIAN SCI. MONITOR, Mar. 2, 1994, at 4 (noting the emerging link between Russian ultranationalist and German neo-Nazi ideologies).

306. See, e.g., Morton I. Abramowitz, *Refugees: The Dilemma of Global Dislocation*, Address to the Fourth Annual Franklin and Eleanor Distinguished Lecture, Roosevelt University (Nov. 21, 1995), in 62 VITAL SPEECHES 138 (Dec. 15, 1995) (relating that ethnic cleansing in the former Yugoslavia has "displaced or made refugees" of at least two million "minorities"); Nicole M. Procinda, Note, *Ethnic Cleansing in Bosnia-Herzegovina, A Case Study: Employing United Nation Mechanisms to Enforce the Convention on the Prevention and Punishment of the Crime of Genocide*, 18 SUFFOLK TRANSNAT'L L.J. 655, 690 (1995) (discussing the genocide that has taken place in the former Yugoslavia and steps taken to deal with the aftermath); Scott Peterson, *Justice for Bosnia May Rest in Mixed Memories: War Crimes Trials Jeopardized by Discrepancies in Witness' Accounts*, CHRISTIAN SCI. MONITOR, May 10, 1996, at 1 (recounting the "ethnic cleansing" that took place in Brcko, Yugoslavia in 1992 and the problems associated with bringing the accountable individuals to justice). A resurgence of Nazi and fascist ideologies has resurfaced throughout Europe. See also Stephen Kinzer, *Youths Adrift in a New Germany Turn to Neo-Nazis*, N.Y. TIMES, Sept. 28, 1992, at A3 (recounting that neo-Nazi ideas have become prevalent among youths); Stephen Kinzer, *German Unrest Expected to Bring Tightening of Law on Immigration*, N.Y. TIMES, Sept. 2, 1992, at A1 (reporting that because German youths have been attacking immigrants, the German government has restricted immigration for those seeking asylum and foreign workers); William Tuohy, *Waldheim Wins Vote in Austria: Elected President Amid Charges of Role in War Crimes*, L.A. TIMES, June 9, 1986, at A7 (reporting that Austrians elected a Nazi officer to be their president). For the history behind the investigation disclosing Waldheim's past, see ELIM. ROSENBAUM, *BETRAYAL* (1993).

307. See, e.g., Abramowitz, *supra* note 306 (mentioning the genocide in Rwanda and the nearly billion dollar expense to pay for the "protection of refugees and rehabilitation costs"); Linda Maguire, *Power Ethnicized the Pursuit of Protection and Participation in Rwanda and Burundi*, 2 BUFF. J. INT'L L. 49, 64 (1995) (highlighting the "ethnic cleansing"



cally, the precedent of prosecutions of those who collaborated in Nazi-sponsored persecution will take on increasing importance with the recent peace accord between the Serbians, Muslims and Croats.<sup>308</sup> Since some refugees from war-torn countries will inevitably seek immigration benefits in the United States,<sup>309</sup> the United States' judiciary must reinforce America's exclusion of war criminals and individuals who participated in persecutory conduct. The credibility of the United States' asserted refusal to become a destination for those who persecute and defile the human rights of others mandates the nation's respect for the Nürnberg principles. If our courtrooms ignore or reject Nürnberg's fundamental international legal doctrines, then Nürnberg and its progeny become meaningless.<sup>310</sup>

## V. CONCLUSION

The Northern District of Ohio's decision in *United States v. Lindert* represents a

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and "genocide" that has plagued Rwanda and Burundi since their independence); Will Lynch, *How Can We Ignore the Cries of Children? Africa: 'Ethnic Cleansing' Escalates; The U.N. Must Act*, L.A. TIMES, Aug. 8, 1996, at B9 (urging action by the United Nations in response to the rampant genocide and "ethnic cleansing" taking place in Rwanda, Burundi and Zaire).

308. Dayton Agreement for Peace, signed by Bosnia, Croatia and Serbia, Dec. 14, 1995. See Craig R. Whitney, *Balkan Accord: The Overview; Balkan Foes Sign Peace Pact Dividing an Unpacified Bosnia*, N.Y. TIMES, Dec. 15, 1995, at A1 (printing the Agreement). The Agreement establishes a war crimes tribunal, *id.*, similar to the IMT.

309. But see Abramowitz, *supra* note 306 (stating that the United States has accepted few refugees in "imminent danger from war or persecution" in recent years and predicting that a large influx over the next decade is unlikely).

310. See Virginia Morris & Michael P. Scharf, 1 AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 9, 91, 111 (1995) (contending that the legacy of individual criminal accountability represents one of Nürnberg's monumental legacies and presenting Article 7, Individual Criminal Responsibility, of the International Military Tribunal for the former Yugoslavia and generally illustrating how the Nürnberg Trial and the IMTs established the precedent for present day war crimes tribunals); see generally Matthew Lippman, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-five Years Later*, 8 TEMP. INT'L & COMP. L.J. 1 (1994) (submitting that the Nürnberg principles formed the foundation for the United Nations' Convention on the Prevention and Punishment of the Crime of Genocide). South African jurist Richard Goldstone, acknowledged the world's failure to learn a simple, but crucial message exemplified by Nürnberg:

The day amnesties for war crimes are given is the first day of the next cycle of violence. There are too many victims who want some acknowledgement. There are too many victims who want some form of justice. If their voices are ignored, the spirals of violence in those areas will continue.

The International Tribunals have to be an example, a shining light to all nations.

Richard Goldstone, *War Crimes Atrocity Victims in Bosnia Cry Out for Justice*, SAN DIEGO UNION-TRIB., Dec. 17, 1995, at G-1 (emphasis added). Justice Goldstone currently serves as chief prosecutor for the United Nations' International Criminal Tribunal for the former Yugoslavia and Rwanda. *Id.*

major break from international and domestic precedent. The holding represents the judicial branch's difficult and frustrating task of enforcing justice fifty years after criminal activity took place. Nevertheless, time does not mitigate the effect of the "crimes against humanity" in which Lindert participated by virtue of his duties of service in the *Totenkopf*. The court should not have concluded that Lindert's role in preventing malnourished and mistreated prisoners from escaping their internment had no bearing on his character and hence his fitness for the privilege of United States citizenship.<sup>311</sup>

The international community views OSI as the "most aggressive and effective Nazi-hunting operation."<sup>312</sup> It has built up this reputation by bringing cases against, *inter alia*, former concentration camp guards. The justice system of the United States "will lack basic moral integrity and justice unless accounts are properly and fully settled with remaining Nazi [collaborators]."<sup>313</sup> Courts should find that anyone who served as a former concentration camp guard lacks good moral character and does not merit the privilege of United States citizenship or residence.

Hopefully, the *Lindert* decision will not affect other cases within and outside the Sixth Circuit. Although over half a century has passed since the Allied Powers liberated the concentration camps, new evidence against participants in Nazi-sponsored persecution has emerged from newly gained access to the archives after the recent fall of the Eastern Bloc countries.<sup>314</sup> As the number of cases brought by the United States government proliferates, it becomes increasingly important that American courts recognize that the duties required by certain service within Nazi and Nazi-sponsored organizations negates a finding of good moral character.

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311. See *Rogers v. Bellei*, 401 U.S. 815, 836 (1971) (holding that an alien enjoys no constitutional right to United States citizenship); *Woodby v. INS*, 385 U.S. 276, 290 (1966) (same).

312. Rick Atkinson, *As Time Slips Away, So Do Aging Nazis*, Commercial Appeal (Memphis, TN), Sept. 3, 1995, at A19 (explaining that OSI has met with limited success in its endeavors). Atkinson quotes one Justice Department official as having estimated that 10,000 Nazi persecutors may have immigrated to the United States between 1948 and 1952. *Id.*

313. ROSENBAUM, *supra* note 128, at 87.

314. Carole Landry, *Hunting Down Nazis with Some Help from the KGB Files*, AGENCE FRANCE-PRESSE, July 15, 1995 (quoting OSI Director Eli Rosenbaum as saying that the fall of the Iron Curtain has provided access to many previously inaccessible archives). For example, the United States instituted denaturalization proceedings against seven alleged Nazi collaborators in 1994 for affirmatively misrepresenting their wartime activities to immigration officials. GERMAN LAW, *supra* note 37, pt. 6, § 1, at 3. That number represents the highest single-year total in over ten years, *id.*, and exceeds the number instituted by Australia, Britain, Canada and Scotland combined for the same period. Landry, *supra*. See Michael Dobbs, *Decoded Cables Revise History of Holocaust*, WASH. POST., Nov. 10, 1996, at A1 (reporting about newly declassified and released information revealing that ordinary German police and army units participated in Nazi-sponsored executions).