exhausts all administrative and judicial appeals, OSI then works with the State Department and DHS to effectuate removal to a country designated by the immigration judge.

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# Taking the Paper Trail Instead of Memory Lane: OSI's Use of Ancient Foreign Documents in the Nazi Cases

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> "And I would sooner trust the smallest slip of paper for truth, than the strongest and most retentive memory, ever bestowed on mortal man."

Georgia Supreme Court Chief Justice Joseph H. Lumpkin, *Miller v. Cotton*, 5 Ga. 341, 349 (1848).

## I. Introduction

A United States district court judge once marveled at the ability of the Office of Special Investigations (OSI) "to discover the acts of a single individual across the temporal expanse of fifty years and a distance of an ocean and half a continent." *United States v. Hajda*, 963 F. Supp. 1452, 1457 (N.D. Ill. 1997), *aff'd,* 135 F.3d 439 (7th Cir. 1998). In murdering millions of unarmed civilians, the Nazis ensured that there would be few potential survivors who could stand as witnesses to their crimes. Moreover, the majority of the surviving victims have died in the six decades since the war ended. Of those remaining, few were in a position during the war to learn the names of their tormentors or to gain comprehensive, first-hand knowledge of their actions. With the passage of decades, the perpetrators now bear scant physical resemblance to their wartime appearance, rendering lineup or in-court identification a virtual impossibility. Although OSI has found cohorts of its targets, most are reluctant in the extreme to testify, or to testify candidly, for fear of implicating themselves.

OSI owes much of its success, therefore, to the treasure trove of documents, including rosters, reports, and correspondence, left behind by Nazi bureaucrats and their agents in the field. These wartime documents often mask the horror that gave rise to their existence as they recite, in bone-chillingly matter-of-fact language, names, numbers, statistics, and terse narratives. Such evidence is usually clear and compelling on its face. Yet because the documents embodying such evidence are often in excess of sixty-years old and are the product of a foreign regime that has long since vanished, they typically require explication by expert historians for courts to understand their full import.

How do OSI prosecutors manage to build their cases on the cornerstone of such historical and foreign documentation? The answer is that, with the proper foundation laid, nearly all courts have found such evidence to be entirely trustworthy and extremely persuasive. The documents are typically, though not exclusively, authenticated as ancient documents (being twenty years or older) under Fed. R. Evid. 901(b)(8), or foreign public documents under Fed. R. Civ. P. 44(a)(2) and Fed. R. Evid. 902(3). They are regularly exempted from the hearsay rule by, *inter alia*, the ancient documents exception of Fed. R. Evid. 803(16), the public records or reports exception of Fed. R. Evid. 803(8), or the business records exception of Fed. R. Evid. 803(6).

Although decades-old documentation from defunct regimes is rarely used in non-OSI federal prosecutions, it has been the bread-and-butter of OSI's Nazi cases. Such evidence may continue to play a vital role in OSI's denaturalization cases against post-World War II human rights violators, who may have committed their crimes abroad during the 1970s and 1980s, if not earlier. Thus, prosecution of such targets will often involve foreign documents that have been in existence for twenty years or longer. As a result, those who will prosecute denaturalization cases involving Nazi-era, or more recently perpetrated human rights violations, would do well to familiarize themselves with the rules and mechanics of working with these ancient foreign documents.

## II. Authentication

Fed. R. Evid. 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Moreover, the burden of proof for authentication is "slight." *Link v. Mercedez-Benz of N. Am.*, 788 F.2d 918, 927 (3d Cir. 1989). "[T]here need only be a *prima facie* showing, to the court, of authenticity, not a full argument on admissibility." *Threadgill v. Armstrong World Indus.*, 928 F.2d 1366, 1375 (3d Cir. 1991).

### A. Ancient documents rule

An example of authentication meeting the requirements of Fed. R. Evid. 901(a) is set forth in Rule 901(b)(8).

> Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

This "ancient documents rule" is the result of three policy considerations. The first is necessity. The passage of twenty years or more makes it more difficult to find witnesses with information that could help authenticate the document in more direct ways. The second is that fraud is less likely given the remoteness of time. One should not reasonably expect to encounter fabrications produced in the expectation of affecting the outcome of a dispute twenty years or more in the future. The third is the relatively high probability of genuineness. The circumstances of proper custody and unsuspicious appearance, when combined with age, give positive circumstantial assurance that the document is what it purports to be. *See* 5 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 529 (2d ed. 2005).

Although the ancient documents rule requires that the document be free from suspicion, that suspicion goes not to the content of the document, but rather to whether the document is what it purports to be. *See United States v. Kairys*, 782 F. 2d 1374, 1379 (7th Cir. 1986).

> [T]he issue of admissibility is whether the document is a *Personalbogen* [wartime German personal information sheet] from the German SS records located in the Soviet Union archives and is over 20 years old. Whether the contents of the document correctly identify the defendant goes to its weight and is a matter for the trier of fact; it is not relevant to the threshold determination of its admissibility.

OSI's practice is to establish the elements of Rule 901(b)(8) principally by calling expert historians to the stand, including renowned Holocaust scholars such as Dr. Raul Hilberg and Dr. Charles Sydnor. *See*, *e.g.*, *United States v. Koziy*, 728 F.2d 1314, 1321-22 (11th Cir. 1984) ("The government produced Dr. Raul Hilberg, a renowned expert on the holocaust [sic]. . . Dr. Hilberg testified that he had seen other *anmeldungs* and *abmeldungs* [wartime German registration forms] and that the ones involved in

the present dispute were very similar to the ones he had seen."); *United States v. Szehinskyj*, 104 F. Supp.2d 480, 489 (E.D. Pa. 2000), *aff'd* 277 F.3d 331(3d Cir. 2002) ("Dr. Sydnor, whose knowledge on this subject is encyclopedic, testified that there is nothing unusual about any of these documents."). Based on familiarity with Nazi organizations and procedures, as well as the condition and location of archives housing Nazi records, these experts can establish the following.

- The documents do not contain anything out of the ordinary.
- They were found in locations, such as German or former Soviet repositories, where they are likely to be found.
- The form of each document is consistent in every way with the document being an unaltered original.

*See*, *e.g.*, *Szehinskyj*, 104 F. Supp.2d at 490-91.

Owing to the strength of such testimony, courts have admitted into evidence a wide range of wartime Nazi documents and related postwar records. *See, e.g*, *United States v. Demjanjuk*, 367 F.3d 623, 630-31 (6th Cir. 2004) (upholding admission of SS service pass), *cert. denied*, 125 S.Ct. 429 (2004); *United States v. Stelmokas*, 100 F.3d 302, 312 (3d Cir. 1996) (affirming admission of rosters and other wartime Nazi documents from former Soviet archives); *Kairys*, 782 F.2d at 1379 (upholding admission of Nazi personnel record from archive in the then-Soviet Union); *Koziy*, 728 F.2d at 1322 (affirming admissibility of Ukrainian police forms from archive in the then-Soviet Union under ancient document exception to hearsay rule). Similar expert testimony has also been employed to offer relevant postwar documents into evidence. *See*, *e.g.*, *Hajda*, 135 F.3d at 443-44 (upholding admission of postwar trial testimony and Soviet interrogation protocols).

## B. Foreign public documents

Courts may also find wartime documents offered in OSI's cases to be self-authenticating as certified foreign documents under Fed. R. Civ. P. 44(a)(2) and Fed. R. Evid. 902(3). *See Demjanjuk*, 1:99CV1193, 2002 WL 544622, at *23 (N.D. Ohio 2002). Fed. R. Civ. P. 44(a)(2) provides, in pertinent part:

> A foreign official record . . . may be evidenced by . . . a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person. . . .

Fed. R. Evid. 902(3) provides, in relevant part, that "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility" is not required with respect to:

> A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person. . . .

When offered under this theory in OSI's cases, government exhibits have been accompanied by certifications, as well as attestations, by foreign officials from public archives authorized to make them. *See In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 285 (3d Cir. 1983) (certified documents from public archives presumptively admissible), *rev'd on other grounds*, 475 U.S. 574 (1986). Thus, even if courts refuse to admit wartime documents under the ancient documents rule, they may still find that they are self-authenticated as foreign public documents.

## C. Arguments attacking authenticity

The government need not prove chain of custody for original World War II-related documentary evidence to satisfy its burden of establishing authenticity because such documents are "non-fungible, and 'unique, identifiable and relatively resistant to change.'" *United States v. Demjanjuk*, 2002 WL 544622, at *22. *See also United States v. Humphrey*, 208 F.3d 1190, 1204-05 (10th Cir. 2000) (unlike drugs, which are fungible, documents are unique and relatively resistant to change and thus do not need a perfect chain of custody). In any event, chain of custody need not be shown to establish that documents are authentic under the ancient documents rule. *See Stelmokas*, 100 F.3d at 312 (3d Cir. 1996).

Defendants have also argued that documents from archives in the former Soviet Union should not be authenticated because of allegations that the Soviets forged documents. This argument has been similarly unavailing. *See Demjanjuk,* 2002

WL 544622, at *15 ("There is no evidence that the Soviets ever forged or altered documents to implicate any American for Nazi (sic) era crimes."); *Szehinskyj,* 104 F. Supp.2d at 490 (court finds no evidence the Soviets ever falsified a document to implicate a Ukrainian living in North America). The court in one OSI case pointed out the fallacy inherent in such claims.

> Lileikis' claims regarding the possibility of Soviet tampering or forgery are totally unsubstantiated and incredible . . . why would even the KGB go to the trouble of forging documents implicating Lileikis in war crimes, and then bar all access to its handiwork for some fifty years, while awaiting the collapse of the government whose evil intentions towards Lileikis it presumably sought to serve?

*United States v. Lileikis*, 929 F. Supp. 31, 38 (D. Mass. 1996). *See also United States v. Stelmokas*, No. 92-3440, 1995 WL 464264, at *8 (E.D. Pa. Aug. 2, 1995) (expert historical witness "testified that he was not aware of a single instance of a World War II archival document pertaining to the Holocaust that was a Soviet forgery"), *aff'd*, 100 F.3d 302, 313 (3d Cir. 1996) ("We cannot conceive that any rational person would believe that someone set out to incriminate Stelmokas and planted fake documents in widely-scattered places for that purpose.")

Nevertheless, out of an abundance of caution, OSI routinely retains the services of forensic document experts, including: (1) scientists who conduct various chemical and other tests on the paper and ink, *see, e.g.*, *Koziy*, 728 F.2d at 1321-22 (11th Cir. 1984) (Dr. Antonio Cantu's testimony helped authenticate Nazi *anmeldung* and *abmeldung* by showing through chemical analysis that these documents were not manufactured after their purported dates of creation); and (2) handwriting specialists, who can analyze, *inter alia*, movement impulses in known writing samples and compare them to those in the writing on documents in question. *See, e.g.*, *Demjanjuk*, 2002 WL 544622, at *23.

## III. Hearsay issues

### A. The ancient documents exception

The key admissibility hurdle to surmount in employing World War II-related documents in OSI's cases is the rule against hearsay. Among the exceptions to this rule is the following: "[s]tatements in a document in existence twenty years or more the authenticity of which is established." Fed. R. Evid. 803(16). This "ancient documents" hearsay exception has been applied to a variety of documents. *See, e.g.*, *Dartez v. Fireboard Corp.*, 765 F.2d 456 (5th Cir. 1985) (memoranda and correspondence from the 1940s discussing the dangers of asbestos); *Compton v. Davis Oil Co.*, 607 F. Supp. 1221 (D. Wyo. 1985) (warranty deeds); and *Bell v. Combined Registry Co.*, 397 F. Supp. 1241 (N.D. Ill. 1975) (old newspaper articles), *aff'd* 536 F.2d 164 (7th Cir. 1976). It has also been cited by courts in permitting admission of wartime documents in OSI's Nazi cases. *See, e.g., Hajda*, 135 F.3d at 443-44 (postwar statements from former SS guards admissible under ancient documents exception to hearsay rule); *Stelmokas*, 100 F.3d at 311-13 (affirming admission of Nazi occupation documents from former Soviet archives under ancient documents exception to hearsay rule).

In *Hajda*, 135 F.3d at 444, the Seventh Circuit addressed, *inter alia*, the admissibility of postwar written statements by former Nazi collaborators who claimed that the defendant had served alongside them during the war. After the *Hajda* court found that these documents were properly authenticated under the ancient documents rule, it examined whether their contents were admissible under Rule 805 and found that they were.

> These documents are more than 20 years old and they were properly authenticated, so they are exceptions to the hearsay rule admissible under Rule 803(16) of the Federal Rules of Evidence. However, this admissibility exception applies only to the document itself. If the document contains more than one level of hearsay, an appropriate exception must be found for each level. Fed. R. Evid. 805. As for Kazimiera's statements, while a government official prepared them, Kazimiera signed and adopted them, so they contain only one level of hearsay, which makes them admissible under Rule 803(16). . . . The signed statements of the Treblinka [death camp]

> guards are admissible for the same reason. Stanislaw's statement, on the other hand, isn't signed, so it contains two levels of hearsay. The document itself falls under Fed. R. Evid. 803(16), but Stanislaw's actual statement needs a separate exception in order to be admissible. Here, the proper exception is a declaration against interest, which permits hearsay statements when (1) they are against the declarant's penal or pecuniary interest at the time made; (2) corroborating circumstances show the trustworthiness of the statement; and (3) the declarant is unavailable. Fed. R. Evid. 804(b)(3).

*Id. Cf. United States v. Stelmokas*, 1995 WL 464264, at *5-6 (wartime German report investigating Lithuanian collaborator not admitted because multiple levels of hearsay violated Rule 805). *See* Gregg Kettles, *Ancient Documents and the Rule Against Multiple Hearsay*, 39 SANTA CLARA L. REV. 719 (1999).

## B. The business records exception

Another exception to the hearsay rule is found in Rule 803(6) for documents: (1) made at or near the time of the events they record; (2) authored by, or created from information transmitted by, a person with knowledge of the information therein; (3) if kept in the course of a regularly conducted business activity; (4) when it was the regular practice of that business to make the document at issue; and (5) as shown by the testimony of the custodian or other qualified witness.

OSI has presented expert historians as "other qualified witnesses" to establish the applicability of this exception with respect to wartime Nazi documents and related postwar records. *See, e.g., Szehinskyj*, 104 F. Supp. 2d at 492 ("Dr. Sydnor testified at length about how the documents are akin to business records, in particular the personnel records of any large organization. He stated that they were necessary in order for the camps to function properly and outlined the circumstances surrounding their creation."); *United States v. Palciauskas*, 559 F. Supp. 1294, 1296 (M.D. Fla. 1983), *aff'd* 734 F.2d 625 (11th Cir. 1984).

## C. The public reports and catchall exceptions

Finally, OSI's proffered documents have also been admitted through the public reports and records exception of Fed. R. Evid. 803(8) and the residual exception of Fed. R. Evid. 807. These exceptions have been applied to such documents as judgments in German postwar prosecutions of Nazi criminals and postwar witness affidavits. *See, e.g. Szehinskyj*:

> Many of the documents also are admissible under Rule 803(8), which provides for the admission of certain public records and reports. For example, the [German] court documents fit within this exception. Finally, the documents are admissible under Rule 807, the general catchall hearsay exception, as all experts agree that they are highly reliable.

104 F. Supp.2d at 492.

## IV. Conclusion

In the final week of World War II, Michel Thomas, a Jewish concentration camp inmate who had escaped the Nazis and joined the U.S. Army Counter Intelligence Corps as it swept into Germany, received a tip about a convoy of trucks in the vicinity of Munich said to be carrying unknown, but possibly valuable cargo. Thomas went to the trucks' destination, where he discovered an empty warehouse filled with veritable mountains of documents and cards with photos attached. He had come upon the complete worldwide membership files of the Nazi Party, which had been sent to the mill to be destroyed on the orders of the Nazi leadership in Berlin. Thomas and others ensured that the documents were protected. Prosecutors at Nuremberg found invaluable evidence in these files, as have generations of prosecutors since that time.

Sixty years later, these documents and many others like them found in archives in Germany, the former Soviet Union, and elsewhere, stand as unassailable witness to the barbarities of Nazi racial policies and the role of Hitler's henchmen in carrying them out. Through use of the ancient documents rule and related provisions in the Federal Rules of Evidence, the government has been able to marshal such evidence against those henchmen in U.S. courts and obtain a measure of belated justice on behalf of Holocaust victims.

Moreover, the judicial precedents established by such cases could prove invaluable for denaturalizing certain post-World War II human rights violators, whose unspeakable deeds are captured in paper and ink and await retelling before the scales of justice.❖

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# Barring Axis Persecutors from the United States: OSI's "Watch List" Program

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## I. Introduction

In addition to denaturalizing and removing Nazi persecutors from the United States, the Office of Special Investigations (OSI) is responsible for enforcing the Holtzman Amendment's provisions barring aliens who assisted in Axis crimes from entering this country. *See* 8 U.S.C. § 1182(a)(3)(E)(i). Such individuals continue to seek to visit the United States. For example, during the Thanksgiving holiday in 2004, an 82-year-old suspect from Austria attempted to enter this country in order to visit relatives in Arizona. OSI had placed his name and birth date on the government's border control "watch list" of aliens possibly ineligible to enter the United States. Therefore, when he arrived at Atlanta's Hartsfield-Jackson International Airport, Customs and Border Protection (CBP) inspectors referred him for secondary inspection and contacted OSI. Following guidelines developed by OSI, a CBP inspector questioned the man in detail about his World War II activities. He soon confessed that he had been sentenced to death after the war for the murder and mistreatment of concentration camp prisoners, but had received amnesty after ten years' imprisonment. Interview by U.S. Customs and Border Protection immigration inspector [name cannot be divulged] with Franz Doppelreiter in Atlanta, Ga. (Nov. 24, 2004). CBP, a component of the Department of