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## Due Process for All--Due Process, the Eighth Amendment and Nazi War Criminals

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## COMMENT

### DUE PROCESS FOR ALL? DUE PROCESS, THE EIGHTH AMENDMENT AND NAZI WAR CRIMINALS\*

#### I. INTRODUCTION

On April 7, 1987, Supreme Court Justice Thurgood Marshall blocked the deportation of alleged Nazi war criminal Karl Linnas to consider, one final time, whether the United States should deport Linnas to the Soviet Union, where a Soviet court had sentenced him to death in absentia.<sup>1</sup> Linnas stood accused of participating in Nazi atrocities as head of the Nazi Concentration Camp at Tartu, Estonia during World War II.<sup>2</sup> A New York Federal District Court revoked Linnas' citizenship in 1981, after the United States brought a denaturalization action against him.<sup>3</sup> After finding Linnas deportable under United States immigration laws, an Administrative Law Judge of the Immigration and Naturalization Service set Linnas' deporta-

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<sup>1</sup> *LI Man Wins Delay of Deportation Order*, N.Y. Times, April 3, 1987, at B24, col. 1. Linnas had applied to Justice Marshall for a stay of deportation. Justices Brennan, Blackmun, and O'Connor would have granted the application for the stay. *Linnas v. I.N.S.*, 107 S. Ct. 1882 (1987). The Court had originally denied certiorari in *Linnas v. I.N.S.*, 479 U.S. 995 (1986). Justices Blackmun, Brennan, and O'Connor would have granted certiorari. Rehearing was denied in *Linnas v. I.N.S.*, 479 U.S. 1070 (1987).

<sup>2</sup> See, e.g., *Linnas v. I.N.S.*, 790 F.2d 1024, 1026 (2d Cir. 1986), *cert. denied*, 479 U.S. 995 (1986), *reh'g denied*, 479 U.S. 1070 (1987). The Circuit Court of Appeals called the evidence against Linnas "overwhelming and largely uncontroverted." *Id.* Several articles, however, appeared in the *New York Times* in support of blocking Linnas' deportation. Attorney General Edwin Meese was sympathetic to Linnas' case. See Noble, *Meese Gives Nazi Suspect Time to Find a Country*, N.Y. Times, March 6, 1987, at A32, col. 1. Former Reagan White House aide Patrick Buchanan expressed his objections to the deportation of Linnas. Buchanan, *Get It Out In the Open*, N.Y. Times, April 7, 1987, at A34, col. 5 (op ed.). Also, ethnic organizations of Baltic and Ukrainian emigrants in the United States lobbied against his deportation. *Meese Hears Plea in Nazi Case*, N.Y. Times, Feb. 14, 1987, at A50, col. 3.

<sup>3</sup> *United States v. Linnas*, 527 F. Supp. 426, 428 (E.D.N.Y. 1981), *aff'd*, 685 F.2d 427 (2d Cir. 1982).

tion for the Soviet Union.<sup>4</sup> The Court of Appeals for the Second Circuit affirmed this decision,<sup>5</sup> and the United States deported Linas to the Soviet Union. He died there on July 2, 1987.<sup>6</sup> Looking at the eighth amendment<sup>7</sup> and the constitutional right to due process of law,<sup>8</sup> Linas' case raises serious questions about the denaturalization and deportation process which may have resulted in his death.

As a problem of eighth amendment analysis, Linas' case implicates the cruel and unusual punishment clause. The eighth amendment forbids "cruel and unusual punishment"<sup>9</sup> in a criminal context.<sup>10</sup> Although Linas' case was not criminal, it arguably had criminal implications due to the link between his denaturalization, deportation and Nazi atrocities.<sup>11</sup> Linas' deportation resulted, in part, due to his misrepresentations on his entry forms regarding his Nazi affiliations.<sup>12</sup> Because of his Soviet death sentence, Linas faced the punishment of death either for misrepresentations on forms, which may violate the eighth amendment,<sup>13</sup> or for his participation in murder, which, though it does not violate the eighth amendment, requires a criminal trial satisfying fifth amendment guarantees of due process of law.<sup>14</sup>

As a problem of due process, the Linas case is, perhaps, a worst case scenario envisioned by a clever constitutional law professor.<sup>15</sup> Here was a man convicted in the Soviet Union in absentia for

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<sup>4</sup> *Linas v. I.N.S.*, 790 F.2d at 1027.

<sup>5</sup> *Id.* at 1032.

<sup>6</sup> Keller, *Estonian Sent to Face Death in Soviet Dies in Hospital*, N.Y. Times, July 3, 1987, at A2, col. 3. Linas died due to natural causes. According to Linas' daughter, the Soviet Union commuted Linas' sentence prior to his death. The author, however, could not find public announcement of this by the Soviet Union. *Linas Death Sentence Reportedly Commuted*, N.Y. Times, July 5, 1987, at A18, col. 5.

<sup>7</sup> The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

<sup>8</sup> The fifth amendment to the United States Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V. For the full text of the fifth amendment, see *infra* note 33.

<sup>9</sup> U.S. CONST. amend. VIII.

<sup>10</sup> *Ingraham v. Wright*, 430 U.S. 651, 664 (1977).

<sup>11</sup> See *infra* notes 171-79 and accompanying text.

<sup>12</sup> *Linas v. I.N.S.*, 790 F.2d 1024, 1026 (2d Cir. 1986).

<sup>13</sup> See *infra* notes 171-78 and accompanying text.

<sup>14</sup> See *infra* note 179 and accompanying text.

<sup>15</sup> Other alleged Nazi war criminals who have undergone similar denaturalization and deportation proceedings include: Vladimir Sokolov, a Russian who allegedly wrote for an anti-Semitic German propaganda paper entitled *Rech*, *United States v. Sokolov*, 814 F.2d 864, 867 (2d Cir. 1987); Liudas Kairys, an alleged guard at the concentration camp at Treblinka, Poland, *United States v. Kairys*, 600 F. Supp. 1254, 1256 (N.D. Ill. 1984); Serge Kowalchuk, a member of the Ukrainian militia in Lubomyl, Poland, *United*

his war crimes.<sup>16</sup> Most Americans concerned about the constitutional rights of individuals to defend themselves against criminal charges would find this problematic.<sup>17</sup> The deportation of Linnas to the Soviet Union, after conviction in that country in absentia, gave him no opportunity to defend himself. Also, because no extradition treaty<sup>18</sup> exists between the United States and the Soviet Union the United States may have, in effect, extradited Linnas in the absence of such a treaty.<sup>19</sup> Soviet criminal process varies so greatly from the American scheme ensuring due process that it cannot be considered analogous.<sup>20</sup> Thus, the questions concerning Linnas' right to due process are compelling and must be explored.

Further, evidentiary problems also arise in Nazi war crimes cases. The photographic displays used may be highly suggestive.<sup>21</sup> "[T]he prosecution of persons for crimes committed as many as forty years in the past cannot help but raise serious, and perhaps

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States v. Kowalchuk, 773 F.2d 488, 490 (3d Cir. 1985); and Feodor Fedorenko, an alleged guard at Treblinka. Fedorenko v. United States, 449 U.S. 490, 493 (1981).

<sup>16</sup> Linnas v. I.N.S., 790 F.2d at 1027. The case of Feodor Fedorenko was similar. The United States deported Fedorenko to the Soviet Union for his alleged war crimes. In the Soviet Union, Fedorenko was tried, convicted and, executed. N.Y. Times, July 28, 1987, at A3, col. 5.

<sup>17</sup> The Soviet legal system does not provide the same protections for the criminal defendant as does the American system. As one study noted:

[T]he arrested person [in the Soviet system] . . . in the most serious cases, while he is confined, may not receive visitors or send or receive letters or telephone calls during confinement. It is, therefore, quite impossible for him to arrange for a legal defense, or have legal assistance, while the investigation within the nine-month limit continues.

AMERICAN BAR ASSOCIATION, A CONTRAST BETWEEN THE LEGAL SYSTEMS IN THE UNITED STATES AND IN THE SOVIET UNION 162 (1968).

<sup>18</sup> The Supreme Court has defined extradition as "the surrender by one nation to another of an individual accused or convicted of an offence [sic] outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender." *Terlinden v. Ames*, 184 U.S. 270, 289 (1902). Under United States laws of extradition, a request for extradition may be granted only pursuant to a treaty of extradition between the United States and the requesting country. 18 U.S.C. §§ 3181 & 3184 (1985). Therefore, the absence of an extradition treaty between the Soviet Union and the United States renders extradition impossible from the United States to the Soviet Union.

<sup>19</sup> Linnas v. I.N.S., 790 F.2d at 1030-31.

<sup>20</sup> The Soviet and American systems of criminal law differ fundamentally. The Soviet criminal law system is based on the Romanist legal tradition, whereas the United States is based on the English common law. In keeping with the Romanist tradition, the Soviet system employs a "preliminary investigator" who conducts a thorough investigation into the facts. The Soviets conduct this investigation in secret. The investigation is like a preliminary trial, except that the accused is not represented by counsel at this time. See, e.g., J. HAZARD, W. BUTLER, & P. MAGGS, *THE SOVIET LEGAL SYSTEM: THE LAW IN THE 1980's* 56 (1984).

<sup>21</sup> See *infra* notes 288-311 and accompanying text.

unique, questions of procedural due process.”<sup>22</sup> The evidence is stale, for the witnesses are elderly and have memory problems.<sup>23</sup> Also, finding additional evidence of crimes committed so far in the past is decidedly difficult.<sup>24</sup> There are also difficulties due to the source of much of the evidence: the Soviet Union. The Soviets are notorious for falsifying such evidence.<sup>25</sup> Thus, it is important to examine closely the evidence used in such cases, for it may imply further due process problems.

The United States proved by “clear, unequivocal and convincing evidence” that Linnas lied on his entry papers about his participation in heinous crimes throughout the Holocaust.<sup>26</sup> The Court of Appeals for the Second Circuit found the evidence against him overwhelming.<sup>27</sup> Eyewitnesses testified that Linnas ordered the transportation of Jewish women and children to a ditch outside the Tartu camp, where they were shot as they knelt alongside the edge.<sup>28</sup> The ditch became a mass grave.<sup>29</sup> If Linnas ordered such atrocities, he had escaped punishment for them in the United States far too long. The United States system of criminal justice affords a means to convict and punish individuals guilty of crimes such as those of Linnas. Thus, it is possible that a heinous murderer escaped his justly deserved fate for thirty-five years, only to die of natural causes in the Soviet Union.<sup>30</sup>

The Linnas case, however, is not a hypothetical. Rather, it was a real case, presenting very real issues. These issues do not end with Linnas’ death. The Office of Special Investigations<sup>31</sup> is currently investigating twelve other individuals whom the United States

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<sup>22</sup> Nesselson and Lubet, *Eyewitness Identification in War Crimes Trials*, 2 CARDOZO L. REV. 71 (1980).

<sup>23</sup> *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. 386, 390 (1868). The court in *Riddlesbarger* described aspects of stale claims as those that are difficult to maintain because of lost evidence, death of a witness, the imperfect recollection of remaining witnesses, or the destruction of documents, making it impossible to establish the truth. *Id.*

<sup>24</sup> *Linnas v. I.N.S.*, 790 F.2d at 1026.

<sup>25</sup> See *infra* notes 312-35 and accompanying text.

<sup>26</sup> *United States v. Linnas*, 527 F. Supp. 438-39.

<sup>27</sup> *Linnas v. I.N.S.*, 790 F.2d at 1026.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Keller, *Estonian Sent to Face Death in Soviet Dies in a Hospital*, N.Y. Times, July 3, 1987, at A2, col. 3.

<sup>31</sup> The Office of Special Investigations is part of the United States Department of Justice. The responsibilities of the Office are the detection and identification of Nazi war criminals as well as the commencement of appropriate legal action leading to the denaturalization and/or deportation of former Nazis in the United States. OFFICE OF THE FEDERAL REGISTER, UNITED STATES GOVERNMENT MANUAL 1988/89 375 (1988).

may denaturalize and deport to the Soviet Union.<sup>32</sup> Linnas' case must be examined in light of the eighth amendment and the right to due process guaranteed by the fifth amendment,<sup>33</sup> or it is possible that other alleged<sup>34</sup> Nazi war criminals might face denaturalization and deportation without adequate protection of their rights. Further, a solution to this problem may also ensure that actual Nazi war criminals will not escape justice in the United States.

This Comment explores the constitutional arguments against the denaturalization and deportation process as that process is applied to alleged Nazi war criminals. This Comment concludes that the current denaturalization and deportation process may violate the eighth amendment and the Due Process Clause of the fifth amendment by depriving individuals such as Linnas of their lives and liberty without a fair criminal trial, often through the use of decidedly problematic evidence. After detailing the due process problems of the current system, this Comment proposes a solution, calling for the trial of alleged Nazi war criminals in the United States, where the American criminal system will ensure the safeguarding of their rights under United States laws.

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<sup>32</sup> Noble, *12 With Nazi Ties Facing Deportation*, N.Y. Times, April 24, 1987, at A6, col. 4.

<sup>33</sup> The fifth amendment provides that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. CONST. amend. V.

<sup>34</sup> The word "alleged" is used throughout this Comment because the United States has not proven in a criminal court that the defendants in denaturalization and deportation cases are guilty of criminal conduct "beyond a reasonable doubt." Under United States constitutional criminal procedure, criminal defendants are afforded a trial by a jury of their peers, in which the government must show guilt by "proof beyond a reasonable doubt." In denaturalization proceedings, by contrast, one is not tried for his or her crimes, but instead on whether he or she has lied on either the application for admission to the country or the application for naturalization. The standard of proof is "clear, unequivocal, and convincing" evidence. *Maxwell Land Grant Case*, 121 U.S. 325, 381 (1887). Also, there is no right of trial by jury in denaturalization proceedings, *Luria v. United States*, 231 U.S. 9, 27-28 (1913), or in deportation proceedings, *Johannessen v. United States*, 225 U.S. 227, 237-39 (1912). The right to trial by jury in criminal cases is guaranteed in the United States Constitution. U.S. CONST. amend. VI. It is also guaranteed in "[s]uits at common law." U.S. CONST. amend. VII. Nesselson and Lubet advocate pre-trial motions in denaturalization and deportation proceedings as a means of ensuring that any evidence admitted is reliable. See Nesselson & Lubet, *supra* note 22 at 79-80.

## II. BACKGROUND

## A. THE "DISPLACED PERSONS ACT"

To understand how the denaturalization and deportation processes function with regard to alleged Nazi war criminals, it is necessary to understand how such individuals first entered the United States. Karl Linnas, and others like him,<sup>35</sup> entered the United States under the the Displaced Persons Act ("DPA").<sup>36</sup> The DPA was enacted in 1948 and allowed European refugees of World War II to gain admission to the United States despite traditional immigration quotas.<sup>37</sup> The DPA allowed individuals displaced from their native lands during World War II to find a haven in the United States, because these individuals could not "return to any of such countries because of persecution or fear of persecution on account of race, religion or political opinions."<sup>38</sup> The DPA excluded those who persecuted civilians.<sup>39</sup> If an individual made misrepresentations on his or her admission application for the United States which were discovered prior to admission, he or she could not enter.<sup>40</sup>

An official of the International Refugee Organization ("IRO")<sup>41</sup> initially determined whether each person seeking admission to the United States qualified as a displaced person.<sup>42</sup> After this determi-

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<sup>35</sup> The OSI currently has twelve individuals under investigation. Noble, *12 With Nazi Ties Facing Deportation*, N.Y. Times, April 24, 1987, at A6, col. 4.

<sup>36</sup> Displaced Persons Act, Pub. L. No. 80-774, 62 Stat. 1009 (1948), amended by Pub. L. No. 81-555, 64 Stat. 219 (1950).

<sup>37</sup> 62 Stat. 1010; *Fedorenko*, 449 U.S. at 495. The United States gave individuals from the Baltic states an immigration preference. 40% of the visas, by law, had to go to Baltic nationals. "The reason for that preference ostensibly was that the Soviet Union had occupied those countries and we did not recognize that occupation." A. Ryan, *Responses to World War Two War Criminals and Human Rights Violators: National and Comparative Perspectives*, 8 B.C. THIRD WORLD L.J. 3, 18 (1988)(symposium).

<sup>38</sup> Displaced Persons Act, 62 Stat. 1011. Such individuals still had to qualify for admission under other immigration laws of the United States, however. 62 Stat. 1009-1014 (1948).

<sup>39</sup> *Fedorenko*, 449 U.S. at 495 (quoting IRO Constitution). The IRO Constitution excluded the following individuals:

1. War criminals, quislings and traitors.
2. Any other persons who can be shown:
  - (a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or
  - (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.

Annex I, Part II, 62 Stat. 3051-52. This definition was incorporated into the DPA. *See id.* at § 2(b), 62 Stat. 1009.

<sup>40</sup> Displaced Persons Act, 62 Stat. 1013.

<sup>41</sup> 62 Stat. 3037, 3051 (1946).

<sup>42</sup> *Fedorenko*, 449 U.S. at 495.

nation, an official of the Displaced Persons Commission<sup>43</sup> interviewed the applicant to decide whether he or she was eligible under the DPA.<sup>44</sup> A vice consul from the State Department would then make a decision on the given applicant.<sup>45</sup> Finally, the Immigration and Naturalization Service ("INS") made certain, through reviewing the case, that the individual was admissible under United States immigration laws.<sup>46</sup> Once the individual passed these requirements, as Linnas did in 1951, the United States considered the person eligible for admission into the United States.

In the course of gaining legal admission to the United States, an individual must fill out forms listing past crimes, convictions, and organizations with which the individual was involved.<sup>47</sup> Under the DPA, the United States conducted a thorough investigation into the applicant's background as well as questioned the applicant prior to granting admission.<sup>48</sup> Thus, pursuant to the DPA, Linnas had to sign a sworn statement prior to receiving his immigration visa.<sup>49</sup>

#### B. THE NATURALIZATION AND DENATURALIZATION PROCESS

In order to become a citizen of the United States, a person must gain lawful admission into the United States as a permanent resident.<sup>50</sup> The DPA offered individuals displaced during World War II an immediate means of gaining such admission.<sup>51</sup> Individuals who lied in order to gain admission took a slot that could have gone to a

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<sup>43</sup> The Displaced Persons Act, 62 Stat. 1009 (1948), created the Displaced Persons Commission to:

make provisions for necessary supplies, facilities, and services to carry out the provisions and accomplish the purposes of this Act. It should be the duty of the Commission to formulate and issue regulations, necessary under the provisions of this Act, and in compliance therewith, for the admission into the United States of eligible displaced orphans and eligible displaced persons.

*Id.* at 1012.

<sup>44</sup> *Fedorenko*, 449 U.S. at 495-6.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 496. Other immigration laws existed at the time that could exclude an individual from the United States. Section 5 of the DPA provided that such individuals should still be excluded even if they qualified as displaced persons. 62 Stat. 1011. United States immigration law also established different quotas. 8 U.S.C. § 1151(a) (1982).

<sup>47</sup> See Nesselson & Lubet, *supra* note 22, at 72-73. This requirement is found in Immigration and Naturalization Service Form I-485, Application for Status as Permanent Resident (rev. May 5, 1983).

<sup>48</sup> 62 Stat. 1013 (1948).

<sup>49</sup> *United States v. Linnas*, 527 F. Supp. 426, 437 (E.D.N.Y. 1981). Linnas also had to sign INS form I-144, in which he swore he had "never advocated or assisted in the persecution of any person because of race, religion or national origin." *Id.* at 438

<sup>50</sup> 8 U.S.C. § 1429 (1982).

<sup>51</sup> See *supra* notes 35-49 and accompanying text for a description of the operation of the DPA.



true victim. Once an individual gained admission into the United States under the DPA, he or she had the opportunity to become a naturalized citizen of the United States after living continuously here for five years, and exhibiting "good moral character" during that period.<sup>52</sup> In an application for naturalization,<sup>53</sup> the applicant must fill out another form disclosing, once again under oath, past criminal activities, organizational affiliations, and military service.<sup>54</sup> Linnas filled out a similar form in order to gain United States citizenship.<sup>55</sup> The government also interviewed him under oath and questioned him extensively about his past.<sup>56</sup> Taking advantage of this procedure, Karl Linnas became a naturalized citizen in February of 1960.<sup>57</sup>

The United States can denaturalize a naturalized citizen on several grounds.<sup>58</sup> The grounds for denaturalization usually applied to Nazi war criminals are that the "certificate of naturalization [was]. . . illegally procured or [was]. . . procured by concealment of a material fact or a willful misrepresentation."<sup>59</sup> Congress, aware of the presence of Nazi war criminals in the United States, in 1978<sup>60</sup> enacted the Holtzman Amendment<sup>61</sup> to relieve the problem. Congress spe-

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<sup>52</sup> 8 U.S.C. § 1427(a) (1982). "Naturalization" is defined as "the conferring of nationality of a state upon a person after birth, by any means whatsoever." 8 U.S.C. § 1101(a)(23) (1982). A naturalized citizen is an individual who, though previously a citizen of another state, has United States citizenship conferred upon him or her. Sometimes the individual must renounce his or her foreign citizenship to obtain United States citizenship.

<sup>53</sup> 8 U.S.C. § 1427(a) (1982).

<sup>54</sup> Immigration and Naturalization Service Form N-400, Application to File Petition for Naturalization (rev. May 5, 1983).

<sup>55</sup> Linnas filed his petition on July 4, 1959. He then was interviewed under oath, during which his past was extensively discussed and forms were prepared. *United States v. Linnas*, 527 F. Supp. 426 (E.D.N.Y. 1981).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 428.

<sup>58</sup> After an individual gives immigration officials this information, a judge may deny an individual citizenship on several grounds. 8 U.S.C.A. § 1182 (1970 & Supp. 1989). Several categories may be applicable to war criminals. One of them is a more general provision, providing that "[a]liens who have been convicted of a crime involving moral turpitude. . . , or aliens who admit having committed such a crime, or aliens who admit committing acts which constitute the essential elements of such a crime" should be denied admission to the United States. 8 U.S.C.A. § 1182(a)(9) (1970 & Supp. 1989). Most alleged criminals trying to gain admittance to the United States do not admit their crimes. Thus, the United States could not use this section in cases such as that of Linnas, in which he did not confess to crimes.

<sup>59</sup> 8 U.S.C. § 1451(a) (1982).

<sup>60</sup> 92 Stat. 2065 (1978).

<sup>61</sup> The term "Holtzman Amendment" refers to five sections of the United States code: 8 U.S.C. § 1182(a)(33); 8 U.S.C. § 1182(d)(3); 8 U.S.C. § 1251(a)(19); 8 U.S.C. § 1253(h); and 8 U.S.C. § 1254(e). The texts of these provisions are set out, *infra* note 105.

cifically aimed the legislation at Nazi war criminals to ensure that none would find a haven from their crimes in the United States.<sup>62</sup> The Holtzman Amendment, in part, provides for the deportation of any alien who, during World War II, in association with the Nazi government of Germany, "ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion."<sup>63</sup> It made ex-Nazis ineligible for visas,<sup>64</sup> and eliminated the attorney general's ability to admit them as temporary nonimmigrants.<sup>65</sup> It also removed an ex-Nazi's ability to voluntarily depart from the United States.<sup>66</sup>

Unlike other deportable aliens, individuals falling under this legislation cannot have their deportation blocked by the Attorney General of the United States.<sup>67</sup> The type of persecution the alien might face in the nation to which he or she is deported is irrelevant.<sup>68</sup> Unlike other aliens, who may depart voluntarily,<sup>69</sup> alleged Nazis may not since the enactment of the Holtzman Amendment.<sup>70</sup> Without these misrepresentations, they would not be eligible for admission or naturalization. These lies carried over to the naturaliza-

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<sup>62</sup> Representative Elizabeth Holtzman of New York sponsored the Amendment, and stated during the debates on it:

Mr. Speaker, the presence of Nazi war criminals in the United States constitutes the unfinished business of World War II. By taking a forthright stand against allowing these mass murderers a haven in this country, we will not only reaffirm our commitment to human rights but we will be making it clear that persecution in any form is repugnant to democracy and to our way of life.

124 CONG. REC. H31647 (daily ed. Sept. 26, 1978)(statements of Rep. Holtzman).

<sup>63</sup> The Holtzman Amendment provides, in part, that anyone:

under the direction of, or in association with—

(A) the Nazi government of Germany,

(B) any government in any area occupied by the military forces of the Nazi government of Germany,

(C) any government established with the assistance or cooperation of the Nazi government of Germany, or

(D) any government which was an ally of the Nazi government of Germany, ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

8 U.S.C. § 1251(a)(19) (1982).

<sup>64</sup> 8 U.S.C. § 1182(a)(33) (1982).

<sup>65</sup> 8 U.S.C. § 1182(d)(3) (1982).

<sup>66</sup> 8 U.S.C. § 1254(e) (1982).

<sup>67</sup> 8 U.S.C. § 1253(h) (1982). The Attorney General can withhold deportation if he or she "determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1253(h)(1) (1982). A specific exception exists for Nazi war criminals under the Holtzman Amendment. See *infra* note 105 for the text of the Holtzman Amendment.

<sup>68</sup> 8 U.S.C. § 1253(h)(1) (1982).

<sup>69</sup> 8 U.S.C. § 1254(e) (1982).

<sup>70</sup> 8 U.S.C. § 1252(e) (1970)(Supp. 1988).

tion forms.<sup>71</sup> Lying on the forms, however, led to denaturalization and possibly to deportation under the Immigration and Nationality Act.<sup>72</sup> The United States must prove by "clear, unequivocal and convincing evidence"<sup>73</sup> that the defendant concealed a material fact or made a willful misrepresentation on these forms.

The United States attorney for a given district has a duty to bring denaturalization proceedings "upon affidavit showing good cause."<sup>74</sup> The United States attorney brings these proceedings in federal district court.<sup>75</sup> If the United States can prove by "clear, unequivocal, and convincing" evidence<sup>76</sup> that the individual falsified material information on either the entry forms or the naturalization forms,<sup>77</sup> it can subject him or her to denaturalization and deportation proceedings.

Linnas' denaturalization occurred, in part, because he made "willful, material misrepresentations" on his entry forms.<sup>78</sup> Prior to denaturalization, the government must show that such misrepresentations are material. In *Chaunt v. United States*,<sup>79</sup> the Supreme Court interpreted the term "material" as used in § 1451(a) denaturalization proceedings. In *Chaunt*, the United States attempted to denaturalize a native of Hungary.<sup>80</sup> The United States alleged that Chaunt had falsely denied his membership in the Communist Party and had misrepresented his arrest record on his naturalization forms.<sup>81</sup> The Court found that the naturalization officials could infer Chaunt's communist affiliation from his admission that he was a member of the International Workers' Order, a group controlled by the Communist Party.<sup>82</sup> The Court concluded that, although arrests are sig-

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<sup>71</sup> See *infra* note 77.

<sup>72</sup> 8 U.S.C. § 1451(a) (1982).

<sup>73</sup> *Schneiderman v. United States*, 320 U.S. 118, 125 (1943).

<sup>74</sup> 8 U.S.C. § 1451(a) (1982).

<sup>75</sup> 8 U.S.C. § 1421(a) (1982).

<sup>76</sup> *Maxwell Land Grant Case*, 121 U.S. 325, 381 (1887). See also *Schneiderman*, 320 U.S. at 125 (1943)(invoking clear, unequivocal and convincing evidence standard for use in denaturalization case); *Woodby v. I.N.S.*, 385 U.S. 276, 286 (1966)(invoking clear, unequivocal and convincing evidence standard for use in deportation case).

<sup>77</sup> If the entry form contains false information, the naturalization form will inevitably have the same false information.

<sup>78</sup> The District Court also found that Linnas lacked the requisite moral character for naturalization required under the Immigration and Nationality Act, 8 U.S.C. § 1427(a)(3) (1982), due to his involvement with the Nazis. See *United States v. Linnas*, 527 F. Supp. 426, 439 (E.D.N.Y. 1981).

<sup>79</sup> 364 U.S. 350 (1960).

<sup>80</sup> *Id.* at 350.

<sup>81</sup> *Id.* at 351.

<sup>82</sup> *Id.* at 355.

nificant and therefore "material" in naturalization proceedings,<sup>83</sup> the United States had "failed to show by 'clear, unequivocal, and convincing evidence' either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship."<sup>84</sup> Courts apply this analysis, known as the materiality standard, to cases in which individuals had lied or withheld information on their naturalization papers.<sup>85</sup> The Supreme Court has not yet applied the materiality standard to admission documents.<sup>86</sup>

The Court has recently explained the materiality standard in *Kungys v. United States*.<sup>87</sup> In *Kungys*, the Court considered the case of a Lithuanian man who misrepresented the date and place of his birth on his visa and naturalization papers.<sup>88</sup> In evaluating the materiality of such misrepresentations under § 1451(a) of the INA, the Court began by noting that the misrepresentations must be both "willful and material."<sup>89</sup> The Court explained the test as:

[W]hether the misrepresentation or concealment was predictably capable of affecting, i.e., had a natural tendency to affect, the official decision. The official decision in question, of course, is whether the applicant meets the requirements for citizenship, so that the test more specifically is whether the misrepresentation or concealment had a natural tendency to produce the conclusion that the applicant was qualified. This test must be met, of course, by evidence that is clear, unequivocal, and convincing.<sup>90</sup>

Justice Scalia stated that misrepresentations as to the date and place of *Kungys*' birth were not material.<sup>91</sup>

In *Linnas*' case, the Court would have found his misrepresentations as to his part in Nazi atrocities material. Thus, *Linnas*' alleged

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<sup>83</sup> *Id.* at 354.

<sup>84</sup> *Id.* at 355. One year later in *Costello v. United States*, 365 U.S. 265 (1961), the Court applied the materiality standard to a bootlegger who stated his business was real estate on his naturalization papers. The Court held that the "[s]uppressed or concealed facts . . . if known, might in and of themselves justify denial of citizenship." *Id.* at 272 (quoting *Chaunt*, 364 U.S. at 352-53).

<sup>85</sup> *Fedorenko v. United States*, 449 U.S. 490, 509 (1981); *United States v. Kungys*, 793 F.2d 516, 529 (3d Cir. 1986), *rev'd*, *Kungys v. United States*, 108 S. Ct. 1537 (1988).

<sup>86</sup> *Chaunt*, 364 U.S. at 355. In *Kungys v. United States*, 108 S. Ct. 1537 (1988), various members of the Court disagreed on this point. Justice Scalia, writing for the majority, stated that the materiality standard was limited to naturalization documents and did not apply to entry documents. *Id.* at 1548 (Scalia, J.). Justice White disagreed with this contention. *Id.* at 1565-66 (White, J., dissenting).

<sup>87</sup> 108 S. Ct. 1537 (1988). The Court decided *Kungys* too late for the *Linnas* case.

<sup>88</sup> *Id.* at 1543.

<sup>89</sup> *Id.* at 1544.

<sup>90</sup> *Id.* at 1547.

<sup>91</sup> *Id.* at 1548 (Scalia, J., plurality opinion).

position as head of a concentration camp would have undoubtedly barred his admission and naturalization had it surfaced during the DPA process. It is material under the *Kungys* standard. Likewise, under the *Chaunt* standard, which was applicable at the time of Linnas' denaturalization and deportation, Linnas' misrepresentations, if proven by "clear, unequivocal and convincing evidence," would be material.

Once the United States denaturalizes an individual, the government may find him or her deportable. Under the Holtzman Amendment, the United States must bring deportation proceedings against those involved with the army of Nazi Germany.<sup>92</sup> A "special inquiry officer" of the Immigration and Naturalization Service conducts the deportation proceedings.<sup>93</sup> After this officer conducts the administrative deportation hearing, he or she may order deportation if such a decision is supported by "clear, unequivocal, and convincing evidence."<sup>94</sup> Once the officer orders deportation, the alien may appeal to the United States Court of Appeals for the circuit in which the administrative proceeding occurred.<sup>95</sup> The court then decides the case based upon the administrative record and the Attorney General's findings of fact.<sup>96</sup> If such evidence is "clear, unequivocal and convincing,"<sup>97</sup> the court will sustain the deportation order.<sup>98</sup>

### C. THE LINNAS CASE

The United States brought an action in a New York district court in 1979 to revoke the citizenship of Karl Linnas.<sup>99</sup> Linnas entered the United States in 1951<sup>100</sup> under the Displaced Persons Act of 1948.<sup>101</sup> A New York Supreme Court admitted Linnas to citizen-

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<sup>92</sup> 8 U.S.C. § 1251(a)(19) (1982).

<sup>93</sup> 8 U.S.C. § 1252(b) (1982). The special inquiry officers must "administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation." *Id.*

<sup>94</sup> *Woodby v. Immigration Serv.*, 385 U.S. 276, 286 (1966). The United States code provides for "reasonable, substantial, and probative evidence." 8 U.S.C. § 1252(b)(4) (1982). However, finding deportation similar in effect to denaturalization, the Court in *Woodby* extended the denaturalization standard of "clear, unequivocal and convincing evidence" to deportation cases. *Woodby*, 385 U.S. at 286.

<sup>95</sup> 8 U.S.C. § 1105a(a)(2) (1982).

<sup>96</sup> 8 U.S.C. § 1105a(a)(4) (1982).

<sup>97</sup> *Woodby*, 385 U.S. at 286. See also *supra* note 94 (describing code versus case law standards).

<sup>98</sup> *Id.*; U.S.C. § 1252 (b)(4) (1982).

<sup>99</sup> *United States v. Linnas*, 527 F. Supp. at 428.

<sup>100</sup> *Linnas v. I.N.S.*, 790 F.2d at 1026.

<sup>101</sup> Under the Displaced Person Act of 1948, 62 Stat. 1009-14, the definition of a displaced person was adopted from the International Refugee Organization ("IRO") Con-

ship.<sup>102</sup> Linnas had told the Army Counter Intelligence Corps that he had been a university student from 1940 to 1943.<sup>103</sup> He signed a sworn statement in May of 1951 stating he had "never advocated or assisted in the persecution of any person because of race, religion or national origin."<sup>104</sup> The Government relied on the Holtzman Amendment<sup>105</sup> to the Immigration and Nationality Act of 1952,

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stitution. The IRO was a creation of the United Nations. Its purpose was to place individuals uprooted during World War II. The IRO Constitution, signed by the United States on December 16, 1946, provided that the IRO would not help any person who had "assisted the enemy in persecuting civil populations of countries, Members of the United Nations." See 62 Stat. 3037, 3051 (1946) for relevant portions of the IRO Constitution. A displaced person was any individual forced to leave his or her country by the Nazi government of Germany, whether for racial, religious, or political reasons. *Id.* at 3050. Under this definition, those who aided the Nazi government of Germany in the persecution of civilians were not admissible to the United States.

<sup>102</sup> United States v. Linnas, 527 F. Supp. at 428.

<sup>103</sup> Linnas v. I.N.S., 790 F.2d at 1026.

<sup>104</sup> *Id.*

<sup>105</sup> 8 U.S.C. § 1451(a) (1982). The Holtzman Amendment provides the following:

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States: . . . (33) Any alien who during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with - . . .

(A) the Nazi government in Germany,

(B) any government in any area occupied by the military forces of the Nazi government of Germany,

(C) any government established with the assistance or cooperation of the Nazi government of Germany,

(D) any government which was an ally of the Nazi government of Germany, ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

8 U.S.C. § 1182(a)(33) (1982).

Except as provided in this subsection, an alien (A) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under one or more of the paragraphs enumerated in subsection (a) of this section (other than paragraphs (27), (29), and (33)), may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General, or (B) who is inadmissible under one or more of the paragraphs enumerated in subsection (a) of this section (other than paragraphs (27), (29), and (33)), but who is in possession of appropriate documents or is granted a waiver thereof and is seeking admission, may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General.

8 U.S.C. § 1182(d)(3) (1982).

Deportable aliens-general classes

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who - . . .

(19) during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with-

(A) the Nazi government of Germany,

(B) any government in any area occupied by the military forces of the Nazi government of Germany,

claiming Linnas' citizenship was (1) illegally procured and (2) procured by concealment of a material fact or willful misrepresentation.<sup>106</sup> Such misrepresentations or concealments lead to denaturalization proceedings.<sup>107</sup>

The Government sought to establish that Linnas was a member of the Selbstschutz, a group of native Estonians who aided the German military forces in Estonia beginning in the summer of 1941,<sup>108</sup> while Linnas claimed he was a university student in Tartu during 1940-1943.<sup>109</sup> At trial, an expert on the Holocaust, Professor Hilberg, testified that the Selbstschutz aided mobile Nazi killing units known as "Einsatzkommandos" in making the Tartu area of Estonia

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(C) any government established with the assistance or cooperation of the Nazi government of Germany, or

(D) any government which was an ally of the Nazi government of Germany, ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

8 U.S.C. § 1251(a)(19) (1982).

(h) Withholding of deportation or return

(1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(19) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

(2) Paragraph (1) shall not apply to any alien if the Attorney General determines that -

(A) the alien, ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or

(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

8 U.S.C. § 1253(h) (1982).

(e) Voluntary departure

The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), (18), or (19) of section 1251(a) of this title (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (2) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

8 U.S.C. § 1254(e) (1982).

<sup>106</sup> *United States v. Linnas*, 527 F. Supp. at 428.

<sup>107</sup> Under federal law, the United States may denaturalize a naturalized citizen if his or her certificate of naturalization was "illegally procured or . . . procured by concealment of a material fact or by willful misrepresentation." Immigration and Nationality Act, 8 U.S.C. § 1451(a) (1982).

<sup>108</sup> *Linnas*, 527 F. Supp. at 430.

<sup>109</sup> *Id.*

"free of Jews" by mid-January of 1942.<sup>110</sup> In presenting its case against Linnas, the Government relied on four video-taped oral depositions of other Estonians involved with the Nazis to establish that Linnas was a member of the Selbstschutz and chief of the concentration camp at Tartu during 1940-1943.<sup>111</sup> These depositions took place in the Soviet Union prior to Linnas' denaturalization proceedings. The Government also introduced four documents allegedly signed by Linnas as chief of the Tartu camp<sup>112</sup> and evidence that Linnas served in an Estonian Police Battalion from 1942 to 1944.<sup>113</sup>

In light of this evidence, the District Court found by "clear, unequivocal and convincing evidence" that Linnas had illegally procured his United States citizenship because he was never lawfully admitted to the United States.<sup>114</sup> Linnas had entered the United States in 1951<sup>115</sup> under the Displaced Persons Act.<sup>116</sup> The DPA makes those who "have assisted the enemy in persecuting civil populations of countries" inadmissible to the United States.<sup>117</sup> The District Court found Linnas inadmissible to the United States, because he served in the German armed forces as head of the Tartu concentration camp, and, thus, had persecuted civilians.<sup>118</sup> In omitting this from his entrance papers, Linnas had misrepresented his background in order to be admitted to the United States, and, thus, had illegally entered under the DPA.<sup>119</sup>

The District Court further found that, at the time of his entrance into the United States, Linnas lacked the requisite "good moral character" required under the Immigration and Nationality Act.<sup>120</sup> His "voluntary involvement in the unjustifiable atrocities

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<sup>110</sup> *Id.* at 430-31.

<sup>111</sup> The four individuals deposed were Hans Laats, the supervisor of guards at Tartu, Olav Karikosk, a concentration camp guard allegedly recruited by Linnas, Oskar Art, a bus driver who transported prisoners, and Elmer Puusepp, a political prisoner at the Tartu concentration camp. *Linnas*, 527 F. Supp. at 431-433.

<sup>112</sup> *Id.* at 434.

<sup>113</sup> *Id.* at 435.

<sup>114</sup> *Id.* at 438-9.

<sup>115</sup> *Linnas v. I.N.S.*, 790 F.2d at 1026.

<sup>116</sup> Pub. L. No. 80-774, 62 Stat. 1009 (1948), amended by Pub. L. No. 81-555, 62 Stat. 219 (1950). See *supra* notes 35-49 and accompanying text.

<sup>117</sup> *Id.* at 1014, § 13.

<sup>118</sup> *United States v. Linnas*, 527 F. Supp. at 434.

<sup>119</sup> *Id.* at 439. The relevant portion of the DPA, 62 Stat. 1013, provides that: "Any person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States."

<sup>120</sup> The Immigration and Nationality Act, 8 U.S.C. § 1427(a)(3) (1982), provides: "(a) No person, except as otherwise provided in this subchapter, shall be naturalized unless



committed against men, women and children" evidenced his poor moral character.<sup>121</sup> The District Court ultimately revoked Linnas' citizenship<sup>122</sup> due to the misrepresentations he had made to secure his naturalization.<sup>123</sup> This decision was upheld upon appeal to the Second Circuit.<sup>124</sup>

Once an individual is denaturalized, he or she is considered an alien and may go through a separate process for deportation.<sup>125</sup> In the case of individuals suspected of involvement with the Nazis, denaturalization inevitably leads to deportation proceedings.<sup>126</sup> Once Linnas was stripped of his citizenship, the Government began deportation proceedings against him as an immediately deportable alien under the Holtzman Amendment.<sup>127</sup> An immigration judge found Linnas deportable.<sup>128</sup> The standard used for deportation is the same as that used for denaturalization: proof by "clear, unequivocal, and convincing evidence."<sup>129</sup>

Under federal immigration law, an individual found deportable may specify to which country he or she wishes to be deported.<sup>130</sup> If that country accepts the individual, he or she is free to depart. Linnas chose the "free and independent Republic of Estonia."<sup>131</sup> The Soviet Union had incorporated the independent Republic of Estonia, however, shortly after World War II.<sup>132</sup> Linnas, it seems, meant to indicate an office building in New York currently used by former Estonians adverse to the Soviet annexation of the independent Republic of Estonia.<sup>133</sup> The immigration judge, under these circum-

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such petitioner, . . . (3) during all the period referred to in this subsection has been and still is a person of good moral character. . . ."

<sup>121</sup> *United States v. Linnas*, 527 F. Supp. at 439.

<sup>122</sup> 8 U.S.C. § 1451(a) (1982).

<sup>123</sup> *United States v. Linnas*, 527 F. Supp. at 440.

<sup>124</sup> *United States v. Linnas*, 685 F.2d 427 (2d Cir. 1982).

<sup>125</sup> 8 U.S.C. § 1252 (1982 & Supp. I 1984 & Supp. IV 1986) governs the proceedings to determine the deportability of an alien. Deportation orders may be appealed through 8 U.S.C. § 1105a (1982).

<sup>126</sup> A portion of the Holtzman Amendment, 8 U.S.C. § 1251(a)(19) (1982), specifically names those involved with the Nazi persecutions as deportable. Thus, denaturalization due to lies about involvement with the Nazis inevitably leads to an individual's deportation.

<sup>127</sup> 8 U.S.C. § 1251(a)(19) (1982); *Linnas v. I.N.S.*, 790 F.2d at 1027. Deportation proceedings are governed by § 242 of the Immigration and Nationality Act, 8 U.S.C. § 1252 (1982 & Supp. I 1984 & Supp. IV 1986).

<sup>128</sup> *Linnas v. I.N.S.*, 790 F.2d at 1028.

<sup>129</sup> *Woodby v. Immigration Serv.*, 385 U.S. 276, 286 (1966).

<sup>130</sup> 8 U.S.C. § 1253(a) (1982).

<sup>131</sup> *Linnas v. I.N.S.*, 790 F.2d at 1027.

<sup>132</sup> *Id.* See also G. VONRAUGH, *THE BALTIC STATES: THE YEARS OF INDEPENDENCE* 225-228 (trans. G. Onn. 1974) (describing incorporation of Estonia).

<sup>133</sup> *Linnas v. I.N.S.*, 790 F.2d at 1027.

stances, ordered that Linnas be deported to the "country" of Estonia, or if the "country" would not accept him, to the Soviet Union.<sup>134</sup>

Linnas appealed the deportation order to the Board of Immigration Appeals ("BIA").<sup>135</sup> The BIA affirmed the immigration judge's decision, except as to the country of deportation,<sup>136</sup> since the United States has never recognized the Soviet incorporation of Estonia.<sup>137</sup> Accordingly, the BIA remanded the decision to the immigration judge with orders to specify a statutory basis for such a designation.<sup>138</sup> On remand, the immigration judge found Linnas' deportation to the Soviet Union justified under those subsections of the Immigration and Nationality Act<sup>139</sup> which provide for deportation to the place of the alien's birth or to any country willing to accept the particular alien.<sup>140</sup> The BIA affirmed this decision based on the subsection<sup>141</sup> which provides for deportation to any country that will accept the alien.<sup>142</sup>

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.* The Board of Immigration Appeals is a quasi-judicial body that hears immigration appeals, including appeals for relief from deportation orders, exclusion of aliens, petitions to classify the status of alien relatives, and fines imposed for violations of immigration laws. The BIA has nationwide jurisdiction to hear appeals by District directors of the Immigration and Naturalization Service as well as immigration judges. The United States Attorney General may modify or overrule decisions of the BIA. The decisions of the BIA are also subject to judicial review in the federal courts. OFFICE OF THE FEDERAL REGISTER, 1988/89 UNITED STATES GOVERNMENT MANUAL 391-92 (1988).

<sup>136</sup> *Linnas v. I.N.S.*, 790 F.2d at 1027.

<sup>137</sup> The Soviet Union incorporated Estonia in 1940, after an illegal election in which only Communist candidates were allowed to run for office. G. VON RAUGH, *supra* note 132, at 225-26. The Estonian parliament met after this election and voted to apply for membership in the Soviet Union. The Soviets, naturally, accepted the application. *Id.* at 226-227. The United States, along with Great Britain, refused to recognize as valid the Soviet incorporation of any of the Baltic States. *Id.* at 228.

<sup>138</sup> *Linnas v. I.N.S.*, 790 F.2d at 1027.

<sup>139</sup> 8 U.S.C. § 1253(a)(4) & (7) (1982).

<sup>140</sup> *Linnas v. I.N.S.*, 790 F.2d at 1028. 8 U.S.C. § 1253(a) (1982) provides for deportation:

- (1) to the country from which such alien last entered the United States;
- (2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;
- (3) to the country in which he was born;
- (4) to the country in which the place of his birth is situated at the time he is ordered deported;
- (5) to any country in which he resided prior to entering the country from which he entered the United States;
- (6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or
- (7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory.

<sup>141</sup> 8 U.S.C. § 1253(a)(7) (1982).

<sup>142</sup> *Linnas v. I.N.S.*, 790 F.2d at 1028.

Linnas sought review of the BIA's decision by the United States Court of Appeals for the Second Circuit.<sup>143</sup> First, Linnas argued that the Holtzman Amendment constituted a Bill of Attainder.<sup>144</sup> Second, Linnas alleged that deporting him to the Soviet Union was, in fact, extradition in violation of his equal protection<sup>145</sup> and due process rights.<sup>146</sup> These rights are applicable to anyone present in the United States.<sup>147</sup> The Court found that the Holtzman Amendment did not constitute a Bill of Attainder, because deportation of a noncitizen from the United States does not constitute punishment.<sup>148</sup> The Second Circuit also found that the deportation of Lin-

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<sup>143</sup> *Id.* at 1026-27.

<sup>144</sup> *Id.* at 1028-29. A Bill of Attainder is an act of Congress which "inflict[s] punishment without a judicial trial." *United States v. Lovett*, 328 U.S. 303, 315 (1946) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866)). The United States Constitution provides in Article I, Section 9 that "[n]o Bill of Attainder or ex post facto law shall be passed." U.S. CONST. art. I, § 9[3]. When Congress was considering the Holtzman Amendment, it discussed at length the issue of whether the Amendment constituted a Bill of Attainder. Congressman Wiggins articulated this concern, stating:

In short, we are legislating retroactively a significant penalty against those identifiable persons. . . . It would seem clear, therefore, that the clause to which I refer applies to the denial of constitutional liberties, such as employment, as well as to the imposition of direct criminal penalties. Surely citizenship and a right to remain in the United States, after that right has been perfected, is a protected liberty of the highest order.

124 CONG. REC. H31649 (Daily ed. Sept. 26, 1978) (statement of Rep. Wiggins). There is some support for the notion that denaturalization is punishment. *See supra* notes 277-280 and accompanying text.

<sup>145</sup> *Linnas*, 790 F.2d at 1028. Under the Holtzman Amendment, Nazis and individuals who had contact with the Nazis are singled out for treatment different from that accorded other aliens. Under 8 U.S.C. § 1182(a)(33) (1982), the United States excludes Nazis and those involved with the Nazi government of Germany from the United States. Congress revoked the United States Attorney General's ability to waive exclusion in the case of those facing persecution in the country of their deportation in Nazi war criminal cases. 8 U.S.C. § 1182(d)(3) (1982). Linnas arguably faced persecution, in the form of a death sentence, in the Soviet Union. Further, the provisions of the Holtzman Amendment single out those connected with the Nazi government of Germany for different treatment due to their "political affiliation." Nazis are singled out as a group, therefore giving rise to equal protection concerns. *See, e.g.,* *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957) (exclusion from the bar due to prior political affiliation with the Communist Party violated due process).

<sup>146</sup> *Linnas*, 790 F.2d at 1028. The fifth amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

<sup>147</sup> *See supra* notes 181-191 and accompanying text.

<sup>148</sup> *Linnas*, 790 F.2d at 1030. The Court used the analysis of *Selective Serv. System v. Minnesota Pub. Interest Research Group*, 468 U.S. 841 (1984), to describe the criteria for a Bill of Attainder. The court considered whether the statute (1) is "'within the historical meaning of legislative punishment,'" (2) has a "'further nonpunitive legislative purpose,'" and (3) "'evinces a congressional intent to punish'" considering the legislative record. *Id.* at 1029 (quoting *Selective Serv.*, 468 U.S. at 852). The court relied on precedent to decide that deportation of a noncitizen was not punishment. *Id.* at 1030.

nas was not, in effect, extradition, because the "impetus for the denaturalization and removal of Linas appears to have come from the government of the United States" rather than that of the Soviet Union.<sup>149</sup> Thus, his deportation was not an extradition and therefore violated neither his right to due process nor his right to equal protection.<sup>150</sup>

Linas, who had been held in a New York INS detention center since February of 1986,<sup>151</sup> appealed to the United States Supreme Court. The Court denied certiorari on December 2, 1986.<sup>152</sup> United States Attorney General Edwin Meese became involved with the case, at the urging of one of President Reagan's aides.<sup>153</sup> On March 5, 1987, Meese granted Linas an extra thirty days to find a country, other than the Soviet Union, willing to accept him.<sup>154</sup> Linas could not do so, and the United States finally deported him. He arrived in the Soviet Union on April 21, 1987.<sup>155</sup> Although Linas sought a pardon in the Soviet Union,<sup>156</sup> no new trial was held.<sup>157</sup> Linas died in the Soviet Union on July 3, 1987 of heart and kidney disease.<sup>158</sup>

### III. THE EIGHTH AMENDMENT AND THE LINAS CASE

In *Ingraham v. Wright*<sup>159</sup> the United States Supreme Court ex-

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<sup>149</sup> *Linas*, 790 F.2d at 1031.

<sup>150</sup> *Id.* at 1031-32.

<sup>151</sup> Noble, *U.S. Asks Panama to Take Nazi but Is Rejected*, N.Y. Times, April 16, 1987, at A1, col. 4.

<sup>152</sup> 107 S. Ct. 1882 (1987); *LI Man Accused of Nazi Atrocities Loses Appeal*, N.Y. Times, Dec. 2, 1986, at B4, col. 3. Justices Brennan, Blackmun and O'Connor voted to grant certiorari.

<sup>153</sup> *Meese Hears Plea in Nazi Case*, N.Y. Times, Feb. 14, 1987, at A50, col. 3. Patrick Buchanan, a White House aide, urged Meese to meet with European groups attempting to stop the Linas deportation. *Id.* Buchanan argued that the hunt for Nazis in the United States had led to "destructive blunders made by our revenge-obsessed Nazi hunters, inside and outside government, resulting in irreparable injury and death to innocent Americans." Buchanan, *Get It Out in the Open*, N.Y. Times, April 7, 1987, at A34, col. 5 (op ed). Buchanan pointed to the case of Tscherin Soobzokov, accused of being a Nazi and later found innocent. The allegations against Soobzokov led to his death during a terrorist bombing of his home in New Jersey. *Id.*

<sup>154</sup> Noble, *Meese Gives Nazi Suspect Time to Find a Country*, N.Y. Times, March 6, 1987, at A32, col. 1.

<sup>155</sup> Kamm, *Estonian Deported by U.S. Arrives in Soviet*, N.Y. Times, April 22, 1987, at A12, col. 1.

<sup>156</sup> *Estonian Deported by U.S. to Soviet Is Seeking Pardon*, N.Y. Times, May 14, 1987, at A8, col. 4.

<sup>157</sup> *Prosecution in Soviet Rejects New Trial for War Criminal*, N.Y. Times, June 9, 1987, at A5, col. 5.

<sup>158</sup> Keller, *Estonian Sent to Face Death in Soviet Dies in a Hospital*, N.Y. Times, July 3, 1987, at A2, col. 3.

<sup>159</sup> 430 U.S. 651 (1977).

plained that the eighth amendment "was designed to protect those convicted of crimes."<sup>160</sup> In *Ingraham* the Court first considered whether the paddling of Florida school children constituted cruel and unusual punishment violative of the eighth amendment.<sup>161</sup> The Court decided that it did not apply, because "[t]he prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration."<sup>162</sup> However, the criminal and Karl Linnas did not necessarily "stand in wholly different circumstances." Unlike paddled school children, Linnas stood convicted of crimes in the Soviet Union and was incarcerated in the United States.<sup>163</sup> Under such circumstances, Linnas' denaturalization and deportation raises eighth amendment issues.

The Soviet Union convicted Linnas for his participation in war crimes. The United States had no responsibility for his conviction and played no part in the proceedings. Therefore, the eighth amendment's cruel and unusual punishment clause does not appear to apply to his case, for there was no action on the part of the United States with respect to Linnas' conviction and punishment. Yet, the United States knew of his sentence. The court knew that by deporting Linnas to the Soviet Union, it would be deporting him to his death.<sup>164</sup> Under such circumstances, the United States could have recognized the implications of its decision on the individual involved. Morally, the courts, in effect, closed their eyes to Linnas' situation. This type of moral blindfold is convenient for cases involving Nazis, but has implications for other cases that may be more repugnant.

The United States does look to the effects of its actions beyond its borders in other cases. The Attorney General of the United States, may, in his discretion, stay deportation if he or she "concludes that deportation to such country would be prejudicial to the interests of the United States."<sup>165</sup> More well known, however, is the political offense exemption.<sup>166</sup> This exemption provides that "[t]he

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<sup>160</sup> *Id.* at 664. For criticism of this aspect of the Court's decision, see Comment, *Ingraham v. Wright: Corporal Punishment in School Passes Constitutional Tests*, 37 MD. L. REV. 594, 603-10 (1978).

<sup>161</sup> *Ingraham*, 438 U.S. at 653.

<sup>162</sup> *Id.* at 669.

<sup>163</sup> *Linnas v. I.N.S.*, 790 F.2d at 1031-32. See *supra* text accompanying note 151.

<sup>164</sup> *Linnas*, 790 F.2d at 1030.

<sup>165</sup> 8 U.S.C. § 1253(a) (1982).

<sup>166</sup> 8 U.S.C. § 1253(h)(1) (1982). For discussions of the political offense exception, see Blakesley, *The Evisceration of the Political Offense Exception to Extradition*, 15 DEN. J. INT'L L. & POL'Y 109 (1986); Gilbert, *Terrorism and Political Offense Exemption Reappraised*, 34 INT'L & COMP. L.Q. 695 (1985); Reiss, *The Extradition of John Demjanjuk: War Crimes, Universality Jurisdiction, and the Political Offense Doctrine*, 20 CORNELL INT'L L.J. 2811 (1987);

Attorney General shall not deport or return any alien . . . to a country if . . . the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."<sup>167</sup> In such a case, the Attorney General would look to the foreign country to determine if an exception was warranted. Congress has spoken through this particular exemption, and has specifically left alleged Nazi war criminals out of the exemption.<sup>168</sup> Perhaps the courts should side with Congress. Yet, it is doubtful that Congress considered the case of a Soviet death sentence. Further, the eighth amendment implications still remain—whether or not Congress has spoken.

There is still a further difficulty with the eighth amendment analysis as applied to Linnas' case. The eighth amendment traditionally applies solely to United States criminal cases.<sup>169</sup> In fact, the Court has held in the past that the amendment does not apply to deportation.<sup>170</sup> Yet, Linnas' deportation and denaturalization had oddly criminal characteristics. Linnas was denaturalized and deported "because of [his] active participation in the Nazi persecution of Estonian Jews during World War II."<sup>171</sup> Thus, it was his involvement in *criminal* activities that lead to his deportation. Specifically, it was his misrepresentations about affiliations with the Nazis that resulted in his deportation.<sup>172</sup> Linnas was deported and faced a death sentence because of lies on his naturalization and entry forms. Entering the United States by means of a "willfully false or misleading representation or the willful concealment of a material fact" is a mis-

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Young & Erny, *The Political Offense Exception as Applicable to Terrorists: Judicial Interpretation and Legislative Reform*, 25 DUQ. L. REV. 481 (1987); Comment, *The Political Offense Exemption to Extradition: Protecting the Right of Rebellion in an Era of International Political Violence*, 66 OR. L. REV. 405 (1987).

<sup>167</sup> 8 U.S.C. § 1253(h)(1) (1982).

<sup>168</sup> *Id.* This provision specifically exempts aliens described under 8 U.S.C. § 1251(a)(19), Nazi war criminals, from such consideration.

<sup>169</sup> *Ingraham*, 430 U.S. at 664-669. See also *Calzarano v. Liebowitz*, 550 F. Supp. 1389, 1390 (S.D.N.Y. 1982)(eighth amendment applies only to criminal matters); *Ryan v. Cleland*, 531 F. Supp. 724, 731-32 (E.D.N.Y. 1982)(eighth amendment applies only to criminal cases). But see, e.g., *Estelle v. Gamble*, 429 U.S. 97 (1976), *reh'g denied*, 429 U.S. 1066 (1977)(deliberate indifference to medical needs of prisoners violated cruel and unusual punishment clause); *Trop v. Dulles*, 356 U.S. 86 (1958)(plurality opinion)(denaturalization due to army desertion violated eighth amendment cruel and unusual punishment clause).

<sup>170</sup> *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). The Court explained that "deportation is not a punishment for crime." *Id.* at 730.

<sup>171</sup> *Linnas v. I.N.S.*, 790 F.2d 1024, 1026 (2d Cir. 1986), *cert. denied*, 479 U.S. 995 (1986), *reh'g denied*, 479 U.S. 1070 (1987).

<sup>172</sup> *Id.*

demeanor,<sup>173</sup> and, for a repeat offender, a felony.<sup>174</sup> Yet, under United States law, "punishment should be proportionate to the crime."<sup>175</sup> Indeed, the eighth amendment prohibits "grossly disproportionate punishments."<sup>176</sup> The punishment for the crimes Linnas participated in under United States law was up to \$1,000 fine and/or two years in prison.<sup>177</sup> This is not nearly a death sentence.<sup>178</sup>

Linnas was also denaturalized and deported in part for his participation in murder. This certainly falls within the realm of crimes meriting the death penalty under United States laws. Yet, Linnas did not receive a full criminal trial. The United States had not convicted him of these crimes under the procedural due process standards required in a criminal case. Although the Soviet Union tried him in absentia, this trial did not satisfy United States due process requirements.<sup>179</sup> Thus, Linnas' case may have been mishandled—either under the dictates of the eighth amendment or the principles of due process. If Linnas' death sentence resulted from his participation in murders, he was not afforded the proper process to obtain a death sentence.

The courts could avoid this issue by ignoring the foreign death sentence or by blindly stating that this simply is not a criminal proceeding, and thus invocation of the eighth amendment is inappropriate. Yet, under the characteristics of a criminal proceeding stated by the Court in *Ingraham*,<sup>180</sup> the Linnas case resembles a criminal proceeding for eighth amendment purposes. Linnas was convicted and incarcerated. Although the conviction occurred in the Soviet Union, the eighth amendment implications still exist.

#### IV. DUE PROCESS CONSIDERATIONS OF THE LINNAS CASE

Linnas, as a naturalized citizen, had the full rights of United

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<sup>173</sup> 8 U.S.C. § 1325(a) (Supp. IV 1986). The Code provides for imprisonment for up to six months or a fine of up to \$500, or both.

<sup>174</sup> *Id.* Also, a defendant, "for a subsequent commission of any such offenses shall be guilty of a felon and upon conviction thereof shall be punished by imprisonment for not more than two years, or by a fine of not more than \$1,000, or both." *Id.*

<sup>175</sup> *Solem v. Helm*, 463 U.S. 277, 284 (1983).

<sup>176</sup> *Id.* at 288.

<sup>177</sup> 8 U.S.C. § 1325(a) (Supp. IV 1986).

<sup>178</sup> The Court in *Solem v. Helm* detailed recent cases in which the death sentence was not proportionate to the crime. 463 U.S. at 288. Included in this list were: *Enmund v. Florida*, 458 U.S. 782 (1982) (felony murder disproportionate to death penalty); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (rape disproportionate to death penalty).

<sup>179</sup> See *supra* note 17 and *infra* notes 231-34 and accompanying text.

<sup>180</sup> See *supra* text accompanying note 162.

States citizenship.<sup>181</sup> Once denaturalized, like all aliens in the United States, he still maintained full due process rights. In the *Japanese Immigrant Case*,<sup>182</sup> the Supreme Court, in ordering a hearing for an immigrant who faced deportation because of his alleged illegal entrance into the United States, specifically granted the right to due process to people faced with deportation proceedings.<sup>183</sup> Due process is also a requirement for denaturalization proceedings.<sup>184</sup>

More recently in *Plyler v. Doe*,<sup>185</sup> the Supreme Court stated that "[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."<sup>186</sup> In cases of aliens, such as alleged Nazi war criminals, who are immediately deportable,<sup>187</sup> the fact that they are deportable does not "negate the simple fact of [their] presence within the State's territorial perimeter."<sup>188</sup> Thus, courts must accord even illegal aliens the due process rights of citizens, for it would be unfair to subject them to United States law without granting them the protections of those laws.<sup>189</sup> The *Plyler* Court applied these principles to equal protection.<sup>190</sup> The Court stated that the concept of equal protection "is fundamentally at odds with the power the State asserts here to classify persons subject to its laws as nonetheless excepted from its protection."<sup>191</sup> Thus, as first a citizen experiencing denaturalization and second as an alien experiencing deportation, Linnas had the right to due process of law.

#### A. DEPORTATION AS DISGUISED EXTRADITION

The Second Circuit quickly dismissed Linnas' due process arguments.<sup>192</sup> The court did not consider Linnas' arguments that the United States had extradited him in the absence of an extradition

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<sup>181</sup> *Schneider v. Rusk*, 377 U.S. 163, 165-66 (1964). The only rights he did not possess by naturalization were the rights to run for the presidency and vice presidency. U.S. CONST. art. II, § 1, cl. 4; *id.* at amend. XII.

<sup>182</sup> 189 U.S. 86 (1903).

<sup>183</sup> *Id.* at 100. Due process was applied in an exclusion case in *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

<sup>184</sup> *Schneider*, 377 U.S. at 165-69.

<sup>185</sup> 457 U.S. 202 (1982).

<sup>186</sup> *Id.* at 210.

<sup>187</sup> 8 U.S.C. § 1251(a)(19) (1982).

<sup>188</sup> *Plyler*, 457 U.S. at 215.

<sup>189</sup> *Id.* at 213.

<sup>190</sup> The Supreme Court has stated that "we have clearly held that the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government." *Id.* at 210.

<sup>191</sup> *Id.* at 213.

<sup>192</sup> *Linnas v. I.N.S.*, 790 F.2d 1024, 1030-32.



treaty, stating that it "need not address this novel question, however, because no extradition has taken place in this case."<sup>193</sup> It is not entirely clear whether or not an extradition took place. Indeed, this Comment explores forceful arguments that Linnas' deportation was a de facto extradition. It then further analyzes the what if: If Linnas' deportation was a de facto extradition, what are the implications of this situation. Further, this Comment explores the evidentiary problems in these cases in light of the procedural due process the court afforded Linnas. The nature of the evidence against Linnas and other Nazi war criminals is arguably unreliable.

### 1. *Was Linnas Extradited?*

The Second Circuit found arguments of due process grounded in the lack of an extradition treaty between the United States and the Soviet Union "ironic," for, as an alleged Nazi, Linnas had afforded none of his victims due process.<sup>194</sup> The court failed to confront the issue of extradition in the absence of a treaty.<sup>195</sup> In support of its decision, the Court explained that the requesting nation must initiate the extradition process.<sup>196</sup> Here, "the impetus for the denaturalization and removal of Linnas appears to have come from the government of the United States."<sup>197</sup> Also, the court noted that Linnas requested the nation of his deportation,<sup>198</sup> so he had a choice, unlike in an extradition proceeding. In extradition proceedings, the defendant must return to the nation in which he or she allegedly committed the crime. Linnas, however, had no real choice. The Soviet Union was the only country that accepted him.<sup>199</sup> Linnas had to go there.<sup>200</sup>

The Second Circuit's argument that Linnas did not face extradition may gloss over the reality of his situation. Had the court deported Linnas while his trial pended in the Soviet Union, the Court would have sent him to the Soviet Union to stand trial. Sending an individual to stand trial in another country is illegal in the absence

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<sup>193</sup> *Id.* at 1031.

<sup>194</sup> *Linnas v. I.N.S.*, 790 F.2d at 1031.

<sup>195</sup> *Id.* See *supra* text accompanying note 193.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* 8 U.S.C. § 1254(e) (1982) provides for such voluntary departure to the nation of choice.

<sup>199</sup> *Linnas v. I.N.S.*, 790 F.2d at 1031.

<sup>200</sup> The author realizes that this argument logically leads to no deportation of an alien to a country where that individual has been convicted of a crime in the absence of an extradition treaty. If an extradition treaty exists, the United States may extradite the individual.

of an extradition treaty.<sup>201</sup> The court would have had difficulty ignoring this situation. Instead, Linnas was not present for his trial in the Soviet Union. Thus, Linnas had opportunity neither to present nor to participate in his defense. This situation is not tolerated under United States' standards of criminal justice and due process.<sup>202</sup> Yet, ironically, the denaturalization and deportation processes led him to face the Soviet death sentence without asserting a defense, for it permitted the court to ignore the de facto extradition in his case. Thus, unlike the normal extradition scenario in which the accused is sent to another country to stand trial, Linnas did not even have this opportunity, because the Soviets already tried him in absentia.

Although Linnas' conviction in absentia made it easier for the court to ignore the de facto extradition, that the Soviets had convicted Linnas in absentia should have made no difference in the court's analysis of his disguised extradition. Extradition is generally considered applicable to those already convicted in absentia.<sup>203</sup> The Fourth Circuit Court of Appeals considered a situation in which the foreign nation convicted the individual in absentia as being the same in effect as an extradition situation, at least where the United States had an extradition treaty with the other nation. In *Antunes v. Vance*,<sup>204</sup> the Fourth Circuit found a defendant extraditable when a French court had already convicted him in absentia for murder and sentenced him to life imprisonment.<sup>205</sup> The fact that Antunes faced life imprisonment did not enter into the court's opinion.<sup>206</sup> It considered probable cause the important aspect of the case.<sup>207</sup> The court looked at this deportation which followed convictions in absentia as an extradition where an extradition treaty existed. The lack of a pending trial in the Soviet Union should make no difference to Linnas' case. As a practical matter, Linnas seemed to face

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<sup>201</sup> The United States denaturalized and deported Feodor Fedorenko, a Nazi war criminal, to the Soviet Union where he ultimately was tried, convicted and executed. Barringer, *Soviet Reports it Executed Nazi Guard U.S. Extradited*, N.Y. Times, July 28, 1987, at A3, col. 5.

<sup>202</sup> See, e.g., *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934), holding that a defendant must be present "whenever his presence has a relation, reasonably substantial, to the fulness [sic] of his opportunity to defend against the charge." The Court in *McKaskle v. Wiggins* interpreted this as meaning that "a defendant has a right to be present at all important stages of trial." 465 U.S. 168, 178 (1984).

<sup>203</sup> See Lubet & Reed, *Extradition of Nazis from the United States to Israel: A Survey of Issues in Transnational Criminal Law*, 22 STAN. J. INT'L L. 1, 4 (1986).

<sup>204</sup> 640 F.2d 3 (4th Cir. 1981).

<sup>205</sup> *Id.* at 4.

<sup>206</sup> *Id.* at 4-5.

<sup>207</sup> *Id.* at 5.

extradition to the Soviet Union. Labelling his situation "denaturalization" or "deportation" does not seem to counteract the final effect of the court's decision. Thus, this decision arguably constituted extradition in the absence of an extradition treaty.

The courts did not state whether the Soviet Union ever formally requested Linnas' extradition prior to the commencement of the denaturalization and deportation proceedings against him.<sup>208</sup> Yet, they agreed to take him, acknowledging that they had already convicted him there. Should it matter when the Soviet request for "extradition" came? The Soviets wanted Linnas for crimes, and the Justice Department knew it. Further, the Soviet Union could not formally ask for Linnas, for they knew, as well as United States officials, that no extradition treaty existed between themselves and the United States. Therefore, the Soviet Union could not expect the United States to hand Linnas over at their request. Instead, the Soviet Union waited and offered to take Linnas, so that they could carry out his death sentence. This amounts to de facto extradition in the absence of an extradition treaty.<sup>209</sup>

The argument that Linnas was, in actuality, extradited, hinges on whether the United States is bound to look at the implications of its deportation decisions. Except in the political offense exemption to extradition situation,<sup>210</sup> the United States generally feels no

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<sup>208</sup> The Soviet Union has previously requested extradition of Nazi war criminals in the United States. However, due to the lack of an extradition treaty between the United States and the Soviet Union, these requests are regularly turned down. Rosenbaum, *Responses to World War Two Criminals and Human Rights Violators: National and Comparative Perspectives*, 8 B.C. THIRD WORLD L.J. 3, 27 (1988)(symposium).

<sup>209</sup> 18 U.S.C.A. § 3184 (Supp. 1989) provides that:

Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States . . . may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. . . . If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

Thus, extradition is strictly a creation of treaty. For a discussion of the United States extradition process, see Lubet & Reed, *Extradition of Nazis from the United States to Israel: A Survey of Issues in Transnational Criminal Law*, 22 STAN. J. INT'L L. 1, 4-9 (1986).

<sup>210</sup> See *supra* notes 165-68 and accompanying text.

compulsion to look beyond its borders.<sup>211</sup> Individuals subject to deportation were never legally in the United States. Thus, the United States' obligation to look at the fate of the individual outside of the United States is, perhaps, minimal. Yet, when an individual's life is involved, and the foreign country's process is so contrary to American concepts of due process, there is a desire to look beyond the borders, and consider the implications of the deportation decision.<sup>212</sup>

## 2. *The Implications of Extradition*

Assuming, contrary to the Second Circuit's determination, that Linnas' deportation constituted a disguised extradition, the implications of the "extradition" on the process Linnas was afforded is far from clear. To begin with, one must examine the nature of extradition and contrast it with denaturalization and deportation to see what actual difference this made to the disposition of Linnas' case.

Through extradition, the United States deports an individual to stand trial in a foreign country which seeks the individual for criminal acts committed in that state.<sup>213</sup> Standards of proof for extradition are different from those used in American criminal process. In an extradition proceeding, the court does not determine guilt or innocence.<sup>214</sup> The court, instead, "determines only whether there is a sufficient legal basis to warrant the return of the fugitive to the requesting country."<sup>215</sup> This is a lower standard than "clear, unequivocal and convincing"<sup>216</sup> required for deportation and denaturalization.<sup>217</sup> The Secretary of State decides ultimately to extradite an individual.<sup>218</sup> The Secretary of State may hand an individual over to the other country only if: (1) a valid treaty exists; (2) the individual has been identified as the same person the other nation is seeking; (3) the charged offenses are considered extraditable offenses.<sup>219</sup>

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<sup>211</sup> It does, however, in the extradition area. See *infra* notes 248-61 and accompanying text.

<sup>212</sup> This is basically the same argument as is used in the eighth amendment area. See *supra* text accompanying note 164.

<sup>213</sup> See *supra* note 18.

<sup>214</sup> See Lubet & Reed, *supra* note 203, at 7.

<sup>215</sup> Lubet & Reed, *supra* note 203, at 6.

<sup>216</sup> *Schneiderman v. United States*, 30 U.S. 18, 125 (1943) (denaturalization); *Woodby v. I.N.S.*, 385 U.S. 76, 286 (1966) (deportation).

<sup>217</sup> *Id.*

<sup>218</sup> 18 U.S.C.A. § 3186 (1985). See Lubet & Reed, *supra* note 203, at 6 (citing *United States v. Schultz (In re Allen)*, 713 F.2d 105, 108 (5th Cir. 1983); *Abu Eain v. Wilkes*, 641 F.2d 504, 524 n.26 (7th Cir.) *cert. denied*, 454 U.S. 894 (1981)).

<sup>219</sup> Lubet & Reed, *supra* note 203, at 6.

Along with these requirements, although the Supreme Court has never formally declared that extradition requires a probable cause determination,<sup>220</sup> courts have nevertheless construed extradition treaties as requiring probable cause where the requirement is not explicitly stated in the treaty.<sup>221</sup> Probable cause requires a determination of the probability of guilt.<sup>222</sup> Unlike criminal cases, as the Supreme Court noted, "[c]ompetent evidence to establish reasonable grounds [for extradition due to criminal conduct] is not necessarily evidence competent to convict."<sup>223</sup> Instead, "sufficient evidence of the relator's criminality [must be] presented in the extradition proceeding before the United States Commissioner."<sup>224</sup> Even in cases of convictions in absentia in the requesting nation, the United States may extradite the individual although he was not present in that nation to stand trial.<sup>225</sup>

The existence of an extradition treaty is significant, because such treaties are ratified with certain assumptions about the process of the requesting country. Extradition treaties are ratified by a two-thirds vote of the Senate and are signed into force by the president.<sup>226</sup> This shows that the "[e]xecutive has investigated the other country's criminal procedure and found it adequate."<sup>227</sup> As Justice Holmes stated for the majority in *Glucksman v. Henkel*,<sup>228</sup> "[w]e are bound by the existence of an extradition treaty to assume that the trial will be fair."<sup>229</sup> As Chief Justice Rehnquist explained while serving as an assistant attorney general: "extradition treaties are not negotiated with those countries which do not have either our form of due process or something we regard as the equivalent of it."<sup>230</sup> Thus, there is an underlying assumption that individuals extradited in the presence of a treaty will receive a fair trial, with their due process rights protected. Yet, it is unclear whether the opposite is true: the absence of an extradition treaty implies an absence of

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<sup>220</sup> See *In re Extradition of Russell*, 805 F.2d 1215, 1217 (5th Cir. 1986).

<sup>221</sup> *Id.* (citing *Caltagirone v. Grant*, 629 F.2d 739, 748 (2d Cir. 1980)).

<sup>222</sup> Probable cause has been defined as "a reasonable ground for belief of guilt." *Carroll v. United States*, 267 U.S. 132, 161 (1925) (quoting *McCarthy v. DeArmit*, 99 Pa. 63, 69 (1881)). Denaturalization and deportation afford no determination of guilt or innocence. See *Lubet & Reed*, *supra* note 203, at 7.

<sup>223</sup> *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925).

<sup>224</sup> *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960).

<sup>225</sup> *Id.* See *supra* notes 203-07 and accompanying text.

<sup>226</sup> U.S. CONST. art. II, § 2.

<sup>227</sup> *Lubet & Reed*, *supra* note 203, at 43.

<sup>228</sup> 221 U.S. 508 (1911).

<sup>229</sup> *Id.* at 512.

<sup>230</sup> *Hearings before the Subcomm. on the Genocide Convention on the Ratification of the International Convention on the Prevention of the Crime of Genocide of the Senate Comm. on Foreign Relations*, 91st Cong., 2nd Sess. 149 (1970).

due process in the other nation. This, however, seems likely in the case of the Soviet Union, where the legal system differs greatly from that of the United States.<sup>231</sup>

The Soviet Union presents particular due process problems in trying Americans, because its criminal justice system differs greatly from that of the United States.<sup>232</sup> For instance, the defendant in a criminal proceeding in the Soviet Union is confined until the government completes a preliminary investigation.<sup>233</sup> During this time, the defendant may not see, speak to or write to anyone.<sup>234</sup> Thus, he or she cannot begin to prepare a defense.<sup>235</sup>

By contrast, in the United States, once the government has brought a suspect, not yet a defendant, into custody and questioned him or her, that individual's right to counsel attaches.<sup>236</sup> An accused must be afforded the right to counsel once the "adversary judicial proceedings have been initiated against him."<sup>237</sup> Once this process has begun, defendant's counsel must be present during pre-trial line-ups,<sup>238</sup> preliminary hearing<sup>239</sup> and questioning, should the suspect so request.<sup>240</sup> By contrast, in the Soviet Union, the accused is not permitted counsel during the preliminary investigation, which amounts to a "dress rehearsal" for trial.<sup>241</sup>

Further, there is often substantial pre-trial detention in the Soviet Union, which can lead to false confessions.<sup>242</sup> Moreover, either the police, procuracy or KGB interrogate the accused at length prior to trial, without the aid of counsel.<sup>243</sup> The Soviet system requires neither an arrest warrant,<sup>244</sup> nor a search warrant.<sup>245</sup> The United

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<sup>231</sup> See *supra* note 17 and *infra* notes 232-46 and accompanying text.

<sup>232</sup> See AMERICAN BAR ASSOCIATION, *supra* note 17, at 62; J. HAZARD, W. BUTLER, & P. MAGGS, *THE SOVIET LEGAL SYSTEM: THE LAW IN THE 1980's* 55-56 (1984); O. IOFFE & P. MAGGS, *SOVIET LAW IN THEORY AND PRACTICE*, 289-93 (1983).

<sup>233</sup> AMERICAN BAR ASSOCIATION, *supra* note 17, at 156-57.

<sup>234</sup> For a description of Soviet trials, see O. IOFFE & P. MAGGS, *supra* note 232, at 290-91.

<sup>235</sup> *Id.* Ioffe & Maggs note that this is the most critical period for the defendant; yet, the state involves no one on the defendant's behalf. *Id.*

<sup>236</sup> *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966).

<sup>237</sup> *Kirby v. Illinois*, 406 U.S. 682, 688 (1972). The adversary judicial proceedings may begin "by way of a formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* at 689.

<sup>238</sup> *United States v. Wade*, 388 U.S. 218, 236-38 (1967).

<sup>239</sup> *Moore v. Illinois*, 434 U.S. 220, 229 (1977).

<sup>240</sup> *Miranda*, 384 U.S. at 473-74.

<sup>241</sup> See O. IOFFE & P. MAGGS, *supra* note 232, at 290-91.

<sup>242</sup> See *id.* at 292. Ioffe and Maggs note also that the courts often try to convict an individual even if the evidence is faulty to justify the pre-trial detention. *Id.* at 290.

<sup>243</sup> *Id.* at 290-91. This leads to overwhelming evidence in the state's favor.

<sup>244</sup> AMERICAN BAR ASSOCIATION, *supra* note 17, at 156.

<sup>245</sup> *Id.* at 203.

States provides a certain amount of protections in all these areas.<sup>246</sup>

Courts in the United States generally do not concern themselves with the process used in other countries so long as an extradition treaty exists.<sup>247</sup> Yet, even if an extradition treaty had existed, the court still could have found grounds to block Linnas' deportation. The Second Circuit expressed concern with the criminal process in foreign countries even though an extradition treaty existed. In *Gallina v. Fraser*,<sup>248</sup> the Secretary of State began extradition proceedings against Gallina to return him to Italy, where an Italian court had convicted him in absentia.<sup>249</sup> The Second Circuit refused to consider the criminal procedure used in Italy to determine whether Gallina would receive due process, finding no authority for such consideration.<sup>250</sup> However, the court questioned the possible results of such a policy.<sup>251</sup> Although it ordered the extradition of Gallina,<sup>252</sup> the court explained its concern: "[n]evertheless, we confess to some disquiet at this result. We can imagine situations where the relator, upon extradition, would be subjected to procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination of the principle set out above."<sup>253</sup> The court here expressed the possibility, in spite of the presence of extradition treaties, that basic procedural requirements which are so fundamental to the American system could be lost in the extradition process. It also hinted that it might begin to look at the other country's process to determine if abuses were likely there, and refuse extradition on that basis.<sup>254</sup>

Examining the procedural safeguards actually used in the country of extradition, the Second Circuit clarified its words in *Gallina* in

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<sup>246</sup> In the United States, criminal procedure varies from state to state. Most states allow a criminal defendant out on bail pending trial unless he or she is found "dangerous." See *United States v. Salerno*, 481 U.S. 739 (1987). Excessive bail is prohibited under the eighth amendment. U.S. CONST. amend. VIII. During incarceration, the government must inform the accused of his or her right to see an attorney prior to and during interrogations. *Miranda v. Arizona*, 384 U.S. at 47. Arrest warrants are preferred, *United States v. Watson*, 423 U.S. 41 (1976), and federal arrests may not occur without a showing of "reasonable grounds to believe that the arrested person is guilty of such offense." 18 U.S.C. § 3050 (1982). The accused cannot be forced to testify against himself under the fifth amendment. U.S. CONST. amend. V.

<sup>247</sup> *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960), *cert. denied*, 364 U.S. 851 (1960), *reh'g denied*, 364 U.S. 906 (1960).

<sup>248</sup> 278 F.2d 77 (2d Cir. 1960).

<sup>249</sup> *Id.* at 78.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 79.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> See *id.*

*United States ex rel. Bloomfield v. Gengler*,<sup>255</sup> stating that if such procedures "shock[ed] our sense of decency," the court would deny extradition.<sup>256</sup> In *Gengler*, the individuals defended themselves at trial against a charge of conspiracy to export and traffic drugs.<sup>257</sup> Although the Canadian court dismissed the charges against the defendants on procedural grounds at trial, the court later entered convictions on appeal in the defendants' absence.<sup>258</sup> Thus, while convicted in absentia, the defendants were not tried in absentia.<sup>259</sup> The Second Circuit Court of Appeals decided that, because the defendants had the opportunity to defend themselves, their situation did not shock its "sense of decency."<sup>260</sup> Reaching this conclusion, the court explained that the "inability to assert a defense might be one of those instances" that warrant a blocking of extradition due to a conviction in absentia.<sup>261</sup>

Linnas, as any other individual convicted in absentia and subject to denaturalization, was unable to assert any defense in the Soviet Union to the charges of his war crimes. Further, war crimes are considered "political" offenses in the Soviet Union.<sup>262</sup> Political cases are run by the KGB,<sup>263</sup> who regularly falsify evidence in such cases.<sup>264</sup> Under the reasoning of the Second Circuit in *Gallina* and *Gengler*, Linnas' case would be "antipathetic" to the court's sense of decency, for he was deprived of his life without the opportunity to assert a proper defense. Failing to recognize this, the Second Circuit, instead, decided *Gallina* was inapplicable to Linnas' case,<sup>265</sup> stating that his appeal to the court's sense of "decency" and "compassion" rang "hollow" in light of his own actions during World War II.<sup>266</sup> The court made no further attempt to explain its argument, but simply dismissed the due process claim. Yet, under the reasoning of the Second Circuit Court of Appeals in *Gallina* and *Gengler*, even if an extradition treaty had existed between the Soviet

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<sup>255</sup> 507 F.2d 925 (2d Cir. 1974).

<sup>256</sup> *Id.* at 928.

<sup>257</sup> *Id.* at 926.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 929.

<sup>260</sup> *Id.* at 928.

<sup>261</sup> *Id.*

<sup>262</sup> *United States v. Kungys*, 571 F. Supp. 1104, 1124 (D.N.J. 1983), *rev'd on other grounds*, 793 F.2d 516 (3d Cir. 1986), *rev'd on other grounds*, 108 S. Ct. 1537 (1988).

<sup>263</sup> O. IOFFE & P. MAGGS, *supra* note 232, at 292.

<sup>264</sup> *Id.* at 289, 292.

<sup>265</sup> *Linnas v. I.N.S.*, 790 F.2d 1024, 1032 (2d Cir. 1986)(quoting *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir. 1960)).

<sup>266</sup> *Id.*



Union and the United States, there is a possibility that the United States should not have deported Linnas.

Yet, the lack of an extradition treaty lends strength to Linnas' case. Because no extradition treaty exists between the United States and the Soviet Union, his deportation would violate United States law, which requires an extradition treaty.<sup>267</sup> By implication, it may also violate his due process rights, if the reason for the lack of an extradition treaty between the two countries is due to a lack of due process in the Soviet Union.<sup>268</sup> Linnas argued that he had a due process right guaranteeing that he would not be extradited in the absence of such a treaty.<sup>269</sup> In reality, extradition affords the defendant a probable cause determination.<sup>270</sup> This allows the court to determine the probability of guilt.<sup>271</sup> Instead, in denaturalization and deportation the government had to show by "clear, unequivocal and convincing evidence" that his citizenship was illegally procured.

There is a certain amount of irony in Linnas' position. Although Linnas argued that an extradition treaty would be necessary for the United States to send him to face a Soviet death sentence, extradition would have afforded him less procedural safeguards than the actual deportation and denaturalization process he underwent. Extradition, like deportation and denaturalization, is not a criminal proceeding.<sup>272</sup> Neither the Federal Rules of Criminal Procedure<sup>273</sup> nor the Federal Rules of Evidence<sup>274</sup> apply. The result is that "extradition hearings are lavish in their use of hearsay, and often tolerant of documents of questionable authenticity."<sup>275</sup>

Further in denaturalization proceedings, the courts have recog-

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<sup>267</sup> 18 U.S.C. § 3181 (1982).

<sup>268</sup> See *supra* notes 227-30, 232-46 and accompanying text.

<sup>269</sup> Linnas v. I.N.S., 790 F.2d at 1031. The Second Circuit Court of Appeals found this possibility unpersuasive in their opinion, stating:

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

*Id.* at 1032.

<sup>270</sup> *In re* Extradition of Russell, 805 F.2d 1215, 1217 (5th Cir. 1986).

<sup>271</sup> The amount of evidence necessary to extradite is not specified by United States statute. Rather, all United States extradition treaties contain a section specifying the amount of evidence required. See Rosoff, *The Quantum of Evidence Required to Extradite from the United States*, in TRANSNATIONAL ASPECTS OF CRIMINAL PROCEDURE 123 (1983).

<sup>272</sup> See, e.g., Romeo v. Roache, 820 F.2d 540, 543-44 (1st Cir. 1987); United States v. Galanis, 429 F. Supp. 1215, 1224 (D. Conn. 1977).

<sup>273</sup> FED. R. CRIM. P. 54(b)(5).

<sup>274</sup> FED. R. EVID. 1101(d)(3).

<sup>275</sup> Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1444 (1988)(footnotes omitted).

nized the importance of the citizenship right at stake. First, denaturalization imposes heavy consequences upon the ex-citizen. Indeed, "[d]enaturalization consequences may be more grave than consequences that flow from conviction for crimes."<sup>276</sup> Second, the courts consider American citizenship a "precious right"<sup>277</sup> and, thus, "naturalization decrees are not lightly to be set aside."<sup>278</sup> Indeed, the Supreme Court has gone so far as to say in the expatriation case of a United States military deserter "[w]e believe . . . that use of denationalization as a punishment is barred by the Eighth Amendment. There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society."<sup>279</sup>

Due to these characteristics of citizenship, the Supreme Court has held that the "[g]overnment carries a heavy burden of proof in a proceeding to divest a naturalized citizen of his citizenship."<sup>280</sup> The burden of proof in denaturalization cases is a showing of "[c]lear, unequivocal, and convincing evidence which does not leave issues in doubt."<sup>281</sup> Justice Black described the Government's burden as "substantially identical with that required in criminal cases—proof beyond a reasonable doubt."<sup>282</sup> In addition to this, the Court will not revoke citizenship without the individual there to present his or her case, just as it will not convict a person of a crime on default.<sup>283</sup> These are heavier safeguards than are afforded individuals in extradition proceedings.

Currently there is some controversy regarding whether an individual, such as Linnas, would have any rights under a treaty if an extradition treaty existed.<sup>284</sup> According to the court in United

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<sup>276</sup> *Klapprott v. United States*, 335 U.S. 601, 611 (1949)(Black, J.), *modified*, 335 U.S. 631 (1949). Justice Black announced the judgment of the Court. There was no majority opinion.

<sup>277</sup> *Costello v. United States*, 365 U.S. 265, 269 (1961).

<sup>278</sup> *Id.* (quoting *Chaunt v. United States*, 364 U.S. 350, 353).

<sup>279</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). This case dealt with a court martial that penalized a deserter with denationalization. The Court, however, has consistently held that the eighth amendment does not apply to civil matters, but only to criminal matters. *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). *But see supra* notes 162-79 and accompanying text. For the text of the eighth amendment, see *supra* note 7.

<sup>280</sup> *Fedorenko v. United States*, 449 U.S. 490, 505 (1981)(quoting *Costello*, 365 U.S. at 269).

<sup>281</sup> *Schneiderman v. United States*, 320 U.S. 118, 125, (1943), *reh. denied*, 320 U.S. 807 (1943). *See also* *Chaunt v. United States*, 364 U.S. 350, 353 (1960)(invoking clear, unequivocal, and convincing standard); *Baumgartner v. United States*, 322 U.S. 665, 670 (1944)("proof to bring about a loss of citizenship must be clear and unequivocal").

<sup>282</sup> *Klapprott*, 335 U.S. at 612 (Black, J., judgment of the court).

<sup>283</sup> *Id.* at 611 (Black, J., judgment of the court).

<sup>284</sup> *See Kester, supra* note 275, at 1465-68.

*States v. Vreeken*,<sup>285</sup> a "defendant can successfully challenge the court's jurisdiction over his person if he is before the court in violation of an international treaty."<sup>286</sup> In *Linna's* case, it is the lack of a treaty, he argued, that violated his rights. Thus, he used a statutory argument—that, by statute, the United States may only extradite in the presence of an extradition treaty.

#### B. PROBLEMS OF EVIDENCE

Several commentators have explored the problems of evidence in Nazi war criminal cases.<sup>287</sup> Rather than restating their arguments in their entirety, this section will provide a brief synopsis of the problems examined by these commentators as well as contemplate additional difficulties raised by Nazi cases. The problems of evidence in Nazi cases falls into three main categories: (1) suggestive identifications; (2) stale evidence; and (3) unreliable Soviet-source evidence.

##### 1. *Suggestive Identifications and Stale Evidence*

The Supreme Court has recognized that eyewitness identifications are inherently suggestive.<sup>288</sup> Indeed, the Court in *United States v. Wade*<sup>289</sup> stated that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."<sup>290</sup> The Court explained that the manner in which the prosecution presents a defendant to witnesses for pretrial identification was "[a] major factor contributing to the high incidence of miscarriage of justice."<sup>291</sup>

Eyewitness identifications are conducted in person or by photograph.<sup>292</sup> In *Linna's* case, the government used photographs.<sup>293</sup> A witness can be influenced by those conducting the photographic dis-

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<sup>285</sup> 603 F. Supp. 715 (D. Utah 1984).

<sup>286</sup> *Id.* at 717 (citing *Cook v. United States*, 288 U.S. 102 (1927); *United States v. Rauscher*, 109 U.S. 407 (1886); *United States v. Winter*, 509 F.2d 975, 983 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975)).

<sup>287</sup> See generally Nesselson & Lubet, *supra* note 22; Note, *Denaturalization of Suspected Nazi War Criminals: The Problem of Soviet-Source Evidence*, 24 COLUM. J. TRANSNAT'L L. 365 (1986).

<sup>288</sup> *United States v. Wade*, 388 U.S. 218, 234-35 (1967).

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 228.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *United States v. Linna*, 527 F. Supp. at 431. Four witnesses, whom the United States deposed in the Soviet Union, identified Linna as the head of the concentration camp at Tartu.

play, and, thereby pick out the wrong individual.<sup>294</sup> The United States conducted the Linnas identifications in the Soviet Union during a deposition by United States officials.<sup>295</sup> The United States Government showed three of the deponents a photographic spread of eight pictures.<sup>296</sup> The witnesses were elderly and were attempting to remember distant events. Their testimony was, therefore, of questionable reliability. Under these circumstances, the validity of the identification procedures used in Linnas' case merit further examination.<sup>297</sup>

The District Court in *United States v. Fedorenko*,<sup>298</sup> considered the case of a photographic display followed by an in-court identification of an alleged Nazi war criminal.<sup>299</sup> The court explained that "[i]n view of the passage of 35 years from the date of the incidents, the court must scrutinize these identifications and the circumstances under which they were made with great care."<sup>300</sup> The court explained that the civil nature of the case made no difference, stating that "the concerns of the Supreme Court regarding the reliability and probative value of identifications made in criminal cases are no less applicable here."<sup>301</sup>

In criminal cases, the courts consider five factors in deciding on the reliability of identifications.<sup>302</sup> These factors include:

the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior de-

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<sup>294</sup> Lubet & Reed, note 203, at 12. The individual conducting the photographic display can point, nod or make facial expressions, suggesting which photograph is correct. The district court in Linnas' case was admittedly disturbed by the identifications. The court explained:

The court however is disturbed by language used by the Soviet prosecutor when introducing members of the Department of Justice to deponents Oskar Art, Olav Karikoski, and Hans Laats. In each instance the Soviet official referred to the instant matter as an action by the United States against the former war criminal, Karl Linnas. The case was variously described as concerning: the "Fascist prisoner murder[er], Karl Linnas," and "Karl Linnas, a former war criminal."

*United States v. Linnas*, 527 F. Supp. 426, 434 n.16 (E.D.N.Y. 1981).

<sup>295</sup> *Id.* at 431.

<sup>296</sup> *Id.*

<sup>297</sup> See Nesselson & Lubet, *supra* note 22, at 74. Nesselson and Lubet note that "[t]he rub, of course, is proof. Except in those rare cases where photographs or other admissible documentation might be available, the evidence will almost inevitably come by way of eyewitness testimony." *Id.*

<sup>298</sup> 455 F. Supp. 893 (S.D. Fla. 1978), *rev'd on other grounds*, 597 F.2d 946 (5th Cir. 1979), *aff'd*, 449 U.S. 490 (1981).

<sup>299</sup> *Id.* at 905.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977)(citing *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972)). The district court in Linnas' case was "guided" by these standards. *United States v. Linnas*, 527 F. Supp. 426, 432 n.11 (E.D.N.Y. 1981).

scription of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.<sup>303</sup>

The fifth factor enunciated by the Court—the time between the crime and the confrontation—is the major factor weighing against the admissibility of witnesses' depositions in Nazi war criminal cases.<sup>304</sup> With the passage of thirty-five years or more, the reliability of witnesses' testimony is questionable. The Court has emphasized the time element in past decisions.<sup>305</sup>

The crimes Linnas allegedly committed occurred sometime between 1940 and 1944.<sup>306</sup> Linnas entered the United States in 1951, and the denaturalization proceedings against him began in 1979.<sup>307</sup> His trial in the Soviet Union occurred in 1962.<sup>308</sup> The evidence in his case, therefore, was at least 35 years old at his denaturalization proceeding and 18 years old when he was tried in the Soviet Union. The United States government relied on eyewitness testimony in his case.<sup>309</sup> The problem with eyewitness testimony in such a case is that it is sometimes as much as forty years old and witnesses are at least in their sixties when testifying.<sup>310</sup> Memory problems associated with these witnesses' advanced age render such testimony and identification questionable. Therefore, eyewitness identifications in Nazi war crimes cases are rife with problems,<sup>311</sup> and are of questionable reliability. Such reliability problems may conflict with due process.

## 2. Soviet-Source Evidence

The evidence used in Linnas' case from the Soviet Union is of

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<sup>303</sup> *Manson*, 432 U.S. at 114.

<sup>304</sup> Nesselson & Lubet, *supra* note 22, at 89-91.

<sup>305</sup> See, e.g., *Simmons v. United States*, 390 U.S. 377, 385 (1968)(witnesses shown pictures "only a day later, while their memories were still fresh"); *Manson*, 432 U.S. at 116 (photographic display two days after the crime).

<sup>306</sup> *Linnas v. I.N.S.*, 790 F.2d at 1027. The United States introduced evidence showing that Linnas signed some correspondence as head of the concentration camp at Tartu and had been wounded in battle on August 30, 1944.

<sup>307</sup> *Id.* at 1026.

<sup>308</sup> McFadden, *Court Approves Expulsion Order for an L.I. Man*, N.Y. Times, May 9, 1986, at B3, col. 1.

<sup>309</sup> The United States had papers allegedly signed by Linnas as head of the Tartu camp that were provided by the Soviet Union and were admitted into evidence. See *Linnas v. I.N.S.*, 790 F.2d at 1027.

<sup>310</sup> Nesselson and Lubet, *supra* note 22, at 75. Nesselson and Lubet explained that fundamental fairness requires that a "defendant in a denaturalization case be allowed to challenge the admissibility of an identification that would not be acceptable in a criminal trial." *Id.* at 79-80.

<sup>311</sup> Lubet & Reed, *supra* note 203, at 11.

questionable reliability, because the KGB has a history of falsifying evidence in political cases,<sup>312</sup> whether it be by threatening witnesses prior to depositions,<sup>313</sup> or falsifying other materials to prove the case against the defendant.<sup>314</sup> As two commentators noted: "[o]bservers of political trials complain repeatedly that witnesses are compelled to lie by the KGB, that documentary testimony is falsified, and that courts accept such evidence uncritically out of deference to the KGB."<sup>315</sup>

A recent student note focused on the due process problems of Soviet-source evidence.<sup>316</sup> In this Note, the author described recent cases in which the validity of Soviet-source evidence was considered by the courts.<sup>317</sup> The author examined three cases that found Soviet-source evidence problematic<sup>318</sup> and three cases that assessed it favorably.<sup>319</sup> Noting that the Soviet Union picks the witnesses,<sup>320</sup> the author explained that "the defendants have no opportunity to examine records in Soviet archives or to locate witnesses in Soviet-controlled territory who may have knowledge of exculpatory facts."<sup>321</sup> The author concluded that changes must be made in the Moscow Agreement,<sup>322</sup> the Soviet-United States agreement concerning the ability of the United States to obtain Soviet-source evidence.<sup>323</sup>

Among the cases discussed that assessed Soviet evidence negatively in the student note were *United States v. Kungys*,<sup>324</sup> *Laipenieks v.*

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<sup>312</sup> *United States v. Kungys*, 571 F. Supp. 1104, 1125-26 (D.N.J. 1983), *rev'd on other grounds*, 793 F.2d 516 (3d Cir. 1986), *rev'd on other grounds*, 108 S. Ct. 1537 (1988).

<sup>313</sup> See O. IOFFE & P. MAGGS, *supra* note 232, at 292.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> Note, *supra* note 287.

<sup>317</sup> *Id.* at 378-92. The author examined three cases in which Soviet-source evidence was questioned, *id.* at 378-85, and and three cases, including *United States v. Linnas*, 527 F. Supp. 426 (E.D.N.Y. 1981), in which the Soviet evidence was found valid. *Id.* at 387-92.

<sup>318</sup> Note, *supra* note 287, at 378-85.

<sup>319</sup> *Id.* at 387-92.

<sup>320</sup> There are conflicting reports on this aspect of obtaining Soviet evidence. Another student commentator stated that the "OSI also points to the fact that the witnesses are requested specifically by the American government; the Soviets do not merely supply the witnesses for investigation." Comment, *Finishing the Work of Nuremberg? Nazi War Criminals and American Law*, 20 CONN. L. REV. 633, 652 (1988)(citing A. RYAN, QUIET NEIGHBORS: PROSECUTING NAZI WAR CRIMINALS IN AMERICA 92 (1984)).

<sup>321</sup> Note, *supra* note 287, at 375.

<sup>322</sup> The Moscow Agreement is not formally published. See A. RYAN, QUIET NEIGHBORS: PROSECUTING NAZI WAR CRIMINALS IN AMERICA 91-93 (1984).

<sup>323</sup> Note, *supra* note 287, at 392.

<sup>324</sup> 57 F. Supp. 1104 (D.N.J. 1983), *rev's on other grounds*, 793 F.2d 516 (3d Cir. 1986), *rev'd on other grounds*, 108 S. Ct. 1537 (1988).

*I.N.S.*<sup>325</sup> and *United States v. Kowalchuk*.<sup>326</sup> In *Laipenieks*, the court was concerned about deposition evidence because during the depositions in the Soviet Union, "the Soviet Procurator, in the presence of the witnesses, continually referred to the matter as the 'war criminal case' or the 'Nazi criminal Laipenieks case.' The IJ found that the prejudicial and highly suggestive language used by the Soviet official tainted the deposition proceedings."<sup>327</sup> The court in *Kowalchuk* viewed the testimony of Soviet witnesses with "skeptism," stating, "the fact remains that these witnesses were all selected and made available by the Soviet government and were under its control; they could scarcely be expected to testify except in support of the charges originally aired by the Soviet government for its own reasons."<sup>328</sup>

Perhaps the most striking of the cases was *United States v. Kungys*,<sup>329</sup> in which a New Jersey district court confronted a situation similar to that of Linnas. The government in *Kungys* relied on Soviet-supplied depositions to denaturalize a Lithuanian who allegedly committed war crimes. The court in *Kungys* noted that the Soviets had a strong interest in war criminal cases and, thus, the courts should examine with particular care any finding reached by the aid of Soviet authorities.<sup>330</sup> In doing so, the court recognized that the KGB prepared the witnesses prior to their depositions by United States authorities.<sup>331</sup> The court questioned the validity of these depositions<sup>332</sup> and decided that the depositions were inadmissible for the purpose of proving that Kungys had participated in the killings.<sup>333</sup> Thus, this court recognized the reliability problems associated with Soviet-supplied evidence.<sup>334</sup> The United States' case<sup>335</sup>

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<sup>325</sup> 750 F.2d 1427 (9th Cir. 1985).

<sup>326</sup> 773 F.2d 488 (3d Cir. 1985), *cert. denied*, *Kowalchuk v. United States*, 475 U.S. 1132 (1986).

<sup>327</sup> *Laipenieks*, 750 F.2d at 1432.

<sup>328</sup> *Kowalchuk*, 571 F. Supp. at 79-80.

<sup>329</sup> 571 F. Supp. 1104 (D.N.J. 1983), *rev'd on other grounds*, 793 F.2d 516 (3d Cir. 1986), *rev'd on other grounds*, 108 S. Ct. 1537 (1988). The Third Circuit found that Kungys had lied about the place and date of his birth on his entrance and naturalization forms. They found this material in that had he answered truthfully, the state would have had cause to investigate his background and "probably" would have denied his visa. 793 F.2d at 530.

<sup>330</sup> *Kungys*, 571 F. Supp. at 1124.

<sup>331</sup> *Id.* at 1126.

<sup>332</sup> *Id.* at 1126-1131. The court stated, "[w]e also are faced with the fact that the Soviet Union uses special procedures in political cases such as this which, on occasion at least, result in false or distorted evidence in order to achieve the result which the state interest requires." *Id.* at 1126.

<sup>333</sup> *Id.* at 1132. The court entered judgment for the defendant, and barred his denaturalization. *Id.* at 1144.

<sup>334</sup> Other courts that have recognized the problems inherent in Soviet-source evi-

against Linnas rested on evidence also obtained from the Soviet Union. With the potential reliability problems involved with the use of Soviet evidence, it may be time to find another solution.

### III. A POSSIBLE SOLUTION

The United States has been criticized for both its failure to rescue Jews during World War II as well as its lax immigration policies which allowed many Nazi conspirators to enter the United States.<sup>336</sup> There is, however, an alternate view that the world should "forget the Holocaust and get on with life."<sup>337</sup> However, "forgetting an occurrence before fully realizing its moral implications and adequately dealing with them is morally irresponsible."<sup>338</sup> In light of such moral implications and the due process and eighth amendment problems that arise in the process of denaturalizing and deporting alleged Nazi war criminals, it is inadvisable to end discussion of the Linnas case without suggesting a possible solution. The United States could take responsibility for its acquiescence to the presence of war criminals within its borders by bringing these criminals to trial within its own territory.<sup>339</sup> The United States normally would not have jurisdiction over these criminals. Under the sixth amendment,<sup>340</sup> the United States can only try individuals for crimes occurring within its borders. However, under international law, the United States may exercise jurisdiction over alleged war criminals.<sup>341</sup>

The United States may exercise jurisdiction over alleged Nazi war criminals based on principles of universal jurisdiction.<sup>342</sup> Ac-

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dence include: *Laipenieks v. I.N.S.*, 750 F.2d 1427, 1433 (9th Cir. 1985); *United States v. Kowalchuk*, 571 F. Supp. 72, 78-80 (E.D. Pa. 1983), *order to revoke citizenship rev'd*, 744 F.2d 301 (3d Cir. 1984), *aff'd en banc*, 773 F.2d 488 (3d Cir.), *cert. denied*, 475 U.S. 1012 (1986). See also Note, *supra* note 287, at 386-87 (discussing cases in which court negatively assessed Soviet-source evidence).

<sup>335</sup> This evidence included depositions by United States officials in the Soviet Union as well as documents provided by the Soviet government. *United States v. Linnas*, 527 F. Supp. at 431-434.

<sup>336</sup> Massey, *Individual Responsibility for Assisting the Nazis in Persecuting Civilians*, 71 MINN. L. REV. 97 (1986).

<sup>337</sup> *Id.* at 151.

<sup>338</sup> *Id.*

<sup>339</sup> *Id.* at 156. As this commentator stated: "Because the United States enabled Nazi collaborators to escape formal judgment for their acts, and extradition is often impermissible, a second solution is for the United States itself to render judgment."

<sup>340</sup> The sixth amendment provides for trial "by an impartial jury of the State and district wherein the crime shall have been committed." U.S. CONST. amend. VI.

<sup>341</sup> The law of the United States includes international law. *The Paquete Habana*, 175 U.S. 677, 712 (1900).

<sup>342</sup> See *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985).



cording to the Restatement of the Law of Foreign Relations Law of the United States,<sup>343</sup> "[a] state may exercise jurisdiction to define and punish for certain offenses recognized by the community of nations as . . . genocide [and] war crimes . . . even where none of the bases of jurisdiction indicated in § 402<sup>344</sup> is present."<sup>345</sup> If a state has jurisdiction to prescribe, it has jurisdiction to enforce.<sup>346</sup> Under this rule, the United States may exercise jurisdiction over alleged Nazi war criminals residing in the United States. The community of nations has recognized Nazi atrocities as war crimes and crimes against humanity.<sup>347</sup> Thus, under principles of international law, the United States has the ability to exercise jurisdiction over alleged Nazi war criminals.

Canada has recently decided to amend its criminal code to allow for the prosecution in Canadian courts of people charged with Nazi war crimes.<sup>348</sup> Further, a United States Court of Appeals applied these principles of international law in the case of *Demjanjuk v. Petrovsky*.<sup>349</sup> Israel alleged that Demjanjuk was "Ivan the Terrible," a guard at the Nazi concentration camp at Treblinka, Poland in 1942.<sup>350</sup> In this case, Israel asked the United States to extradite

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<sup>343</sup> RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (tentative draft no. 6, vol. 1) (1985). The Court in *Demjanjuk v. Petrovsky* gave considerable weight to the Restatement. 776 F.2d at 582-83. The Supreme Court recently recognized the relevance of the seventh tentative draft in resolving questions of international law in *Societe Nationale v. United States Dist. Court, Dist. Iowa*, 482 U.S. 522, 107 S. Ct. 2542, 2555, n.28 (1987).

<sup>344</sup> RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (tentative draft no. 6, vol. 1)(1985). § 402(1) provides in part: "a state has jurisdiction to prescribe law with respect to . . . (1)(b) the status of persons, or interests in things, present within its territory; (c) conduct outside its territory which has or is intended to have substantial effect within its territory." The most recent version of the Restatement, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987), uses essentially identical language.

<sup>345</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987) (footnote added).

<sup>346</sup> *Id.* at § 431(1).

<sup>347</sup> The United Nations has made several resolutions in this particular area. One of them states that "[e]very State has the right to try its own nationals for war crimes or crimes against humanity." Principles of International Co-Operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, General Assembly Resolution 3074 (XXVIII) Dec. 3, 1973. The U.N. considers Nazi atrocities as both war crimes and crimes against humanity. See, e.g., 41 A.J.I.L. 172 (1947).

<sup>348</sup> Burns, *Canada to Try Nazi Suspects*, N.Y. Times, March 13, 1987, at A1, col. 1. Canada currently has twenty cases considered urgent and two hundred people under investigation of potential Nazi war criminals. *Id.*

<sup>349</sup> 776 F.2d 571 (6th Cir. 1985).

<sup>350</sup> *Id.* at 575.

Demjanjuk to Israel to stand trial.<sup>351</sup> The Sixth Circuit ordered the extradition, recognizing "that some crimes are so universally condemned that the perpetrators are the enemies of all people. Therefore, any nation which has custody of the perpetrators may punish them according to its law applicable to such offenses."<sup>352</sup> Thus, the court held that the fact that Demjanjuk allegedly committed the crimes in Poland did not "deprive Israel of authority to bring him to trial."<sup>353</sup>

A specific treaty also exists that gives the United States the ability to prosecute war criminals. In 1986, the United States Senate ratified the Genocide Convention.<sup>354</sup> A creation of the United Nations, the Genocide Convention confirmed that genocide was a crime under international law.<sup>355</sup> The Convention provided for the punishment of "[p]ersons committing genocide" and other related crimes.<sup>356</sup> The parties agreeing to the Convention:

undertake to enact, in accordance with their respective constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III.<sup>357</sup>

Thus, as a party to this Convention, the United States is under a treaty obligation to "provide effective penalties" for those committing genocide, which would include Nazi war criminals. While one could argue that the Holtzman Amendment has effectively done this, the problems that arise under the due process clause and eighth amendment call for another solution.<sup>358</sup>

Further, the Convention calls for "effective penalties."<sup>359</sup> The Holtzman Amendment would not work as an effective penalty if the United States sent Linnas, as then Attorney General Meese tried to

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<sup>351</sup> *Id.* An extradition treaty exists between Israel and the United States. Convention on Extradition, Dec. 10, 1962, United States-Israel, 14 U.S.T. 1707, T.I.A.S. No. 5476.

<sup>352</sup> *Demjanjuk*, 776 F.2d at 582.

<sup>353</sup> *Id.*

<sup>354</sup> Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, 78 U.N.T.S. 277, approved by the Senate, S.Res. 347, 99th Cong., 2d Sess., 132 Cong. Rec. S12297 (1986) [hereinafter "Genocide Convention"].

<sup>355</sup> *Id.* at art. I, 280.

<sup>356</sup> *Id.* at art. IV, 280. The crimes enumerated included: "(a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide." *Id.* at art. III, 280.

<sup>357</sup> *Id.* at art. V, 280.

<sup>358</sup> See also *infra* notes 359-60 and accompanying text (questioning effectiveness of Holtzman Amendment).

<sup>359</sup> 78 U.N.T.S. at art. V, 280.

do, to Panama.<sup>360</sup> Linnas faced no prosecution in Panama. In effect, he would have escaped all penalties for his war crimes. Thus, by trying him in the United States, the Government would be assured that he was brought to justice, in keeping with the Genocide Convention.

There remains one difficulty in invoking the Genocide Convention as a means to bringing alleged Nazi war criminals to justice in the United States. The Genocide Convention contains a jurisdictional provision, stating:

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.<sup>361</sup>

Under the second provision, no international tribunal currently exists to try alleged Nazi war criminals. Under the first portion of the jurisdictional provision, the United States would not seem to have jurisdiction, because the crimes did not take place in the United States. Yet, this has not prevented other parties to the Convention from considering themselves competent tribunals to hear these cases.

Like Israel and Canada, the United States should claim jurisdiction over alleged Nazi war criminals. At a minimum, legislators should make this provision for those, like Linnas, who face *de facto* extradition in the absence of an extradition treaty or who would face no penalty in the country of their deportation. In this way, individuals like Linnas would be assured of adequate due process, yet the accused would not escape justice, as those who are currently deported to non-hostile nations under the Holtzman Amendment.<sup>362</sup>

There still remains one problem in trying alleged Nazi war criminals in the United States. Even if Congress enacted a statute allowing for prosecution of Nazi war criminals in the United States, it is possible that the government could not bring such cases due to the *ex post facto* clause of the Constitution.<sup>363</sup> In enacting, for instance, a new statute governing Nazi prosecutions in the United States, Congress would criminalize conduct that occurred outside of

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<sup>360</sup> Attorney General Edwin Meese tried to find another country for Linnas. Noble, *U.S. Asks Panama to Take Nazi But is Rejected*, N.Y. Times, April 16, 1987, at A1, col. 4.

<sup>361</sup> Genocide Convention, *supra* note 354, at art. VI, 280-82.

<sup>362</sup> For example, in *Kulle v. I.N.S.*, 825 F.2d 1188 (7th Cir. 1987), the court upheld the deportation of a member of the Waffen SS to the Federal Republic of Germany. See *supra* note 360.

<sup>363</sup> U.S. CONST. art. I, § 9, cl. 3 states: "No Bill of Attainder or *ex post facto* law shall be passed."

the United States. War criminals, arguably, came to the United States knowing that the United States government could not try them in light of the sixth amendment requirement that individuals be tried at the site of their crimes. A statute that provided for trials in the United States for crimes committed outside of its borders would, thus, cause *ex post facto* problems.

The United States Supreme Court in *Weaver v. Graham*<sup>364</sup> explored the *ex post facto* prohibition. At first glance, the Court's decision seems to work against the trial of alleged Nazis in the United States. The Court set out two requirements for a criminal or penal law to be *ex post facto*: "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it."<sup>365</sup> A new law covering Nazi prosecutions looks retrospective, for currently there is no law that applies penal sanctions to Nazis. Yet, the United States has always criminalized murder. Further, the Court based these requirements on the purpose behind the *ex post facto* provision. The Court stated that "[t]hrough this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."<sup>366</sup> Thus, notice seems to be key to the intent behind *ex post facto* laws.

The Court described the importance of notice in *ex post facto* analysis in *Dobbert v. Florida*.<sup>367</sup> In *Dobbert*, the Court considered a murder case in which a valid death penalty statute did not exist at the time of the murders.<sup>368</sup> The Court stated, "[h]ere the existence of the statute served as an 'operative fact' to warn the petitioner of the penalty which Florida would seek to impose on him if he were convicted of first-degree murder. This was sufficient compliance with the *ex post facto* provision of the United States Constitution."<sup>369</sup> There are many possible "operative facts" that could serve as notice to alleged Nazis such as Linnas, including the criminalization of murder in the United States and the Genocide Convention.

Under international law, the United States recognizes Nazi atrocities as crimes. Indeed, the United States' participation in the

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<sup>364</sup> 450 U.S. 24 (1981).

<sup>365</sup> *Id.* at 29 (footnotes omitted).

<sup>366</sup> *Id.* at 28-29 (citations omitted).

<sup>367</sup> 432 U.S. 282 (1977).

<sup>368</sup> *Id.* at 297. The murders occurred prior to the Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), in which the Court found the death penalty unconstitutional. After the Court overturned this decision, *Dobbert* was tried under a new Florida death penalty statute that went into effect after his crimes. *Dobbert*, 432 U.S. at 297.

<sup>369</sup> *Dobbert*, 432 U.S. at 298.

Nuremberg Trials evidences this.<sup>370</sup> The Sixth Circuit Court of Appeals in *Demjanjuk v. Petrovsky*<sup>371</sup> considered a similar issue in deciding whether an Israeli court would be competent to try Demjanjuk. The court stated that "Demjanjuk had notice before he applied for residence or citizenship in the United States that this country, by participating in post-war trials of German and Japanese war criminals, recognized the universality principle."<sup>372</sup> Linnas, entering the United States the year before Demjanjuk,<sup>373</sup> was also on notice that the United States recognized his conduct as criminal and could claim jurisdiction over him.<sup>374</sup>

Crimes such as those committed by the Nazis cannot be dismissed as offenses against only a particular nation. Indeed, the Sixth Circuit in *Demjanjuk* stated, "the underlying assumption is that the crimes are offenses against the law of nations or against humanity and that the prosecuting nation is acting for all nations."<sup>375</sup> Linnas' case is even stronger, because the nation where he allegedly committed his offenses no longer politically exists.<sup>376</sup> It was therefore, in a political sense, impossible to send him to the nation where his crimes were perpetrated to stand trial under its laws. Thus, the United States, as Israel and Canada have already, could begin to act for all nations, and assume the responsibility of trying these individuals for whom it has provided a haven since the end of World War II.

#### IV. CONCLUSION

In enacting the Holtzman Amendment,<sup>377</sup> Congress sought to fill a gap in United States immigration and naturalization law. With this Amendment, Congress provided for the removal of Nazi war

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<sup>370</sup> At Nuremberg, the United States even prosecuted individuals whose crimes were committed prior to the United States' involvement in World War II. *The Municipal and International Law Basis of Jurisdiction over War Crimes*, BRIT. Y.B. INT'L L. 382, 391 (1951).

<sup>371</sup> 776 F.2d 571 (6th Cir. 1985).

<sup>372</sup> *Id.* at 583.

<sup>373</sup> Demjanjuk entered the United States in 1952. *Id.* at 575. Linnas entered the United States in 1951. *Linnas v. I.N.S.*, 790 F.2d at 1026.

<sup>374</sup> The London Agreement, which chartered the International Military Tribunal, was signed on August 8, 1945. 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 Northern 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, Aug. 8, 1945, 59 Stat. 1544, 1546, E.A.S. No. 472, 82 U.N.T.S. 279.

<sup>375</sup> *Demjanjuk*, 776 F.2d at 583.

<sup>376</sup> The Soviet Union incorporated Estonia in 1940. See VON RAUGH, *supra* note 132, at 226-27.

<sup>377</sup> See *supra* note 105 for the text of the Holtzman Amendment.

criminals residing in the United States. Though an admirable effort, the "solution" may violate the due process and eighth amendment rights of these alleged criminals. By trying individuals such as Linnas in the United States, the courts can protect such persons' constitutional rights. In addition, it can insure that these people will face their accusers and be brought to justice. As it stands, the current deportation and denaturalization processes merely act as a means to circumvent eighth amendment and due process rights accorded these individuals by virtue of their presence in the United States. It is up to either the courts to find the Holtzman Amendment unconstitutional or Congress to change the amendment, at least in cases such as that of Linnas. Congress, then, could grant jurisdiction to United States courts to make certain that the United States will bring these alleged Nazi war criminals to justice.

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